DANIEL HATTON, VICTOR GUERTIN AND HENRI GUERTIN (DEFENDANTS)..... } APPELLANTS;

AND

THE COPELAND-CHATTERSON COMPANY (PLAINTIFFS)..... } RESPONDENTS.

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*Oct. 9, 10.
*Nov. 15.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent of invention—Infringement of patent—Sale for a reasonable price—Use of patented device—Contract—"Patent Act," R.S.C. c. 61, s. 37—Evidence.

The patentee of a device for binding loose sheets sold the defendant H. binders subject to the condition that they should be used only in connection with sheets supplied by or under the authority of the patentee. H. used the binders with sheets obtained from the other defendants, contrary to the condition. In an action for infringement of the patent,

Held, that the condition in the contract with H. imposing the restriction upon the manner in which he should use the binders was not a contravention of the provisions of section 37 of the "Patent Act," R.S.C. ch. 61, in respect to supplying the patented invention at a reasonable price to persons desiring to use it, and that the use so made of the binders by H. was in breach of the condition of the contract licensing him to make use of the patented device and an infringement of the patent.

Judgment appealed from (10 Ex. C.R. 224) affirmed.

APPEAL from the judgment of the Exchequer Court of Canada(1), maintaining the plaintiffs' action with costs.

The action was brought, under the circumstances

*PRESENT:—Fitzpatrick C.J. and Girouard, Idington, Maclennan and Duff JJ.

(1) 10 Ex. C.R. 224.

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stated in the head-note, against the defendant Hatton, with whom the contract had been made, and the defendants Victor Guertin and Henri Guertin as having knowingly and for their own gain contributed to the infringement of the patent.

The judgment appealed from, in maintaining the action, directed the usual reference for the taking of accounts, restrained the defendant Hatton from using in any of the binders purchased by him from the plaintiffs, on the condition mentioned in the contract, any sheets other than those sold by or under the plaintiffs' authority, and, further, restrained the other defendants from making, using or vending similar binders; and, with respect to sheets adapted for use in such binders, restrained them from procuring or inducing persons known to be purchasers of the plaintiffs' binders subject to such restrictive conditions, to use such sheets in plaintiffs' binders.

Mignault K.C. and *Perron K.C.* for the appellants.
Raney for the respondents.

The judgment of the court was delivered by

IDINGTON J.—The respondents never authorized, nor intended to authorize, the use by the appellant of the binder sold to him, save in connection with sheets sold by the respondents. That is clearly expressed by the words

> this binder is sold and bought for use only with sheets sold by or under authority of the Copeland-Chatterson Co., Limited,

forming part of the appellant's order, and inscribed in large letters prominently set forth in the inside cover of the binder delivered.

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The appellant never paid nor agreed to pay such a reasonable price for the patented binder as if bought freed, by the terms of purchase, from this obvious restriction upon its use.

An absolute, unconditional sale of a patented article may carry with it unlimited license to use it.

If the appellant desired that unlimited right he ought to have bargained for it, and not left it in such doubtful condition.

The rights to make, use or sell a patented article are daily subject matter of limitation in regard to time and place and *mode of user thereof*. So infinitely varied are these that no fixed price or terms can be attached uniformly to all of these modes of licensing the use of a patent right.

The patentee and those claiming under him arrange these various rights of user between themselves, and it is not our province to do more than determine whether or not the use has been within or beyond the intention of the parties.

If a use goes beyond that which is clearly expressed and permits such user the court enjoins, and if the use is within a clearly expressed intention the court refrains.

In each case the duty of the court is to find, as in other cases, the intention from the agreement.

No question arises of want of jurisdiction so long as the point raised is one of extent of right to use. Collateral agreements of many kinds involving something beyond this bare issue, yet having relation to, or springing out of, patents in their relation to the uses of articles, may arise and be outside the jurisdiction of the Exchequer Court. I see nothing such in this case, and the astute counsel who had charge of the case does not seem to have pleaded it.

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As to the alleged forfeiture I see nothing to support the contention.

Clearly, section 37 of the "Patent Act" has been complied with in every respect, unless we are to find, what is not in evidence, that respondents, having manufactured in Canada and made obtainable for use therein, as they did, the article in question, refused deliberately to permit its use, or its being obtained therefor, for a reasonable price.

The Huysman incident occurred after this suit began, and is not pleaded even if available. The evidence relating to it is not definite. It obviously relates to a supposed request to sell one of the articles then being vended, covered by other patents, presumably valid, as well as the use it is said herein to relate to.

It is, even if capable of the meaning which I should not attach to it, fully met by abundant evidence. Neither is the long and very extensive dealing of respondents in the goods covered by this patent, restricted, as I am viewing it just now, to the binder part as subject to a separate patent, any evidence of refusal to sell the binder part alone and unconditionally.

If parties having a patent see fit to make ten thousand bargains for a limited use thereof with people ready and willing to accept such limitations, that is no evidence that it has become impossible to obtain the unlimited use of the article so patented at a reasonable price.

The patentees might have been giving the patented article away, as an inducement to bring about by its use compensation in the sale, at a large profit, of other articles stipulated to be used therewith so long as, and whenever, used. That compensation is no

measure of, or criterion of, what might be a fair price to ask for an unconditional sale or other use of the patented article by itself.

The price in this latter case would be something so difficult to fix, and needing so much consideration, that I do not think a patentee is to be tripped up and his ruin brought about by such an ingenious device as displayed in Huysman's visit to the shop of the respondent, the invitation to somebody there to meet him, and the interview that followed. It may be said the patentee might from the start have fixed that price. I decidedly think the reasonable price contemplated by the statute is not a thing that must be fixed once and for all during the currency of the patent.

A patentee might fix, in order to induce buyers to interest themselves at first, a price far below what could be insisted upon by the public as a reasonable price.

Surely he is not bound to abide by that.

And if by reason of such a situation, never until years after the issue of a patent, (from such causes as existed here) having arisen, he has overlooked this fixing of a price, he is entitled to time to consider.

In dealing with the patent as if restricted to the binder alone, or as if separate, I am not to be taken as saying or holding that such is the necessary meaning of this patent under the law.

I have formed no opinion either as to the validity of other claims set up in this patent and case, or as to the true extent of meaning (in every case) of the word "use" in section 37, or many other questions that this case suggests, and in respect of some of which I may, in thus arguing it out, have thrown out tentative suggestions.

Certainly I do not think that it is desirable to

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weaken in any way the provisions of section 37. The respondent's property in his invention is the creation of a statute intended for the benefit (by encouraging productions of inventive genius) of others as well as the patentee. Whilst he must be treated fairly, he must treat these others fairly. It is in that spirit I would desire to interpret that section, when, if ever, the necessity for a closer scrutiny of its meaning arises.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Archer, Perron & Taschereau.*

Solicitors for the respondents: *Mills, Raney, Anderson & Hales.*