

THE ALSOP PROCESS COMPANY OF CANADA, LIM-  
ITED..... PLAINTIFFS;

1917  
June 7

AND

J.P. FRIESEN & SON..... DEFENDANTS.

*Patents—Process patent—Importation—Claims and specifications considered.*

The importation of apparatus to carry out a process patent is not within the prohibition of the Canada Patent Act (R.S.C. 1906, ch. 69, sec. 38). An attack on a patent on the ground of illegal importation may be made by way of defence.

Held also that a patent for a device used in the process of ageing, conditioning and bleaching flour was not invalid on the ground of prior invention or insufficiency of the specifications; nor was the process in violation of the Adulteration Act (R.S.C. 1906, c. 133, s. 3) or the Inspection and Sale Act (R.S.C. 1906, c. 85, s. 176.)

**STATEMENT OF CLAIM** filed on behalf of the plaintiff against the defendants, claiming an injunction to restrain the defendants, from infringing the letters patent sued upon and for damages.

Case tried at Ottawa, April 17, 18, 19, 20, 1917, before the Honourable MR. JUSTICE CASSELS.

*R. McKay, K.C., and Gideon Grant, for plaintiff.*

*F. B. Feltherstonhaugh, K.C., and Russell S. Smart, for defendants.*

CASSELS, J. (June 7, 1917) delivered judgment.

The action came on for trial before me at Toronto on April 17, and following days. The letters patent in question sued upon, is a patent dated May 20, 1902, N. 75,953. The plaintiff is the assignee of this patent.

At the trial the following admission was filed:—

“The following facts and matters are admitted and are to be considered as if proved in the usual way by competent *viva voce* evidence given at trial:

“(a) That if there is any invention described in the said letters patent No. 75,953, which is not admitted by

1917  
 THE ALSOP  
 PROCESS CO.  
 v.  
 FRIESEN.  
 Reasons for  
 Judgment.

“the defendants, but denied, and if the said invention is  
 “new, which is also not admitted by the defendants, but  
 “denied, then said invention was made by John Andrews  
 “and Sidney Andrews.

“(b) That the allegations as to title contained in  
 “par. 5 of the statement of claim are as therein stated.

“(c) The defendants, since the issue of the said patent  
 “No. 75,953, and prior to the issue of the writ in this action,  
 “installed and had in operation at their mill at Gretna,  
 “Manitoba, a bleaching device or machine, and shown in  
 “Canadian Patent No. 104,114, granted on March 12, 1907,  
 “to one McNorgan, which device or machine is used in the  
 “process of ageing, conditioning, and bleaching flour accord-  
 “ing to the specifications and claims of plaintiff’s Canadian  
 “Patent No. 75,953.”

The specification of the patent in question, except as to  
 the claims, is identical with the specification of the English  
 patent granted to John Andrews and Sidney Andrews in  
 England.

The claims of the patent in question differ in one respect  
 from the English patent. The English patent not merely is  
 a patent granted for the process, but there is also a grant  
 for the machine used in carrying out process.

The Canadian patent is limited to a patent for the process  
 merely.

As I have mentioned, the specifications of the Canadian  
 patent, with the exception of the claims which I will have  
 to deal with later on, are identical with the specifications  
 of the English patent; and the claim No. 3 of the specifica-  
 tion of the Canadian patent is identical with claim No. 2  
 of the English patent, in respect to which the extended  
 litigation in England took place. I will have to refer to  
 these English decisions.

It will be well to note that the patentee in the Canadian  
 patent has brought himself within what are termed the  
 licensing clauses of the Patent Act, R.S.C. 1906.

The patent is one for the process of bleaching flour. It is  
 unnecessary for me to analyze minutely the specifications  
 of the patent, as this has been fully gone into in the various  
 English decisions to which I am about to refer. It would  
 simply mean recopying the language of the various Judges

who have carefully analyzed the specifications and explained the legal meaning thereof.

The first case, which may be called the revocation case, was tried before Kekewich, J., on March 1, 2, 6, 7, 8, 13, 14, 15 and 16, 1906, and is styled "In the Matter of Andrews' Patent." A full report of this case is to be found in 23 R.P.C. 441.

A very strenuous attack was made against the patent. Very full arguments by very able counsel, and a very exhaustive judgment was given by Kekewich, J. That Judge deals very fully with the meaning of the specification. He appears to have given a broader meaning to the specification than was intended.

Construing the specification in the manner in which the Judge construed it, he came to the conclusion that the invention in question was disclosed in a previous patent granted to one Frichot, No. 21,971, of 1898, and that the patent is bad and must be revoked.

An appeal was taken from this judgment to the Court of Appeal in England, and a very lengthy argument took place before Vaughan Williams, Farrell and Buckley, L.JJ. The argument lasted for 9 days, ending on March 26, 1907, and again their Lordships dealt exhaustively with the question as to the meaning of the specifications. Their Lordships took a different view from that taken by Kekewich, J., as to the proper construction to be placed upon the specification, and came to the conclusion that Frichot's patent referred to was not an anticipation of the Andrews' patent and the judgment of Kekewich, J., was reversed, and the validity of the patent sustained. Infringement having been admitted, judgment was pronounced in favour of the patentee.

The defendants being dissatisfied with the judgment of the Court of Appeal, appealed to the House of Lords, and this appeal which occupied five days, terminating April 7, 1908, was dismissed with costs. It is reported in 25 R.P.C. 477. Counsel appearing were very prominent at the bar, and particularly versed in patent law. In this latter appeal to the House of Lords the meaning of the specifications was fully dealt with, the House of Lords coming to the same conclusion as the Judges in appeal.

1917  
 THE ALSOP  
 PROCESS CO.  
 v.  
 FRIESEN.  
 Reasons for  
 Judgment.

1917  
 THE ALSOP  
 PROCESS CO.  
 v.  
 FRIESEN.  
 ———  
 Reasons for  
 Judgment.

Prior to the decision of the House of Lords, an action was brought by *Flour Oxidizing Co. Ltd. v. Carr & Co. Ltd.*,<sup>1</sup> This action was tried before Parker, J., on January 20, 21, 22, 23, 24, 27, 28, and 30, and February 1 and 22, 1908. New evidence was adduced, and certain further anticipations were relied upon. The case was elaborately argued by very prominent counsel, and an exhaustive judgment was delivered by Parker, J., upholding the patent. One would have thought after these various decisions that acquiescence in the validity of the patent might have been looked for, but a further contest took place before Warrington, J., in the case of *Flour Oxidizing Co. Ltd. v. Hutchinson*. A lengthy trial took place lasting 22 days ending on April 28, 1909.<sup>2</sup> Further anticipations were produced and elaborate arguments from eminent counsel were heard, and judgment was pronounced in favour of the validity of the patent.

The reasons for judgment of Warrington, J., are voluminous and deal with the nature of the invention. A perusal of these authorities will show the views of the Judges in England, as to the construction to be placed upon the specification.

While the defendants in the present case may not be technically bound by the decisions in the cases to which I have referred, except as to questions of law, it would require a strong argument to induce me to come to a different view as to the construction of the specifications from that held by the House of Lords and these eminent Judges.

The evidence for the defence, and the arguments against the validity of the patent with two exceptions are practically the same as that given in the English cases. I find it difficult to see how the various letters patent referred to before me can possibly be treated as anticipations if the Frichot patent previously referred to was not an anticipation.

Parker, J., in his judgment referred to, at pages 458 and 459, deals with the question as to prior anticipations and what prior patents should show.

Dr. Milton Lewis Hersey, who is an analytical and consulting chemist, and whose qualifications are detailed in his

<sup>1</sup> 25 R.P.C. 428.

<sup>2</sup> 26 R.P.C. 597.

evidence, was called on the part of the defendants, and he admits in his evidence that no single patent relied upon discloses the whole invention. He singles out parts from each patent as showing a portion of the invention claimed, but admits that no patent covers the whole thing. He puts it in this way. I stated to him "if you take these patents (referring to the patents produced on behalf of the defendants) up to the present time, each one describes a process for a purpose said to be accomplished by the patentee; none of them describes the particular process said to be accomplished by the patentee; none of them describes the particular process set out in Andrews' patent. (He stated)—No one patent covers the whole thing through out."

On his cross-examination he is examined in detail as to each of the patents produced by the defendants relied upon as destroying the patent, and it would seem that, according to the views held by the English Courts, and according to my view of what is clear patent law, no one of these patents anticipates the patent in question.

In the case before Warrington, J., Hands, Fox, Johnston, Byrne, Bay, Hogarth and Frichot, were all dwelt upon. All of these 7 patents are the ones relied upon in the present case. The defendants in the case before me produced 9 patents of which 7 of them are the ones referred to in the particulars before Warrington, J. I think the evidence of Mr. Werner, given on behalf of the defendants, correctly distinguishes these various alleged anticipations from the patented invention of Andrews'. It is common knowledge that in most patented inventions for combinations, each element in the combination may be old; in fact in most cases this is admittedly the case, but while each element may be old, to bring them together in combination is the invention, and it is clear law that a combination of old elements, if it produces a new and beneficial result, and is not anticipated, is the valid subject matter of a patent. It has been so held by the House of Lords, and is almost elementary law in patent cases.

In my view of the case, the defendants have utterly failed to impeach the validity of the Andrews' patent on the ground of prior invention. The proof before me in favour

1917  
 THE ALSOP  
 PROCESS CO.  
 #.  
 FRIESEN.  
 Reasons for  
 Judgment.

1917  
 THE ALSOP  
 PROCESS CO.  
 v.  
 FRIESEN.  
 Reasons for  
 Judgment.

of the defendants' contention is weaker than that before the English Courts.

The defendants contend that the patent is void because the specification does not in detail show the quantity of the nitrous gases required in the process. This would be a question of evidence whether a man skilled in the art could ascertain it. The point was raised in all of the English cases, and has been determined in favour of the patentee: and the defendants in the case before me adduce no evidence of any skilled miller to show that there was any difficulty in this respect.

A further point was argued by Mr. Fetherstonhaugh that the patent should be avoided because it enabled the patentee to pass off a low grade flour for a high grade flour. I think there is nothing in this contention. His own client, Mr. Friesen, puts it in this way:—"Q. Does this bleaching process bring the low grade flour to the same appearance as the high grade? A. No, but it improves it in appearance a good deal. Q. But anyone would know it was a low grade flour? A. Yes. Q. No matter whether it was bleached or not? A. Yes.

It is also contended on the part of the defendants that the flour put through the Andrews' process becomes dangerous to health by reason of the nitrites left in the flour after the process. I think the defendants fail on this point. Their main witness, Dr. Charles F. Saunders (I give him precedence over Dr. Wiley who, while possessing a world-wide authority in matters of dietetics, gave evidence of little or no importance, so far as the questions at issue before me are concerned) is the Dominion Cerealist. He explained his duties as being in regard to the protection and testing of the different varieties of grain, as to their suitability for the very purposes for which they are intended. He details his qualifications and his titles. I may state that the flour while being treated by the particular process, is only in contact with the gas for about 11 seconds. Dr. Saunders was called as a witness for the defence. He is asked this question:—"Q. It is alleged that one advantage of this process is that you can utilize the bleached flour immediately, whereas the other you have to keep it two or three months before it can be used?"

His answer is:—"A. So far as colour is concerned I think "that is correct."

He further states:—"From the commercial point of view "the baking-qualities are improved in regard to colour, but "not otherwise."

And on cross-examination he is asked:—"Q. That is to "say, the product as a whole when baked and handed to "the public would be regarded by the man receiving it as "as improved product? A. Yes, the average man."

He also testifies that a loaf baked from this flour "would "be a much more presentable loaf than if it had not been "bleached." He was also asked the following question:—"Q. I understand that you did consider very carefully the "question as to the use of the artificial bleaching process, "and that your conclusions were stated at least once that "I know of, that in your view at any rate so far as the "colour, the flour was improved?"

He answers:—"A. Not in my personal view, but in the "commercial view. I would not prefer it, but the public "would as a whole, provided they didn't know how it was "done."

He is asked the question in view of the contention that the object of the invention is illicit.

"Q. Then your view was that there was no harmful result "at all from it (referring to the process)? A. I couldn't "say that there was any harm in regard to anything left in "the flour. Q. It is also said that good breadmaking flours "are not lowered when they are bleached? A. That is "true. Q. And there is no amount of nitrites left or any- "thing of that kind, from a food standpoint? A. That is "my view."

Dr. McGill is the Chief Analyst of the Inland Revenue Department at Ottawa. He is also called on the part of the defendants. This last witness seems to have procured an order in Council requiring bleached flour, which contains a greater quantity of nitrites than that defined, to be marked as bleached flour, but the percentage is, as I understand, in the Andrews' process less than that defined in the order in council. Counsel undertook to furnish a copy of this order in council, but have not done so, as I am informed.

1917

THE ALSOP  
PROCESS CO.

v.

FRIESEN.

Reasons for  
Judgment.

1917  
 THE ALSOP  
 PROCESS CO.  
 v.  
 FRIESEN.  
 Reasons for  
 Judgment.

Mr. McGill states:—"My recommendations to the department which resulted in the order in council, were based upon the assumption that oxides of nitrogen, if they remained in the flour, were highly objectionable material."

He is asked the question:—"Q. Assuming that these people using the bleaching process complied with those directions, it would be all right, would it? A. Provided that no excess of poisonous oxides of nitrogen remain in the flour. My recommendations were based on the conclusion that the changes in the flour itself were without injury to health. Q. If they keep within your standard it is all right? A. Yes. Anything beyond that would be dangerous. Q. That is because the bleached flour would be likely to absorb more; but if they keep within the standard and bleach it, there is no harm? A. Quite so."

I think it clear that the invention is a valuable invention. I think it clearly proved that the bleached flour is in no way harmful; and, I think this is proved by the defendants' own witnesses, to whose evidence I have referred. It has been very extensively used, and it has been a commercial success. It enables the flour to be used immediately instead of having to keep it for 2 or 3 months in order to age it before it can be placed upon the market. This, of itself, is a matter of considerable importance from a commercial point of view.

I do not think the Adulteration Act, R.S.C. 1906, ch. 133, relied upon by Mr. Fetherstonhaugh, has any application. Sec. 3 is as follows:—

"Food shall be deemed to be adulterated within the meaning of this act—

"(a) If any substance had been mixed with it so as to reduce or lower or injuriously affect its quality or strength."

The evidence before me makes it quite clear that nothing of the sort happens by reason of this bleaching process.

"(f) if it contains any added poisonous ingredient or any ingredient which may render such an article injurious to the health of persons or cattle consuming it."

The evidence before me shows that nothing of the sort happens.

"(h) if it is so coloured or coated or polished or powdered that damage is concealed, or if it is made to appear better or of greater value than it really is."



Nothing of the sort happens through the using of this process.

Mr. Fetherstonhaugh also relied on ch. 85, R.S.C. 1906, entitled Inspection and Sale. He relied upon Sec. 176, which reads as follows:—"Every person who wilfully mixes "or blends with any foreign substance any flour or meal "by him packed for sale or exportation shall, for such "offence, be liable to a penalty, etc."

There is not the slightest evidence adduced which would bring into application this section of the statute. I think the argument based upon the alleged fraud fails.

A further defence which Mr. Fetherstonhaugh strenuously argues is that by reason of the importation by the patentee of a machine used in the process, the patent is avoided under the provision of sec. 38 of the Patent Act, R.S.C. 1906, ch. 69. This section provides:—"Every patent shall, unless "otherwise ordered by the Commissioner as hereinafter pro- "vided, be subject, and expressed to be subject, to the fol- "lowing conditions:—(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."

I decided the question at the trial but Mr. Fetherstonhaugh has asked me to further consider it, as the question has been bothering him for several years. I thought perhaps I had better end his trouble by deciding the question at the trial and did so; but since the trial I have given it further consideration, and see no reason to change the views which I then expressed.

In the case of *Smith v. Goldie*,<sup>1</sup> the late Chancellor Spragge held that a defendant in a patent action could set up importation in contravention of the Patent Act as a defence. In the Court of Appeal and also in the Supreme Court, the Judges seemed to be of opinion that this defence was not

<sup>1</sup> 7 A.R. (Ont.) 628; 9 Can. S.C.R. 46.

1917

THE ALSOP  
PROCESS CO.v.  
FRIESEN.Reasons for  
Judgment.

properly a matter for defence, that it was something that should be raised in an independent proceeding. At the time of the decision of *Smith v. Goldie*, the tribunal was the Commissioner of Patents. Since then the jurisdiction is given to the Exchequer Court.

I take it for granted that since the decision in *Power v. Griffin*,<sup>1</sup> by the Supreme Court, it is open to a defendant to raise the question as a defence to an action. The statute expressly confers upon the patentee the right to plead any defence, default, etc.

*Power v. Griffin* was not the case of importation, but a case of non-manufacture within the prescribed period required by the statute. It seems to me the effect of that decision makes it clear that it is open to a defendant to raise by way of defence that the patent has been avoided by importation of the invention. I think, however, that it is necessary for him to prove the defence.

I have pointed out before and it is a matter that has to be borne in mind, that the patentee does not claim the machine, he merely claims the process. It is open to anyone to manufacture the machine. Anyone who buys the machine would have to obtain the right to use the process before he could utilize the machine.

According to the evidence the process is valuable and extensively used. A man might invent a particular machine which would surpass all others in the market, and in that way obtain a large market from those who had the right to use the process. How could such a manufacturer be prevented by the patentees under the patent in question from manufacturing and selling such a machine? Could any Judge be asked to restrain such manufacture or sale by reason of the patented invention being covered by the process patent? I think not. If not, how can it be reasonably argued that importation of the machine not covered by the patent is the patented invention? Mr. Fetherstonhaugh states that there has never been a decision on this point, and has asked me to pass upon it, and therefore I deal with it.

The only remaining point that requires consideration is the question raised, although not dwelt upon, as of any

<sup>1</sup> 33 Can. S.C.R. 39.

importance, the difference between the claims in the Canadian patent and those in the English patent. In his argument before me, Mr. Fetherstonhaugh thought that this was not of much moment. He seems to agree with me that the other claims of the Canadian patent were practically the same. That is the way it struck me. I said:—"But the question does arise, suppose a man takes a patent for 5 claims, four of which are useless, what is the effect on his patent? *Mr. Fetherstonhaugh*—Our law here is not the same as in England, my Lord, if one claim of the patent fails the whole patent does not fail, it is good for the remaining claims in any event."

Further on he stated that the question as to whether the patentee should have disclaimed does not arise in this case. In answer to a question put by me, he said:—"As far as I can see I don't think so anyway,"

The clauses of the Patent Act referred to are secs, 29 and 33.

In the case of *Johnson v. Oxford Knitting Co.*,<sup>1</sup> I had occasion to refer to the proper method of construing the specification and claims of a patent. The case of *Edison Bell Phonograph Corp. v. Smith*<sup>2</sup> there referred to, was a case before the Court of Appeal in England, and the language quoted is that of Lord Esher, the Master of the Rolls: I think it of such importance that I quote it again in these reasons:—

"The first question was, what was the proper mode of construing a patent? The rules of construction were the same as would be applied in the case of any other written instrument. It was not in accordance with the true canons of construction to read the claim alone without the specification. The whole document must be looked at to see what the claim was. In *Arnold v. Bradbury*,<sup>3</sup> it was contended that the claim, when read alone, was too large as including something which could not be patented, and that therefore the patent was bad. Lord Hatherley, however, said that the specification must be read first to see what the inventor had described as

<sup>1</sup> 25 D.L.R. 658, 15 Can. Ex. 340.

<sup>2</sup> (1894), 10 T.L.R. 522.

<sup>3</sup> L.R. 6 Ch. App. 706.

1917

THE ALSOP  
PROCESS CO.v.  
FETHERN.Reasons for  
Judgment.

“the thing to be patented. He said:—“I do not think  
 “that the proper way of dealing with this question  
 “is to look first at the claims, and then see what the full des-  
 “cription of the invention is; but rather first to read the  
 “description of the invention, in order that your mind may  
 “be prepared for what it is the inventor is about to claim.  
 “Therefore, in order to construe the instrument, the descrip-  
 “tion of the invention must be looked at to see whether the  
 “claim went further than the specification. That rule had  
 “been followed in subsequent cases. That was the true  
 “rule, and it was the same as was applicable to any other  
 “instrument. In the present case there was an elaborate  
 “and detailed specification of what the inventor wished to  
 “patent. It was an invention of certain improvements in  
 “phonograph machines. He described those improve-  
 “ments minutely. It was not suggested that the descrip-  
 “tions in the specifications were too large. The objects and  
 “the means of carrying out those objects were described.  
 “Then the claims were headed with a statement that the  
 “inventor, “having now particularly described and ascer-  
 “tained the nature of this invention, and in what manner  
 “the same is to be performed,” claimed, etc. Claim No. 1  
 “was the one chiefly contested. It was said that it was too  
 “wide. But in the specification the inventor had pointed  
 “out the exact manner in which he would carry out the  
 “object stated, and any one reading the claim reasonably  
 “would come to the conclusion that all he meant to claim  
 “was what he had previously described and shown. There-  
 “fore the claim was not too large, and the patent was not  
 “bad upon that ground.”

Now, construing the patent in the light of this decision, it seems to me impossible to contend that the patentee was claiming by any of the other claims gases of a noxious nature. I think practically the claims mean the same thing, particularly if you import the doctrine of equivalents. The specifications as I have pointed out have been dealt with over and over again by the English Courts. The meaning of them seems now quite clear, and if there was any doubt about it, as Mr. Fetherstonhaugh conceded, the clauses of the Patent Act referred to would still leave valid and untouched the main claim in question.

Judgment should issue in favour of the plaintiff as prayed, with a reference to the registrar to assess the damages. The defendants must pay the costs of the action.

1917  
THE ALSOP  
PROCESS CO.  
v.  
FRIESEN.  
Reasons for  
Judgment.

*Judgment for plaintiff.*

Solicitors for plaintiff: *Johnston, Mackay, Dods & Grant.*

Solicitors for defendants: *Fetherstonhaugh & Smart.*