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TRAVER INVESTMENTS INC. (form-
 erly known as TRAVER CORPORA-
 TION) and E. I. DUPONT DE NE-
 MOURS AND COMPANY (*Plaintiffs*) } APPELLANTS;

AND

UNION CARBIDE CORPORATION }
 and CELANESE CORPORATION OF } RESPONDENTS.
 AMERICA (*Defendants*) }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Conflicting applications—Date of invention—Priority of invention
—Patent Act, R.S.C. 1952, c. 203, s. 45(8).

Pursuant to s. 45(8) of the *Patent Act*, R.S.C. 1952, c. 203, this action was brought to determine the rights of the parties in respect of their pending applications for patent containing claims which were found by the Commissioner of Patents to be in conflict. The invention concerned an apparatus and method for treating polyethylene film so as to make its surface ink-adherent. The plaintiffs alleged a date of invention by Traver, under whom they claim, in late May or early June 1949. The defendant Union Carbide Corporation alleged a date of invention by Adams and Wakefield, under whom it claims, not later than May 3, 1950. The trial judge held, *inter alia*, that by May 3, 1950, Traver had not made the invention, and in the result dismissed the plaintiffs' action and allowed in part the counterclaim of the defendant Union Carbide. The plaintiffs appealed to this Court. The finding of the trial judge that by May 3, 1950, the invention in question had been made by Adams and Wakefield was not seriously challenged before this Court.

Held: The appeal should be dismissed.

The trial judge was right in holding that by May 3, 1950, Traver had not made the invention. The onus of proof that Traver had made the invention and the date by which he had made it was upon Traver not only because he was asserting an affirmative but also because all the subject matter of these allegations lay particularly within his knowledge. In so far as the judgment at trial deals with the dates on which Traver obtained successful results, even empirically, the trial judge did not believe his testimony or that of those witnesses who sought to support it. The trial judge was justified in rejecting Traver's evidence. The finding of fact as to the priority of invention made by the trial judge should not be disturbed.

Brevets—Conflit de demandes—Date d'invention—Priorité de l'invention
—Loi sur les Brevets, S.R.C. 1952, c. 203, art. 45(8).

Conformément aux dispositions de l'art. 45(8) de la *Loi sur les Brevets*, S.R.C. 1952, c. 203, la présente action a été instituée en vue de déterminer les droits des parties relativement à leurs demandes pour brevets, en suspens, contenant des revendications que le Commissaire

*PRESENT: Cartwright, Abbott, Martland, Hall and Spence JJ.

des Brevets a jugé être en conflit. L'invention se rapporte à un appareil et à une méthode de traiter les films de polyéthylène de telle sorte que l'encre puisse y adhérer. Les demandeurs ont allégué une date d'invention, par leur auteur Traver, à la fin du mois de mai ou au début du mois de juin 1949. Quant à la défenderesse Union Carbide Corporation, elle allègue une date d'invention, par ses auteurs Adams et Wakefield, de pas plus tard que le 3 mai 1950. Le juge au procès a décidé, *inter alia*, que le 3 mai 1950, Traver n'avait pas fait l'invention, a rejeté l'action des demandeurs et a maintenu en partie la demande reconventionnelle de la défenderesse Union Carbide. Les demandeurs en appelèrent devant cette Cour. La conclusion du juge au procès à l'effet que le 3 mai 1950, l'invention en question avait été faite par Adams et Wakefield n'a pas été sérieusement disputée devant cette Cour.

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Arrêt: L'appel doit être rejeté.

Le juge au procès a eu raison de dire que le 3 mai 1950, Traver n'avait pas fait l'invention. Le fardeau de prouver que Traver avait fait l'invention et la date qu'il l'avait faite était à la charge de Traver non seulement parce qu'il soutenait une affirmative mais aussi parce que le sujet de ces allégations était particulièrement de ses connaissances. En autant que le jugement de première instance traite des dates lors desquelles Traver a obtenu des succès, même empiriquement, le juge au procès n'a pas cru son témoignage ni celui des témoins qui ont tenté de le supporter. Le juge au procès était justifié de rejeter la preuve soumise par Traver. La conclusion de fait du juge au procès quant à la priorité de l'invention ne doit pas être changée.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada¹, dans une action de conflit de demandes en matière de brevets. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada¹, in an action on conflicting applications for patents. Appeal dismissed.

Gordon F. Henderson, Q.C., and R. G. McClenahan, for the plaintiffs, appellants.

Harold G. Fox, Q.C., and Donald F. Sim, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment¹ of Gibson J. pronounced on February 18, 1965, in an action brought pursuant to s. 45(8) of the *Patent Act*, R.S.C. 1952, c. 203, as amended, hereinafter referred to as "the Act", for the determination of the rights of the parties in respect of their pending applications for patent containing

¹ [1965] 2 Ex. C.R. 126, 30 Fox Pat. C. 21, 47 C.P.R. 124.

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claims which were found by the Commissioner of Patents to be in conflict.

The claims in conflict were numbered C-1 to C-94 inclusive and C-107; they are set out in Schedule B to the reasons of the learned trial judge. After the procedure prescribed by subsections 1 to 7 of s. 45 of the Act had been followed neither of the parties was satisfied with the determination made by the Commissioner and this action followed in which the appellant, E. I. Dupont de Nemours and Company, hereinafter referred to as "Dupont", in its Statement of Claim and the respondent Union Carbide Corporation, hereinafter referred to as "Union Carbide", in its counter-claim each asserts that it is entitled to the claims.

The respondent Celanese Corporation of America was a defendant in the action but did not appear in the Exchequer Court and the appellants obtained a default judgment against it on April 16, 1964. It takes no part in this appeal.

The main issue between the parties is who, as between George W. Traver (under whom the appellants claim) on the one hand and George M. Adams and Sidney J. Wakefield (under whom the respondent Union Carbide claims) on the other hand, was the first to invent an apparatus and method for treating polyethylene film so as to make its surface ink-adherent.

Prior to 1949 polyethylene film became available in substantial quantities and was widely used as a wrapping material, especially for foods. Its suitability for this purpose was lessened because printing or decoration would not adhere to the film. This created a problem for the whole industry. The invention which is in dispute between the parties furnishes a solution of this problem.

The two pending applications which were placed in conflict by the Commissioner were Serial number 650,205 filed by George Traver on July 2, 1953, all rights in which were assigned to the appellant Dupont and Serial number 627,046 filed by the respondent Union Carbide on February 18, 1952, based on an invention made by Adams and Wakefield.

The respondent Union Carbide alleges a date of invention by Adams and Wakefield not later than May 3, 1950. The finding of the learned trial judge that by that date the invention in question had been made by Adams and Wakefield is amply supported by the evidence and was not seriously challenged; but the appellants contend that Traver had already made the invention in late May or early June, 1949.

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The learned trial judge decided that Union Carbide was entitled to the issue of a patent of invention on its application Serial number 627,046 containing claims C-3, C-6, C-9, C-12, C-87, C-88, C-89, C-92 and C-93. Each of these claims describes the treatment of polyethylene by exposing its surface to a high voltage electrical stress accompanied by corona discharge to render the surface adherent to subsequently imprinted ink impressions. The disposition made of the other claims in conflict will be referred to later.

The finding of the learned trial judge as to what constitutes the invention is expressed as follows:

Dealing first with the invention, I find, on a consideration of the whole of the evidence that the invention was the discovery that the phenomenon which made polyethylene film receptive to ink so the ink adhered to the film was produced by exposing the polyethylene film to a form of electrical discharge; and that the form of this discharge which is essential to the process is aptly described as corona discharge.

The corona discharge that I refer to is the term used in its colloquial meaning, and not in its classical meaning, as discussed in the evidence. I find that most experts in the field at all material times used and at present use the term corona discharge in its colloquial meaning to describe the phenomenon which produces the successful result in this matter. In this sense the words "corona discharge" are used in these reasons, and this use of the words "corona discharge" correctly describes the material phenomenon which is referred to in the relevant specifications and claims in issue and in the evidence adduced in this action.

Elsewhere in the reasons of the learned trial judge it is explained that the colloquial meaning of the words "corona discharge" as used in this passage and throughout his reasons, is a form of electrostatic discharge producing a corona which is a physical manifestation resulting when a gas, usually air, has been stressed until a condition is maintained wherein some ionization of the gas is present and oxygen molecular re-arrangement takes place forming ozone, the presence of which may be detected by its pungent odour; a purplish discharge or glow may be seen under

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reduced light in the vicinity of the metallic parts charged and a sound described as a crackling or frying noise is heard.

At the trial and before us counsel for both parties demonstrated the way in which the process works by the use of an apparatus, set up in the Court room, illustrating the fundamental equipment employed to give the necessary treatment to polyethylene film. As was stated by the learned trial judge many variations of this equipment may be devised to produce the desired result and the apparatus demonstrated to us was merely illustrative of the kind of apparatus which may be used for that purpose. It consisted of two electrodes, the first being an oxy-dry tube, that is a glass tube filled with argon gas, and the second being a conductive metal plate placed below the oxy-dry tube and at a distance from it of one-eighth of an inch. Both electrodes were connected to a source of electric current derived from that supplied to the Court room, said to be about 110 volts, and stepped up by means of a transformer to 10,000 volts. The film to be treated was placed on the metal plate and when the current was turned on a corona discharge as described above took place between the two electrodes. It was common ground that this accomplished the desired treatment of the film. As the invention was developed for production of treated polyethylene film on a commercial basis a metal roller was substituted for the metal plate as the second electrode and instead of a single oxy-dry tube several of such tubes were used as the first electrode.

The first question which we have to determine is whether the learned trial judge was right in holding that by May 3, 1950, Traver had not made the invention.

Traver was a witness at the trial and was examined and cross-examined at great length. He testified that the idea of the invention came into his mind early in 1949 and that in May or June of 1949 he caused a printing machine known as a Meisel Press used by Traver Corporation (of which he was an officer and which he controlled) to be equipped with oxy-dry tubes and adapted so that by its use polyethylene film could be, and was, successfully treated. On conflicting evidence, including that of the witness Stopp, who had been the designer of the Meisel Press and stated that it

would not be practicable to adapt it in the manner described by Traver, the learned trial judge rejected Traver's evidence on this point. He concluded his review of the relevant evidence as follows:

In my opinion, therefore, the story that successful treatment was had by employing the Meisel Press as told by Traver is not true and I so find.

Traver also gave evidence that in or about June, 1949, he caused Fred J. Pool, an employee of Traver Corporation, and Arthur Groh, the superintendent of the production department, to set up an apparatus substantially similar to that which was used in the demonstration before the Court, that the gap between the electrodes was one-eighth of an inch, that a current of 10,000 volts was used and that polyethylene film was successfully treated. This apparatus was sometimes referred to in argument as "Traver's one-tube set-up".

Traver went on to state that he thereupon directed Pool to build an apparatus similar to the one-tube set-up by using eight tubes instead of one and a metal foil instead of a plate as the second electrode and that this apparatus also treated the film successfully. This apparatus was referred to as "the multiple-tube set-up".

Neither of these two apparatuses was produced at the trial. Traver said that they had been taken apart and were no longer in existence but that reproductions of both of them had been made in 1955, which was after the controversy between the parties had developed, and photographs of these reproductions were filed as exhibits at the trial.

Traver said that having obtained successful results with these two machines he instructed Pool to adapt a machine known as a Cameron slitter so that it could be used to treat polyethylene film. The Cameron slitter was used for cutting rolls of paper or film into strips and was adapted for slitting film from a master roll into smaller rolls and rewinding these on separate shafts in such a way as to prevent them from intertwining. When in operation it caused a roll of film on a master band to pass over and under certain rollers before it was rewound.

Traver said he told Pool to take the knives out of the Cameron slitter and install a bank of several oxy-dry tubes on the top roller so placed that they would be about one-

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eighth of an inch from the metal roller immediately below with the result that the tubes on the top rollers would correspond to the first electrode and the metal roller below them would correspond to the second electrode in the apparatus which was used in the demonstration before us.

Traver said that the Cameron slitter was successfully adapted in this way in about September 1949, that he received a letter from Pool regarding it in February 1950, that he himself saw it in operation in April 1950 and that it was used intermittently from as early as February 1950 until early in 1951 to render treated polyethylene film available in commercial quantities, the reason that it was used only intermittently for this purpose being that it was required to carry out the work for which it was designed that is the slitting of film or other material. It was said that the task of adapting it from one form of operation to the other was a simple one which did not take up a great deal of time. It was said that in 1951 an apparatus was built and used exclusively to treat polyethylene film on a commercial basis and presumably thereafter it was unnecessary to make use of the Cameron slitter for this purpose.

It was sought to strengthen the appellants' case in regard to the matters of fact set out in the three preceding paragraphs by the production of certain "job pockets". Evidence was given that the procedure at Traver Corporation was to make an envelope described as a job pocket for each order filled, to place in it a sample of the product sold to the customer and to note on the outside of the pocket information as to the name of the customer, the date of the order, the colour specification, bag size and date of shipment. It was said that polyethylene film successfully treated on the Cameron slitter was sold commercially in March 1950 and samples of treated film and the job pockets in which they were said to have been located were produced at the trial and filed as exhibits.

These job pockets were not retained by Traver. They with other records of Traver Corporation were turned over to Container Corporation which purchased certain assets of Traver Corporation. They were said to have been found by one Kritchever when he searched the records at the

premises of Container Corporation on the instructions of Mr. Dawson who was patent attorney for Traver.

It will be observed that, as is not unnatural, all the evidence in support of the date of invention claimed by Traver was as to matters in the knowledge of the appellants and as to which the respondent had no means of knowledge.

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In his elaborate reasons the learned trial judge examined in great detail the evidence which I have endeavoured to summarize briefly above, as to what, if anything, Traver invented and when he invented it and reached the conclusion that he expressed as follows:

The only conclusion therefore that can be reached is that Traver did not nor did anyone under his direction cause to be formulated verbally or in writing a description which afforded the means of making that which Traver alleged he invented, at least up to October 17, 1950.

It is a proper conclusion to find that up to that date Traver and the others under his direction were experimenting. But now, in retrospect Traver is saying that he used the oxy-dry tube, 10,000 volts and $\frac{3}{8}$ " spacing set-up to get successful treatment and disclosed it, because he now knows that that particular set-up will produce successful treatment, in that corona discharge will be present.

But it is clear that all the evidence adduced on behalf of the plaintiffs (Traver) was directed to the attempt to prove that sometime early in 1950, and at least prior to the alleged material date of Adams and Wakefield (defendant Union Carbide), namely, May 3, 1950, that Traver successfully treated polyethylene film so as to make it ink-adherent using a process in which the phenomenon of corona discharge was present and that he knew and disclosed this factor as the critical one, and disclosed both verbally and in writing a description which afforded the means of making that which was invented.

The attempt was not successful.

Certainly, neither Traver nor anyone acting under Traver's directions discovered at least until after October 17, 1950, that isolating corona discharge as the critical factor was the invention.

I therefore find that the evidence adduced by and on behalf of Traver did not establish that Traver at any time was the inventor of the treatment process involving the phenomenon of corona discharge; and as stated, that alone is the invention which is the subject of these proceedings. Indeed, the evidence adduced by and on behalf of Traver affirmatively established that he was not the inventor of this treatment process.

Counsel for the appellants do not merely attack this finding as not supported by the evidence; they submit that its wording and that of other passages in the reasons of the learned judge shew that he was mistaken in law in the tests which he applied in determining whether or not Traver was the first inventor.

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They argue that on the evidence it should be found that prior to the making of the invention by Adams and Wakefield, Traver and his assistants had actually constructed an apparatus which would, and did, produce corona discharge and which treated polyethylene film successfully. Their argument proceeds that the learned trial judge mistakenly held that Traver had not made the invention merely because he did not describe its operation as producing corona discharge and did not discover that any discharge within the corona range would give effective treatment.

In support of the submission set out in the last sentence the appellants rely on the judgment of Thorson P. in *Ernest Scragg & Sons Ltd. v. Leeson Corporation*¹, and particularly the following passage at pages 676 and 677, where the learned President quoted the following statement from the judgment of this Court in *Christiani and Nielsen v. Rice*²:

The holding here, therefore, is that by the date of discovery of the invention is meant the date at which the inventor can prove he has first formulated, either in writing or verbally, a description which affords the means of making that which is invented. There is no necessity of a disclosure to the public.

and continued:

It was not intended, in my opinion, that the test laid down in the statement should be all-inclusive. It is clear, of course, that if an inventor can prove that he formulated a description of his invention, either in writing or verbally, at a certain date then he must have made the invention at least as early as that date. It is also clear that the requirement that there must be proof of the formulation of a description of the invention, either in writing or verbally, is neither apt nor necessary in the case of an invention of an apparatus where the inventor can prove that at the asserted date he had actually made the apparatus itself, although there was no formulation of a written or oral description of it. Nor was it intended that the test laid down in the statement should replace the general statement in the *Permuti v. Borrowman* case (*supra*) that before a man can be said to have invented a process he must have reduced the idea of it to a definite and practical shape. Consequently, even although the test of proof of the formulation of a description of the invention, either in writing or verbally, at a particular date might be appropriate in determining the date of an invention of a process, it cannot have been intended to exclude proof that the process was actually used at the asserted date, even although there was no formulation of a written or oral description of it at such date. Thus the statement in *Christiani v. Rice* case (*supra*) to which I have referred should not be interpreted as laying down a rule that proof that an invention was made at an asserted date must be confined to evidence that a written or oral description of it

¹ [1964] Ex. C.R. 649.

² [1930] S.C.R. 443 at 456, 4 D.J.R. 401.

had been formulated at such date. It may also be proved, in the case of an invention of an apparatus, that the apparatus was made at such date, or in the case of an invention of a process, that the process was used at such date. The essential fact to be proved is that at the asserted date the invention was no longer merely an idea that floated through the inventor's brain but had been reduced to a definite and practical shape. The statement to which I have referred should be construed accordingly.

The argument proceeds that if in fact Traver and his assistants had, prior to the date of the invention by Adams and Wakefield, adapted the Cameron slitter and successfully treated polyethylene film with it, in the manner described by Traver in his evidence, then he would have been the first inventor of that apparatus and process, because he would have actually made an apparatus which worked and afforded a solution to the problem which was baffling the industry. He would not, in the supposed circumstances, have been any the less the first inventor because he neither identified the electrostatic discharge created during the operation of the machine as "corona discharge" nor realized that successful treatment could be obtained regardless of any variation of the arrangement of the component parts of the apparatus and of the voltage used so long as corona discharge resulted. He would have attained the desired result empirically.

I do not find it necessary to reach a final conclusion as to the validity in law of this argument because in my view it fails on the findings of fact made by the learned trial judge. As I understand his reasons, he has stated that the appellants have failed to satisfy him that Traver had done, even empirically, what the invention does until some time after the complete invention had been made by Adams and Wakefield. The learned trial judge in no way exaggerates the onus that lay upon Traver at the trial to prove that he had made the invention and the date by which he had made it. The onus of proof of these matters was upon Traver not only because he was asserting an affirmative but also because all the subject matter of these allegations lay particularly within his knowledge. It was still however the onus in a civil case and the learned trial judge so instructed himself. In speaking of the conflicting evidence of certain experts he says:

The Court is left with the usual legal standard of proof, namely, more probably than not, or as it is sometimes put, the preponderance of

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believable evidence. And this was the test employed in reaching the conclusions in these reasons where it was necessary to resolve any conflict in such expert testimony.

and later he speaks of examining:

(a) the oral or verbal evidence adduced at this trial, and

(b) the written evidence,

for the purpose of determining what credible evidence was adduced to the satisfaction of the Court to enable it to make a finding on the balance of probabilities as to issue of priority of invention.

From a reading of the whole of his reasons it appears to me that the learned trial judge found himself unable to believe the evidence of Traver and those witnesses who, to some extent, supported his story. I have already quoted at some length from those reasons and now repeat one of the paragraphs quoted because it appears to me to contain a clear indication of the view which the learned trial judge took as to the trustworthiness of Traver.

It is a proper conclusion to find that up to that date (October 17, 1950), Traver and the others under his direction were experimenting. But now, in retrospect Traver is saying that he used the oxy-dry tube, 10,000 volts and $\frac{1}{8}$ " spacing set-up to get successful treatment and disclosed it, because he now knows that that particular set-up will produce successful treatment, in that corona discharge will be present.

A little later in his reasons the learned trial judge says:

I have also taken into consideration that it may be that Traver, without any knowledge of what any other inventor was doing, *sometime in 1950, after the month of October*, did discover that successful treatment could be had by employing the Cameron slitter process, Exhibit 42, providing a $\frac{1}{8}$ " gap was used (although there is some doubt that there was any precise knowledge or understanding that the width of the gap was critical using this particular apparatus.)

The significant words in this passage are those which I have italicized.

If, as argued for the appellant, the learned trial judge was of the view that even if Traver's evidence as to the successful treatment of film by use of the "one-tube set-up", "the multiple tube set-up" and the adapted Cameron slitter were accepted, Traver still could not be held to be the first inventor by reason of his failure to identify corona discharge as the essential element in the process, then it would have been unnecessary for the learned judge to consider the evidence as to the job pockets. He does, however, examine this evidence with care and reaches the conclusion which he expresses as follows:

On this evidence, I find it is impossible to believe that the Cameron slitter was employed to give successful treatment on any commercial production basis during the year 1950 or that the plastic bags allegedly found in these so-called job pockets were actually in these pockets since 1950 or were from a production run of plastic bags successfully treated by the Cameron slitter in 1950.

It may be said that if the learned trial judge disbelieved the evidence of Traver it was unnecessary for him to examine in detail the evidence as to exactly what constituted the invention and what disclosure and claims were made by the parties in regard to it; it is true that this examination would scarcely seem to have been necessary on the sole question of who was the first inventor but it did become relevant to the question of whether the respondent was entitled to a patent and, if so, what claims it should contain.

When the learned trial judge was discussing the nature and extent of the discovery made by Adams and Wakefield he said:

On the evidence I find that it was not obvious or natural on March 21, 1950, after the first successful result was obtained, to discover and isolate the corona that was present as the element and the only element that would produce successful treatment of polyethylene film.

This discovery which taught that successful treatment could be accomplished by using one of the many combinations of electrodes, dielectrics, spacing and voltage so long as corona discharge was present, was genius and invention of the highest order. And it is not detracted from in the least by the fact that Mr. Traver or some other person employed or acting for him or Traver Corporation or independently, may have obtained without knowing why, even before March 21, 1950 (*which, as stated above, I do not find*) successful treatment of polyethylene film by using the particular combination of an oxy-dry tube, 10,000-volt transformer, and a $\frac{1}{8}$ " spacing and confined solely to such combination, while not recognizing that corona discharge was the essential feature of the invention.

The words in the parenthesis which I have italicized strengthen the view which I have formed that in so far as it deals with the dates on which Traver attained successful results, even empirically, the learned trial judge simply did not believe his testimony or that of those witnesses who sought to support it.

Priority of invention is primarily a question of fact, and, while it is unnecessary to quote authority as to the duty of an appellate court which is asked to interfere with the findings of fact made by a trial judge who has seen and

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heard the witnesses on whose testimony the findings are based, the following words in the speech of Lord Wright in *Powell v. Streatham Manor Nursing Home*¹ appear to be peculiarly applicable to this appeal:

Two principles are beyond controversy. First it is clear that in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong'. And secondly the Court of Appeal has no right to ignore what facts the judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing.

Attention has already been called to the circumstance that all the evidence on which Traver sought to obtain a finding in his favour to the effect that he had made the invention prior to Adams and Wakefield was as to matters particularly within his knowledge and as to which the respondent would normally have no means of contradicting him.

In considering whether the learned trial judge was justified in rejecting that evidence the following matters may be borne in mind. At the trial Traver told a story as to obtaining successful treatment of film by adapting the Meisel press which story the learned trial judge found to be untrue. It was shewn that in other proceedings relating to the same invention Traver had sworn to a statement as to the date of his invention which was false in fact and the learned trial judge rejected the explanation put forward in an endeavour to shew that this was done innocently. None of the apparatuses with which Traver claimed to have attained the successful result were preserved. Neither Traver nor any of his employees kept any log or systematic record of their experiments with the process. The samples of treated film said to have been marketed early in 1950 were not retained by Traver or Traver Corporation but, as has already been mentioned, were turned over with other records to Container Corporation.

While none of these matters may be of vital importance their cumulative effect adds to the difficulties in the way of the appellants' argument that we should reverse the finding of fact of the learned trial judge on the decisive question

¹ [1935] A.C. 243 at 265, 266, 104 L.J.K.B. 304.

whether Traver had made any invention prior to the date on which Adams and Wakefield had completed their discovery. I have reached the conclusion that we cannot disturb that finding of fact and since it follows from it that Traver was not the first inventor of anything with which this appeal is concerned the appeal fails.

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The proceedings at trial involved a large number of claims which had been placed in conflict in addition to those as to which the learned trial judge held that the respondent was entitled to the issue of a patent but I do not find it necessary to deal with the disposition made of those other claims as there is no cross-appeal and the respondent simply seeks to support the judgment at trial.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Gowling, Mac-Tavish, Osborne & Henderson, Ottawa.

Solicitors for the defendants, respondents: McCarthy & McCarthy, Toronto.
