

DOMINION CHAIN COMPANY } (PLAINTIFFS) .....	APPELLANTS;	<u>1918</u> *Dec. 4, 5.
AND		
McKINNON CHAIN COMPANY } (DEFENDANTS) .....	RESPONDENTS.	<u>1919</u> *Feb. 4.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Patent—New invention—Manufacture in Canada—Importation of parts.*

An application for a patent on "New and useful improvements in Grip Treads for Pneumatic Tires" contained fourteen claims respecting what the applicant desired to patent. In an action instituted for infringement a disclaimer was filed as to nine of the fourteen claims, the plaintiff relying on the one feature of placing at right angles, instead of diagonally as in other grip treads patented, the chains connecting the side chains of the grip treads.

*Held*, Mignault J. dissenting, that the remaining claims shewed that the invention was intended to consist of the entire grip tread and not the right-angled feature only; that all of the elements of this invention were old and well known and it had been anticipated by prior patents and prior user; and that the patent was properly declared void.

All the parts of the plaintiffs' grip tread were imported the only work done in Canada being to put them together by a simple operation that could be performed by any person.

*Held*, Mignault J. dissenting, that this was importation of the invention forbidden by section 38 of "The Patent Act" and the work done in Canada was not the manufacture required by that section.

*Per* Mignault J.—Placing the cross chains at right angles was a combination, previously unknown, of old elements and, as such, was a patentable invention.

Judgment of the Exchequer Court (17 Ex. C.R. 255, 38 D.L.R. 345); affirmed.

APPEAL from the judgment of the Exchequer Court of Canada (1), dismissing an action for damages by infringement of the plaintiffs' patent and declaring the patent void.

The material facts are stated in the above head-note.

\*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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CHAIN CO.*Russell Smart* for the appellants.*Tilley K.C.* and *J. G. Gibson* for the respondents.

THE CHIEF JUSTICE.—I concur with Mr. Justice Anglin.

IDINGTON J.—The appellant, as the assignee of a patent obtained by one Weed, a resident of New York State, on the 20th December, 1904, in response to a petition praying for the grant thereof, for an alleged new and useful improvement in grip treads for pneumatic tires, sought in the Exchequer Court to restrain respondent from infringing its alleged rights under said patent.

It was met by two defences amongst others; first, that the said patent if ever valid had been rendered null by reason of failure to comply with the requirement of section 38 of the "Patent Act" rendering it obligatory upon a patentee to manufacture the article covered by a patent; and instead of doing so importing said article into Canada; and secondly, that the patent had always been void. Both of these defences have been, as I think rightly, maintained by the learned trial judge, Sir Walter Cassels, and the action dismissed.

As I agree entirely with the reasons assigned by the learned judge I only desire now to add thereto a few remarks suggested by the course of the argument here.

And what I am about to say I intend to apply to and cover, so far as applicable thereto respectively, each of the said defences.

Counsel for appellant claimed that the obligation relative to manufacture had been complied with by an assembling of the chains imported and fitting them together with the hook fastenings which required only the application of an ordinary tool and very little labour, evidently an infinitesimal fraction of what is

involved in the manufacture of the grip tread for pneumatic tires.

It seems to me the determination of the question thus raised must turn upon the nature of the patent and what the alleged inventor claimed to have invented and covered in his application for a patent, and especially by the terms of the specifications therein.

Originally there were fourteen specifications in Weed's application of what he claimed and desired to secure by letters patent.

The majority of them were disclaimed by the appellant filing a disclaimer on the 2nd November, 1917, over six months after this action had been initiated and the pleadings were at issue.

Of those remaining, counsel selected, in argument here, the tenth as that upon which he felt he might with most safety rely. It reads as follows:—

10. A reversible trip tread for elastic tires comprising two parallel lengthwise chains composed of comparatively short links, and parallel cross chains at right angles with and linked to the lengthwise chains.

I pointed out to him that by these very terms the patented article so described as a "reversible grip tread for elastic tires," etc., seemed to be a thing capable of manufacture in Canada and thus fitted to complete and render imperative the obligation imposed by section 38, on pain of nullification of the patent.

The answer made was that it was only an improvement upon what was well known in the market that in fact was now claimed.

And then, in reply as to what the improvement consisted of, counsel pointed out the fitting of the cross chains so that they would run at right angles across the tire instead of diagonally as in accordance with the specification in an application made by someone else for an earlier patent granted by the United States.

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It does not seem to me, however ingenious that, this gets the appellant out of its difficulties on the score of non-manufacture.

It is not as an improvement that the invention is claimed in a single line of its specifications. It is a complete whole that they each and all aim at a definition of.

And the very obvious purpose of the application was to claim an invention of the whole.

The objects of the invention are set out as follows:—

The object of my present invention is to provide a flexible and collapsible grip or tread composed entirely of chains linked together and applied to the sides and periphery of the tire, and held in place solely by inflation of the tire, and which is reversible so that either side may be applied to the periphery of the tire, thus affording double wearing surfaces.

These grips or auxiliary treads are adapted to be applied to the traction or driving wheels of automobiles, and one of the important objects is to enable any one, skilled or unskilled, to easily and quickly apply the auxiliary tread when needed by partially deflating the tire and then placing the grip thereon, and finally, reinflating the tire to cause the transverse chains to partially imbed themselves into the periphery of said tire, whereby the auxiliary tread or gripping device is firmly held in operative position against circumferential slipping on the tire.

Another object of equal importance is to construct the auxiliary grip or tread in such a manner that it may be collapsed into a minimum space when not in use to be carried in the vehicle, and owing to the fact that it is constructed of chains with comparatively short links, it will be apparent that it may be compressed into a very small space, and therefore can be placed under the seat or in any other available receptacle in the vehicle.

Some minor objects in drawing details are given which in no way help appellant in this regard.

Nor does the usual introduction, common to all such applications, of "certain new and useful improvements" help.

There is in short nothing than can be said to point specifically to any improvement on old grip treads as the purpose of the inventor. And this is not the case of an application for a patent of a combination of old,

well-known devices being applied to a new object, and an improvement of that character.

The only claim either expressly or impliedly made in way of combination is that made in the 7th specification, which is a combination of the specified grip tread with the pneumatic tire.

Nor can the combination to be patented be found, as has been found in some cases, by a consideration of the scope and purpose of the whole application, to be either expressly or impliedly in a claim for a mere improvement.

It is a claim for the whole article as a new invention that is made and hence not of an improvement that is entitled to be protected by a patent.

I would refer to Terrell on Patents, 4th ed., under the heading of "The Complete Specification" and the cases cited therein, and especially the language of Mr. Justice Buckley in *The British United Shoe Company v. Thompson* (1), quoted therein, pp. 155 and 156, for I venture to think the pith of the relevant law necessary for us to consider is well summed up in the last sentence of that so quoted, as follows:—

The whole is summarized in a few words by saying that the patentee must shew what is the new thing that he claims.

Assuredly the patentee in this case has failed entirely in shewing that the new thing he claims is the alleged simple improvement counsel is reduced by force of circumstances to contend for.

If that had been all that had been claimed and specified as his claim, a very nice question might have arisen as to what, if anything, had to be manufactured in Canada. And another nice question as to whether it was not so impalpable as to be impossible of definition

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or when defined so evidently simple in its character as to render it impossible to claim it as a novelty.

I repeat it is, with tiresome reiteration, made manifest by the fourteen claims set forth in the original specifications that what the alleged inventor had in mind was a whole article, easily capable of manufacture in Canada, and nothing of that kind having been attempted within the prescribed time, the patent should be held null.

The argument so fully and forcibly set forth in appellant's factum founded upon the extensive use of the article and the attendant prosperity arising therefrom, I respectfully submit, appears most fallacious when we use that common knowledge we are permitted to resort to relative to the recent advent of the automobile and its remarkably rapid progress in becoming an article of common use.

That, and not this adoption of the right angle crossing of a gripping chain, is the result of the expansion of trade in and manufacture of such devices as the patentee claimed.

Common knowledge again tells us that in manifold ways the parallel lines of ridges on a wheel, crossing it at right angles when intended to furnish it with a gripping capacity, was older than automobiles and in common use in many mechanical applications of the use of power.

It was not the need of inventive faculty that prevented that exact adaption of a well-known gripping device such as a ridge across a wheel, but the application thereof by means of metal across a rubber wheel in such a way as not to destroy the rubber that was the thing that was wanted.

The chain device of the Parsons' patent, which I take the liberty of thinking the patentee here in question appropriated, because that was not patented in Canada,

and made the foundation of his patent got here in question, furnished what was really needed.

The fact that Maxim's attempt to construct a leather grip for a bicycle a few weeks anterior to the patent in question was tried transversely and, I imagine, more nearly at right angles than the grip in question, shews how naturally the mind turned that way would resort to the parallel right angle traversing the wheel in solving what was in question.

It was the choice of material and the least hurtful mould thereof that really was the puzzle, and that was solved by Parsons' ample demonstration anticipating and destroying any foundation for the claim in question.

He, however, apparently had the accomplishment of some other objects in view as well as the gripping, as his specifications plainly shew, and hence the diagonal shape he specified instead of the usual transverse ridge for the chains running.

There was nothing left for the alleged inventor here in question except to copy two old things. Indeed, everything he used or claimed to use had long been in one form or another anticipated; and of a patentable combination he never had the faintest conception.

I think the appeal should be dismissed with costs.

ANGLIN J.—The material facts of this case appear sufficiently in the report of the judgment of the learned judge of the Exchequer Court (1), from which the plaintiff appeals. Although the claims in the Weed patent remaining after full effect is given to the disclaimer filed by the plaintiff, on the 2nd November, 1917—Nos. 4, 7, 9, 10 and 12—as I read them cover much more than the mere disposition of

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parallel cross chains at right angles with and linked to the lengthwise chains,

mentioned in claim No. 10, the appellant now would limit the patented invention solely to this arrangement of the cross chains at right angles to the side chains. I assume that this feature is claimed by the phrase

extending transversely the shortest distance across the tread of the tire in claim No. 4, and by the words

extending from anchor to anchor directly across the periphery of the tire in No. 7. In No. 9, however, there is not even a veiled reference to the right-angled arrangement of the cross chains. They are described merely as

cross chains parallel with each other and connecting the lengthwise chains.

They might be at any angle—right, acute, or obtuse—provided all were at the same angle to the side chains. In No. 12 the description is

cross chains disposed at substantially right angles to the lengthwise chain.

In a very recent case, *Betts v. Reichenberg* (1), Mr. Justice Younger held a patent void because the particular idea or device relied on as the novelty was not set forth in two of the seven claims and the specification in some of its descriptions of the patented articles—in that case a wrist watch strap—also omitted it. Here the right angle feature is only mentioned once in the specification and then not in the vital part of it but merely in a paragraph descriptive of a figure said to be shewn as demonstrating or illustrative of “the practicability of my invention.” Reading the specification as a whole, the right angle feature would appear to be quite unessential and a mere accident in the illustration

(1) 35 Cut. Pat. C. 1.



and the idea that that was the real invention claimed certainly would not occur to one.

The patentee declares that,

The object of my present invention is to provide a flexible and collapsible grip or tread composed entirely of chains linked together and applied to the sides and periphery of the tire, and held in place solely by the inflation of the tire, and which is reversible so that either side may be applied to the periphery of the tire, thus affording double wearing surfaces.

\* \* \* \* \*

Another object of equal importance is to construct the auxiliary grip or tread in such a manner that it may be collapsed into a minimum space when not in use to be carried in the vehicle, and owing to the fact that it is constructed of chains with comparatively short links, it will be apparent that it may be compressed into a very small space, and therefore can be placed under the seat or in any other available receptacle in the vehicle.

\* \* \* \* \*

The end links at one side of the (lateral) chains are of special construction.

Flexibility in all directions, reversibility, and compactness were the objects.

Mr. Justice Cassels has pointed out other features of the invention of importance as described in the patent which have been wholly discarded. Claims No. 7 and 9 are as follows:—

7. In combination with a pneumatic tire, a reversible gripping device comprising endless anchors disposed at opposite sides of the tire and flexible circumferentially, and flexible members extending from anchor to anchor directly across the periphery of the tire and secured to said anchors.

9. A reversible grip tread for elastic tires comprising two parallel lengthwise chains, and additional cross chains parallel with each other and connecting the lengthwise chains.

How is it possible in view of these claims to maintain that the disposition of the cross chains at right angles to the side chains is the entire invention patented, or even an essential feature of it? In my opinion the invention claimed and for which the patent stands is much wider and covers the entire grip-tread. The idea of confining the patent to the feature of right-angled

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connections between the cross and side chains was purely an afterthought resorted to in an attempt more ingenious than ingenuous to meet the difficulty presented by non-manufacture and importation of the invention as described by the patentee in the specification and in the claims which his disclaimer did not remove from the patent.

Confessedly, however, this feature of cross chains at right angles to the lateral or anchor chains is the only novelty to which the patentee could lay even the semblance of a fair claim in view of the Parsons' patents (British and American) for a grip-tread consisting of side chains with transverse chains attached thereto. Although Parsons in the specification of his United States patent described the cross chains as passing "diagonally across the tire," the claims of that patent are not confined to that construction. Under them the cross chains might be placed at any angle to the side members. In his British patent the cross chains are described merely as

fitting loosely over the periphery of the tire and passing from side to side across the tire.

In his illustrative figures shewing "modes of construction and classifications" the cross chains appear as passing diagonally across the tire. In both patents, however, he distinctly says:—

I do not limit myself to any particular construction of chains.

The defendant's chief witness, Prof. Carpenter, speaking of the Weed patent, says that,

a departure not exceeding 10 or 15 degrees from the right angle would not be a practical variation.

Yet it would be within the Parsons' patent.

Having regard to all these facts, I am of the opinion that the plaintiff's patent is impeachable on the grounds of want of novelty and anticipation, as well as for failure

to disclose and claim as the invention patented the feature which is now solely relied on. I express no opinion on the question whether the arrangement of cross chains at right angles to the side chains was a patentable invention.

I also think the defendant's patent has been avoided under clause (b) of section 38 of the "Patent Act" by importation.

(b) If, after the expiration of twelve months from the granting of a patent, or an authorized extension of such period, the patentee or patentees, or any of them, or his or their or any of their legal representatives, for the whole or a part of his or their or any of their interest in the patent, import or cause to be imported into Canada, the invention for which the patent is granted, such patent shall be void as to the interest of the person or persons so importing or causing to be imported. 3. Edw. VII. ch. 46, sec. 4.

In *United Telephone Company v. Dale* (1), Pearson J. is reported, at page 782, to have said:—

If there was a patent for a knife of a particular construction, and an injunction was granted restraining a defendant from selling knives made according to the patent, and he was to sell the component parts so that any school boy could put them together and construct the knife, surely that sale would be a breach of the injunction.

In *Dunlop Pneumatic Tyre Co. v. Mosely* (2), at page 280, Vaughan Williams L.J. approves of this statement of the law, adding:—

If you are in substance selling the whole of the patented machine, I do not think that you save yourself from infringement because you sell it in parts which are so manufactured as to be adapted to be put together.

In *E. M. Bowden's Patents Syndicate v. Wilson* (3), a sale of all the component parts of a patented brake was held to be a violation of an injunction protecting the patented invention. I find the observation of Pearson J. in the *Dale Case* (1), cited with approval in Frost on Patents, vol. 1, at page 377, and Fletcher Moulton on Patents, at page 161.

(1) 25 Ch. D. 778.

(2) 21 Cut. P.C. 274.

(3) 20 Cut. P.C. 644.

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The importation of *all* the component parts of the patented invention ready to be put together by some very simple process would, in my opinion, constitute an infringement of the patent quite as much as would the sale of the same parts. The importation of them by the holder of the patent would entail its avoidance under Clause (b) of section 38 of the "Patent Act." See also Fisher and Smart on Patents, pp. 148 *et seq.* But without condemning it, I wish especially to guard myself against being committed to an indorsement of the first paragraph on page 152, expressing the personal view of the authors of the work last cited as to the effect of the importation of anything on which labour has been done to particularly adapt it to use in the invention.

The decision of Burbidge J. in *Anderson Tire Co. v. American Dunlop Tire Co.* (1), is an authority against their view.

But we are dealing not with a case of the importation of one or more of the component parts of the patented article, but with the importation of *all* the component parts together in such a form that they can easily be made into the combination.

I have not overlooked the cases of *Sykes v. Howarth* (2), and *Townsend v. Howarth* (3). The *Townsend Case* (3), was not a case, such as this is, of supplying all the component parts of the invention—parts specially manufactured according to specifications in sizes and lengths and with appropriate attaching fittings, the whole as manufactured being suitable and suitable only for the making of the patented invention. The *Sykes Case* (2), is merely authority for the general proposition that

(1) 5 Ex. C.R. 82.

(2) 12 Ch. D. 826.

(3) 12 Ch. D. 831.

selling articles to persons to be used for the purpose of infringing a patent is not an infringement of the patent.

Here, according to the evidence, the side chains with hooks attached, and the cross chains with hooks attached, all made to order and of particular sizes—"manufactured to the proper lengths"—being *all* the component parts of the plaintiff's chain tire grip were imported "adapted to be put together" by a simple process which "any school boy," if endowed with sufficient strength, could apply. All that was done in Canada was the insertion of the hooks of the cross chains in the links of the side chains and the clamping or nipping of these hooks together by the use of a heavy pair of pincers. That this, if not actually inconsistent with his specifications was, at least, not regarded by the patentee as an essential operation in constructing his invention is shewn by the following extract from the specification:—

I also contemplate detaching the cross chains from one or both of the parallel chains by making an open link or hook connection, as seen on the left hand side of Fig. 3, in which case the ends of the parallel chains might be permanently connected.

Whether what was done in Canada amounted to construction or manufacture sufficient to satisfy clause (a) of section 38 of the "Patent Act," even if the patent could be confined to the disposition of the cross chains at right angles with the side chains, is, to say the least, very doubtful. But if the patent claimed is wider, as I think it is, there was nothing approaching construction or manufacture in Canada of the patented article.

On the grounds that I have indicated, I would affirm the judgment of the Exchequer Court and dismiss the appeal.

BRODEUR J.—I am in favour of dismissing this appeal for the reasons given by my brother Idington.

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MIGNAULT J.—The whole question here is whether the Weed Canadian patent, No. 90650, for alleged new and useful improvements in grip treads for pneumatic tires, now belonging to the appellant, is a valid and subsisting patent. If so, the action taken by the appellant against the respondent for infringement should be maintained, if not, it must be dismissed.

The appellant having taken proceedings against the respondent for infringement, the latter asked for the dismissal of the action on three grounds:—

1. The patent is not a valid invention within the meaning of the "Patent Act."

2. The patent is void because the owners of the patent did not within two years from the date thereof commence, and, after commencement, continuously carry on in Canada the construction or manufacture of the invention patented, as required by section 38 of the "Patent Act."

3. The plaintiff, after the expiration of twelve months from the granting of the patent, imported into Canada the alleged invention.

The learned trial judge in the Exchequer Court, Sir Walter Cassels, maintained these three grounds of defence, and dismissed the plaintiff's action, and the latter now appeals to this court.

I am, with deference, of the opinion that the second and third grounds of defence are not made out. Section 38 of the "Patent Act," which provides for both, is in the following terms:—

Every patent shall, unless otherwise ordered by the Commissioner as hereinafter provided, be subject, and expressed to be subject, to the following conditions:—

(a) Such patent and all the rights and privileges thereby granted shall cease and determine, and the patent shall be null and void at the end of two years from the date thereof, unless the patentee or his legal representatives, within that period or an authorized extension thereof, commence, and after such commencement, continuously carry on in

Canada, the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada;

(b) If, after the expiration of twelve months from the granting of a patent, or an authorized extension of such period, the patentee or patentees, or any of them, or his or their or any of their legal representatives, for the whole or a part of his or their or any of their interest in the patent, import or cause to be imported into Canada, the invention for which the patent is granted, such patent shall be void as to the interest of the person or persons so importing or causing to be imported.

As to non-manufacture in Canada, the requirement is that the patentee or his legal representatives shall within two years from the date of the patent or an authorised extension thereof

commence, and after such commencement, continuously carry on in Canada *the construction or manufacture* of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada.

The alleged invention consists of a lateral chain around the wheel or tire of an automobile or other similar vehicle, to which are attached several cross chains crossing the tire so as to prevent the wheel from skidding when the automobile is being driven along a slippery road.

The evidence shews that both the lateral and cross chains were, during the two years, manufactured in the United States and imported into Canada, where, at a small establishment at Bridgeburg, Ontario, they were fastened together so as to be ready to be fitted on the tires. When orders were received, and they were not very numerous during the first years, specifications were sent to the manufacturers of the chains, and then chains of the required lengths were made, sent to Canada, and were there fastened together in the manner required by the patent of invention.

I cannot escape the conclusion that this was at least a *construction* of the patented invention in Canada.

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for the whole invention consisted of fastening the cross chains to the lateral chains, so that they could be fitted on the tires. Moreover, it was such a construction of the invention patented that, in the words of section 38, "any person desiring to use it" could

obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada.

Consequently, in my opinion, the defence of non-manufacture fails.

The same reason disposes of the defence of importation into Canada of the alleged invention. What the patentee imported into Canada was the chains, which could have been used for other purposes, and not the invention. The latter, as I have said, was constructed in Canada.

There remains the first ground of defence, whether the alleged invention was, at the date of the patent, a valid subject-matter for a patent of invention. On this ground, after serious consideration, I have come to the conclusion that this defence also fails and that the judgment of the Exchequer Court should be set aside.

The case, I must frankly say, is one of considerable difficulty, and I have not felt entirely free from doubt. Such a device as Weed patented comes very close to the border line which separates invention from no invention. I have very briefly described it, and the only novel feature that the appellant claims has been achieved, the placing of the cross chains at right angles to the lateral chains.

The question now is whether this arrangement of the cross and lateral chains has sufficient novelty to entitle it to a patent of invention. To answer this question I will briefly give the history of this particular art.

The evidence made as to the prior art shews that



several devices had been manufactured and were subsequently patented with a view to prevent the skidding of rubber tires. The really pertinent alleged anticipations are those of Maxim and Bardwell, 1901, and of Parsons, 1903, these dates being those of the above patents, and the appellant's patent having been granted in 1904.

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The Maxim and Bardwell device was made of leather or other tough, pliable material, and consisted of side or lengthwise members to which were attached cross members or straps, some of which were arranged to be strapped around the tires so as to hold the whole appliance firmly in place. The cross members were placed at right angles to the side members. Mr. Maxim, one of the inventors, examined as a witness at the trial, stated that the invention did not prove a success, for it was impossible to strap on the appliance tightly enough to keep it in place, and, moreover, the leather would become wet, and then it would stretch, lose its strength and finally break. He says that the straps could not be put on otherwise than at right angles, adding that

the general idea seemed to be that we must have something diagonal across the tire, and it was the general opinion that this was necessary, but when it came to leather the proposition was different owing to the flexibility of the leather to have it across the tire at right angles, and by fastening it down very tightly.

The difficulty as to other materials was that it was then considered that the use of metal instead of leather would injure the tire, so the Parsons' patent was a distinct advance in the art, for he used metal cross chains attached to a lateral ring made out of wire or of chains (the English patent mentions both wire and chains, the American one merely wire or wire rope or other suitable material). But following the prevailing idea mentioned by Mr. Maxim that the cross members

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should be placed diagonally and not at right angles to prevent skidding, Parsons' cross chains were so placed and described in his specification, although his claims and especially the claims of the American patent, merely state that the cross chains extend across and around the periphery of the wheel. These claims, however, should be construed to mean the form of construction specified, that is to say, the diagonal arrangement of the cross chains.

The evidence shews conclusively to my mind that the then prevailing idea that the cross members should be placed diagonally and not at right angles to prevent skidding was a fallacy. It was thought the diagonal position would arrest an incipient skidding movement, but it was found that once the skidding had commenced, Parsons' device would not stop it, so that practical experience shewed that the desired end was not obtained by the Parsons' grip tread. This device, had, however, a creeping effect which was useful to prevent the wearing of the tire.

It was under these circumstances that Weed designed a grip tread made of chains like Parsons', with lateral and cross chains, but the latter were placed at right angles to the lateral chains, and this arrangement was found to produce the desired effect, for the right-angle position of the cross chains altogether prevents incipient skidding. Moreover, although the inventor appears not to have foreseen this result, there was the same creeping effect as with the Parsons' grip tread, and, like the latter, Weed's device was reversible.

The evidence shews that, after the fallacy of the diagonal arrangement of the cross chains had been demonstrated by actual experience, the success of the Weed device was conspicuous and lasting, and while at

first a very small establishment was sufficient, to-day there is an immense manufactory of Weed's device at Niagara Falls, Ont., representing an investment of half a million dollars for the building and equipment, and of an equivalent amount for material and stock, and the Parsons' grip tread has been driven out of the market by the Weed invention.

This success of the appellant's patent, as well as the history of the art which I have very briefly traced, have convinced me that there is here sufficient invention to sustain the patent. I think that Weed, contending, as he did, against a prevailing fallacy, evolved something really new, and based on different principles as to skidding prevention devices. One of the best tests of patentability is the fact that the alleged invention has supplied a long-felt need which previous devices had failed to satisfy. Commercial success, of course, is not the only test, and may in some cases be an insufficient one, of invention, but it certainly goes very far to prove that an invention has really been made. Referring to the evidences of invention, Fletcher Moulton, in his work on Letters Patent for Invention, page 23, says:—

One class of such evidence is of extreme importance. If the development be one of great utility, and one which has satisfied a long-felt want in the trade, the evidence is almost overwhelming that it required inventive ingenuity or it would have been made before, that is presuming that there has been no material change in the conditions of the trade, such, for example, as a new demand caused by a change of fashion.

It is suggested that the popularity of the Weed grip treads may have been caused by their lightness as compared to the Parsons' appliance, but even this would be a merit in a matter of this kind.

And should it be said that all the elements here are old and were well known, I would consider that as furnishing no insurmountable objection to the patent,

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if these old elements are brought or combined together in a new form and have satisfied a long felt need of the trade.

Of course the question of the novelty of an invention is in each case a question of fact, so that other cases, where other matters and problems were involved, are not always a very secure guide. However, I think that I can rely on the statement of Lord Halsbury in *Taylor v. Annand* (1), at pages 62 and 63, with regard to the principles governing the class of cases where a very useful improvement has been made meeting the needs of the trade, but involving nothing more than the combination of old and well-known elements.

The learned trial judge expressed the opinion that under the evidence the Weed device with the cross chains at right angles would be an infringement of the Parsons' patent, the cross chains of which would still be diagonal if placed at so small an angle from the right angle as fifteen degrees. It must, however, be observed that Parsons, not having obtained a patent in Canada, no question of infringement of his patent here can arise. Moreover, the learned counsel of the appellant stated at the hearing that his clients owned the Parsons' patent in the United States, so they could not be considered as infringers there. I may add that the criterion of novelty and that of infringement are not the same. A device improving a patent can be patented, although it might be an infringement of the original patent. Frost on Patents, 4th ed., vol. 1, p. 349. Of course, the patentee of the improvement would not have the right to use the original invention, but this would not affect his patent for the improvement. "Patent Act," sec. 9.

(1) 18 Cut. P.C. 53.

Since writing what precedes, I have had the advantage of reading the opinion of my brother Anglin, and I will merely say that I have not overlooked the question discussed at bar with regard to the claims of the patent sued on. During the pendency of these proceedings in the court below, the appellant filed a disclaimer of certain claims contained in Weed's patent, and, as I understand the respondent's contention, as stated in its factum, it is that the claims retained were restricted to the placing of the cross chains at right angles, and that there is no originality in this form of construction. I do not find that the respondent raised any question whether the remaining claims, as restricted to the right-angle arrangement, were too wide to support a patent for such an arrangement, assuming that there is sufficient originality in this arrangement of the cross chains. And as I feel constrained to decide that the right-angle arrangement of the cross chains is an advance on the prior art, and that by means of this arrangement the patentee has successfully solved the problem of discovering an effective anti-skidding device, I would not deem myself justified in setting aside this very useful patent for the reasons now urged in connection with the disclaimer and the remaining claims.

For these reasons, I state as my opinion that the appellant's patent is a valid patent of invention. The appeal should, therefore, be allowed with costs in this court and in the court below.

*Appeal dismissed with costs.*

Solicitors for the appellants; *Fetherstonhaugh & Co.*

Solicitors for the respondents: *Gibson & Gibson.*

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