
BETWEEN:

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Feb. 21, 23 24, 25

RALPH DI FIORE, trading under the firm name and style of THE STEADFAST SHOE REG'D., ... } PLAINTIFF;

AND

GABRIEL TARDI, trading under the firm name and style of ATOMIC SLIPPER REG'D., ... } DEFENDANT.

Patents—Infringement—The Patent Act, 1935, S. of C. 1935, c. 32, ss. 26, 35(1), 35(2)—Shoe-making process—Moulding slippers by the use of moulds—Misleading and ambiguous statements in specification—Failure to disclose important information—Anticipation—Failure to confine claims to invention.

The plaintiff brought action for infringement of his patent for a shoe-making process. The defendant attacked the validity of the patent on the grounds of insufficiency in the specification, lack of novelty and subject matter, and claiming more than was invented and denied infringement.

Held: That if a specification by itself will not enable a person skilled in the art to which it relates to put the invention to the same successful use as the inventor himself could do, without leaving the result to the chance of successful experiment, the specification is insufficient to comply with the requirements of section 35(1) of The Patent Act, 1935, and the patent falls.

2. That the statement in the specification that other materials than leather could be used is misleading.

3. That the term "suitable machinery" in the specification is ambiguous.

4. That the plaintiff failed to disclose how to make and operate the moulds for the preforming of the sole shells and uppers and how to design suitable lasts that can be used with the moulds and taken out of them.

5. That the plaintiff's invention was not anticipated.

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6. That if the plaintiff's method of moulding a slipper was an invention he failed to disclose wherein and in what respects it is different from other methods of moulding known in the art and his patent falls for failure to distinguish his invention from other inventions.

7. That the plaintiff has not confined his claims to his particular method of moulding but has made them cover moulding generally and thus include what is old as well as what might be new and the patent falls for claiming more than was invented.

ACTION for infringement of patent.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Montreal.

E. D. Angers for plaintiff.

C. Scott Q.C. for defendant.

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

THE PRESIDENT orally delivered the following judgment:

This is an action for infringement of the plaintiff's Canadian Letters Patent No. 459,582 applied for on February 18, 1947, and issued on September 13, 1949, for a shoe-making process. The defence to the action is that the patent is invalid for insufficiency in the specification, lack of novelty and subject matter, and claiming more than was invented. The defendant also denies infringement.

The specification recites that the invention relates to a manufacturing method for shoes and, more particularly, such flexible types as so-called "lounge" shoes, slippers and the like and sets out its objects as follows:

The main object of the invention resides in the provision of a simplified method for producing an inexpensive slipper or the like.

Another object is the provision of a method for making an inexpensive yet comfortable shoe.

A further object contemplates a slipper-making method which can be performed by unskilled labour.

A still further object concerns a shoe-making method which is applicable to a variety of styles and forms of slippers or lounge shoes.

Other objects and advantages of the invention will become apparent, or be pointed out further, during the description to follow.

Then there is a description of the four figures of the drawing annexed to the specification and a reference to the parts as follows:

Referring to the drawing, wherein similar reference characters represent corresponding parts throughout, the slipper shown in Figure 1, consists essentially of the following parts: the vamp "V", the rear quarter section "R", the sole shell "S", the heel "H" and the cushion pad "C".

And I set out also the following paragraphs:

In accordance with the method of the invention, the elements above-mentioned are preformed by means of suitable machinery either by heating the leather or other materials chosen for the said elements, moistening the same or a combination of the two. In any case, this preforming operation requires the use of moulds for shaping the elements of the slipper to standardized dimensions.

Describing, now, the individual elements, it will be seen from Figure 3, that the sole shell "S" consists of a sole proper 5 a marginal upstanding wall 6 and a right angular outwardly extending flange 7 integral with the top of said wall 6 and in a plane parallel to that of the sole 5. The vamp "V" and the rear quarter "R"" are similarly provided with flanges 8 and 9 respectively adapted to lie against flange 7 when the elements are assembled in their proper relative positions. Of course, during the forming operation of the vamp and rear quarter a bias or out-turned bead 10 may be formed or provided on the outer edges thereof for decorative purposes.

For assembling together the component parts of the slipper, a suitable last is disposed inside the sole shell, the contacting faces of the flanges 7, 8 and 9 coated with a suitable cement after which the vamp and rear quarter are put in place. Pressure exerted all around on the said flanges will secure the same together and permit the stitching down of the vamp and rear quarter to the sole shell proper by means of a marginal stitching line 15. Thereafter, the projecting portion of the flanges 7, 8 and 9 are trimmed close to the stitching and the ends of the flanges rounded and polished to form a decorative bead as shown to advantage in Figures 1 and 2. The next operation consists in attaching in position the heel "H" and filling the bottom of the sole shell with the cushion pad "C", said cushion being in the form of a suitable textile or a lamb skin (shearing).

The specification ends with two claims reading as follows:

The embodiments of the invention in which an exclusive property or privilege is claimed are defined as follows:

1. In a method of the character described, the steps of forming a sole shell having a depressed sole and marginal flange, similarly forming rear quarter and vamp sections with sole shell-registering flanges, cementing said flanges in contacting relation under pressure, and stitching together the cemented flanges.

2. A shoe-making method, comprising prefabricating by moulding a sole shell having a depressed centre sole and marginal flange, a flanged rear quarter section and a flanged vamp section, cementing said vamp and rear quarter sections flanges to the sole shell flange, stitching the flanges together, and trimming the flanges close to the stitching to form a bead.

The plaintiff, who has been a shoe manufacturer since 1920, gave a detailed and clear demonstration of the process by which he made his slipper, Exhibit 1. The two pieces of leather required for the bottom or sole shell and for the top or upper were cut on a clicking machine. The bottom piece was then moistened and heated and set in an aluminum mould with a last inserted inside the leather.

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This was then pressed down by hand or with a hammer or a hydraulic press. Then the last was removed and the leather piece taken out. This had now become a moulded sole shell with an upright wall and a flat flange at the top. The top piece of leather, intended for the upper, was dealt with in a similar manner and became a moulded upper with a flat flange at the bottom. The moulded sole shells and uppers kept their shapes and could be packed away until required. The next step in the process was to put a fine layer of cement on the top of the flange of the moulded sole shell and the bottom of the flange of the moulded upper. These two parts were then put back in the moulds with the last inserted inside and the two moulds were pressed together so that the cement would hold. The top and bottom moulds were then taken off leaving the moulded sole shell and moulded upper glued together with the last inside. The outstanding flanges of the bottom and top were then stitched together with a Goodyear lock-stitch machine and the last taken out. The excess leather on the united flange was then cut off and the edge trimmed. The slipper was then ready for coloring of the leather, polishing, trimming and other finishing. The plaintiff explained that he had been trying to find a method of putting a sole shell and an upper together that would replace the old method which consisted of mounting the parts on a last by hand by means of mounting pliers or pincers and tacks and then sewing the parts together. When he started to make slippers in a mould he found difficulties such as not being able to take the last out of the mould. It took him 18 months of experimentation before he could make his first slippers.

The plaintiff then explained how he made his moulds. He first drew a design of his proposed slipper on a last, made a pattern of the design out of cardboard, cut the necessary pieces of leather according to this pattern, pasted them on the last, put the last with the leather on it into a form, poured plaster around it up to the top of the bottom piece of leather on the last and thus obtained a plaster cast of the lower mould. A plaster cast of the upper mould was obtained in a similar manner. The two plaster casts were then taken to a foundry where aluminum moulds were made. The plaintiff selected aluminum because it would not spot the leather. Then the moulds required machining

inside, which the plaintiff did himself, and they were then taken to a machine shop and the tops and bottoms made level so that the pressure on the top and bottom when the two moulds were put together should be equal. This was essential. The adaption of the lasts to the moulds presented a hard problem because of the offsets in a standard last. They could not be taken out and the plaintiff had, therefore, to design his own lasts and eliminate the offsets to the extent of making it possible to take them and the slippers out of the moulds.

The slipper now made by the plaintiff, Exhibit 1, is not the one shown on the drawing annexed to the specification but the process of making it is essentially the same.

It was admitted by the plaintiff on his cross-examination, and there is plenty of evidence from other sources, that most of the steps in his process were old, such as, cutting the leather, moistening and heating it, using cement, making soles and uppers with flanges, applying pressure, sewing with a lock-stitch, trimming and polishing. But what was claimed as new was the preforming of the sole shells and uppers by the use of moulds. In effect, the essence of the plaintiff's invention, as counsel for the plaintiff put it, was said to be the making of moulded sole shells and uppers by the use of moulds and suitable lasts and bringing them together by the steps described in the specification.

I have no doubt that the plaintiff's method of making slippers was useful in that it accomplished the purposes which he sought to achieve. The evidence also supports the conclusion that he was the first person in Canada to make slippers by the use of moulds. But this is not enough for section 26 of The Patent Act, 1935, Statutes of Canada, 1935, chap. 32, requires as a condition of the validity of a patent that the invention for which it is granted should be "not known or used by any other person" before the inventor invented it, so that first invention in Canada will not suffice. Moreover, while I believe the plaintiff's statement that he had never previously heard of moulded soles or uppers, meaning thereby soles or uppers preformed by the use of moulds, and think that in making his application for a patent he acted in good faith, this will not help him if any of the attacks on the validity of his patent are well based.

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I shall deal first with the contention that the patent is invalid for insufficiency in the specification for failure to comply with the requirements of subsections (1) and (2) of Section 35 of The Patent Act, 1935, as amended, which provide as follows:

35. (1) The applicant shall in the specification correctly and fully describe the invention and its operation or use as contemplated by the inventor, and set forth clearly the various steps in a process, or the method of constructing, making, compounding or using a machine, manufacture or composition of matter, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most closely connected, to make, construct, compound or use it. In the case of a machine he shall explain the principle thereof and the best mode in which he has contemplated the application of that principle. In the case of a process he shall explain the necessary sequence, if any, of the various steps, so as to distinguish the invention from other inventions. He shall particularly indicate and distinctly claim the part, improvement or combination which he claims as his invention.

(2) The specification shall end with a claim or claims stating distinctly and in explicit terms the things or combinations which the applicant regards as new and in which he claims an exclusive property or privilege.

I had occasion in *Minerals Separation North American Corporation* v. *Noranda Mines, Limited* (1) to deal with the requirements of a similar section. While my judgment in that case was reversed there was no dissent from my comments on these requirements. There I said, at page 316:

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 purpose underlying this requirement is that when the period of monopoly has expired the public will be able, having only the specification, to make the same successful use of the invention as the inventor could at the time of his application. 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 and distinct as the difficulty of description permits. It must not contain erroneous or misleading statements calculated to deceive or mislead the persons to whom the specification is addressed and render it difficult for them without trial and experiment to comprehend in what manner the invention is to be performed. It must not, for example, direct the use of alternative methods of putting it into effect if only one is practicable, even if persons skilled in the art would be likely to choose the practicable method. The description of the invention must also be full; this means that its ambit must be defined, for nothing that has not been described may be validly claimed. The description must also give all information that is necessary for successful operation or use of the

(1) (1947) Ex. C.R. 306.

invention, without leaving such result to the chance of successful experiment, and if warnings are required in order to avert failure such warnings must be given. Moreover, the inventor must act *uberrima fide* and give all information known to him that will enable the invention to be carried out to its best effect as contemplated by him.

This statement of the extent to which the disclosures must go in describing the invention and its operation or use as contemplated by the inventor, if the patent is not to fail for either the ambiguity or the insufficiency of such description, was abstracted from a number of cases which I cited.

When it is said that a specification should be so written that after the period of monopoly has expired the public will be able, with only the specification, to put the invention to the same successful use as the inventor himself could do it must be remembered that the public means persons skilled in the art to which the invention relates for a patent specification is addressed to such persons. It should, therefore, be looked at through their eyes and read in the light of the common knowledge of the art which they should possess. But it is important to note that such common knowledge must be limited to that which existed at the date of the specification.

I have come to the conclusion on the evidence that the specification does not comply with the requirements of section 35(1) of The Patent Act, 1935. I shall deal first with the less important reasons for this conclusion. On his cross-examination the plaintiff had his attention drawn to the words "or other materials" and was asked what materials other than leather could be used. He suggested that plastics might be used but admitted that shoemakers had given up the idea of using them. The fact is that leather is the only material that is practical, so that the words "or other materials" are, strictly speaking, misleading. Similarly, the term "suitable machinery" is not free from ambiguity. Does it mean merely the machinery by which the moulds are pressed, which seems likely, or does it include the moulds and last as well? Both Mr. C. Jucker and Mr. F. Schonenbach, who gave expert evidence for the defendant, found the words difficult to understand. Mr. Schonenbach thought that he might have to invent his own machinery. I find the term "suitable machinery" an ambiguous one. Moreover, the plaintiff did not give all the

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information known to him that would make his invention work to the best advantage. He said, for example, that it was essential to his process to use leather that had been tanned by a vegetable tanning process and that oil tanned leather such as chrome leather, which is ordinarily used for shoes, would not do. The reason for this was that the vegetable tanned leather admits water whereas the oil tanned leather rejects it and it was essential to the moulding of leather that it should be of such a nature as to let in water. Nor is there any reference to the desirability of using aluminum moulds instead of steel or cast iron ones, although the plaintiff selected aluminum because it would not spot the leather. There is also no information as to how much water or heat should be applied to the leather or how long it should be kept pressed into the moulds to preform the sole shells and uppers. While these omissions of information might not invalidate the patent on the ground that the information is of such a nature that persons skilled in the art might reasonably be expected to possess it there is a striking insufficiency in the specification. Mr. Schonenbach, who is an experienced shoemaker, expressed the opinion that all the operations in the plaintiff's process were fully described, except the moulding, and he could not tell from the specification how the mould, which he considered the crux of the process, should be made. And Mr. Jucker, with whose evidence I was, on the whole, favourably impressed, said that he thought that with the specification he could gradually, through trial and error, make just as good a slipper as Exhibit 1, if he had the moulds, but he would have to have the moulds in order to be able to do so. Then he would also have to design a suitable last. As a matter of fact, the designing of a last that would be suitable for use in a mould would have a determining effect on what kind of a mould should be made.

If a specification by itself will not enable a person skilled in the art to which it relates to put the invention to the same successful use as the inventor himself could do, without leaving the result to the chance of successful experiment, the specification is insufficient to comply with the requirements of section 35(1) of the Act and the patent falls.

In my opinion, the plaintiff has failed to disclose two important things, which are, of course, closely related to one another, namely, the making and operation of the moulds for the preforming of the sole shells and uppers and the designing of suitable lasts that can be used with the moulds and taken out of them. It may be that the designing of suitable lasts is the more important. In any event, I do not believe that a workman skilled in the art and having only the specification before him could put the plaintiff's process into the same successful use and operation as the plaintiff himself can do, without very considerable experimentation. Indeed, I am satisfied that he could not do so. Under the circumstances, I find that the specification fails to meet the requirements of section 35(1) of The Patent Act, 1935, and that the patent is invalid accordingly.

There is another important reason for holding the patent invalid. Counsel for the defendant adduced evidence to show the state of the prior art, in the course of which various types of slippers were produced. These, except for the defendant's slipper, Exhibit 16, were different from the plaintiff's slipper, Exhibit 1, or the slipper which he first made according to the drawing, Exhibit A, and have no direct bearing on the issue except as illustrating part of the prior art. Counsel also filed a great many patents both to show the state of the prior art and also to support the defences of anticipation and lack of subject matter. I list these patents as follows, giving in each case the name of the inventor and the number and date of the patent: Exhibit R, K. Grosz, Canadian patent No. 333,628, dated June 27, 1933; Exhibit S, Q. E. Packard and A. Lennon, Canadian patent No. 83,164, dated September 29, 1903; Exhibit T, J. A. Romain, Canadian patent No. 145,936, dated February 11, 1913; Exhibit U, S. Strauss, Canadian patent No. 180,229, dated November 6, 1917; Exhibit V, J. J. Heys, Canadian patent No. 228,713, dated February 13, 1923; Exhibit W, W. S. Bass, United States patent No. 1,139,153, dated May 11, 1915; Exhibit X, S. Strauss, United States patent No. 1,209,225, dated December 19, 1916; Exhibit Y, S. Strauss, United States patent No. 1,331,220, dated February 17, 1920; Exhibit Z, J. H. Pope, United States patent No. 1,386,654, dated August 9, 1921;

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Exhibit Z1, J. H. Pope, United States patent No. 1,388,120, dated August 16, 1921; Exhibit Z2, K. Grosz, United States patent No. 1,972,339, dated September 4, 1934; Exhibit Z3, O. F. Hoppe, United States patent No. 2,001,308, dated May 14, 1935; Exhibit Z4, A. Bates, United States patent No. 2,054,188, dated September 15, 1936; Exhibit Z5, D. W. Wiggin, United States patent No. 1,871,764, dated August 16, 1932; Exhibit Z6, F. Ashworth, United States patent No. 2,086,526, dated July 13, 1937; Exhibit Z7, L. Mondschein and P. Speier and K. Grosz, British patent No. 383,935, dated November 24, 1932; Exhibit Z8, L. Mondschein and P. Speier and K. Grosz, British patent No. 387,602, dated February 9, 1933; Exhibit Z9, L. Mondschein and P. Speier and K. Grosz, British patent No. 388,349, dated February 23, 1933; Exhibit Z10, K. Grosz et al, German patent No. 573,969, dated April 7, 1933; Exhibit Z11, F. Bengtsson, German patent No. 581,202, dated July 22, 1933. The evidence discloses that the moulding of leather was not new. Nor was the idea of moulding parts of shoes or slippers a novel one. While Mr. Schonenbach admitted that he had not seen a moulded slipper like that of the plaintiff, Exhibit 1, or that of the defendant, Exhibit 16, in Canada and admitted the plaintiff's ingenuity, he had seen moulded bottom shells in Europe made by the Batta Shoe Company in Czechoslovakia. Moreover, the idea of making a moulded slipper had occurred to himself about 10 years ago, and he had prepared a crude mould but had given up the idea of working on it for lack of the necessary time and money and also because he considered that a hand made slipper was superior to a moulded one. Mr. Jucker also said that the moulding of uppers was general in Europe and that the moulding of lowers had been done in Czechoslovakia. Moreover, several of the patents put in by counsel for the defendant indicate the use of moulds in the making of leather footwear, for example, Exhibit V, The Heys Canadian patent No. 228,713, showing the use of moulds for making mocassins and how the moulds should be made and used, Exhibit X, the Strauss United States patent No. 1,209,225, showing a machine for moulding a shoe, Exhibit Z, the Pope United States patent No. 1,386,654, describing the use of moulds in the making of mocassins, Exhibit Z2, the Grosz United States patent

No. 1,972,339, showing a moulded sole, Exhibit Z3, the Hoppe United States patent No. 2,001,308, showing a machine for making a sandal with a moulded sole and Exhibit Z4, the Bates United States patent No. 2,054,188, also showing a moulded sole.

Counsel relied upon Exhibit Z2, the Grosz United States patent, as anticipation of the plaintiff's invention. The requirements that must be met before an invention should be held to have been anticipated by a prior publication have been discussed in many cases. I had occasion to deal with the matter in *The King* v. *Uhlemann Optical Company* (1) which judgment was recently affirmed by the Supreme Court of Canada. There, at page 157, I put the requirements as follows:

> The information as to the alleged invention given by the prior publication must, for the purposes of practical utility, be equal to that given by the subsequent patent. Whatever is essential to the invention or necessary or material for its practical working and real utility must be found substantially in the prior publication. It is not enough to prove that an apparatus described in it could have been used to produce a particular result. There must be clear directions so to use it. Nor is it sufficient to show that it contained suggestions which, taken with other suggestions, might be shown to foreshadow the invention or important steps in it. There must be more than the nucleus of an idea which, in the light of subsequent experience, could be looked on as being the beginning of a new development. The whole invention must be shown to have been published with all the directions necessary to instruct the public how to put it into practice. It must be so presented to the public that no subsequent person could claim it as his own.

This statement was merely a summary of the views expressed in the cases there cited, including *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills Ld.* (2), where Viscount Dunedin, in delivering the judgment of the Judicial Committee of the Privy Council, put the test in these words:

> Would a man who was grappling with the problem solved by the Patent attacked, and having no knowledge of that patent, if he had had the alleged anticipation in his hand have said, "That gives me what I wish."

and later, at page 56:

> Does the man attacking the problem find what he wants as a solution in the prior so-called anticipations.

And it should be borne in mind here also that, in considering whether an invention was anticipated by a prior patent, the prior patent must be read in the light of the

(1) (1950) Ex. C.R. 142. (2) (1929) 46 R.P.C. 23 at 52.

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common knowledge which a person skilled in the art should have had immediately prior to the alleged invention. If the prior publication would give such a person the same information, for practical purposes, as the patent under attack then it is an anticipation of the invention covered by it, but otherwise not.

The test of whether a prior publication, such as a patent, is an anticipation of the invention covered by a patent in suit in a particular case is thus seen to be a very exacting one. The Grosz patent, Exhibit Z2, must meet this test before it can properly be held to have been anticipatory of the plaintiff's invention. Can it do so? I think not. When Mr. Schonenbach was asked whether, having the Grosz Canadian patent, Exhibit R, before him, he could make a slipper with a moulded bottom shell like Exhibit 7, the bottom part of the plaintiff's slipper, Exhibit 1, he said that he could. I am unable to accept this statement in view of his evidence about the difficulty involved in the plaintiff's patent of knowing how the moulds should be made. He would be faced with a similar difficulty in trying to make the plaintiff's slipper, Exhibit 1, with only the Grosz Canadian patent, Exhibit R, before him and he later recognized this difficulty himself. When Mr. Jucker was shown Exhibit R, the Grosz Canadian patent, he said that the disclosures in it permitted making a slipper having a sole that was preformed by moulding, thinking that that patent disclosed how the moulds were made, but in this he was completely mistaken for there is no such disclosure there. Then Mr. Jucker was shown Exhibit Z2, the Grosz United States patent, which does indicate that a mould was used, and said that with it before him he could construct a slipper similar to the plaintiff's slipper, Exhibit 1, if he had the necessary last and mould. These were essential and he could not make the slipper without them without experimentation. Then Mr. Schonenbach was re-called and examined with respect to Exhibit Z2, the Grosz United States patent, and substantially qualified his previous statement. He said that, with the Grosz United States patent before him, he could make a slipper similar to the plaintiff's slipper, Exhibit 1, after experimentation. He would have to create his own moulds. On cross-

examination he said that while the Grosz patent gave him the germ of an idea he would have to find something in his own mind that did not exist in the Grosz patent. On this evidence it seems plain to me that the Grosz United States patent, Exhibit Z2, does not meet the tests of anticipation that I described in the *Uhlemann Optical Company* case (*supra*) and I find that the plaintiff's invention was not anticipated by it.

But that does not dispose of the issue of novelty in favour of the plaintiff, for he is on the horns of a dilemma. If his particular method of moulding a slipper was new and inventive, which is not impossible, he has totally failed to disclose wherein and in what respects it is different from other methods of moulding known in the art and his patent falls for failure to distinguish his invention from other inventions. And, furthermore, he is in the position that he has made his claims too broad. Even if his particular method of moulding a slipper was a patentable advance in the art he has not confined his claims to his improvement in the art of moulding slippers or his particular method of moulding. They cover moulding generally and thus include what is old as well as what might be new and the patent falls for claiming more than was invented.

In view of these defects in the patent it is not necessary to enquire further whether the plaintiff's advance in the art, if he made any, over what was common knowledge in it was a workshop improvement or involved the exercise of inventive ingenuity. If it was the former then there was lack of subject matter and if it was the latter it was not disclosed. In either event, the patent falls.

The plaintiff may well be in the position of an inventor who loses the benefit of his invention through defects of draughtsmanship in the specification but every patentee who brings an action for infringement runs the risk of having the validity of his patent challenged.

Since the plaintiff's patent is invalid he has no case for infringement of it. If it were otherwise I would have no difficulty in finding on the evidence that the defendant deliberately took the plaintiff's process without his consent and used it with variations in making his own slippers. It is true that both Mr. Schonenbach and Mr. Jucker pointed out differences between the defendant's slipper, Exhibit 16,

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and the plaintiff's slipper, Exhibit 1. Mr. Schonenbach illustrated two respects in which there were differences. The first was that the defendant's sole shell was moulded all the way around without any seam at the back and was considerably higher from the bottom at the back than the plaintiff's sole shell. The other difference, which followed from the first one, was that the flanges did not go all the way around the slipper but only as far as the front. This made for less sewing. These differences in construction called, of course, for different lasts and moulds but aside from them the method followed by the defendant was essentially similar to that which he had been taught by the plaintiff while he was in his employ. That essential similarity would, in my opinion, be sufficient to constitute infringement, if the patent were valid, but as it is the defendant is free from liability to the plaintiff.

Under the circumstances, the plaintiff's action must be dismissed with costs.

Judgment accordingly.