

BETWEEN:

NEIL FRANCIS GIBNEY, FREDERICK JOHN MARTIN and HERBERT G. HASKINS of the City of Vancouver in the Province of British Columbia and DONALD S. ANDERSON of the City of Honolulu, Hawaii, of the United States of America, carrying on business under the firm name and style of PROGEN DISTRIBUTORS PLAINTIFFS;

Toronto
1967
Feb. 21-22
Ottawa
Apr. 21

AND

FORD MOTOR COMPANY OF CANADA LIMITED } DEFENDANT.

Patents—Infringement—Makeshift device to protect car generator from contaminants—Placement by filling station operator in customer’s car—Whether “public use”—Patent Act, R.S.C. 1952, c. 203, s. 28(1)(c)—Lack of subject matter.

In 1951 the operator of a filling station in Vancouver wired a piece of stove-pipe to the generator of a customer’s car and flared out a portion of the stove-pipe in order to protect the generator from oil splashes and fumes and other contaminants whilst permitting the flow of air. It was common knowledge at the time that water, dirt and oil injuriously affected generators. The operator did not caution the

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customer to keep the device secret and did not see him again until early in April 1952 when he discovered that the device had worked well. He then had similar devices manufactured and commenced selling them in June 1952. He applied for a patent on April 23rd 1954 and a patent issued in March 1957. Subsequently defendant sold generators which infringed the patent.

Held, dismissing an action for infringement, the alleged invention was in public use in Canada more than two years before the application for a patent, which was therefore invalid under s. 28(1)(c) of the *Patent Act*, and furthermore the device lacked inventive ingenuity.

It suffices that one person saw the invention (*cf. Carpenter v. Smith*, (1841) 1 Web. Pat. Cas. 530) to make it known in a public manner, which is the test (and not use by the public) if the plaintiff fails to establish that he was experimenting. A common sense view should be taken in dealing with the means taken by an inventor in experimenting to perfect his invention. The small man is entitled to an invention as well as the large corporation and providing that what he is doing is experimenting he should be able to use whatever means are available to him.

In re Stahlwerk Becker Aktiengesellschaft (1919) 36 R.P.C. 13; *In re Taylor's Patent* (1896) 13 R.P.C. 482; *Conway v. The Ottawa Electric Rly Co*, 8 Ex. C.R. 432; *Boyce v. Morris Motors Ltd*, (1927) 44 R.P.C. 105; *Westley v. Tolley, Sons &c*, (1894) 11 R.P.C. 602; *Croysdale v. Fisher*, (1884) 1 R.P.C. 17; *Elias v. Grovesend Tinplate Co.*, (1890) 7 R.P.C. 455, referred to.

ACTION for infringement of a patent.

Gordon F. Henderson, Q.C. and *Edwin A. Foster* for plaintiff.

Donald F. Sim, Q.C. and *Weldon Green* for defendant.

NOËL J.:—This is an action for infringement of patent No. 538,561 issued March 26, 1957, to Donald S. Anderson one of the plaintiffs herein. The plaintiffs are partners who carry on business under the firm name and style of Progen Distributors, in the City of Vancouver, in the Province of British Columbia.

The defendant is a corporation duly incorporated and organized under the laws of Canada and has its head office and chief place of business in Toronto, Ontario.

A large number of defences were raised in the Statement of Defence and in the Particulars of Objections, but as a result of the new rules of this Court the parties herein were able to produce, prior to trial, an "Agreement on facts and on issues in controversy", which narrows the issues herein to two specific matters only, namely, that (1)

Donald S. Anderson in whose name the patent in suit was issued, placed the invention into public use more than two years prior to the date of his application for a patent in Canada with the result that the patent is invalid by virtue of section 28 (1)(c) of the *Patent Act* and (2) in any event, it did not require inventive ingenuity to conceive the subject matter of the patent, a shield for the protection of generators in automobiles.

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On the other hand, the plaintiffs' position concerning the attack on the validity of their patent is that (1) any use or sale of these shields or protectors more than two years before the filing date of the application was experimental and that (2) the invention did require inventive ingenuity.

The parties' "Agreement on facts and on issues in controversy" is set out hereunder:

AGREEMENT ON FACTS AND ON ISSUES
 IN CONTROVERSY

Upon the parties agreeing that:

1 The Plaintiffs are partners under the firm name and style of Progen Distributors, being located in the City of Vancouver, in the Province of British Columbia.

2. The Plaintiffs do not carry on business as alleged in paragraph 1 of the Statement of Claim.

3. The Defendant is a company duly incorporated and organized under the laws of Canada, having its head office in the City of Toronto, in the Province of Ontario.

4. The Plaintiffs are the owners of Canadian Letters Patent No. 538,561 which issued on March 26, 1957 for an invention of Donald S. Anderson entitled "Protector for Electric Rotary Machines".

5. (a) The Defendant has infringed the rights of the Plaintiffs under claims 1, 4, 5 and 6 of the said Letters Patent after the issue of the said Letters Patent, and, before and after the 31st day of May, 1961:

(i) by the use of protectors for electric rotary machines in motor vehicles sold by the Defendant.

(ii) by the sale of protectors for use with electric rotary machines.

(b) The Defendant threatens to continue the infringement referred to in paragraph 5(a) hereof.

(c) All of the generator protectors used or sold by the Defendant from March 25, 1957 to the date hereof infringe the aforesaid claims, and for the purposes of this trial can be taken to be identified as Exhibits 1

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and 3 to the Examination for Discovery of J. M. Lambert who is an officer of the Defendant company. The infringement extends to the use or sale of all such units by the Defendant.

(d) The only Ford generators upon which generator protectors have been used by the Defendant or for which they have been sold by the Defendant are of the type shown with reference to page 270 of the 1962 Ford Passenger Car Parts and Accessories Catalogue. The Ford unit in question is identified in this diagram as No. 10170. The generator to which it is applied is No. 10002. The end plate fastened to the engine block is identified as No. 10139 and has openings which are not visible in the diagram due to the adjacent fan which is identified as No. 10130. Air is drawn by the fan mounted on the generator shaft in through the rear ventilating holes of the generator forward over the armature and field coils of the generator and is expelled radially at the front. Air also passed from front to rear over the outside frame of the generator due to the action of the radiator fan and the forward motion of the vehicle.

(e) The Ford unit assists in preventing water splash, dirt and oil from entering the rear openings of the generator. The unit does not increase nor assist air flow or generator performance except in so assisting in preventing water splash, dirt, oil from so entering the generator.

6. As of the date of invention and for several years prior thereto, it was common general knowledge in the art to which this patent is directed that water, dirt and oil were injurious to the proper operation of a generator and that it was, therefore, desirable to prevent the ingress of water, dirt and oil into a generator housing.

7. Claims 2 and 3 of the said Letters Patent are withdrawn from the action.

8. In the event that claims 1, 4, 5 and 6 of the said Letters Patent are held to be valid, the amount of damages or profits will be determined upon a reference made to the Registrar of this Honourable Court.

Notwithstanding the issues raised by the pleadings, the parties agree that, excepting the issue of damages or profits, the only issue between them is the Defendant's allegation that claims 1, 4, 5 and 6 of the said Letters Patent are void and invalid.

More specifically, the Defendant defines the issue of invalidity as follows:

1. The alleged invention described and claimed was not inventive nor an invention in that (a) the alleged invention described in the patent and claimed in the claims in issue did not in fact and in law involve any inventive step, and (b) the alleged invention described in the patent and claimed in the said patent was and is not an invention, but was and is, at best merely the result of mechanical skill. The Defendant relies upon the following:

U.S. Patents 1,133,184, 1,439,990, 1,816,183, 1,883,288, 1,972,315, 1,982,139, 1,998,087, 2,057,637, 2,093,082, 2,240,664, 2,294,586;

British Patent 290,043;

German Patent 632,663;

the common general knowledge in the art and the public use and/or sale of metal protectors more than two years prior to the filing date of the application for the said Letters Patent. In respect of the allegation of

public use and/or sale, the Defendant relies only upon the admissions made during the course of the Examination for Discovery of Donald S. Anderson relating to the development, use and sale of metal protectors.

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2. The alleged invention described and claimed in the said Letters Patent was not new but was known before Anderson invented it, if he did invent it, by the persons named in the patents identified in paragraph 1 hereof, and was disclosed by such persons in such a manner that it had become available to the public by reason of the publication of the patent set forth in paragraph 1 hereof before the date of application for the said Letters Patent. The Defendant will also rely upon the common general knowledge in the art as of the date of invention.

3. The alleged invention described and claimed in the said Letters Patent was described in patents published more than two years prior to the application for filing the said Letters Patent, as identified in paragraph 1 hereof.

4. The device described and claimed in the said Letters Patent was in public use or on sale in Canada for more than two years prior to the application in Canada. The Defendant relies only upon the admissions made in the examination for discovery of Anderson as to the development, use and sale of metal protectors.

The Plaintiffs' position concerning the issue of invalidity as defined by the Defendant is as follows:

1. The Plaintiffs join issue with the Defendant on paragraphs 1, 2, 3 and 4. The Plaintiffs allege that any use or sale of metal protectors more than two years before the filing date of the application for the said Letters Patent was experimental.

DATED at Ottawa this 10th day of November A.D. 1966

(sgd) Gowling, MacTavish, Osborne &
 Henderson
 Gowling, MacTavish, Osborne & Hen-
 derson—Solicitors for the Plaintiffs
 (sgd) McCarthy & McCarthy
 McCarthy & McCarthy
 Solicitors for the Defendant

It therefore appears from the above document that the matter of infringement by defendant of the plaintiffs' patent is admitted and I should add that counsel for the defendant in his opening address at the trial stated that on the question of lack of invention or inventive ingenuity, the prior art on which defendant would rely was limited to two prior patents only, namely: (1) U.S. patent 2,057,637 by W. G. Schneider, a "cooling system for dynamo-electric machines" and (2) German patent No. 632,663, a "Device for cooling the driving motor of a propeller blower for delivering hot gases" (a translation of which agreed to by the parties was attached to a photographic copy thereof). Counsel for the defendant further stated that he is not claiming that the Anderson invention was anticipated by

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any of the two patents he is relying on nor by any others and it therefore follows that what the patentee did must be taken to have been new.

The invention in suit relates to a protector for electric rotary machines, i.e., a generator and according to the patent, it is a "device for protecting the ventilating holes in an electric rotary machine and for increasing the rate of flow of cooling air passing within the outer casing of the rotary machine".

The only Ford generators upon which a shield or protector has been used by the defendant or for which they have been sold by the defendant are of a type shown at p. 275 of the 1962 Ford passenger car parts and accessories catalogue which page was produced as Ex. 2 herein. This generator appears on this page under No. 10002 and a physical embodiment thereof was produced as Ex. 3. A generator in an automobile is a secondary source of electrical power, the battery being the primary source. The electrical current generated by the armature revolving in the generator must have some place to go and brushes mounted on the back plate are fitted to ride on a commutator and these brushes pick up the current and take it wherever it is needed. These brushes are in a holder and rub on the commutator. When contamination gets on the commutator and lifts the brushes away, it is like turning off a switch and breaking the connection and there is no longer any flow of current. Contamination can also get into the brush holder and when there is also contamination on the commutator, the brush will stick in an upward position away from the commutator and the generator will no longer operate. In some cases, the brushes freeze together. According to Rodak, one of defendant's witnesses, the main point of failure in generators was the parting of the field coil wire which energizes the field windings and which establishes the magnetic fields within the generator. The wire staked on to the terminal (the one connecting the field terminal on the case generator) would part and create an open circuit. As a result thereof, there would be no flux generated and the generator would be rendered inoperative. According to Rodak, this was due to the entrance of a saline solution or road salt and water into the interior of the generator which would attack the bare wire at the

terminal part. I should add that all of the generator protectors used or sold by the defendant from March 25, 1957, to the date hereof and which infringe claims 1, 4, 5 and 6 of the Anderson patent (claims 2 and 3 having been withdrawn by the plaintiffs from the action) are identified as Exs. 2 and 4 herein.

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Plaintiffs' shield or protector (Ex. 5) can be described as having a portion (which the patentee calls an annular band) which fits on to the rear part of the generator and another portion which extends outwardly and rearwardly over the ventilating holes situated around the rear end of the casing containing the generator thereby preventing the direct entry of splash, fumes, oil or other contaminants and because it extends outwardly or flares out, it does not block these holes out.

A generator converts mechanical power to electrical power. In some of Ford's vehicles it has a projecting shaft at its forward end on which a pulley and centrifugal impeller are mounted which pulley is linked up to the shaft of the motor fan which drives the generator's impeller and, of course, the faster the motor of the automobile is driven the faster the centrifugal impeller of the generator revolves. This impeller draws air from right to left (i.e., in the same direction as the method of travel of the vehicle) through the holes at the rear of the casing and expels this air out the front holes situated near the impeller. If in the process of converting mechanical power to electrical power the generator is not cooled it will burn out and if in the process of drawing air inside the casing of the generator contaminants are allowed to get in the generator or to block the holes through which the cooling air can enter, then the brushes of the generator can be burnt out or worn out or the insulation or the soldering may become dissolved and the generator may then cease to function.

Donald S. Anderson, the patentee of the patent in suit completed, in 1930-1932, two courses in motor mechanics and electricity and then from 1932 to 1933 worked in a Ford dealership in Calgary called Macklin Motors. He moved to Vancouver in 1933 and in 1936 became a journeyman mechanic. From 1939 to 1941 he worked in Vancouver in his own garage and service station. During the

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last war he left the service station and worked as a welder at Burrard Shipyards in Vancouver, B.C. From 1943 to 1945 he was an airman in the R.C.A.F. In 1945 he worked for Carmichael Motors in Vancouver for a year as shop foreman where his work then was in the service shop as a mechanic. In 1947 he again opened his own business in Vancouver which he called Anderson Motors Limited and which he operated until 1952. He was then a lessee of the Texaco Oil Company and on the rear of the property he had his own property on which he had a garage. From 1952 to 1954 he sought to promote his progen unit (the generator shield). From 1954 to 1957 he was employed by the Bowell McLean Motor Car Company in Vancouver. From 1957 to 1959 he had his own business again, selling, however, used cars. He then left for Honolulu where from 1957 to 1965 he was still in the automobile business. In 1965 he returned to Vancouver where he continued to work in the automobile business until January 1967 when he became the manager of a furniture business.

Anderson stated that in the fall of 1953 Ford changed the location of the generator on its 8-cylinder models from on top of the motor to the bottom thereof. Anderson's experience was that, prior to 1953, when the generator was mounted on top of the motor, oil fumes from the oil filler cap (which accumulated in the crank case) located at the rear end of the generator (and this applied particularly when the motor was idling) would be drawn in the rear openings of the generator and would contaminate the brushes and the commutator. Sometimes, according to this witness, the openings on the generator closest to the side of the filler cap would actually have more than an oil film on it and it could almost be scraped off with a knife. It would not be sufficient to block the apertures in the casing, but it would be sufficient to fill up between the brush holder and the brush and cause the brush to stick in the generator and prevent it from functioning. In the case of worn out motors, the problem of the fumes entering the generator became, according to Anderson, real serious. Several remedies were tried to correct the situation such as placing masking tape over the openings closest to the filler pipe or discarding the filler cap and installing a flexible tube in the filler cap which extended rearward and downward and

which would take the fumes out and away from the generator. When the generator on the 8-cylinder Ford models was moved down from the top of the motor (where the generator on the 6-cylinder model had always been) a further problem (according to Anderson) developed when the oil in the rocker arm which works the valves would leak and drip directly down on the generator. Located down close to the road, the generator was also subject to water entering it through splashing.

Although, as already mentioned, Rodak, a Ford employee and witness, stated that the field wire was the main source of the problem, Anderson's experience was that very seldom did the field wire give any trouble and that he was always finding the commutator and the brushes fouled up or the generator overheated.

In cross-examination, Anderson admitted that his progen unit did not prevent oil fumes going into the generator but restricted them and that, although some fumes go in, it is not near as much a problem as without his shield. He added that he had never realized the salt problem was as great as it was until he made the trip to Toronto for the present trial. He agreed that the oil dripping into the generator from the valves in the engine was about as isolated a cause of generator failure as he said the field terminal would cause trouble through contamination.

Charles George Ashdown, a warrant officer with the Royal Electrical and Mechanical Engineers, Ottawa, was heard on behalf of the plaintiffs. He is technical assistant to a staff officer who covers problems of maintenance and supply of spare parts due to maintenance problems. This witness has had considerable experience with the problem of contaminants in generators for a great number of years on military as well as on commercial vehicles.

Ashdown stated that during the time he was a craftsman and later when he was in charge of a repair shop, he saw generators when mounted on top of the engine become contaminated around the opening with a sort of black dust which he said was an outside sign. The commutators would become discoloured, would eventually cease to conduct and an amalgam of dust and oil would have to be cleaned off. Depending on the type of use the vehicle and the generator

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was put to, where it was driven, Ashdown saw generators become inoperative after as little as one hundred miles, some after two or three months and others after several thousands of miles.

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This witness became aware of this problem when he started to work on a great number of generators in 1944 adding that the problem continued up until the time he ceased to run a repair section which was around 1956 or 1957. Brushes would stick mostly up in the brush holder and generators failed and burnt out due, apparently, to the ventilating holes being partially blocked by contaminants.

The witness stated that as on the Canadian military pattern vehicles made by General Motors, the ventilating holes were in the end plate or the brush plate and not in the casing, the trucks were fitted with filters. The filter, however, had problems too, some operators discarded them because the generator would overheat and over a period of time the filter would become clogged and if it was not serviced or replaced, the generator would not get the proper supply of air.

He had less trouble with generators on passenger cars than on trucks but stated that he definitely had enough difficulty with the generators of automobiles to say that this was a major problem in the period. Ashdown experienced problems with generators from November 1944 to the year 1956 in varying degrees on Ford vehicles in Great Britain, India, Malaya, Northwest Europe and, finally, in Canada. He agreed that it was a greater problem in the tropical areas because of the higher ambient temperatures.

John Charles Hastings, of Toronto, a mechanical engineer, and defendant's expert witness, stated that he has always been aware and that it is fundamental knowledge that contaminants in the cooling air can cause damage to or impair the operation of an electric generator or motor. That water with salt or water alone to a lesser degree if it enters the generator casing, can corrode the generator parts and is extremely injurious to the varnishes used on the electrical wire rings of the generator and to the faces of the commutator and brushes. He added that oil and fumes, if present in the cooling air, can act as a solvent for certain

types of insulation and can also enhance the collection of certain types of dirt and thus reduce the efficiency of the electrical unit.

He pointed out that design requirements dictate that the generator be as small as possible and it follows that the smaller the generator, the more the heat builds up because these generators are permitted to operate at as high a temperature as possible in getting the maximum output for their size. This requires larger circulation of cooling air and increases the chance for contamination.

He was of the view, however, that although these facts have been well known for years, generator failure in automobiles due to the presence of contaminants in the cooling air was not a significant factor prior to about 1959 when in the 1958 Mercury and Monarch the generator was mounted low on the engine block and splash was entering the generator air inlet slots to a greater degree and when in the 1960 Falcon, the generator was located on the right side of the engine block at the front about 14 inches below and slightly behind the oil filler. During the filling of the engine, oil sometimes would drip onto the generator and in some cases oil fumes emitted from the breather vent would follow a path towards the rear of the generator and would be sucked into the generator casing. The low mounting of the generator in these vehicles also increased the possibility of water being splashed directly into the slots.

In cross-examination, Hastings asked whether he was aware that trouble with generators due to contaminants was a problem for many years prior to 1959, answered (at p. 41 of the transcript) that it had happened from time to time, adding that "It has not been a serious problem but it has happened".

He admitted that filters had been used to solve the problem and that in the case of Cadillacs the generator was even enclosed entirely in a casing and a flexible or blast tube was used as a separate source of cool air. He agreed that there is a tendency for hot fumes from the crank case to come out of the breather and form part of the ambient air, particularly if an engine is worn out, but added however that such a situation would not exist while in motion. He also admitted that there is always a tendency for leakage to develop with an overhead valve engine and that this

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area of potential leakage bore a relationship to the position of the generator in some models where the generator was mounted below and alongside the block and the area below the area of attachment of the cover to the head proper.

Hastings was then re-examined by counsel for the defendant and to the following questions, at pp. 84, 85 and 86, gave the following answers:

RE-EXAMINATION BY MR. GREEN:

Q. I have some questions in reply, my lord. Now, Mr. Hastings, you will recall you told my learned friend this morning that generator failure due to contaminants of one sort or another in the cooling air had occurred for many years. Do you recall that portion of your evidence?

A. Yes.

Q. Mr. Hastings, will you tell the court when and for how long prior to the introduction of the Ford shield, Exhibit 2, such failure was a general problem in the automotive field.

A. Well, it wasn't a general problem for any significant time prior to that, as I pointed out.

. . .

A. Yes, sir. Based on my experience you can't say that there was a specific time when a situation became a problem, and that prior to that time there was no problem. As has been stated before, there have been periodic failures of generators and indeed virtually every other component of a motor car since the device was first designed.

However, as I have pointed out in paragraph 15 of my affidavit, I think there have been a series of events since the second World War which have gradually worked together and pyramided and it was somewhere around the late '50s that this began to manifest itself as a significant problem.

From the whole of the evidence, it appears that although the question of contaminants entering the generator was not a great problem, it was a problem which existed long before 1959 when the defendant, through Hastings, submitted it became one. As a matter of fact, paragraph 6 of the Agreement on Facts clearly establishes that prior to the progen unit which came into existence sometime between 1951 and 1952, the contamination of generators by water, dirt and oil was known and it was felt desirable to prevent these contaminants from entering it. Paragraph 6 of the Agreement on Facts reads as follows:

6. As of the date of invention and for several years prior thereto it was common general knowledge in the art to which this patent is directed that water, dirt and oil were injurious to the proper operation of a generator and that it was, therefore desirable to prevent the ingress of water, dirt and oil into a generator housing.

The evidence of Ashdown during the period 1944 to around 1956 or 1957 who encountered problems with Ford generators in many countries including Canada and the problems with contaminants in generators encountered by Anderson in British Columbia sufficiently establish not only that there existed long before the year 1959 a problem or problems due to the entry of contaminants in Ford generators, but also that prior to the patentee's device, a number of attempts were made to correct the situation. Masking tape was in some cases placed over the holes close to the oil breather, which one witness said was like "slitting one's throat to stop a nose bleed" and which was unsatisfactory because although it prevented the entry of fumes, it did not allow sufficient air to cool the generator. Filters were also used. They, however, were not entirely satisfactory either as they would get clogged and in many cases the operators of the vehicles would remove them; at one time, a hose from the oil filter cap was used and in the case of Cadillacs, a hose from the rear vent was used; Schneider's solution (an American patent produced (Ex. 7) as part of the prior art on which the defendant relies to establish lack of inventive ingenuity) was to put holes in the end plate and the size of these holes was changed from time to time.

It was sometime in the spring of 1951 when Anderson, the patentee in suit, was operating a filling station (as a lessee of Texaco Oil Company) and a garage in Vancouver, B.C., that an unidentified customer (whom the patentee saw twice and has not seen since) came to his shop with a defective generator and asked him to check it for him. Anderson states that there was masking tape covering two of the openings of the generator on the side closest to the filter cap. The generator had overheated and burnt out. He installed a new armature and brushes and then charged the battery and repaired it. Anderson states that this customer was very perturbed about his generator and told him that he had had this same generator repaired three months prior thereto and had been having periodic trouble with it. He then asked him whether he would not try to do something to stop it. Anderson then took a piece of stove-pipe he had in the garage, wrapped it around the generator, wired the back end, cut out a portion for the terminals and used a tool to flare out the front portion which overlapped

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 v. restricting the entry of air. This was a very makeshift
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Anderson then states that he charged this customer for the generator repair (between \$18 and \$20) but did not charge him for the stove pipe. He then added that he asked him "if it did improve anything to let him know".

Anderson had been examined on discovery in October, 1963, and in cross-examination he was asked by counsel for defendant why he had not told him then that he had asked the customer to let him know if it did him any good and he answered, at p. 227 of the transcript as follows:

Q. You didn't tell me about this when we talked about this matter in Vancouver three years ago?

...

A. I didn't apparently, no.

He was then referred to his examination in 1963, question 128, p. 18, where he gave the following answer:

A. When he came in to pick up his car I billed him for the generator repairs and told him I wasn't charging him for this apparatus I put on there but I hoped it would help him. That was the last I saw of him for almost a year and one day this car drove in the service station and the owner requested that I go out and service the car. I gave him gasoline and I looked under his hood to check the oil and I saw this piece of stovepipe that I had put on there. And that, then I recognized that it had been the one, the customer that had been in before.

Asked again by counsel for the defendant why he did not state in 1963 that he had told the customer if it worked to come back and tell him about it, he stated that although he knew in 1963 that he had told the customer to come back, he had not mentioned it because he only realized today that counsel for the defendant felt it was important adding also (at p. 231 of the transcript):

A. Probably, other than the fact I was just as nervous at that time as I am now.

Anderson explained that this customer was not a regular customer and he did not ask his name nor write down his licence number. Nor did he caution him to keep the device confidential, and this appears from his answers at p. 232 of the transcript:

Q. Did you ask him to keep this device that you fitted to his car, secret or confidential?

A. No, Sir.

Q. You didn't caution him not to show it to nobody else?

A. No.

Q. You didn't ask him to bring it over to you for service in the future until you found out whether it worked or not?

A. No, at this particular time, I didn't know whether it would work or not. I placed it on there in the hope it would help him.

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and at p. 236 of the transcript:

Q. In any event you put it on for the purpose of helping this problem of contaminated air entering the generator apertures?

A. I put it on there hoping it would help the situation.

Q. And for that reason only. And as it turned out it did do the job?

A. Yes, Sir.

Q. But you didn't find this out until a year later?

A. That is correct.

This same customer returned to Anderson's garage in the spring of 1952 when one of the attendants told Anderson a customer wanted him and would not allow anyone else to service him. Anderson states at p. 204 of the transcript:

A. ... I went out and served him. And when I checked the oil I saw this piece of stove pipe. And he got quite a kick out of my surprise, because over the period of time I hadn't expected him back. He told me I could take anything off his car but that. He had no trouble during the time he was away.

As a matter of fact, when the customer came back, it appears from Anderson's evidence that nothing had to be done to the unit on the generator at the time as it had functioned well since the spring of the preceding year and this appears at p. 238 of the transcript:

Q. When the unit came back in 1952, when you saw it again for the second time, did the customer indicate he had to do something to it in the meantime?

A. No, it was a pretty rigid piece of metal. The stove pipe isn't flimsy. I wired it on. The generator was stationary and so was the piece of metal.

Shortly thereafter, Anderson contacted a tinsmith, Colingwood Sheet Metal, gave them the dimensions of the generator and requested a sample that could be tried out. These samples, however, were not satisfactory; they would not fit properly to the generator and stay in place and he was afraid they would come in contact with the terminals. He, however, used the aluminum model to make a design for a plastic one and then ordered plastic progens from Listo Plastic Company, in Vancouver, which he started to sell on June 22, 1952.

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He first contacted the franchised Ford dealers in the Vancouver area and made sales in every case. He then called on independent service stations and garage operators and was successful here also. He called on all the Ford dealers in southern British Columbia and in Alberta as far north as Edmonton and each one of them placed an order for "progens". He also advertised the device. He sold approximately 6,000 units from 1952 up through the year 1953 and 3,000 others were sold after that.

It was in the fall of 1952 that he received from the defendant corporation a letter signed by a Mr. C. M. Lossing stating that Ford's Parts and Accessories Division in Windsor, Ontario, were interested in handling Anderson's progen product in their line and asking him to submit a quotation on this item as soon as possible. Anderson proceeded to Windsor around November 1, 1952, where he met Lossing and discussed with him the possibility of Ford handling his progen device as a genuine Ford accessory. Before departing, he left six progen units with Lossing and Anderson says it was agreed that the latter would get in touch with him later. Lossing had given him the name of a Ford employee in the River Rouge plant at Detroit where he proceeded and where he was given a conducted tour through the Ford operations. He then obtained information as to who he should see in order to try to sell his device to the Ford Motor Company in the United States. He saw three individuals at Ford at the Detroit plant and left three progen units with each of them.

He however did not devote all of his time to the selling of progens in subsequent years, because money was a problem in promoting the item and also because he became involved in a combines case which took up most of his time. The promotion of his device was further affected by the fact that he had been using the Ford letter as a selling argument suggesting that it would soon be a Ford accessory when one day in the Engine Motor Parts Department, in Vancouver, when discussing the sale of some progens with the parts manager, a Ford representative by the name of Les Woodbridge came in and gave instructions to take his progen units off the shelf and not display them as they were not genuine Ford accessories.

It is against the above background that counsel for the defendant maintains that Anderson has placed the inven-

tion in public use more than two years prior to the date of his application for a patent in Canada, (i.e. April 23, 1954) contrary to section 28(1)(c) of the *Patent Act* which provides that:

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

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...

(c) not in public use or on sale in Canada for more than two years prior to his application in Canada

may, on presentation to the Commissioner of a petition setting forth the facts (in this Act termed the filing of the application) and on compliance with all other requirements of this Act, obtain a patent granting to him an exclusive property in such invention.

An inventor may, therefore, get a patent providing he applies for it within two years of the time in which he first puts his invention in public use or on sale in Canada. Were it not for the above section, an inventor could market an invention for any number of years and apply for a patent only when someone else decided to duplicate his invention. He would then, instead of obtaining a 17-year monopoly, obtain one covering a longer period of time. It is, therefore, in the public interest that an inventor apply within two years of the first public use or the placing on sale of his invention or forfeit his right to obtain a patent.

Counsel for the defendant urges that more than two years before the date of application for the patent, the conduct of Anderson by supplying the unidentified customer with a makeshift shield for his generator, without cautioning him to keep the matter confidential and secret, did something which amounted to public use of his invention in Canada and that such public use was beyond the two year period provided in section 28(1)(c) of the *Patent Act*.

The difficulty here is that the Act does not define public use and recourse, therefore, must be had to the decided cases as to its meaning.

In *Conway v. The Ottawa Electric Railway Company*¹ this Court (Burbidge J.) held that:

The use of an invention by the inventor or by other persons under his direction, by way of experiment, and in order to bring the invention to perfection is not such a public use as, under the statute, defeats his right to a patent. But such use of the invention must be experimental, and what is done in that way must be reasonable and necessary, and done

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in good faith for the purpose of perfecting the device or testing the merits of the invention; otherwise, the use in public of the device or invention for a time longer than the statute prescribes will be a dedication of it to the public; and when that happens, the inventor cannot recall the gift.

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In *Boyce v. Morris Motors Ltd.*¹ Astbury J. stated:

It is a question of fact in each case whether a prior use alleged has been proved to have been complete. An incomplete experimental use which led only to partial success, even in the subsequent patentee's field would not amount to a disclosure of the subsequent perfected invention.

In *Westley v. Tolley, Sons and Bostock and the same v. W. H. Richards & Co.*² Charles J. had this to say on the question of experimental use:

...it is perfectly true supposing the Defendants had applied for a patent for this invention, which they undoubtedly use in their factory, they might have been met by one of you saying, "You cannot apply for a patent, you have given this thing"—I will not use the word dedicated—"but you have given this thing to the public years and years ago, and anybody who went into your factory at Darlaston might, if he had taken the trouble to look about him, have seen that this thing was being used". It may be that that would be an answer, and that the Crown would say: "Very well, you shall not have a patent at all because there has been a public use of this invention already". Equally is it true that the Defendants might answer, "True it is we have been using it, but we have only been using it to try whether it is a good thing or not", and if that were the opinion of the authorities, then the Defendants would get their patent, even although they had used it in their own factory.

Fletcher Moulton on Patents at p. 68 suggests as good law:

...that a prior user in order to defeat a patent must have been a user as a manufacturer and not a mere fortuitous user of the subsequent invention in which the person using it gained no knowledge of the advantages of the invention and which would not have led to its further use.

In *In re Stahlwerk Becker Aktiengesellschaft*³ the House of Lords, through Lord Finlay L.C., at p. 19 dealt with the matter of prior user as follows:

...The law as to prior user seems to be this, that, if the article has been manufactured and sold, that gives the means of knowledge to the purchaser, and that that is enough to establish prior user.

And lower down on the same page he added:

When an article is manufactured and sold, and from an inspection of it it is possible for the vendee to ascertain its component elements, or the main principles of its construction, then, in my opinion, there has been publication by prior user.

¹ (1927) 44 R.P.C. 105 at 135.

² (1894) 11 R.P.C. 602 at 607.

³ (1919) 36 R.P.C. 13.

The principle applied as to what is public use by the inventor such as here, as distinct from use by another inventor or person, was clearly enunciated by Pollock B. in *Croysdale v. Fisher*¹ as follows:

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...When it is said that a process has been disclosed or an invention has been disclosed by means of user, it is not necessary that such user should be a user by the public proper, provided only there is a user in public, that is to say, in such a way as contra-distinguished from a mere experimental user with a view of patenting a thing which may or may not be existing.

In *Elias v. Grovesend Tinsplate Co.*² the Master of the Rolls elaborated on the principle of experimental use as follows:

...that so long as you are experimenting upon the thing in the hands of people who ought not to disclose it—you must have people to assist you, and you cannot do everything yourself in your own private room—but so long as you are only doing it with people who are to assist you, and who ought not to tell, that is experimenting, and it is no publication; it does not make it public property. But if you go on with all that you have been in doubt about, to erect or make your patent—if it is a machine, to make your machine—if all that is over, and you put it up in a public workshop or in a place where other people would come who are not bound by any rule of secrecy or faith—who are not bound to keep the secret—if you put it up in a place which they are to frequent and where they can see it, you have published it, and if you have published it, it becomes public property—it becomes the property of all the world immediately. If you put it up in a public workshop—not to go on experimenting about it in the sense in which I have said, to see whether your machine is complete or not—but to use it as the completed thing, as here, (for that is the way in which it was put up) in his factory as part of his plant, and in respect of the user of which it is obvious, if it turned out a failure, he would have to pay for the plates—then it is commercial user as well. If that is done it is no longer experimental; it is a publication.

I would indeed think that a common sense view should be taken in dealing with the means taken by an inventor to complete and perfect his invention and thereby ensure that a half baked device is not patented and providing he is experimenting, the means employed should not be too important.

Indeed, the small man, in my view, is entitled to an invention as well as the large corporation and whether he is or not a dedicated or professional inventor, he should still be entitled to what he invents. He will not have all the advantages of a laboratory or a testing ground and the assistance of a large staff but that should not place him in a position different from those who have such advantages

¹ (1884) 1 R.P.C. 17 at 21.

² (1890) 7 R.P.C. 455 at 466.

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and he should be able to use whatever means of testing are available to him even if such means are, as here, a customer and his automobile, providing always, however, that what he is doing is experimenting.

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Reverting, however, to the facts disclosed in the present case, it is most difficult, under the circumstances involved here, to find that the patentee was merely experimenting when he placed his stove-pipe shield on the customer's generator even if it was a makeshift contraption and, in any event, it is not possible to hold that such was the case after this customer's return in the beginning of April 1952 (which was still, even then, more than two years prior to his application for the patent in suit) when he was so happy with the stove-pipe shield he had been using for a year that he told Anderson he could take anything else off but that he should leave the shield on and which, of course, he did.

Experimentation here is further denied by the placing of the shield on this unknown man's generator without any restriction on his use of it or without any injunction for secrecy and in the absence of the customer, whom Anderson could not identify and who, therefore, could not be questioned as to how many people saw the invention, and also because of the public manner in which the device was used, I am irresistably led to the inference that it is most likely that other people saw it or heard of it. Quite apart, however, from the number of people that may have seen the patentee's device, the authorities clearly establish that it is sufficient that one person alone sees the invention (cf. *Carpenter v. Smith*¹) to make it known in a public manner, which is the test (and not use by the public) if, on the other hand, the plaintiff was not able to establish that what he was doing was experimenting.

It was again held that one use alone is sufficient to establish public use in *Taylor's Patent* case² which dealt with a grate in a fireplace, although there was no sale and only one prior use and it was in a private house. In this connection Romer J. expressed himself as follows:

There is one point which, in my opinion, is fatal to this patent, and certainly the Specification as at present drawn, and that is this—the very thing that the Patentee claimed as his invention was in use in Mr. Bowes'

¹ (1841) 1 Web. Pat. Cas. 530 at 535.

² (1896) 13 R.P.C. 482 at 487.

hall for several months prior to the date of the Respondent's patent... This grate in the hall, which, as I have said, is, for all practical purposes, the Patentee's, was originally put up and used only by way of experiment, and used by way of experiment up to November 1893. After that time the necessity of keeping it in any way secret and only using it experimentally ceased so far as Mr. Bowes was concerned, but for several months, from November 1893 down to the 2nd of April 1894, the date of the Respondent's patent, this grate of Mr Bowes was publicly used—used in his house, openly, seen by a hundred visitors at least, explained to them, and in no way kept secret... It was an open user, and for the purposes which I am now considering a public user.

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In *Stahlwerk Becker Aktiengesellschaft*¹ the House of Lords decided that if an invention were available to even one member of the public, that was sufficient. Indeed, Lord Finlay stated at p. 19:

I think it would be very dangerous to introduce the doctrine which your Lordships are now invited to introduce, either that it must be actually shown that the knowledge had been acquired by some individual, or that there is a high probability that it had in fact been acquired. The law as to prior user seems to be this, that, if the article has been manufactured and sold, that gives the means of knowledge to the purchaser, and that that is enough to establish prior user.

And lower down he added:

When an article is manufactured and sold, and from an inspection of it it is possible for the vendee to ascertain its component elements, or the main principles of its construction, then, in my opinion, there has been publication by prior user.

In the present case, as soon as the unidentified customer drove out without any injunction or restriction placed upon him, it then became available to anyone who wanted to lift up the hood and look at it.

In *Birtwhistle v. Sumner Engineering Co. Ltd.*² one unit only of a timing device for bookmakers was not even sold but merely carried around by a bookmaker when he went on his rounds for the purpose of trying it out and yet this was held to be prior public use.

As a public use has been established here, it was, I believe, incumbent upon the plaintiffs to bring themselves within the exception and establish that such use was experimental only and nothing else. Anyone who claims he is exempted from the provisions of the statute by reason of experiment must, I should think, establish clearly that it is an experiment. The plaintiffs have not, in my view, succeeded in establishing an experimental use here.

¹ (1919) 36 R.P.C. 13.

² (1929) 46 R.P.C. 59 at 71.

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The fact that Anderson said to the unknown customer, "I hope this will help you" is, in my view, a long way from establishing that the placing of the makeshift device on his automobile was experimental. It merely establishes that there was some doubt in his mind as to whether the device would be successful or not and nothing else. There is also no question that it was placed there for the purpose of solving the problem the man had had with his generator and it did, in fact, exactly that. I should also add that had Anderson really been an experimenter, he would have tried it on other cars, yet he did not do it, nor did he, according to the evidence, at any time think of doing it.

Furthermore, the evidence of Anderson on this matter is not too satisfactory in that on discovery in October 1963, he merely stated that he had told the customer "I hope this will help you" and it was only at the trial that he stated he had said to the customer "... if it did any good, I told him to come back and see me". This is not, in my view, sufficiently cogent and convincing evidence on which to establish an experimental use.

How indeed can it be held that this was experimental when Anderson failed to take even the most elementary precautions to guarantee or ensure the placing of the device on the customer's car as experimental.

In any event, whatever was in Anderson's mind, if this was experimental, it was not experimental in the mind of the unidentified customer as he was under no restriction or injunction to secrecy when he first came to the patentee in 1951, nor was he under any such restriction when he came back and left at the end of March or beginning of April 1952, which was still more than two years prior to Anderson's application for his patent which was filed on April 23, 1954.

It therefore follows that even if it could be said that whatever took place in 1951 prior to the customer's return in the spring of 1952 was experimental, it definitely ceased to be experimental when he came back and said "I used it for a year and it worked fine". At that time there was no further experiment involved.

The patentee did go through the process of first causing aluminum units to be made which were not satisfactory. They were unsatisfactory, however, not because Anderson had not perfected his device at this stage, and was experi-

menting, but merely because there was some difficulty in that they did not fit the generator properly and stay in place and he was also afraid that they would come into contact with the terminals. He had no such trouble with the stove-pipe contrivance which was also made out of metal and which remained as a permanent fixture and a satisfactory solution to the customer's generator problem.

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Under the above circumstances, it is not possible to hold that the use here was experimental and it therefore follows that the device described and claimed in the patent in suit was in public use in Canada for more than two years prior to the application in Canada for the said letters patent.

I now come to the second attack made on the patent in suit in that it lacks the attribute of inventive ingenuity necessary to make it a patentable device. The evidence has shown, as already mentioned, that although there was not too serious a problem and that the long felt want for a solution was not overwhelming, (the Ford Company could have, in 1952, used the Anderson device without infringement as it was not patented at the time, yet it did not) the problem with Ford generators was still sufficiently important to the defendant company to cause it to have a look at Anderson's device as early as 1952, to use such devices on some of their vehicles prior to 1963 and to eventually apply their infringing shield devices on all of their cars from the year 1963. I also believe that it can be said that Anderson's device was one that was simple, low cost and relatively maintenance free.

The only matter remaining is whether Anderson's invention required inventive ingenuity or was merely the result of workshop improvement. Under section 48 of the *Patent Act* the onus was on the defendant to establish that there had not been an inventive concept. In order to determine this matter, it is necessary for the Court to place itself in the context in which the competent workman started to address himself to the problem around the year 1951. This problem at the time was a rather simple one in that the generator had holes around the top or the end through which air should penetrate in order to cool the armature and the brushes but through which also, in some cases, oil leakage, oil fumes and particles of dirt could either block these apertures or penetrate into the generator and the solution, in my view, was obvious and consisted in merely

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applying an attachment to that part of the generator over the holes to cover them and shield them from the direct entry of oil from above and of splash from beneath or particles of dirt or fumes from the ambient air without, at the same time, blocking them off and preventing the ingress of air into the holes. It was then also, in my view, a simple matter to place a band around this generator and flare it out outwardly and rearwardly over the ventilating holes.

That such was the obvious manner to deal with the problem and that it could be simply executed, appears from the evidence which discloses that the solution to the problem followed very quickly as soon as either Anderson or Rodak directed their efforts to it. It indeed required, in my opinion, nothing more than the application of workshop skill.

Reverting to the evidence herein, it appears from Anderson's testimony that all he did to solve the unidentified customer's generator problem was to go into his shed, pick up a piece of old stove-pipe, mold it to go around the generator and then flare out the rearward portion thereof in order to ensure that the holes would be protected or shielded from direct splashes or that oil could not directly fall in, or that oil fumes and particles in the ambient air would be restricted somewhat in being drawn in by the impeller into the air cooling stream of the generator.

The patentee's shield turned out eventually to have a number of other minor advantages to which, however, I am convinced neither Anderson nor for that matter, even Rodak, gave any thought at the time of their respective inventions, such as the aerodynamic effect of the flared portion (which, however, applied only when the automobile was in movement) which provided a number of sharp turns for the air entering the generator slots thus making it more difficult for particles of dirt to enter the ventilating holes by creating what one of the witnesses called a labyrinthine path and a sharp radial turn (with the protector, indeed, the air has to make one turn to go downwards, another turn to go underneath the lip and, finally, another turn to go into the holes) and finally by causing the flaring of dirt particles away from the air intake portion in the rear of the generator thus preventing some of the particles of dirt or contaminants from entering the generator casing

by centrifugal gravity (although if the vehicle is in movement there will still be a separation of dust particles from the air intake due to the specific gravity of the particles and the velocity component even without the flaring out feature) and, finally, by creating a somewhat depressed area in the air intake portion in the rear of the generator thus facilitating the passage of air from front to back in the case where the impeller would not function and thereby ensuring proper cooling of the generator armature and parts even in the event of a breakdown of the impeller.

I should add that whether the inventor realized that he was getting these advantages or not by making his device as he did, he would still be entitled to the benefit of such advantages if his invention, as defined in his claim or claims, encompasses such advantages. However, when considering the question of obviousness or inventiveness or inventive ingenuity such unsuspected and unimportant advantages are not too helpful in determining whether a device has the inventiveness required to establish a valid patent.

Quite apart, however, from the prior art submitted by the defendant and merely looking at the problem to be solved, how it could be solved and how the patentee solved it, it appears to me evident that the solution of an outwardly flared band attached to the generator would have been obvious.

Should I, however, go to the prior art, i.e., the Schneider and the German patent, both of which were public knowledge long before the date of invention and with which the skilled workman in the art at the date of invention in the present case is held to have knowledge of, the obviousness of the invention in suit here becomes still clearer, even if one should consider the unexpected aerodynamic properties or advantages which flow from the flared out rearward position of the Anderson shield. Indeed, the Schneider patent (Exhibit 7) deals with a cooling system for dynamo-electric machines with aerodynamic properties which, in my view, solve the problem in a very similar manner to the patentee's device. At page 3, column 1, line 37 *et seq.* of the Schneider patent it is stated that:

...The rapid change in direction of the air currents will serve to separate the dust particles from the air, due to the specific gravity of the particles and velocity component.

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The drawings of the Schneider patent indicate how the air travels across the top of the unit and then turns 180 degrees from the rear and, of course, this is very similar to the labyrinthine path mentioned by Robinson, the plaintiffs' expert witness, when dealing with the aerodynamic effects of the Anderson unit.

At page 2, column 2, line 40 *et seq.* of the Schneider patent, this sharp turn of the direction of the air is dealt with as follows:

...due to the greater specific gravity and component of inertia of dust or other foreign matter, the same can not follow the sharp turn taken by the air currents, the air entering the generator housing being free from dust or foreign matter without the use of filtering or cleaning devices such as wire screens of knitted fabric for retaining dust particles which interfere with proper circulation of air and obstruct its ingress into the generator housing, a factor which decreases efficiency and increases manufacturing cost.

The only thing not shown by Schneider is the outwardly flared portion which with the progen unit gives to the air an outward radial velocity component. From the evidence of Hastings (at p. 56 of the transcript) this flared portion, however, would not seem to be of considerable use in that as put by the witness and as already pointed out above:

...When you have a significant velocity of air, the tendency for foreign particles and dirt and so on to enter these holes even without the shield is at a minimum.

It appears also that the radius on the progen unit is slightly less than on the Schneider unit. The sharper radius at the end of the flange of the progen unit resulting in a sharper turn of the air at this corner making it more difficult for particles of dirt to enter the apertures of the generator than in the Schneider unit, does not seem from the evidence, however, to be too significant.

The German patent (Exhibit 8) on the other hand is a cooling device for the driving motor of a propeller blower which delivers hot gases. It is a quite different application from the patentee in suit's device in that its object is to separate two regions of clean gas, one hot and one cold. It also has a separate source of cooling air, whereas the generator on which Anderson's shield applies must use the ambient contaminated air for cooling.

The phenomenon of hot gases arriving in the presence of cooler ones is a particular feature of the German patent. It is, therefore, concerned with low velocity gases in which

inertia effects are negligible and here also the outwardly flared flange is neither necessary nor disclosed. The German patent, however, covers a motor mounted in a special casing and although it does not appear to be of great use in determining the inventiveness of the patent in suit, it would appear from an answer given by Mr. Hastings, the plaintiffs' expert, in cross-examination, that the rearward projection of the casing E would shield the rear entry holes from the entry of water and contamination.

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From this I must conclude that a competent workman at the date of the invention, knowing that a rearward extension of the casing would shield the rearward holes from the entry of contaminants, with the knowledge also of the teaching of Schneider, that if one makes the air undergo a change in direction an aerodynamic principle of reduction of particles, of contaminants going into the generator will be realized, would have easily come up with a unit such as the progen unit and, therefore, I have here further reason to hold that the patentee's unit was a perfectly obvious, logical and reasonable solution to whatever problem existed at the time and, finally, that there was no invention in so doing.

I should, before parting with this case, deal with Canadian patent No. 650,112 by Joseph J. Rodak, Dearborn, Michigan, U.S.A., an employee of the American Ford Motor Company, which patent was granted to Ford Motor Company of Canada, Limited, Oakville, Ontario, the defendant herein. The shields covered by the above patent are those (Exhibits 2 and 4) which the defendant admits as infringing the Anderson patent.

It was possible for Rodak and the defendant corporation to obtain the above patent because of the rather broad manner in which the Anderson claims are framed. From a reading of them it appears that Anderson's invention purports to cover any device attached to a generator which extends rearwardly and over the rear ventilating holes to protect them without blocking them and the claims are not limited to any material, nor to any specific construction.

Because of the broadness of these claims, it was possible for Rodak and the defendant corporation to obtain a patent for what must have been considered by the Patent Office to be invention over the Anderson invention, otherwise, it would not have allowed the patent.

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The differences between the Ford patent and the device covered by the Anderson patent, reside firstly, in the selection of the material which in the Ford patent is elastomer, i.e., of an elastic nature, secondly, the placing of ribs inside the shield to keep the elastic band away from the ventilating holes and, thirdly, the placing of a number of lugs on the ribs to prevent the shield from moving and keep it in place.

The priority date for the Rodak patent is December 26, 1958, and it was, therefore, applied for subsequent to the Anderson patent which was issued March 26, 1957. Rodak was heard as a witness and stated that he was not familiar with the Anderson patent when he applied for a patent for his shield and that he had not even heard of it until the eve of the present trial in Toronto. He agreed that it was possible, however, that the American or Canadian Ford employees who deal with patents could have heard of it.

From what either Rodak or the Ford Motor Company did in obtaining its patent, from what was said in this patent, from what Rodak stated in evidence relating to what he considered was inventive and finally from the fact that they used the subject matter of the Anderson patent, counsel for the plaintiffs submitted that one should conclude that the Anderson patent was inventive. He urged that one may look to the conduct of the defendant with a view to determining whether it treated the subject matter of the Anderson invention as inventive and as an admission against interest.

In the Rodak patent reference is made in the first paragraph to the invention as follows:

This invention relates to a dynamo-electric machine and more particularly to a protective cover for such a machine which has a portion thereof fitting in spaced relationship over slots provided for the passage of cooling and ventilating air.

The above, of course, is equally applicable to the Anderson unit (Exhibit 5).

The patent then continues and describes the application of its device and the problems that it solves without, however, any acknowledgement whatsoever of the Anderson shield and one reading the Rodak patent would believe that the protector or shield was here discovered for the first time.

The patent also describes that the shield protects without impeding the air and this is what Mr. Rodak stated he considered as significant in the invention adding in his testimony that the shield also deflects the air. What the plaintiffs are saying here is that as the defendant corporation took Anderson's invention and its advantages, it cannot in this case now be heard to say that it is not inventive and that this is cogent evidence that what they did is evidence of invention.

Now, whether the Ford patent covers the Anderson invention or not is a matter that does not require a solution here. It appears, however, that the Anderson patent is broad enough to read on the Ford construction and, of course, that is why the defendant admitted that its shield infringed the Anderson patent. It may well be that the Rodak patent is an improvement on the Anderson patent and he could well be entitled to a patent for an improvement under section 34 of the *Patent Act* although it would take some considerable effort for me to arrive at such a conclusion in view of the conclusion I have arrived at, that the device covered by the Anderson patent is not inventive. I would, indeed, think that there would be more reason to find inventiveness in the Anderson patent than in the Rodak one.

It, however, appears to me that whatever Rodak, or the Ford Corporation, thought of its device or of the inventiveness or inventive ingenuity involved can have no bearing on the present decision as to whether on the facts, evidence and prior art produced in this case, the Anderson device has the attribute of inventiveness necessary to make it a valid patent. Having determined that it has not, no admissions made by either party can, in my view, inject a patent with such an attribute if it does not have it.

As I have reached the conclusion that the patent in suit was placed in public use in Canada more than two years prior to the patentee's application in Canada contrary to section 28(1)(c) of the Act and that it also lacks the attribute of inventiveness necessary to make it a valid patent, the action fails.

There will, therefore, be judgment for the defendant with costs.

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