

BETWEEN:

IMPERIAL TOBACCO COMPANY }
 OF CANADA LIMITED, AND }
 WM. WRIGLEY JR. COMPANY, }
 LIMITED

PLAINTIFFS;

1936
 March 23.
 July 24.

AND

ROCK CITY TOBACCO COMPANY }
 LIMITED

DEFENDANT.

*Patents — Infringement — Anticipation — Prior publication — Novelty —
 Invention — Subject-matter.*

The patents in suit, infringement of which was claimed by the plaintiffs, were for methods of severing package wrappers. The Court found that there was no subject-matter in the patents and dismissed the action.

Held: That when a principle is not new, a patent for a method of applying it only secures to the patentee protection in respect of the particular method specified, and the use of different methods of carrying the same principle into effect cannot be restrained.

2. That a combination of well-known elements without any new functions or the accomplishment of any new results does not constitute invention.

ACTION by plaintiffs to have it declared that Canadian Patents for Invention numbered 349,299 and 349,983 are valid and infringed by the defendant.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

R. S. Smart, K.C., for plaintiffs.

J. T. Richard for defendant.

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

THE PRESIDENT, now (July 24, 1936) delivered the following judgment:

This is an action for the infringement of two patents. The first named plaintiff, a manufacturer of tobacco and cigarettes, is the owner of patent no. 349,299 which issued on April 2, 1935, on an application filed on August 14, 1934, by one Van Sickels, and that plaintiff is the exclusive licensee of the second named plaintiff, in respect of the sale of tobacco in any form, under patent no. 349,983 which issued on April 30, 1935, on an application filed on August 14, 1933, by one Lindsey, and which patent is now owned by the second named plaintiff, a manufacturer of chewing

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gum. Both patents relate to means for removing wrappers from packages of such articles as cigarettes and chewing gum. The defendant is a manufacturer of cigarettes, some of which are sold under the trade name of "Spud."

The patent to Lindsey, which is owned by the William Wrigley Jr. Company, was applied for just one year earlier than Van Sickels, and, it was contended by Mr. Richard, Van Sickels would appear to occupy about the same field as Lindsey. However, whether Lindsey anticipated Van Sickels is not of importance in this case because the Imperial Tobacco Company is the exclusive licensee of the Wrigley Company in respect of the sale of tobacco in any form. Furthermore the question of priority as between Lindsey and Van Sickels was not put in issue.

I shall refer first to the Lindsey patent. I reproduce below figures 1 and 2 of that patent which will at once disclose the nature of the invention claimed in this patent, and it will also assist in understanding what Van Sickels claims as invention. They are as follows:—

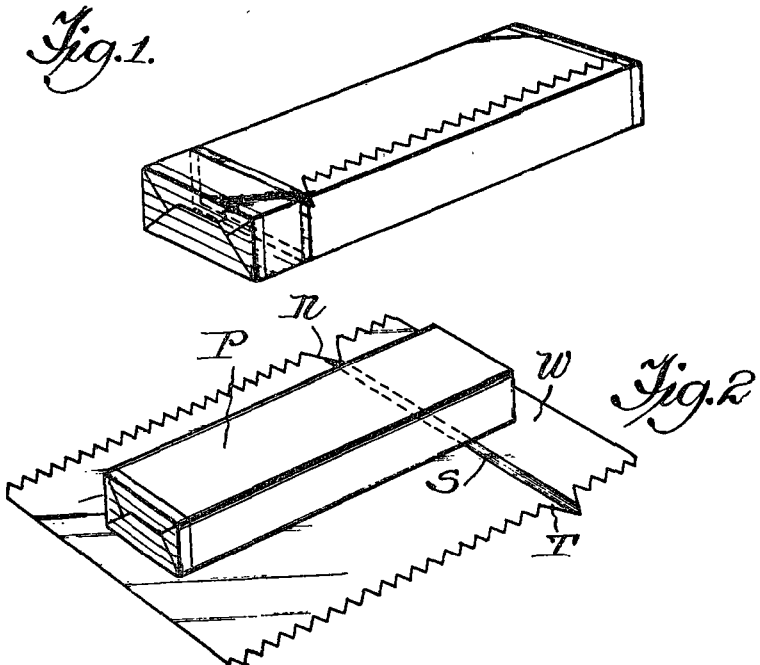


Fig. 1 is a perspective of the package completely wrapped. Fig. 2 is a perspective view of the unwrapped package showing its position relative to the outer wrapper with a gum strip adhering thereto.

In fig. 2, along one of the edges of the wrapper W, the one which lies exterior the package when the wrapper is folded and sealed, there is shown a pointed tab T spaced inwardly from one end thereof a distance corresponding to the predetermined location of the strip S. The tab is one of the serrations increased to at least three times the width and length of the remaining serrations and is formed when the wrappers are cut by providing the cutting members with an enlarged cutting tooth, and consequently as each wrapper is severed from the web of wrapping material fed between the cutting members the leading edge will have the enlarged tab T, and the trailing edge will have a corresponding recess or notch N. Thus with the tab T located in line with the strip and the gummed strip adhered to the tab, the outer end will be extended beyond the edge of the wrapper and the loose projecting end can be grasped between the fingers and pulled with a following movement around the package thus severing the wrapper. The whole operation, as I understand it, is performed mechanically in both patents but this mechanism is not claimed by either patentee.

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Some portions of the specification state the object of the invention, and the invention claimed, more clearly than I have done and accordingly it might be useful to quote from the specification the following:

It is common practice at the present time to enclose package consumable goods, such as chewing gum, confections and the like, in an outer wrapper of a moisture-proof material, that bearing the Registered Trade-mark "CELLOPHANE" being a very satisfactory material for this purpose, for in addition to being moisture-proof, it is perfectly transparent and very durable, as is exhibited in its tenacity against breakage or rupture, although once a break has been made, it tears very readily and in all directions, since it has no definite texture. Thus a sheet of such "CELLOPHANE" material tightly wrapped about a package and sealed, offers considerable resistance to rupture and to such extent that numerous schemes have been devised for assisting in the breaking open of a package so wrapped, such as projecting tabs and unsealed edge portions which may be grasped for the purpose of tearing open the end of the package. Owing to the nature of the material as above stated, however, it is quite likely that, in tearing open the wrapper at one end of the package, the entire wrapper will be torn away and the protection afforded thereby is lost during the period of consumption.

* * * * *

For the purpose of this disclosure, the package P may be any package consumable product or article to which is to be applied an additional outer wrapper W of moisture-proof material such as that bearing the Registered Trade-mark "CELLOPHANE" although the familiar pack-

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age of chewing gum has been illustrated as one to which the improved method and means of opening is particularly adaptable. Like most package consumable products, chewing gum ordinarily lasts for a period of time before the contents of the package are consumed, and hence it is customary to break open one end of the package and remove the contents therefrom. Consequently, on applying an outer moisture-proof wrapper, it is desirable to provide for opening the package in the usual manner, and hence the outer wrapper with the auxiliary opening member is applied accordingly. Thus as shown in Figure 2, the outer wrapper is a rectangular sheet, enough longer and wider than the package to completely envelope it with the longer edges overlapping each other and the protruding ends tucked in and folded neatly against the ends of the package in a regular square end fold.

* * * * *

The opening member S as previously explained is preferably a narrow ribbon-like strip of the same material as the outer wrapper of, say $\frac{1}{16}$ or $\frac{3}{32}$ of an inch in width, and of a colour that is readily visible in contrast with that of the package and the outer wrapper. Thus for example, if a colourless clear material is used for the wrapper, the strips may be red or some other colour.

The specification states that the strips may be incorporated in the packages during the wrapping operation in several different ways, two of which are illustrated in the drawings but it will be sufficient to refer to one, fig. 2. The specification states:

By one method (Figure 2) the strip material has the form of a gummed tape fed from a roll or spool toward the web of outer wrapping material as it travels toward the cutter, the gummed surface of the tape being moistened as it is fed into contact with such web, and just before the latter passes between the cutters. In short, by the method of using a gummed tape, the wrapper and strip materials are assembled before the individual wrappers are cut.

Claim 7 is typical and might be quoted:

A package wrap comprising a package having a wrapper wrapped tightly around the same and sealed at its ends and along overlapping marginal portions, the edge of the outer overlapping marginal portion of the wrapper extending parallel with and adjacent to one of the longitudinal corner edges of the package and having a loose tab projecting toward and beyond said corner edge, and a narrow strip of the wrapper material extending around said package beneath the wrapper and with its end portion lying between the overlapping marginal portions and adhering to said tab.

The object of Van Sickels is stated in one paragraph in the specification and it is as follows:

The object of this invention is to facilitate the removal of the transparent moisture-proof outer wrappers used on cigarette and other packages. To this end the invention comprises a tearing strip extending around the package inside the wrapper so that one of its terminals may be conveniently grasped and pulled to tear away the overlying part of the wrapper. The tearing strip is preferably located to divide the wrapper into two half sections which are easily slipped off the package to permit the latter to be opened in the usual manner.

There is but one claim in this patent and as it specifically defines what is claimed as the invention it had better be quoted. It is as follows:

1. A package comprising a container, a wrapper folded about the container to completely enclose the same, said wrapper presenting overlapping inner and outer flap portions overlying one wall of said container, a narrow tearing strip extending around the package inside the wrapper with one end of the strip disposed between said inner flap and the underlying wall of the container and the other end of the strip disposed between the two overlapping flaps, the outer of said overlapping flaps being provided with slits extending inwardly from its free edge along opposite sides of the tearing strip.

The wrapper, which comprises a sheet of regenerated cellulose, such as that sold under the trade-mark "Cellophane," is wrapped around the package in the usual manner, to provide, it is said, a moisture-proof enclosure therefor. The tearing strip, which may be a narrow flat band of paper, regenerated cellulose or other suitable sheet material, extends completely around the package inside the wrapper, with one end of the strip disposed between the inner flap and the package or container itself and the other end disposed between the two overlapping flaps, and ordinarily projecting outwardly therefrom; the projecting end may be grasped and pulled to tear away the overlying part of the wrapper. The outer of the overlapping flaps of the wrapper is provided with two slits, one on either side of the strip, forming a sort of tab. These slits extend inwardly a short distance from the edge of the wrapper and serve to facilitate the tearing of the wrapper when the end of the strip is pulled for that purpose. The slits also enable the end of the strip to be grasped when the end of the strip terminates flush with the edges of the flaps of the wrapper material instead of being projected beyond the same. The pulling of the tearing strip serves to remove a portion of the wrapper corresponding to the width of the tearing strip and thus dividing the wrapper into two sections, one or both may be removed. It is the presence of the slits that distinguish Van Sickels from Lindsey.

The claim to validity in Lindsey and Van Sickels is based on the combination of the wrapper material, the tearing strip adhered to the inside of the wrapper, and the tab, and this combination is said to constitute subject-matter in each case. The defendant claims that what is described

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in both patents was anticipated by prior publications, and was obvious. To initiate a rupture or tear in cellophane is difficult, but when once started it tears very easily by the finger or otherwise, for example, by a strip or band adhesively attached to the inside of the wrapper. There can be no doubt as to the utility of the tearing strip, and probably the tab, however formed. The difficult question to decide is whether there is novelty and utility in the combination in the degree requisite to constitute subject-matter. A thing may be new and useful without being suggestive of invention.

The defendant for a few days used the same wrapper and tearing strip described by Van Sickels, that is to say, there was a slit on each side of the strip which formed a tab, but I am not sure whether the strip projected beyond the edge of the wrapper material. When Van Sickels issued, the defendant thereafter used but one slit, and still does as I understand it. The one slit assists in tearing off one end of the cellophane wrapper, that is to say, the tear follows the side of the strip on which is the slit, and the end of the wrapper comes away with it. The severance is not the width of the strip as in Lindsey and Van Sickels, but a definite severance is effected and one end of the wrapper is removed.

We may now turn to a review of some of the cited prior publications. I shall first refer to Boyd, a British patent, accepted in 1902. The patentee states in his specification:

In the practice of my invention I provide a sheet of paper (a) or any other suitable material of any length and width desired and cover it on one side with adhesive material the whole of its length. At a predetermined distance from one of the side edges of this sheet in the direction of its length I seal thereto by means of the adhesive material with which the sheet is provided a tape or ribbon (b) of any suitable material, one end of which may or may not extend slightly beyond end of sheet (a).

There is more than one embodiment of the invention described in the specification. Where Boyd suggests only the use of a sheet of paper, that is as a wrapper, he covers it with adhesive material only to a predetermined distance on the edge of one side. At the inside edge of this adhesive material he seals a tape or ribbon, the remaining and large portion of the sheet being uncovered and in its natural state. Later he directs that before the covers or wrappers are placed around articles that a slit or notch should be

made on them, on each side of the end of the tape or ribbon, unless such tape or ribbon extends slightly beyond one end of the covers or wrappers. The slit or notch, he states, enables one to take hold of the tape or ribbon and by pulling it remove the wrapper from the package instantly. Evidently Boyd contemplated that the ribbon normally would extend beyond one end of the covers or wrappers, or it might be flush with the same, and in the latter event he suggests the slit or notch should be adopted. He suggests that his device is suitable for tubes of various kinds, also magazines, newspapers, etc., and other articles, and the device is not to be limited to the construction described in his specification. What Boyd claimed was:—

(1) A wrapper or case consisting of a sheet of paper or other suitable material to one side of which at a predetermined distance from one or more of the edges thereof is sealed or attached by means of adhesive material a tape or ribbon of any suitable material for the purpose of enabling such wrapper or case to be instantly removed from any goods which it covers, all as substantially and for the purposes as hereinbefore described.

The United States patent to de Escobales (1916) relates to an intricate machine designed for the purpose of mechanically folding wrappers over packages. The machine functions in such a way as to cause a paste secured wrapper and a narrow tape—which is inside the wrapper—to be folded upon the article or container, so that in the end the unpasted end of the tape protrudes beyond the edges of the wrapper when it is finally folded. I only refer to this patent for the purpose of pointing out that in applying the wrapper to the article there is an accompanying narrow tape between the wrapper and the article, one end of which protrudes beyond the end of the wrapper when it is folded, and which is used as a tearing strip, which is not, however, claimed by the patentee—at least I do not think it is.

Martinez, a French patent, issued in 1914, refers to a wrapper, which may be of paper, thin cardboard or of any other material. Upon the sheet constituting the wrapper, and on the inside, is secured a tongue, which may be a cord, a textile or metallic thread, a belt of resistant paper or any other suitable material. The tongue which is destined to facilitate the opening of the package is arranged in such a manner that, after the article is wrapped up and

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the parts of the wrapper secured by some suitable adhesive, the tongue protrudes and permits of its being seized so that when pulling it the wrapper, which encloses any article, may be undone.

I might refer to the United States patent to Panza (1923). This invention relates particularly to receptacles for containing cigarettes. In general, the patentee states that his invention consists in securing to the wrapper portion of the package a thin strip of ribbon, so arranged that when one end of the ribbon is pulled the wrapper may be severed or torn along a plane, that corresponds with one that is parallel to the closed or upper end of the package and a short distance below the ends of the cigarettes, leaving the upper ends of the cigarettes exposed. The patentee states that any suitable means may be employed for securing the strip of ribbon to the paper and tinfoil parts which make up the wrapper.

Other cited prior publications suggest in various forms the use of strips, ribbons or strings, to sever wrappers which are applied to various types of articles and containers but it is not, I think, necessary to refer to them. I might however add that wrappers were in the past and still are severed from packages by a protruding thread or string, particularly where the wrapper is wholly pasted upon the article, and this form is illustrated by a package of cigarettes, put in evidence by the defendant, wherein a protruding thread or string is used to sever the wrapper at the point where the two parts of the box or container come together and are closed.

Mr. Thomas, factory manager for the Wrigley Company in Canada, speaking more specifically to the Lindsey patent, but not as an expert, stated that Wrigley experimented with a thread or string with unsatisfactory results because there was no means of attaching the thread or string to the cellophane wrapper and that it would not tear because there was nothing to guide it; that the use of a string or thread was feasible in the case of a paper wrapper but not in the case of a cellophane wrapper which had no grain; that the tab with the ribbon attached gave the lead to tearing the wrapper, and that the ribbon formed a cutting edge; that if the tab were used without a ribbon it would be difficult to see the tab because it is colourless, and that it would not

tear straight because there was no cutting edge and the wrapper would tear itself in an oval form; that if a ribbon alone, flush with the edge of the wrapper, were used, it would be impossible to grasp the ribbon so that it would tear; and that if a protruding ribbon were used without a tab it was possible at times to make some type of tear, but in the majority of cases, owing to the toughness of the cellophane wrapper, it would not tear properly. I might observe that it does not appear who did the experimental work for Wrigley. Neither patentee was called to give evidence.

I find it difficult to accept much of the evidence of Thomas. If cellophane were applied to cigarette packages, similar to that shown in the defendant's Exhibit E, I have no doubt a string would tear the cellophane in a straight line if a single slit were employed, and I am inclined to think that under certain conditions this would occur even if there were no slit at all. It is quite true, I should think, that a cellophane tab alone, that is without a ribbon attached, would not tear in a straight line, but in oval form, but that question does not arise in this controversy and I do not quite understand why it was introduced. It may or may not be correct to say that if a ribbon alone were used, flush with the edge of the wrapper and without a protruding end or tab, that the tear would be unsatisfactory, but it certainly would be satisfactory if slits were used just as Boyd suggests, and a single slit would effect the same result just as in the defendant's case. Then it seems to me to be very doubtful to say that if a protruding strip were used without a tab it would not be possible at all times to effect a proper tear; the defendant's Exhibit C shows a cellophane wrapper will tear along the plane of the ribbon; and Van Sickels would seem to suggest that this could be done without the use of slits. If a cellophane tab by itself is objectionable because it is colourless and invisible I should not think there were invention in doing something which would make it visible to the eye. On the whole, I do not think this evidence is particularly helpful and it appears to me too much like straining the facts to support a contention that is debatable. At least it does not strike at the root

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of the issue, namely, whether there is invention in Lindsey and Van Sickels over and above what was before known.

Whether or not there is invention in Lindsey and Van Sickels is not a question entirely free of difficulty. In cases of this kind the line of demarcation between validity and invalidity is always difficult to define and determine. Validity is not claimed for Lindsey or Van Sickels upon the ground that the wrapper may be cellophane, or that it is transparent, or grainless, or moisture-proof, or that it is outwardly attractive, or that the cellophane ribbon is colourless or may be coloured, or that the wrapper and ribbon are cut, relatively positioned, made adhesive, wrapped, folded and sealed by automatic mechanical means. These features are not claimed by either patent. In Lindsey invention is claimed for the combination of a wrapper material, a tab projecting at a predetermined point beyond the edge of one of the overlapping marginal portions of the wrapper when folded and sealed, and a band extending around the package transversely of the overlapping marginal portions the end thereof adhering to the projecting tab. In Van Sickels the substantial difference in the combination is that when the ribbon does not project beyond the edge of the overlapping marginal portions there is a slit in the wrapper on either side of the ribbon thus forming a sort of tab which may be grasped by the hand. The objective of each patent is similar, generally the means are the same, but the precise arrangement of means are slightly different. The prior art, in a variety of arrangements, discloses the principle or method of severing a sealed wrapper overlying a container by means of a tearing thread or ribbon.

If a principle is not new, a patent for a method of applying it only secures to the patentee protection in respect of the particular method specified, and he cannot restrain the use of different methods of carrying the same principle into effect, which may be fit subject-matter for other valid patents. Therefore the only ground upon which the validity of the patents in suit may be maintained is that they each disclose particular means, which are new and useful and contain subject-matter, for carrying out an old principle. What each patentee here claims is in fact a

particular arrangement of means for carrying out an old principle. A new principle with old means of putting it into effect, or the reverse, might afford subject-matter, but if the principle is old and the means for carrying it out are old, or fail in subject-matter, then there cannot, I think, be invention. Nor does a combination of well-known elements without any new functions, or accomplishment of any new results constitute invention. See *Chamberlain and Hookham Ltd. v. Mayor of Bradford* (1), and *Proctor v. Bennis* (2). Then the sole question for decision here is whether the patents in question disclose new and patentable means for severing a package wrapper, or, whether they each describe a new combination which performs new functions or accomplishes new results. Is there such a difference between the means described and claimed by Lindsey and Van Sickels, over that already known, so important as to constitute subject-matter? The answer to such question affords, in my opinion, the proper line of enquiry in this case.

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A tearing strip attached by some adhesive to the inside of a wrapper was not new. Boyd and others suggested this in one form or other. In some cases it was a string or thread; in others a band, a ribbon, a strip, adhered partially or wholly to the inside of the wrapper. Boyd evidently intended that the end of his ribbon would ordinarily protrude outside the sealed ends of the wrapper, so that it might be grasped, and he states that when it does not so protrude, slits should be made on either side of the end of the ribbon,—forming a sort of tab,—so that it may be grasped by the fingers, which is precisely what Van Sickels suggests, and in the practical sense just what Lindsey suggests; it was necessary that the end of the ribbon could be grasped by the finger, and so that on being pulled it would first rupture the edge of the wrapper and then sever the whole wrapper. That there is variation between the tearing means of Lindsey and Van Sickels and that disclosed in the prior published art, is not necessarily of importance or conclusive of invention; the means might vary slightly or considerably without there being anything like invention

(1) (1903) 20 R.P.C. 673 at p. 684. (2) (1887) 4 R.P.C. 333 at p. 354.

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in any of them; to maintain validity in such cases there must be a substantial exercise of the inventive power or inventive genius, but, of course, invention may result from slight alterations if they produce important results.

Subject-matter is stressed here on the ground that in a cellophane wrapper it is difficult to start the tear, and that it required invention to devise means of doing so. Once a start in a tear is made in cellophane it will readily tear, as easily or more so than most paper, in any way in which it is guided by the fingers or otherwise. Some one in Wrigley's employ experimented with a string or thread, but unsuccessfully it was said because there was no means of attaching the thread to the cellophane; but why did he not experiment with a ribbon, a band or strip or something of that sort, which obviously could be attached to the cellophane by some adhesive? The latter would be as obvious as the string or thread, I should think, particularly where it was in the mind of the patentee that the tearing means was to be affixed to the inside of the wrapper by some adhesive. I think the person attacking the problem, if there were one, could have found the key to the solution in the prior art. True, he could not find in the prior published art reference to the employment of cellophane as a wrapper, it then being unknown, but with Boyd and other publications before him I can hardly believe that he would not at once see that the application of one or more of the methods and means therein described would quickly lead him to the solution, with a minimum of trial and experiment. It is correct to say that in order to render a document a prior publication of an invention it must be shown that it publishes to the world the whole invention, that is, all that is material to instruct the public how to put the invention into practice. See Lord Moulton in *British Ore Concentration Syndicate Ltd. v. Minerals Separation Ltd.* (1). It seems to me that some of the prior publications cited here did give to the public all that was necessary to put Lindsey and Van Sickels into practice because they disclose the principle involved in each, and substantially the means are much alike. That it was difficult to start a rupture in a sheet of cellophane became obvious to all as

(1) (1909) 26 R.P.C. 124 at p. 147.

soon as that material came into use. That being known, I think it was obvious for a person grappling with that problem to turn to the suggestions of the prior art and to use a band or strip adhered to the wrapper, slightly projecting from the edge of the folded wrapper, or by making slits on either side of the band or strip, as suggested by Boyd, in the event of the end of the band or strip not extending beyond the edge of the wrapper. It seems to me that the principle being old, that the projecting tab carrying the ribbon or strip, or the band or strip slitted on both sides at the end, was not a step that constituted subject-matter, which is always a question of fact determinable on practical considerations.

If a principle or method is known, it should not be possible for one to be the recipient of a grant of monopoly for every variation in the means for carrying out that principle or method, unless it involved means that strongly pointed to invention and required the exercise of the inventive faculty. Whatever variation there be between either Lindsey or Van Sickels and what was previously known to the art, I do not think that variation constitutes such a step that merits monopoly. The case is not an easy one and I am not unmindful of the force of the argument of Mr. Smart in support of the patents in suit. However, my conclusion is that there is no subject-matter in the patents in question and the plaintiffs must fail.

Having found that there is no subject-matter in Lindsey or Van Sickels it is not necessary to discuss the matter of infringement, but I might express briefly my opinion on this point in case another court may take a different view as to the validity of Van Sickels and Lindsey. As already stated, the defendant at first employed two slits in the cellophane wrapper, one on either side of the end of the ribbon. If there be invention in Van Sickels or Lindsey, or both, then I would be inclined to the view that there was infringement. The defendant knew of Lindsey being on the market and it apparently was attempting to avoid an attack of infringement of that patent by adopting the two slit arrangement, and learning of Van Sickels it quickly abandoned that, adopting, as I have already stated, the one slit, again no doubt in the hope of avoiding infringe-

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ment of Van Sickels. I do not think infringement can be avoided in that way, that is, by resorting to a less attractive and satisfactory method of severing the wrapper. On the other hand, the principle being old, Lindsey and Van Sickels claim, and could only claim, in my opinion, a particular arrangement of means, that described by each, and the defendant's means of severing the wrapper is slightly different. It is settled law that in a narrow invention, involving an old principle, if a patentee adopts a particular means or arrangement, such as Lindsey or Van Sickels, he is restricted to that and that alone, and it is arguable that the defendant is to be protected as to its particular means or arrangement, because it is different from Lindsey and Van Sickels in the respect mentioned. But this point was not sufficiently developed by counsel on behalf of the defendant, and I do not propose relying on it; something, however, may be said for that view though I doubt it is of substance.

The defendant will have its costs of the action.

Judgment accordingly.