

1961

BETWEEN:

June 5-8
Nov. 20-23,
27-30

ROSS F. ROWELL PLAINTIFF;

1962

AND

Mar. 28-30

S. & S. INDUSTRIES, INC. DEFENDANT.

1964

Sept. 9

Patents—Validity—Declaration of invalidity—Damages—Workshop improvement—Prior publication and knowledge—Patent Act, R.S.C. 1952, c. 203, s. 28(1)(b).

The plaintiff sues for a declaration that Canadian Letters Patent No. 525-962, relating to a brassière frame, issued June 5, 1956, of which the defendant is the assignee, is invalid on the grounds of ambiguity of the specification and he claims, lack of novelty and lack of invention and damages for loss of trade and commercial goodwill resulting from an action brought by the defendant against one of the retail outlets for the plaintiff's products. The defendant counterclaimed for infringement by the plaintiff of the said Letters Patent, for damages or an account of profits and for delivery up or destruction of the infringing articles.

Held: That the steel ribbon made pursuant to the drawings of the Pons Patent, issued on March 31, 1931 in the United States, shows a nearness to the defendant's brassière frames such that the minute difference is undeserving of the privileged level of monopoly.

2. That a scrutiny of the Pons Patent of 1931 discloses to anyone skilled in the art, information comprehensive enough to relegate the claims of the defendant's patent to the status of workshop improvements.
3. That the defendant's Letters Patent No. 525-962 issued June 5, 1956 by the Canadian Patent Office are null and void.

ACTION to have defendant's Letters Patent declared invalid.

The action was tried by the Honourable Mr. Justice Dumoulin at Ottawa.

G. F. Henderson, Q.C., David Watson and J. D. Richard for plaintiff.

G. H. Riches, Q.C. and W. G. Hopley for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

DUMOULIN J. now (September 9, 1964) delivered the following judgment:

The plaintiff, Ross Frederick Rowell, describes himself as a wire manufacturer, pursuing his trade under the name

and style of Hops-Koch Reg'd, in the city of Montreal, P.Q.

The defendant, S. & S. Industries, Inc., is a commercial enterprise incorporated under the laws of the state of New York, U.S.A., with its principal office in that American metropolis.

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S. & S. Industries is the assignee of Canadian Letters Patent no. 525-962, issued June 5, 1956, for the alleged invention of one Marcus Schwartz relating to a brassière frame.

This patent, no. 525-962, is presently attacked by the plaintiff as invalid on the following grounds:

1. ambiguity of the specification and claims;
2. lack of novelty;
3. lack of invention.

To this first ground of objection is added the complaint that the defendant threatened an action against the plaintiff and, in fact, instituted legal proceedings in the Supreme Court of Ontario against one of the plaintiff's retail outlets, the Robert Simpson Co. Ltd., under no. 7587-1959 of the Ontario Supreme Court records, thereby jeopardizing the principal source of the plaintiff's income until then derived from the manufacture of brassière wire frames. Ross F. Rowell was also enjoined "to cease and desist from the manufacture, sale and use of flat arcuate wire for use in brassières" in a letter, ex. 10, dated August 13, 1959, emanating from the law office of Irving Seidman, a New York attorney representing S. & S. Industries, Inc.

Paragraph 3 of the amended Particulars of Objection declares that:

The alleged invention was not new; it was known by others or another before the dates or date it is alleged to have been made as appears from:

- (a) the Common Knowledge in the art at the said date and reference is made to Schedule 1;
- (b) the prior knowledge of the patentee or inventors named in the patents and applications therefor set forth in Schedule 1;

In para. 5 of the Objections, it is said that Letters Patent 525-962 "give rise to no useful result and do not produce

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the result claimed". The ultimate paragraph of the Particulars of Objections asserts the Letters Patent are defective, deficient and irregular in that the specification fails to disclose what is claimed, contains inaccuracies, is ambiguous, wilfully diffuse for the purpose of misleading and, lastly, fails to disclose patentable subject-matter and does not show inventive steps.

The plaintiff consequently claims:

- (a) a declaration that the said Letters Patent No. 525,962, dated June 5, 1956, are null, void and of non-effect;
- (b) an order revoking and annulling the said Letters Patent;
- (c) damages in the amount of \$75,000 against the defendant;
- (d) costs of this action.

In Schedule 1, annexed to the Particulars of Objection, are listed eleven United States Patents to prove common knowledge in the art and prior knowledge by the patentees or inventors before the Convention date, set at October 20, 1954, in the American Patent Office.

The Statement of Defence necessarily denies the reproach of invalidity levelled at these Letters Patent; states that any protective action taken against Rowell or the Robert Simpson Co., was launched in the *bona fide* assumption that defendant was entitled to do so and disclaims inflicting damages on the plaintiff.

A counter-claim for infringement is joined to the statement of defence with the customary conclusions for an injunction restraining the plaintiff and his servants and agents from manufacturing and selling articles or wares contravening the Letters Patent; for damages or an account of profits as the defendant may elect and for the delivering up or destruction of all infringing articles, the whole with the costs of the counter-claim.

Both parties have filed briefs in which their contending viewpoints are elaborated.

The defendant's written submission, in a style fortunately more concise and understandable than the technical jargon of the specification and claims of its Letters Patent, describes, at page 4, the subject-matter of the instant issue, the Schwartz patent ". . . as a brassière frame of flat steel

wire of arcuate shape having a ratio of longitudinal extensibility to lateral flexibility that will give stability to the wire when worn so that torsional twisting does not take place."

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The following paragraph, on the same page of the brief, Dumoulin J. concedes that:

The defendant, the patentee, does not claim a flat wire brassière "per se" as the invention described in the patent in suit. What the defendant does claim, however, as set forth in each of the claims 1, 2 and 3, is a *steel* wire brassière frame having certain selected characteristics which give advantages not found in the prior art.

This case may be divided in two chapters relating to separate problems:

- (1) does the use of a flat steel wire as the supporting frame of a brassière constitute, at the very least, a useful improvement in the art?
- (2) does the defendant's Canadian Patent, No 525-962, satisfy the essential conditions of patentable subject-matter required by Section 2(d) of the Act (1952, R.S.C. c. 203) hereunder cited:

"2. (d) 'invention' means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process machine, manufacture or composition of matter."

(1) Since the defendant, as just seen, "does not claim a flat wire brassière 'per se' as the invention described in the patent in suit", it would be superfluous to examine at great length this question. Still, the particularity of a flat wire in the brassière frame so repetitiously occurs throughout the entire proceedings that it cannot be summarily dismissed.

Prior knowledge of the flat wire innovation appears quite plainly in the Pons patent issued to one Hélène Pons by the United States Patent Office on March 31, 1931, under serial number 1,798,274, listed herein as exhibit 5, and in the Gluckin patent also issued by the U.S. Patent Office on November 6, 1945 under numeral 2,388,535.

On page 1 of the Pons Patent, the specification, from line 85 to 100, reveals that:

In order to achieve the purposes of my invention member 13 must be resilient and sufficiently flexible to conform to any of many curved surfaces characteristic of the chests of different individuals in the vicinity of

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the breasts. If made of metal or of a steel spring, an elongated cross-sectional form such as that illustrated in Fig. 3 is suitable for the broadest dimension 15 affords sufficient surface for a comfortable presentation against the surface of the body and its narrow dimension 16 is a factor enabling the strip to follow the undulations of the surface of the body with which it contacts and thereby distributes pressure transmitted over a greater surface than would be the case if the member were not sufficiently flexible.

Next, on page 2, Claim I specifically mentions a flat wire (lines 115 to 127):

1. A body-fitting brassière which supports the breasts individually and without effecting false forms comprising, a pair of breast-forms and limp material connecting the breast-forms and holding them in position upon a wearer, each of the breast-forms being of an individual construction and having an open-ended flat wire loop of resilient material capable of being flexed to lie against the chest of the wearer, the wire of said loop being substantially oblong in cross section with the broad dimension of the cross section substantially in a plane . . .

Claim III, from line 38 to 46, reads:

3. A body-fitting brassière which supports the breasts individually and without effecting false forms comprising, a pair of breast-forms, each having a resilient metallic frame in the form of an open-ended loop adapted to conform to the body and breast of the wearer, said loop comprising a steel wire more flexible in directions perpendicular the plane of the loop than in any other direction, . . .

Hélène Pons is a New York theatrical costume designer who testified (cf. Transcript of Evidence, p. 375) that her invention utilized a flat wire to frame the breast cups and also (p. 382) that she applied in 1929 for the patent issued in 1931.

The Gluckin Patent, the last of a folder of patents marked Exhibit 5, at page 2, from lines 15 to 30, specifies that:

Further, my invention is not limited to brace or supporting members of any particular shape or contour. However, in the present construction, they are in the form of reasonably wide bands which may be sufficiently flexible to take the curved contour, illustrated in the cross-section in Fig. 2 of the drawing, to fit the periphery of the breasts and adjacent part of the body of the wearer. In some instances, these members may be preformed to a curved contour substantially similar to that illustrated in Fig. 2. These members may be composed of metal, plastics or any other type or kind of relatively firm material.

Mr. André Hone, a scientist of high repute, Doctor in Metallurgy, Professor of Engineering at the University of Montreal, heard on behalf of the plaintiff; unhesitatingly

stated (cf. Transcript, p. 285) that wire of round or regular cross-section, that is, flat wire, "has been available for a long time, but speaking only of my own experience, for at least 30 years."

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It does seem established beyond reasonable doubt that the manufacture and use of flattened wire, of steel or other metallic material, precedes the Convention date of the Schwartz patent, October 20, 1954, and cannot therefore be credited to it as an invention nor a useful improvement in the art.

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(2) The validity of Canadian Patent No. 525-962.

One main issue remains to be dealt with, namely, whether or not the quality of the metal used by the defendant, S. & S. Industries, Inc., according to their patent No. 525-962, is of such a composition, or better still, offers to the interested purchasers a technical superiority deserving of the qualification of invention, or at least, that of useful improvement in the art.

This patent, Exhibit 1, utilizes, so it says in the specifications, lines 36 and 37, ". . . a special type of round cross-section hypereutectoid steel . . ." It may be apropos to insert here the definitions of hypereutectoid, hypoeutectoid and eutectoid steels, as mentioned, first, by Dr. Hone (cf. Transcript, p. 223):

Hypereutectoid: implies a carbon content in steel higher than 0.90% by weight;

Hypoeutectoid: is a steel combination of a carbon content lower than 0.90% by weight;

Eutectoid: implies a carbon content in steel in a range of 0.90% by weight.

Dr. G. H. Johnson, a Bachelor of Science from Bishop's University, presently supervisor of the Warnock-Hersey Company Chemical and Physical Laboratory, at Lachine, P.Q., approves of the above formulae as may be deduced from his evidence on plaintiff's behalf at pages 159, 161, 162, 163 and from his brief written report, exhibit 28.

The defendant's leading expert, Mr. Harold Carlson, a licensed professional engineer, registered as such in the State of New York, "specializing to a large extent in the field

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of spring design, spring manufacturing, use of proper spring materials" (transcript, p. 760) refers to a 1960 bulletin issued by the American National Bureau of Standards wherein ". . . because of better instrumentation, they discovered that hypoeutectoid steel ends at .80 per cent. not .90 . . .", and continuing thus: "Hypereutectoid steels: more than .80 per cent. of carbon" (transcript, pp. 784-785). Dr. Hone, in rebuttal, counters this opinion on the ground of arbitrariness, saying ". . . by convention, people may agree to call it (i.e. hypereutectoid steel) .80 or .85 or .95; this is not decided by the steel itself, this is decided by a convention . . . Nobody could fix it, but by convention we may agree to call it .80 or .85." (Transcript, pp. 935-936).

Whatever one may think of this learned dissent it has no great bearing here and Mr. Carlson himself brings the discussion to an end when, asked by the defendant's counsel, Mr. G. H. Riches, Q.C., at page 783 of the transcript:

Q. What advantage, if any would there be in using hypereutectoid steel as against hypoeutectoid in the brassière wire frame industry?

A. There would be the small advantage of having greater resilience, but hypoeutectoid could be used as a substitute.

Dr. Hone, requested by counsel for the plaintiff, Mr. G. F. Henderson, Q.C., to tell the Court "whether rigidity in the lateral and vertical directions is a function of the type and metallurgical condition of the steel or is primarily the function of something else", replied that: "The rigidity of a section is primarily a function of the shape of the section for any one material" and again that "in the range of ordinary common steels, I say the influence of the type of steel is negligible." (cf. p. 239).

Professor Hone testified that where elasticity is important, hypereutectoid steel would offer no real advantage over the hypoeutectoid composition and that torsional twisting would be the same in both kinds of steel. Hypereutectoid is a more expensive metal of superior quality but utilized especially where non-scratching properties are required such as in the manufacture of files, tools, razor blades, etc. (transcript, p. 229).

This assertion of the possible interchangeability, for the purposes of the patent, of hypereutectoid and hypoeutectoid steel was not challenged by the learned counsel for defendant who, in the course of his introductory address, said, conformably to engineer Carlson's future testimony:

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Evidence will also be introduced to show that hypoeutectoid steel can be substituted for hypereutectoid and that the latter is the mechanical equivalent—that is, hypereutectoid is the equivalent of hypoeutectoid steel: hyper and hypo and interchangeable. (transcript, p. 423)

Evidence will also be heard to prove that while hypereutectoid steel is the best steel for the purpose, it was known to those skilled in the art that hypoeutectoid by proper cold working and heat treatment would give a satisfactory product for the specific use. The "Specific Use" we are speaking of, my lord, is the brassiere frame. (Transcript, p. 424).

If then, hypereutectoid steel, for the present purposes, may be suitably replaced by the hypoeutectoid type, if the latter is a fitting substitute for the former, might not this adaptability negate a claim for any particular advantage characteristic of a genuine invention and simply fall within the limitless class of workaday improvements?

At all events, in due prosecution of this enquiry let us investigate:

- (a) the composition and processing technique of the steel utilized in patent No. 525-962;
- (b) the moot question of flexibility and torsional deflection or stress of the wire brassiere frames manufactured by S. & S. Industries, Inc.

Mr. G. H. Johnson tested samples of the plaintiff's wire frames, round and flat, exhibits 19, 20, 21, and, similarly some of defendant's, exhibits 22, 23, 24, 25. In his oral evidence, reported at pages 158 to 163 inclusive, the expert declares that all those samples were made of hypo and not hypereutectoid steel, contrary to lines 15, 36, 37, *inter alia*, of the specification and claim 3 of the Patent, ex. 1. Engineer Johnson's analysis, detailed in a written report, ex. 28, shows that (pp. 1 and 2) "All analysis were performed according to the latest methods specified by the American Society for Testing Materials (A.S.T.M. E-30)" and "The apparatus used to perform these tests was a Spring Testing Machine manufactured by Coats Machine Tool Co. Ltd., London . . . The machine was checked using

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dead weights at 1 pound and at 3 ounces and found to give accurate readings.”

Professor André Hone, as we have seen, considers the steel in defendant's wares as of hypoeutectoid quality. The one dissenting opinion is that of engineer Harold Carlson, and only as to the scientific composition of hypereutectoid steel, not as to the brand actually used (cf. Transcript, p. 767).

Processing of the steel, outlined in the patent's specification, was scrutinized practically step by step in Mr. Henderson's examination in chief of Dr. Hone. On pages 243 to 246 of the transcript are reproduced this witness' assertions that, about 30 years ago, steel ingots were reduced to wire form by rolling in a hot mill rod; that cold drawing process has been applied to steel for more than 30 years, permitting to bring it “to any particular gauge and finish”, together with a more than 30-year old technique of intermittent annealing during the cold drawing process. Mr. Hone is well aware, also, of “an electrically heated annealing furnace”, a method occasionally employed “in a controlled atmosphere”. Improvement of steel by cold drawing has been known “for more than 30 years”. Counsel for plaintiff then asks the witness if:

Q. . . . in achieving the purpose of cold drawing, as has been known, . . . there [is] any special equipment or skill required?

The answer reads:

A. No, the technology is well known and standard equipment is supplied by manufacturers who do that type of work.

At pages 245-246 of the transcribed evidence, the examination proceeds thus:

Q. Let me ask you: if in the heat treatment of spring steel you heat to a temperature of about 1400 degrees f. to 1500 f. and quickly cool to a comparative low temperature between 100 and 200 degrees f., what will that result in? What kind of steel does that result in?

A. That will result in hardening the steel.

Q. How long has that been known?

A. For more than 30 years.

Now, on page 246:

Q. . . . Would you give us some tempering ranges that are known in the art?

- A. Some tempering ranges may be anywhere as low as 350 degrees f.
- Q. Up to what?
- A. Let us say, maybe 1000.

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Lower down the page:

- Q. Will you tell the Court whether or not hardening, quenching, tempering of spring steel as a continuous operation has ever been done before?
- A. Yes. I have seen it done maybe as long as 30 years ago.

This line of questioning persists for a few pages more extending to all the operations indicated in Exhibit 1. Apparently no rebuttal of Professor Hone’s evidence on these points was attempted. For these reasons, it does indeed seem that the formulas appearing in patent 525-962, for the preparation of wire frame steel, do not depart from a standard technique known to the industry for well over three decades. Therefore the element of novelty, if any, the step forward in this particular fabrication, in a word, the “scintilla of invention” must be sought for elsewhere, as no special type of steel has been developed.

Before trying to explore—or delve into—the intricacies inherent to the alleged elimination of so-called “torsional twisting”, under a given load, from the patented brassière wire, a reading of the patent’s triple claim is necessary if somewhat tedious. In a heavy dosage of technical jargon the would-be inventor, one Marcus Schwartz of New York, lays claim to:

1. A substantially rigid arcuate steel wire brassière frame of substantially rectangular cross-section having its longer dimension extending radially of the curve, and having a greater degree of lateral flexibility than longitudinal extensibility permitting lateral deflection of the wire from the unstressed plane of the wire to fit the contours of the body of the wearer without causing a torsional twisting of the wire along the curve of the arc.
2. A substantially rigid arcuate steel wire brassière frame of substantially rectangular cross-section having its longer dimension extending radially of the curve, and having a greater degree of lateral flexibility than longitudinal extensibility, said lateral flexibility being a minimum of four times the longitudinal flexibility and a maximum of twenty times the longitudinal flexibility of a round wire under the same load and having the same longitudinal extensibility as a round wire of the same cross-sectional area, permitting lateral deflection of the wire from the unstressed plane of the wire to fit the contours of the body of the wearer without causing a torsional twisting of the wire along the curve of the arc.

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3. A substantially rigid arcuate wire brassière frame of hypereutectoid steel of substantially rectangular cross-section having its longer dimension extending radially of the curve, and having a greater degree of lateral flexibility than longitudinal extensibility, said lateral flexibility being approximately fourteen times the lateral flexibility of a round wire under the same load and having the same longitudinal extensibility as a round wire of the same cross-sectional area, permitting lateral deflection of the wire from the unstressed plane of the wire to fit the contours of the body of the wearer without causing a torsional twisting of the wire along the curve of the arc.

Here, I cannot refrain from a moment's pause to assuage common sense. Whether there be or not "torsional twisting" of the wire frame, assuredly anyone, skilled or unskilled in the art, pretending to unravel the ponderous jargon thus inflicted without enduring a distressing "twist of the mind" would hardly be worthy of belief save under oath.

Fortunately for this impression of mine, it is in line with quite a few precedents of the highest authority, amongst which, possibly the most striking, remains Lord Loreburn's statement in *Linotype v. Hopkins*¹, it follows:

I have had occasion to observe that there is a tendency to frame specifications and claims so as to puzzle a student, and to frighten men of business into taking out a licence for fear that their interpretation may be held erroneous and they may be found guilty of infringement That is an abuse of the law and will be checked, if occasion should require, by the simple process of declaring a patent invalid.

I would join to the principle enunciated above this excerpt from Lord Romer's speech in *R.C.A. Photophone Ltd. v. Gaumont British Corporation Ltd. and British Acoustic Films Ltd.*²

It is the duty of a patentee by his claim to make quite clear what is the ambit of his monopoly in order that workers in the art be left in no doubt as to the territory that is forbidden them during the life of the patent. *If he fails to do this, his patent becomes a public nuisance.* (emphasis added).

In other and less felicitous words: fencing off to oneself a few acres of some mercantile Garden of Eden has become a human trait, but then, the protective image of an angel of the flaming sword, in the guise of a proper patent, should not be confused with that of a scarecrow.

¹(1910) 27 R.P.C. 109 at 113.

²(1936) 53 R.P.C. 167 at 195.

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A voluminous record of close to 1600 pages, reproducing the evidence, mostly technical, tendered both in and out of Court (Examination on Discovery) reveals together with other complaints, that, in the plaintiff's understanding of the patent, its disclosures and claims, when applied, do not produce the result alleged: avoidance, under specified conditions, of "torsional twisting" of the brassière wire frame. This deficiency, of course fatal if proved, would originate in an unorthodox testing process, the use by Mr. H. Carlson, not illustrated in the patent (cf. Transcript, p. 793), of a rigid fixture or clamp ". . . to hold the wire frame at the mid-point so only one half would be flexible", in lateral and longitudinal tests (Transcript, p. 796). But, of this, more later.

At this stage some chronological information is necessary. Mr. Harold Carlson, a prominent American mechanical engineer, President of the Carlson Company, his own, was approached in the early summer of 1954 by Marcus Schwartz who asked him ". . . to make longitudinal and lateral tests of rectangular wire to determine the fact that rectangular wire (i.e. flat) would have less lateral load", than round wire. (Transcript, p. 764).

Mr. Carlson says these tests "established that a rectangular wire frame made from rectangular wire would give less lateral load and, therefore, less pressure against the body . . . it proved that his contention was correct" (transcript, pp. 764 and 765). The witness merely performed the required experiments, the idea itself was imparted by Marcus Schwartz, the actual patentee, engineer Carlson readily agreeing that he, personally, knows nothing about brassière design (transcript, pp. 846, 847).

At trial, the crux of oral evidence bore precisely on Carlson's tests, leaving the outcome rather inconclusive on the subject of their technical appropriateness. I shall now insert the witness' description of these, tending to show that "a load of 12 ounces" deflects a flat wire frame five eighths of an inch (5/8") in longitudinal and lateral or transverse directions (cf. Ex. 1, fig. 2) as against 28 and 27 ounce loads with round wires.

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The exhibit with which Mr. Carlson carried on his tests in Court, was one of plaintiff's flat wires (transcript, pp. 772 and 775); the method is given as hereunder; the instrument being a Pelouze Tension Testing Scale:

. . . I will file a notch in the outer end and a similar notch will be filed on the other end. These notches have, again, no effect on the operation of the fixture. I will, again, draw a line at the outer extremity. The line I drew before coincides with it so we will mark that as line number 1, then, I will draw a line exactly five eighths of an inch further away parallel to it so that we will have five eighths of an inch deflection. Now, I again place the testing instrument in the notch and I will deflect it exactly five eighths of an inch and the load is exactly 12 ounces and there is no tortional twisting of the wire longitudinally (transcript, p. 775).

Mr. Watson (plaintiff's counsel), at page 775:

Could the records show that there is a steel ruler?

The witness:

. . . My lord, you will notice now I have removed the scale and, again, deflected five eighths of an inch and, again, the load is twelve ounces and without the ruler there is still no tortional twisting.

Next, on page 776, Mr. Carlson continues:

I will now prepare this fixture for the lateral tests.

Five lines below:

I will do it again. There is a knife edge. Well, I file the notch in the wire and it rests upon the knife edge. The spring testing instrument is applied to the outer end, again deflected five eighths of an inch; the load is, again, twelve ounces and there is no tortional twisting.

In the last paragraph of page 776, the witness remarks:

My lord, I would like you to observe the method of making a flexibility test. Heretofore, all flexibility tests were made from the extremities and the proper method is by holding the frame in the centre because only one half of the wire frame is deflected laterally, not the entire frame.

Similar experiments in the longitudinal and lateral planes with round wire frames resulted, for a .625 or five eighths of an inch deflection, in a 28 ounce load longitudinally and a 27 ounce one transversely (transcript, p. 785).

Requested to comment on Professor Smith's results, Mr. Carlson replied:

. . . Professor Smith in the cross-examination was asked what the loads were using a circular arc and for the full 180 degrees, but that is not the method by which these wire frames should be tested. Only half of the arc should be tested and this half is not one circular arc, there are

several arcs in it and with my results the loads are practically the same whereas his, (because) of the complete arc of 180 degrees versus mine of 90 degrees, shows that his was a different ratio than mine. (transcript, p. 786).

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To test transverse flexibility, Mr. Carlson includes:

A fixture or a clamp; a clamp could be called a fixture, merely to hold the wire frame at the midpoint so only one half would be flexible. (transcript, p. 796).

The fixture itself is described as:

. . . a plate approximately 2 inches wide and, perhaps, 5 or 6 inches long that could be clamped to the platform, that moves upwards and downwards which now holds hook 49 which, of course, could be removed and on this little plate would be a clamp which would hold the wire frame at the mid-section. (transcript, p. 797).

This particular process drew, as said above, a protracted attack from the plaintiff. In cross-examination, the expert witness was shown a copy of his own patent (American) No. 2,670,628 (ex. 54), dated March 2, 1954, for a spring testing machine and asked by Mr. Watson:

Q. Does this patent as illustrated show any way for mounting arcuate flat springs for making transverse tests?

A. No, a small fixture would have to be made for that or a clamp.

Q. And that is not illustrated in the patent?

A. No, that is not illustrated in the patent, but it is well understood in the industry that many fixtures can be attached to testing instruments. (transcript pp. 793, 794).

Previously, I had asked the witness if this device had "anything to do with the Pelouze Tension Testing scale . . .?" To this question the answer was that although completely different, both could be used (transcript, p. 792).

Another question, in a similar line of cross-examination, soon followed, I quote:

Mr. Watson: Can you point to any publication, Mr. Carlson, with a description of what you say is the proper way of testing arcuate flat springs?

Answer: I have never heard of such a publication. Ordinarily, the manner of testing is determined by the laboratory and the man who wants it tested, and if it happens to come from the brassiere industry to anyone skilled in the art it is known that a flexural test must consist of the test of one half of the wire frame. (Transcript, p. 798).

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It was also admitted that no standards are set by the American Society for Testing Materials (commonly abbreviated to A.S.T.M.) for the type of test resorted to by Mr. Carlson (transcript, pp. 798, bottom line and top of 799).

Here, the statement that a flexural test of one half the wire frame is known to those skilled in the art of brassière wires appears rather controversial.

Professor I. W. Smith, lecturer in machine designing at the University of Toronto, one of the two distinguished scientists called by the defendant, apparently disapproves of his American colleague's manner of testing the arcuate wire by fixing one half with a rigid beam or clamp and could agree with Dr. Hone's criticism of it.

On page 740, cross-examined by plaintiff's counsel about Dr. Hone's hypothesis that the entire arc had to be taken into account, he answered:

If he (i.e. Dr. Hone) based his conclusions on the tests and they were properly done, I certainly would have no criticism. My criticism was the use of the straight beam in calculating deflections of the arcuate beam. (transcript, p. 740).

By the expression "straight beam" the expert meant the "fixture or clamp", an essential factor of Mr. Carlson's method.

Professor Smith, referring I believe, to the test mentioned in column 5, lines 13 to 26, page 3, of the patent ex. 1, commented that: ". . . When the beam is not against the table but is up in the air torsional twisting would commence at a lower load . . . load and deflection are tied together so far as I am concerned, so if you want to put it that way, at a smaller deflection, torsional twist would begin."

A practical experiment of this was at once made with, as a medium, exhibit 52, a flat wire of Ross F. Rowell's manufacture, identified by the witness as identical to the frames of the supposedly infringing samples found in Warner Bros' marks of brassières "Wonder Bra" and "Dream Lift", exhibits Z10, Z11 (transcript, pp. 779, 781, 782, 783). The purport of the test is, inferentially, that the legitimate and allegedly offending wares being similar, all discrepancies between the latter and the patent's disclosures

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must necessarily affect the former. If, then, torsional deflection or stress (improperly termed: torsional twist) occurs at ratios differing from those claimed by the patent, an unfavourable conclusion is unescapable. Wire no. 52 at hand, Professor Smith takes a reading at eleven sixteenths of an inch, and to the cross-examining counsel's question "Would you agree there is torsional twist?", replies "Very distinctly there is, yes." (transcript, p. 739). Opposed to this finding is the statement on page 3, column five, lines 64 to 66 of the patent: "The flat wire did not take a set even at 2" deflection and could have been deflected more if desired."

Dr. André Hone's criticisms of Mr. Carlson's mode of clamp testing appear on pages 932 to 935 of the transcript; they should be quoted at some length and they form the terminal phase of the oral evidence. In re-examination, the witness is questioned by counsel for plaintiff, Mr. Watson.

Q. You have studied the patent in suit, Canadian Patent 525,962, did you find in it anything which would indicate to you that a whole wire should be tested in the longitudinal test compared with a half wire in the lateral test?

A. . . . there was no mention in this patent of the length of the arc to be used in one direction or the other direction so I made the test to the best of my ability in comparing similar lengths and not different lengths which would be an abnormal procedure for such testing.

Q. If evidence has been given that no torsional twisting has been observed in a certain series of longitudinal tests which otherwise are generally similar to the tests which you carried out, but that the wire has been confined between a pair of steel plates closely spaced from the wire, what are your comments?

A. . . . I believe I have already mentioned that I have observed twisting in a longitudinal test of a shape of this sort?

Exhibiting a flat wire held in his hand, Professor Hone pursues his evidence:

. . . I would expect torsion to happen in any case when the longer axis is in the plane of the arc. There is, necessarily, a twisting that takes place because the material tends to fall off from equilibrium into the other direction. This twist, in some cases, might be small, in other cases, it might be large. It all depends on the kind of stretch but it is doomed to exist. (transcript, p. 934).

The appliance of steel rulers, to the sides of a flat arcuate wire "with its long dimension going radially" would restrain

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the lateral forces and, consequently, torsional twisting, but, if those plates were removed, the torsional twist would take place, says Dr. Hone (transcript, pp. 934-935).

Again, the plaintiff's experts are at odds with the defendant's technician, Mr. Carlson, on the topic of torsional twisting, non-existent according to the patent at five-eighths of an inch deflection.

The supervisor of Warnock-Hersey's Chemical and Physical Laboratory, Mr. G. H. Johnston, previously quoted, declares that in his tests of flat wires of either party's make, for instance, ex. 21 (plaintiff's) or ex. 23 (defendant's), none "required 28 ounces to deflect 5/8ths inch." (transcript, p. 176).

Mr. Johnston noticed, furthermore, several inaccuracies in the specifications. For example, after plaintiff's counsel, Mr. Henderson, had read lines 13 to 26, column 5, of exhibit 1, reproduced herein, and put this question:

Did you find that round wire and flat wire deflected 5/8ths of an inch—do you require the same load?,

the answer reads: "No, they do not." (transcript pp. 177-178). Mr. Henderson proceeds:

Q. . . . I think what you have told us (is) that what you found did not agree with the statements contained in this paragraph?

A. That is right. (transcript, p. 180)

Counsel now reads lines 27 to 31 of the patent's specifications; they are:

Inasmuch as the stress caused by the extension was less than the elastic limit for both sections, the frames returned to their normal free position. With this amount of deflection in both instances there was no distortion of either wire.

The ensuing question is:

Q. Mr. Johnston, I read to you this paragraph. Assuming that the .625 (equivalent to 5/8th of an inch; cf. p. 177) is this amount of deflection, when you deflected the flat wire did you find any distortion or twisting of the flat wire?

A. Yes. (transcript, p. 180, bottom, and 181, top line).

Next, at page 181:

Q. Then, is the statement that this amount of deflection, should I say .625 (when) observed on a flat wire, there was no distortion

or twisting of the flat wire; is that an accurate statement according to your tests?

A. No, it is not.

The ultimate words on the matter were those of Professor Hone at pages 236 and 237 of the transcribed evidence. Mr. Henderson asks:

Q. If I take a sample of the defendant's wire, exhibit 23, and I seek in any way to deflect it in the lateral plane, would you tell us whether or not twisting is inevitable?

The reply is:

A. In the lateral plane twisting is inevitable.

At the foot of pages 236 and top of 237, the question and answer are:

Q. Now, will you take a sample, or rather, the same wire, exhibit 23, and you put some, however so slight, put some load to give some deflection. Will you tell the Court what, if anything, happens to the wire?

Four lines below:

A. In the longitudinal direction, then, for the slightest load I expect torsion within that body.

I must now survey the practical aspect of the case as it unfolds in conflicting channels.

The first of three witnesses in this series of facts was Mrs. Lillian Hunau Sayers, of New York City, a brassière designer of many years' experience and presently employed by S. & S. Industries, the defendants (transcript, p. 487). From 1944 to about 1959, she was actively engaged in designing brassières for "Exquisite Form Bra", "reputedly the largest manufacturers of brassieres in the world" (pp. 491-492).

Her first knowledge of flat wire frames dates back to "... 1954 or 1955 or somewhere around that time"; at all events "approximately two or two and a half weeks before the January market showing of 1955" (transcript, p. 506). Mrs. Sayers waxed enthusiastic at this most promising innovation as one may infer from her emotional recollections hereunder cited (transcript, pp. 506-507):

... I, at the time, was planning putting two bras into the line utilizing wire. They were high fashion garments and I became so terribly excited with flat wire when I saw it because immediately upon seeing

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the flat wire I put it into one of the garments I was working on at the time and I tried the garment on myself and I was elated with the feeling that this had. It felt like I was wearing a bra that didn't have wire and I immediately realized that this was a wonderful thing that happened because we could then build a "better mouse trap" actually, as the saying goes, and, really, sell this product very well all through the country.

As a matter of fact, I felt so strongly about it (that) I went immediately to the President of our company and showed him this product. He became so excited that he called all the key executives in and everybody's reaction was the same. We were very, very thrilled and immediate plans . . . a lot of conversation started about a tremendous advertising promotion and so on and the fact is we were figuring how many thousands of brassieres we could manufacture and sell a week. It was quite exciting.

Mrs. Sayers' expectations of a "tremendous advertising promotion" for "a better mouse trap" materialized to the tune of more than two million dollars (transcript, pp. 509-525) including radio flashes and fashion magazine advertisements, some instances of which are exemplified in exhibits U, V, W, X and Y, this latter one deserving a passing comment.

Exhibit Y, a two-page communication on Exquisite Form stationery, undated, but probably of February, 1955, is a newsletter "that was sent out to every fashion editor of every newspaper throughout the country" and addressed "Dear Fashion Expert". It praises in exultant language ". . . the new, flattened wire . . .". After proclaiming its manifold superiorities such as "flexible, adjusting to the body contour, non digging and non poking", the promotional prospectus volunteers the admission that "Yes, it's a very simple idea, but the simplest ideas are always the best". Another paragraph, with a dash of proud generosity, prognosticates that "Ribbon Wire" (the product's designation) "is bound to be copied, too. A year from now it'll be standard with all manufacturers. But meanwhile it's all Exquisite Form."

Coupled with this better than tacit invitation extended in February, 1955, by Exquisite Form's publicity department to all future imitators (transcript, p. 521), is the purchase of this Ribbon Wire stock from, seemingly, no one else than S. & S. Industries, assignees, since October 19, 1954 (cf. ex. 58) of Marcus Schwartz's United States patent, number

270-5800 (ex. 58), whose official date appears as October 20, 1954.

What strikes me as somewhat odd are, on the one hand, the advertising firm's ignorance of their supplier's patent, and, on the other, the patentee's unwonted quiescence in the face of this oblivion of its monopoly. There may be very little in this, still, I deemed it not unworthy of notice.

Mrs. Lillian Sayers' evidence, of a few hours' duration, can be fittingly summarized by stating that it served as an aggressively lucid, but indifferently convincing plea in favour of S. & S. Industries' products, and an unrelenting disparagement of the American pioneering experiment in flat wire brassiere frames, the Pons Bra, exhibit 42, a U.S. patent, no. 1798274, granted to Mrs. Hélène Pons, on March 31, 1931.

Mrs. Pons, a resident of New York City, heard as a witness by the plaintiff, describes her occupation as that of "a theatrical designer, a costumer for almost 40 years" (transcript, pp. 357-358).

Sometime "before 1931" she devised a flat wire brassière frame for which patent no. 1,798,274, issued March 31, 1931, filed as ex. 5A.

Notwithstanding her many years' stay in the United States, Mrs. Pons does not appear to have mastered the vernacular and testified in laborious phrases though her meaning was quite understandable. She identified Exhibit 42 as a brassière nowise different from her 1931 model, and commented thus:

This is the same because I only believe in flat wire because a whole-sale business you can't get that as you need something that follows the ribs of the woman. The stiff wire wouldn't do that and would dig and I was very concerned they would have cancer or something like that and that is why I had the flat wire. (p. 375)

The theatrical costume designer eventually handed over the making of the flat wire to the Buffalo, N.Y. firm of Carry Spring Work. She received a sum of \$1,500, seemingly on an experimental basis, from the Van Raalte Company and royalties of 5 per cent. Her regular job in the theater workshop occupied the greater part of her time and she soon

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enough lost interest in the commercial future of her innovating design. Nonetheless, Mrs. Pons obtained a patent, ex. 5, in good and due form, from which and from the drawings annexed an attentive designer could gather both the inventive idea and essential directives presently found in the document at stake.

True, the fabricating stages of the metallic strips are unmentioned in exhibit 5A, but the defendant revendicates none of this as an "ingredient" of his own patent.

Once more, duty compels me to support this notion by abundant corroborative material gleaned from the Pons patent, exhibit 5A. The first quotation goes from lines 84 to 90 in the second column of the specifications; it reads:

In order to achieve the purposes of my invention member 13 must be resilient and sufficiently flexible to conform to any of many curved surfaces characteristic to the chests of different individuals in the vicinity of the breasts. If made of metal or of a steel spring . . .

A few excerpts from four of the five claims follow. Mrs. Pons declares:

I claim:

1. A body-fitting brassière which supports the breasts individually and without effecting false forms comprising a pair of breast-forms and limp material connecting the breast-forms and holding them in position upon a wearer, each of the breast-forms being of an individual construction and having an open-ended flat wire loop of resilient material capable of being flexed to lie against the chest of a wearer, the wire of said loop being substantially oblong in cross section with the broad dimension of the cross section substantially in a plane . . .

2. A body-fitting brassiere which supports the breasts individually and without effecting false forms comprising a pair of breast-forms, each having a resilient frame in the form of an open-ended loop which is more flexible in directions perpendicular the plane of the loop than in directions at right angles to said directions of greater flexibility, said loop being adapted to conform to the contour of the body and breast of a wearer . . .

3. A body-fitting brassière which supports the breasts individually and without effecting false forms comprising, a pair of breast-forms in the form of an open-ended loop adapted to conform to the body and breast of a wearer, said loop comprising a steel wire more flexible in directions perpendicular the plane of the loop than in any other direction . . .

4. A body-fitting brassière which supports the breasts individually and without effecting false forms comprising, a pair of breast-forms and pliant material connecting the breast-forms and holding them in position

upon a wearer, each of the breast forms being of individual construction and having an open-ended loop of resilient material capable of being flexed when in use, said loop being more flexible in directions perpendicular the loop than in directions within the plane of the loop. . .

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Several times, during her cross-examination, Mrs. Pons reaffirmed that, when made, the wire of exhibit 5A "was perfectly flat" (pp. 393-394). Exhibit 5A was the wire inserted in exhibit 42, the completed Pons brassière.

Any doubt whatever about the flat or rectangular shape of the metallic ribbon in the Pons brassière would be conclusively dispelled by the defendant's consultant designer, Mrs. Lillian Sayers who, at this question by Mr. Riches, Q.C.:

Q. Would you please first examine that brassière (the Pons model, ex. 42), particularly with respect to the flat wire that is shown in there, it does show a flat wire, I believe?

answers:

A. It does, this wire is flat.

And to a subsequent query:

Q. Does that look like the S. & S. Industries' wire?

the witness acknowledges that:

A. It does look like the S. & S. Industries' wire, but that is where the similarity ceases.

Between those two metal bands, the difference, according to Mrs. Sayers, is that:

. . . this wire (i.e. ex. 5A), you are able to pull this wire at both legs and keep going quite a distance. This sort of thing, there would be no purpose to using this bra. It could not perform; it could not function . . . (transcript, bottom line of p. 532, top of p. 533).

On page 534, by Mr. Riches, Q.C., for defendant:

Q. Having examined the brassiere . . . and the wire, would that wire, in your opinion, support a breast?

A. No, I have just explained it couldn't because it opens too readily. It is very easy; with the slightest bit of pressure you can open this considerably and this defeats the purpose for which the wire is used in a bra.

Previously, Dr. Hone, undergoing his exhaustive examination-in-chief had testified on this identical subject, the Pons brassière, or rather on the peculiarities of its wire looping.

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To do so, Professor Hone had a wire made "with a ratio of 1 to 4 as far as width and thickness were concerned" taking the measurements "right in the drawing" appended to Exhibit 5A, which gave a ratio of 1 to 4. (transcript, p. 330). The tests were carried out "in the same way, using the same testing machine" as in the case of exhibits 36 and 37 (p. 332).

Exhibit 36, by the way, is an arcuate flat wire similar to exhibit 21, of plaintiff's make.

The upshot of those experiments materialized in exhibit 40, a flat wire possessing the same cross-sectional ratio of dimensions as Pons, ex. 5A, and about which the expert witness reported that:

On the transverse test for a deflection of 5/8ths, a load of one quarter ounce was required. In a longitudinal direction for a deflection of 5/8ths inch, a load of four ounces was required . . . (transcript, p. 331, bottom line, and top of 332),

with a ratio of 1 to 4 for thickness and length, (p. 330) and a ratio of flexibility of 16 to 1 (p. 332). The preceding ratios in the Pons wire approximate closely to those of the 1956 Schwartz patent, ex. 1; and remained unchallenged by the opposing party's technicians.

One disapproving voice only was heard, that of Mrs. Sayers, who, comparing exhibit 40, just described, with the wire (5A) in the Pons brassière, exhibit 42, said:

A. It (ex. 40) looks like it is approximately the same but this (ex. 40 again) is more rigid. You see the restraining influence (indicating); it seems to pull back.

Then to this remark of mine:

Q. According to you it would have the qualities which 42 lacked; it is more rigid.

I was told:

A. Yes, it is more rigid. (with this further explanation relating always to ex. 40) This has more rigidity . . ., there is a restraining influence, in other words you feel the pulling back as you try to pull it out. It is difficult to pull it gently. (transcript, p. 535).

Again, Mrs. Sayers' concluding observation was: "No, I wouldn't care to use it (ex. 40) as a bra wire. This steel does not have the strength that I would require in a bra."

Even though this lady's opinion were not unfounded, the steel ribbon, ex. 40, made pursuant to the drawings of the Pons patent (ex. 5A) shows a nearness to the defendant's brassière frames such that the minute difference is undeserving of the privileged level of monopoly.

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At long last, this paragraph brings to an end the review of the evidence.

Ross F. Rowell, successful in his complaint, is entitled to a measure of pecuniary compensation.

On August 13, 1959, the defendant's attorney, Mr. Irving Seidman, of New York, wrote to Hops-Koch Products, Montreal, Rowell's business style, a threatening letter, ex. 10, the ultimate paragraph of which follows:

You are hereby advised that unless you inform us within the week that you will immediately cease and desist from the manufacture, sale and use of such flat arcuate wires for use in brassières, you will leave me with no other alternative but to forward the matter to my Canadian associates for institution of legal proceedings for infringement of the aforesaid patent.

In 1959, S. & S. Industries instituted an action for infringement of patent No. 525-962, in the Supreme Court of Ontario against the Robert Simpson Co. Ltd. of Toronto, a large department store, one of the retail outlets for the products of the plaintiff.

Next, the December 17, 1959, issue of the fashion paper "Women's Ware Daily", ex. 11, diffused to its widespread clientele the news of these Court proceedings.

Eventually, S. & S. Industries Inc. consented to discontinue their law suit upon the joint undertaking of Robert Simpson Co. Ltd., retailers, and Peter Pan Foundations Inc., a Quebec corporation, manufacturers of the contested brassières, to ". . . acknowledge the validity of the said Patent . . ." and not to ". . . directly or indirectly make, use or sell the rigid arcuate steel wire brassiere frame of the invention described in the said Letters Patent, and known as flat brassiere wire . . . unless manufactured by the plaintiff or its licensees". "Dated at Toronto, this 2nd day of February, 1960." (ex. 64)

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Rowell testified that after publication of the law suit against the Robert Simpson Co. in *Women's Ware Daily*, ex. 11, he received many telephone calls from alarmed clients, and lost not only Peter Pan Foundations as customers, but also his "American market" comprising Exquisite Form of New York, purchasers of his in the States and in Canada.

Under those circumstances, Rowell's trade and commercial good will surely did suffer serious losses.

Since, however, these damages were not particularized during the trial, their apportionment, if the parties disagree, is referred to the Registrar or a Deputy Registrar of this Court.

In conclusion, the defendant acknowledges that its patent's inventive feature does not consist in the flattening of round wire, something contemporaneous with the discovery of steel itself. It lays no claim to any new species of steel nor to any hitherto unknown processing formula. Neither can S. & S. Industries urge as a novel and useful step the inclusion of rectangular arcuate wire frames in brassières.

So far back as 1931, the Pons Patent admittedly afforded a sample of flat wire brassière frames or "loops", and, possibly also, the Gluckin patent (ex. 5K) of November 6, 1945. Prior publication and knowledge have been proved, antedating at least 23 years the model marketed by the defendant. Therefore, the field left open for any valid monopoly narrows down to S. & S. Industries' restatement, on page 4 of its brief, less assuming in ambit than the three claims, of having devised a brassière frame with "a ratio of longitudinal extensibility to lateral flexibility that will give stability to the wire when worn so that torsional twisting does not take place."

Entrusted by Marcus Schwartz with the practical application of his paper specifications, engineer Carlson impressed me as a thoroughly competent and sincere witness, and in no lesser degree, so did his contradictors, Drs.

Johnston and Hone, as also Professor I. W. Smith, the other expert for the defence.

At this closing stage, it would be fastidious to do more than allude to the pros and cons of scientific evidence of which I deemed it a duty to reproduce copious passages.

Mr. Carlson upheld the accuracy of his clients' patent. Professors Hone and Johnston pointed out some significant discordances between the printed theory and the material findings.

Both unhesitatingly asserted, after repeated trials and contrarily to the defendant's patent, the existence of torsional twisting at the ratios indicated in exhibit 1. They lay the blame at Mr. Carlson's door, namely, holding "the wire frame at the mid-point (with a fixture or clamp) so only one half would be flexible" (transcript, p. 796).

Dr. Hone's criticism of this test comes anew to my mind: "I would expect torsion to happen in any case when the longer axis is in the plane of the arc. There is necessarily a twisting that takes place because the material tends to fall off from equilibrium into the other direction." (transcript, p. 934).

More significantly still, Professor I. W. Smith, the defendant's other technician, and equally eminent scientist, shares the criticisms of his fellow expert's tests as conducive to inaccurate results.

In my humble opinion, a preponderance of evidence substantiates the view that the claims urged are not vindicated objectively. This patent does not live up to those essential requirements so ably formulated in *Minerals Separation v. Noranda Mines Ltd.*¹ by the late President of this Court, Mr. Justice Thorson, who wrote:

Two things must be described in the disclosures of a specification, one being the invention, and the other the operation or use of the invention as contemplated by the inventor, and with respect to each the description must be correct and full . . . The description must be correct; this means that it must be both clear and accurate. It must be free from avoidable obscurity or ambiguity and be as simple as the difficulty of description permits. It must not contain erroneous or mistaken statements . . .

¹ [1947] Ex. C.R. 306 at 316.

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Finally, I believe that prior publication, exemplified by the Pons Patent, occurred in 1931. If so, the defendant's application in Canada, dated March 21, 1955, contravenes s. 28 (1) (b) of the Act, hereafter cited:

28. (1) Subject to the subsequent provisions of this section, any inventor or legal representative of an inventor of an invention that was

(a) . . .

(b) not described in any patent or in any publication printed in Canada or in any other country more than two years before presentation of the petition hereunder mentioned, . . . may obtain a patent.

A scrutiny of the 1931 document discloses, in simple, unassuming language to anyone skilled in the art, information comprehensive enough to subsequently relegate into the anonymity of workshop improvements the sententious dabbling of the later patent.

For the reasons profusely elaborated, the Court orders and enacts as follows: It declares null, void and of no effect Letters Patent number 525-962, issued June 5, 1956, to Marcus Schwartz, and since assigned to S. & S. Industries Inc.; It also declares the plaintiff entitled to damages in such amount as may be found on an inquiry as to damages by the Registrar or a Deputy Registrar if the parties cannot otherwise agree. The Court dismisses the defendant's counterclaim for infringement and its belated motion for contempt of Court directed against Ross Frederick Rowell. The plaintiff is allowed the costs of all proceedings after taxation in due form.

Judgment accordingly.