

APPENDIX No. 2.

BENJAMIN BARTERPETITIONER ;

AND

GEORGE THOMAS SMITH,.....RESPONDENT.

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Feb. 15.

Petition for avoidance of patent on ground of non-manufacture and improper importation—35 Vic. c. 26, s. 28—38 Vic. c. 14, s. 2, construction—Duty of patentee as to creating market for patent—Burden of proof—Intention of legislature in restricting importation of patented invention—Effect of patentee's consent to importation by others—Contractual character of patent.

Although a patentee may not have commenced to manufacture the patented article within the period limited in section 28 of 35 Vic. c. 26 (as amended by 38 Vic. c. 14, s. 2), yet so long as he is in a position either to furnish it, or to license its use, at a reasonable price to any person desiring to use it, his patent ought not to be declared forfeited.

- (2.) It is not incumbent upon a patentee to show that he has made active efforts to create a market for his patented invention in Canada. It rests upon those who seek to defeat the patent to show that he neglected or refused to sell the invention for a reasonable price when proper application was made to him therefor.
- (3.) The intention of the legislature in enacting the provisions of section 28 of 35 Vic. c. 26, which prohibit the patentee from importing his invention in a manufactured state after the expiry of a given time from the granting of his patent, was to protect the industrial interests of Canada, and the prohibition should not be extended to operate a forfeiture in cases where the character and circumstances of the importation tend to promote rather than prejudice such interests.
- (4.) If, after the time has expired wherein the patentee may have imported the invention without prejudice to his rights, he consents to its importation by others, such consent brings him within the prohibition of the statute and avoids his patent.
- (5.) The granting of letters-patent to inventors is not the creation of an unjust monopoly, nor the concession of a privilege by mere gratuitous favor ; but it is a contract between the State and the discoverer, which, in favor of the latter, ought to receive a liberal interpretation.

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PETITION to the Minister of Agriculture praying that certain patents, granted to the respondent in the year 1873, should be declared null and void for non-compliance with the provisions of the 28th section of 35 Vic. c. 26, entitled *An Act respecting Patents of Invention*, as amended by 38 Vic. c. 14, s. 2 (1).

It was alleged in the petition that the Minister of Agriculture had granted to the respondent, who was a resident of the United States, three several patents, viz: No. 2409, for a Process of Milling; No. 2257, for a Flour-Dressing Machine; and No. 2258, also for a Flour-Dressing Machine. It was further alleged that the respondent had violated the provisions of the above cited enactment by not manufacturing his patented inventions in Canada within two years after the date of the granting of the patents, and by import-

(1) 28. Every patent granted under this Act shall be subject and expressed to be subject to the condition that 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 assignee or assignees, shall, within that period have commenced, and shall, after such commencement, continuously carry on in Canada the construction or manufacture of the invention or discovery patented, in such 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, and that such patent shall be void if, after the expiration of twelve months from the granting thereof, the patentee, or his assignee or assignees, for the whole or a part

of his interest in the patent, imports, or causes to be imported into Canada, the invention for which the patent is granted; and provided always, that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture, or his deputy, whose decision shall be final.

2. Whenever a patentee has been unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned, the Commissioner may at any time not more than three months before the expiration of that period grant to the patentee a further delay on his adducing proof to the satisfaction of the Commissioner that he was for reasons beyond his control prevented from complying with the above mentioned condition.

ing such patented inventions from another country after the expiry of twelve months from such date.

The petition asked that the respondent should be required to furnish particulars in case he alleged that his inventions had been duly manufactured in Canada.

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November 3rd, 1876.

Edgar, Fenton and Ritchie for petitioner ;

Grahame, Howland and Ryerson for respondent.

The preliminary hearing took place before the Deputy Minister of Agriculture. Counsel for petitioner opened the case by reading the following statutory declaration of the petitioner in support of the allegations contained in his petition :—

“That he (Barter), during the summer of the year
 “1876, visited the mill of Messieurs Howland and
 “Spink, at Thorold, and saw machines branded
 “*G. T. Smith, Patentee, and Rakes, Lockport,*
 “*Manufacturer.* That the said machines were
 “imported machines, and covered the material
 “portions of the inventions claimed by patents
 “No. 2257 and No. 2258 ; that these machines were
 “ascertained to have been made in the State of
 “New York by Rakes for the patentee Smith,
 “who caused the said machines to be imported
 “during the month of April, 1876 ; that these
 “machines were imported, two on the 25th day of
 “April aforesaid, as “*Smith’s Purifiers Machines,*”
 “on which \$109 duties were paid, and two
 “on the 29th, on which same amount of
 “duties was also paid ; that these machines are
 “constructed and adapted for the performance of
 “material and substantial portions of the process
 “patented by Patent No. 2409 ; that diligent en-
 “quiries have led him (Barter) to believe that
 “Smith’s inventions were not manufactured in

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“Canada until about August, 1876, with the exception of one machine, manufactured during the winter months of the year 1876.”

He contended that the petitioner having thus established *primâ facie* evidence of delinquency, the respondent should be forced to assume the burden of proof by reason, first, of the peculiar constitution of this tribunal, which was instituted to protect the public against the extension of the patentee's privileges; secondly, from the absence of power to compel witnesses to appear; and, thirdly, because it would otherwise force the petitioner to prove a negative.

The counsel for the respondent argued, in substance, as follows:—

It would be a most extraordinary thing to force the patentee to prove a forfeiture against himself, especially when there is positively no other evidence adduced by the petitioner than assertions made by himself, and the allegations of his petition.

That this is an attempt on the part of a rival patentee to fish out a grievance, in order to deprive a competitor of his acquired rights.

That unless the petitioner declares himself ready to go on with his evidence, of which not a thread is so far shown, this day's proceedings on his part amount to a non-suit, and the case should be dismissed at once.

Per TACHÉ, D. M. A.—The burden of proof is on the petitioner, but a sufficient case has been made out to necessitate a thorough investigation of the matter in dispute.

November 25th, 1876.

The evidence was completed on this date and the case argued.

The following is an analysis of the documentary evidence adduced:

1. The exemplification of Patent No. 2257, granted to respondent, George Thomas Smith, for a "Flour Dressing Machine," under date the 18th day of April, 1873.

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2. The exemplification of Patent No 2258, granted to respondent for a "Flour Dressing Machine," under date the 18th day of April, 1873.

3. The exemplification of Patent No. 2409, granted to respondent for a "Process of Milling," under date the 4th day of June, 1873.

These three patents have, on their face, the conditions of forfeiture prescribed by the 28th section of *The Patent Act*, hereinbefore quoted.

4, 5, 6. Three petitions addressed to the Commissioner of Patents, in the month of August, 1876, in relation to the three above named patents, by the patentee, George Thomas Smith, representing generally that he has been unable to dispose of his inventions for want of demand or acceptance on the part of the public; that he believes he has fulfilled the spirit of the law, but as doubts and disputes have arisen, he prays for a further extension of delay, and for a declaration that the offering of his inventions for public use upon payment of a reasonable royalty is sufficient compliance with the statute.

(The official answer to these petitions was that from the allegations of the patentee it did not appear that the said patents had been avoided.)

7. A letter of Messieurs Grahame, Howland and Ryerson, of Toronto, solicitors of the patentee Smith, inquiring about the mode of obtaining a conclusive decision in the matter of the said disputes, and suggesting that parties questioning the existence of their client's patents should be cited to appear and prove their case, and in default that the decision be given on the showing of the patentee.

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(The official answer was to the effect that the Patent Office could not undertake to initiate a case of dispute.)

8. A letter of Messieurs Edgar, Fenton and Ritchie, of Toronto, solicitors of the petitioner, raising the present dispute against the three hereinabove mentioned patents of the respondent.

9. A certified copy of an invoice dated 21st April, 1876, from Charles Rakes, of Lockport, in the United States, to Messieurs Howland and Spink, of Thorold, in the Province of Ontario, as attested by Wm. Leggett, Collector of Customs.

10. A printed circular addressed "To Millers" by the petitioner, not dated, but posterior to the 25th of July, 1876, offering for sale "The Original Middlings Purifier." This circular contains certificates of millers having made use of Mr. Barter's machines. Of these certificates ten indicate that they are from the Province of Ontario, the oldest of which is dated the 1st December, 1875, and four are dated July, 1876, the others are from the United States, the oldest being dated the 2nd December, 1872.

11. An authenticated copy of a bill of complaint filed in Chancery, in Toronto, on the 9th September, 1876, on behalf of George Thomas Smith (the respondent) against James Lawson (a witness in this case), concerning an alleged infringement of his (Smith's) patent for a "Process of Milling."

The following statutory declarations were put in in addition to that of the petitioner to be found on page 457:

1. That of Thomas Laurie, of the City of Hamilton, Millwright, dated 22nd of November, 1876, accompanied with two exhibits marked "a" and "b,"—the first being a copy of the specifications of Smith's patents, and the other a printed circular from Thomas Pringle, of Montreal, dated 21st March, 1873, advertising "Middlings Purifiers," stating:—

" That on the 6th of November, 1876, he called, in
 " company with the petitioner, on Charles Rakes,
 " at Lockport, State of New York, for the purpose
 " of making enquiries; that the said Rakes in-
 " formed them that he had manufactured for the
 " patentee, Smith, the machines erected in Mes-
 " sieurs Howland and Spink's mill, at Thorold;
 " that he (Rakes) had nothing to do with selling
 " these machines to Howland and Spink; that the
 " said Rakes told further, that Smith was charging
 " for his machines considerably more than the cost
 " of manufacturing; that, being asked to make an
 " affidavit of these facts, Rakes refused to do so;
 " that he (Laurie) had visited during the then
 " current month of November, 1876, the mill
 " of Howland and Spink, at Thorold, and, as a
 " practical millwright of forty years standing, says
 " that these machines are the machines and the
 " putting into operation of the process described
 " in Smith's specification; that Smith's machines
 " do not require a large expenditure, but could be
 " readily manufactured at any mill with ordinary
 " tools; that for at least three years past there has
 " been a great demand among millers in Ontario
 " for Middlings Purifiers of the description paten-
 " ted by Smith; that he is aware that many
 " machines, as advertised in the annexed circular,
 " were sold in Ontario during the years 1873, 1874
 " and 1875; that he is not aware of any of Smith's
 " machines having been manufactured, sold or
 " offered for sale in Canada for more than two
 " years after the date of Smith's patents, and that
 " if any active effort had been made to introduce
 " them, he (Laurie) should have become aware of it."

2. The statutory declaration of James Lawson, of

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“That he knows the respondent, Smith, who, in
 “company with one Charles Rakes, of Lockport,
 “N. Y., visited him at his (Lawson’s) mill, in May
 “1876, to ask him (Lawson) to purchase the same
 “machines as he (Smith) was putting up in Mes-
 “sieurs Howland and Spink’s mill; Smith informed
 “Lawson that Rakes was making these machines
 “for him (Smith) at the price of \$350, to which
 “price Smith was adding \$250 additional; that
 “he (Lawson) asked to be furnished with the said
 “machines at a lower price, to which proposal
 “Smith’s answer was that this was his lowest price;
 “that before that interview Rakes had told about
 “Smith coming to Thorold and expressed his hopes
 “that Lawson might purchase the machines from
 “Smith to give Rakes the job of building them;
 “that he (Lawson) is acquainted with Smith’s
 “machines and knows they are not of expensive
 “manufacture, but could be built with ordinary
 “tools and materials at any mill. He (Lawson),
 “having been a miller for about twelve years on
 “his own account, is aware that for at least four
 “years past there has been an active demand
 “among millers in Ontario for these Middlings
 “Purifiers. Mr. Spink had told him (Lawson)
 “that he had been negotiating with Smith for
 “the purchase of his machines, and afterwards
 “that he had purchased them from Smith; that
 “in the early part of last summer he (Lawson) saw
 “Smith, who was regulating the Purifiers at
 “Spink’s mill, and on having remarked about the
 “workmanship, Smith told him that he was not to
 “have any more constructed by Rakes; that Mr.
 “Spink told him that he had a written contract with

“Smith for the Purifiers, but being asked by
 “Barter, on the 14th November, 1876, in his
 “(Lawson’s) presence, to give affidavit on the
 “subject, Spink declined to do so.”

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3. A second statutory declaration of Barter, the petitioner, dated 16th November, 1876, accompanied with an exhibit marked “a,” being letters exchanged between the said petitioner and the firm of Howland and Spink, stating:—

“That he, in company with Thomas Laurie,
 “visited Charles Rakes at his place of business at
 “Lockport, where they were informed by said
 “Rakes that he (Rakes) had manufactured the
 “machines at Messieurs Howland and Spink’s
 “mill for G. T. Smith, who made the bargain for
 “them; that the said Rakes informed them that
 “he (Rakes) never saw the said Messieurs How-
 “land and Spink or any one on their behalf
 “until he went to Thorold, at the request of and
 “for the said Smith, to make arrangements about
 “putting the said machines into the said mill;
 “that Rakes told Laurie, in Barter’s presence, that
 “Smith charged considerably more than the cost
 “of manufacturing; that Rakes refused to make
 “affidavit of his said statements; that Smith
 “admitted to him (Barter) that the machines put
 “in Howland and Spink’s mill are his (Smith’s)
 “Purifiers; that Smith’s machines do not require
 “much expenditure but can be built with ordinary
 “tools and machinery at any mill; that for several
 “years past there has been an active demand
 “among millers in Ontario for machines of that
 “description; that the letter annexed is in the
 “handwriting of Mr. Spink, of the firm of How-
 “land and Spink, and was received by him
 “(Barter); that he (Barter) was informed by Mr.

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“ Spink, on the 26th February, 1876, that Smith had been telegraphed to come over to close the bargain for the purchase of the said machines ; that later, Mr. Howland told him (Barter) that he was too late, their firm having bought from Smith, who had come to Toronto to sell his machines ; that Messieurs Howland and Spink have declined to give evidence in the case.”

The letter of the firm of Howland and Spink, dated the 9th February, 1876, annexed to the above declaration and referred to, is to the following effect :—

“ That Mr. Spink has just returned from the United States ; that he has found Smith’s Process of Milling the best he has ever yet seen ; that Smith’s Purifiers are sold for less money than Barter’s machines ; that Smith’s machines have such a reputation that American millers will have no other ; that they expect Smith to come soon, and in the meantime should like to see Barter, as their machines will have to be ordered from some manufacturer in a few days, and that he (Barter) had better call on them at once.”

The answer of Mr. Barter to this letter is dated 12th February, 1876, and is to this effect :—

“ That he purposes soon going to Thorold ; that the (so-called in the States) Smith’s plan of milling is good, meaning the mode of milling at present adopted there, but that as the means by which it is effected belong to himself (Barter), the mode of milling for which the means were invented must also of necessity belong to him. That he is anxious for the patronage of the firm and should be most sorry if they do not come to terms.”

4. A third statutory declaration of Barter, the petitioner, dated 20th November, 1876, stating;—

“That he (Barter) had been informed, in February, 1876, by Mr. Spink, that G. T. Smith had had one of his machines manufactured at Dexter, in the County of Elgin; that he (Barter) went in the month of May, 1876, to Dexter and St. Thomas to enquire about the fact; that he, having enquired from millers around, could not find any one who knew of any such machine as a Middlings Purifier having been made or offered for sale in that neighborhood; that he verily believes that no such machine as patented under No. 2257 was ever constructed there previous to May 1876.”

5. An affidavit of the respondent, George Thomas Smith, made and signed in Jackson County, State of Michigan, and dated 23rd November, 1876, stating:—

“That he (Smith) had never imported into Canada any of the machines manufactured under his Canadian patents; that he had offered to millers in Canada personally, and through agents, to sell the right to use his inventions for a reasonable compensation; that he never refused to furnish his machines manufactured in Canada; that he did not purchase nor import the machines placed in Messrs. Howland and Spink’s mill at Thorold; that the sale of said machines and the payment thereof was a transaction between the millers and Rakes in which he (Smith) had no interest; that he (Smith) sold to Messrs. Howland and Spink the right of using his process under patent No. 2409, and superintended the arrangements of the machinery for carrying the said process; that his (Smith’s) royalty for the use of his process and machine No. 2257 was the

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“ only profit and emolument which he received
 “ in connection with the said Howland and
 “ Spink’s mill at Thorold.”

6. The statutory declaration made in Toronto, on
 the 22nd day of November, 1876, by Charles Rakes,
 Machinist, of Lockport, in the State of New York,
 stating:—

“ That he had constructed at Lockport the machines
 “ put up in Messrs. Howland and Spink’s mill at
 “ Thorold; that such machines are after American
 “ patents of which G. T. Smith is the patentee,
 “ and are nearly equivalent to the Canadian
 “ Patent No. 2257, and that the distinguishing
 “ feature of No. 2258, namely, the grading reel,
 “ does not appear in the machines set at Thorold;
 “ that the first opening in connection with this
 “ transaction was the meeting of Mr. Spink, in
 “ December, 1875, at the North Buffalo Mills; that
 “ the said Mr. Spink told there, to him (Rakes),
 “ that he had been visiting that part of the State
 “ of New York to enquire into the relative merits
 “ of the various Middlings Purifiers, and that he
 “ (Rakes) had been recommended to him (Spink)
 “ by M. A. Chester, of the firm of Thornton and
 “ Chester, Millers, of Buffalo; that previous to
 “ that interview with Mr. Spink he had not had
 “ any communication with G. T. Smith, nor with
 “ any person on his behalf, in regard to putting
 “ Purifiers in the said mill of Messrs. Howland
 “ and Spink, and that he (Rakes) never said that
 “ he had had such previous communication with
 “ G. T. Smith,—“ the assertion contained in Ben-
 “ jamin Barter’s declaration to that effect is false;”
 “ that on the occasion of the said first interview,
 “ Mr. Spink visited Rakes’ factory at Lockport,
 “ that he (Rakes) visited Thorold, on or about the

" 11th February, 1876, and met there George T.
 " Smith and Mr. Spink, arranging for the sale
 " of the right to use Smith's inventions. They
 " all three went to Toronto to meet the other
 " member of the firm, and it was when returning
 " to Thorold that he (Rakes) finally bargained
 " with Mr. Spink to build the said machines for
 " him at the price of \$350 a piece, free on board at
 " Lockport; that he was to be paid by Messrs.
 " Howland and Spink; was paid \$1100 by them,
 " and looks to them for the balance still due; that
 " he (Rakes) has had, for about two years, an
 " agreement with Smith to furnish millers with
 " Smith's inventions in the United States at stated
 " prices, but not for use in Canada; that at the
 " time that he (Rakes) was putting up the machi-
 " nes in Messrs. Howland and Spink's mill at
 " Thorold, the said Smith proposed to him (Rakes)
 " to undertake the manufacture in Thorold of
 " machines to be used in mills in Canada; that it
 " was expressly proposed by the said Smith that
 " if Mr. James Lawson should purchase the right
 " of using his inventions that he (Rakes) should
 " manufacture the necessary machines at Thorold
 " in Canada; that the said Lawson did not
 " purchase the said right; that he (Rakes) does
 " not recollect having told Barter, in the terms
 " of Barter's declaration, that the bargain for
 " the machines had been made by Smith, if
 " anything were said on the subject it must
 " have been that Smith had concluded an
 " agreement for the sale of the right to use his
 " inventions; that, to the best of his (Rakes') know-
 " ledge, Smith has had no interest or commission
 " or profit in the sale of machines manufactured
 " by him (Rakes) in any case; that he had

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“ travelled a good deal in Canada during the last  
 “ four or five years for the purpose of selling mill  
 “ machinery, and that until within the last year  
 “ or two he saw very little use of, and heard of  
 “ very little demand for, Middlings Purifiers; that  
 “ the connecting machinery to apply Smith’s  
 “ process at Messrs. Howland and Spink’s mill, at  
 “ Thorold, was made by the millwright at the  
 “ said mill, at Thorold, under direction of said  
 “ Smith; that he (Rakes) declined to give an  
 “ *ex parte* affidavit, but expressed his willingness  
 “ to Barter to appear before any judicial authority  
 “ to be examined on oath, that he (Rakes) has  
 “ made the present declaration on account of  
 “ having been informed, by Messrs. Grahame,  
 “ Howland and Ryerson, that the conversation he  
 “ (Rakes) had with Barter was to be made use of  
 “ to influence the decision of the Commissioner  
 “ of Patents, and because the statements reported  
 “ as contained in Barter’s declaration were mis-  
 “ representations and tended to give a false im-  
 “ pression of the facts of this case.”

The following facts were admitted by the parties :

(a.) The petitioner admits that nothing is proved as regards the alleged importation of the invention patented under No. 2258.

(b.) The petitioner admits that he has never made any request to George Thomas Smith for the use of Smith’s patented machines and process.

The following fact was ascertained by the Deputy Minister from the records of the Patent Office :—

1. That the petitioner, Benjamin Barter, obtained a patent for a “Flour-Dressing Machine” on the 20th day of January, 1874, numbered 3014.

Counsel for the respondent argued in substance :—

To avoid a patent on account of non-manufacturing

it is necessary to prove that the patentee has refused to furnish his invention to some one desirous of obtaining it, and to avoid a patent on account of having imported the invention requires the proof that the patentee himself, or his assignee, has imported, or caused to be imported, the said invention.

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Now, nothing of the kind has been proved here. The evidence, such as it is, being only an attempt to establish that Smith did not actually manufacture his machines, and that he was a party to the importation of invention No. 2257, which the petitioner tries to connect with patent No. 2409 for a process,—a position which is utterly untenable. It is plain that machines of a large size and costing several hundred dollars, and especially a process which involves the construction of a mill to apply it to, are not things which may be made in advance of demand and kept in stock. For several years the Canadian millers have waited for the result of experiments carried on in the United States with these Middlings Purifiers, and it is only of late that a demand has been created for them in Canada. The whole evidence given by Barter and his witnesses is mere hearsay, mere conversations filtered through the medium of interested parties. The subsequent declarations of Barter amount to an admission that he tried to get information on what he had already presumed, in advance of such information, to become a witness. Rakes' alleged answers to the enquiring Barter and friends are susceptible of an interpretation very different from that attributed to them in the declarations filed in this case. Smith admits that he did sell to the millers, on payment of a royalty, the license to use his invention; but nothing proves that Smith was the channel through which Rakes undertook to manufacture the machines imported at Thorold; the correspondence between Barter

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and Spink, filed by Barter himself, is proof to the contrary.

The whole evidence adduced by Barter is quite consistent with the interpretation that the negotiations, which have caused the importation of machine 2257, are totally independent of Smith's contract with the millers for the privilege of using his process of milling, or even the imported machine; the whole in fact proves very little more than the Customs records, which show that the goods were sent by Rakes to the miller. To have imported or caused to be imported in the spirit of the statute, the patentee must be either the consignor, the consignee or the owner of the thing imported. Smith is proved to be neither the consignor nor the consignee. Was he the owner? Nothing is proved to show that he was.

There is evidently no proof that Smith, the patentee, did refuse manufacturing for, or selling to, any applicant, and there is no proof that he imported or caused to be imported any of his three inventions; but to add to the want of proof of the petitioner a positive proof that the respondent has done nothing to forfeit his patents, we have filed an affidavit of Smith and a statutory declaration of Rakes the manufacturer.

The petitioner's counsel argued, in substance:—

To start with, the application of the respondent for an extension of time is an admission of non-manufacture, besides containing in words the admission that he did not manufacture. The stringency of the law rests on the word *unless* the patentee does a certain thing, which ought to be construed in its strictest sense because it refers to an exclusive privilege which the legislature intended to restrict in certain defined limits; the patent is a restriction in favor of an indi-

vidual against the public, and these conditions are restrictive upon the individual in favor of the public.

The law is not to be interpreted to mean what it ought to mean or as any one would like it to be, but as it is. The patentee loses his patent "*unless he shall have commenced,*" &c. (see the 28th section hereinbefore cited). To the plain condition of manufacturing, the law adds another condition, which is that it must be done in a manufactory; if the law had stopped at the word *patented*, it might have been made in a cellar, but the Act requires that it must be done openly. The letter of the law must be taken as it is, because it shows the spirit of the law. (Cites *Potter's Dwaris on Statutes.*) (1)

This tribunal has no latitude; it is a court in which the Commissioner, or his Deputy, is not acting as an executive officer, who, in the ordinary dealings of the Patent Office, can exercise a certain discretion and show a certain leniency; here he is bound to take the words of the law. There are cases in which the strict meaning of the law would create impossibilities, such as, for instance, the case of a graving dock being patented; if the law had not provided for such cases it would become necessary to fight for the spirit of the law as applied to an exceptional case; but the statute has provided for such cases by sub-section 2 of the 28th section, which gives to the Commissioner the power of granting an extension of time, which may be for any number of years of the duration of the patent. The letter of the law is binding upon this tribunal as well as upon any court of law.

The three patents of the respondent expired with the two years of delay for want of manufacture. The forfeiture applies to Patent No. 2409, although for a process, as well as to the two others. The law says

(1) P. 193, note 12.

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that this condition is to be inserted in every patent granted ; therefore it is necessary that a meaning be found for that condition as relating to a process as well as to anything else. The patentee did himself admit, in his petition for the extension of time, that he has no more worked the process than the machines. The avoidance on account of importation does apply to the process, inasmuch as the machines are the means to carry the process into operation, as is admitted by the patentee in his petition where he asserts that these machines are necessary for that purpose. In fact, in the question of importation as well as of manufacturing, the process cannot be separated from the machines.

An answer by letter was given the other day by the Patent Office to a question, put at my advice, that the importation of the various parts of a machine to be put together in Canada is, in the meaning of the law, an importation of the invention. That it would have been easy to manufacture these inventions in Canada is fully established ; it is also proved that there was an active demand for them, the circular received by Laurie in 1873 shows that they were in demand.

I am not prepared to say that Smith imported himself, but it is proved that he caused an importation of Invention No. 2257, and consequently of Invention No. 2409. Smith denies having imported the machines, but he does not deny having caused them to be imported. The statute does not speak of the interest the patentee might have in the transaction. Smith got his royalty and superintended the arrangements of these machines. The evidence of Barter, Lawson and Laurie, taken together, with the admission of Rakes and Smith, show that the bargain was entered into between Smith, Rakes and the firm of Howland and Spink.

It is proved that Smith has a written contract with Messrs. Howland and Co., but the last mentioned gentlemen have refused to furnish a copy of the said contract and also refused to give evidence on the subject.

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The respondent's own case shows that Smith has not manufactured, within two years of the date of his patents, any of his machines, and that he has caused to be imported, after the expiration of twelve months from the said date, the machines of Patent No. 2257, and, consequently, the process of Patent No. 2409.

Counsel for respondent argued, in reply, in substance :—

The hearsay evidence and disconnected conversations adduced by the petitioner are destroyed by Rakes' testimony, which gives as proof the history of the whole transaction, which originated out of Smith's knowledge, during a visit made by the miller in the United States for the purpose of examining Middlings Purifiers there, and of selecting the best he should happen to meet with, irrespective of patents or persons. There is not a shadow of evidence to show that Smith did cause the importation ; of course having decided after that visit to adopt Smith's process and machines, the millers had to settle with Smith for his royalty. The law rules that the patentee must allow *any person desirous to use, &c.* (1); but the patentee is not requested to bind the purchaser as to where and from whom the article is to be procured. The patentee is bound to sell the use of his invention ; he is not bound to dictate to the purchasers what tools and what men they (the purchasers) are to employ. It is argued that Smith did not, in his affidavit, say in so many words that he did not cause the importation ; such technical omission has no weight in such a de-

(1) 35 Vic. c. 26, s. 28 ; 38 Vic. c. 14, s. 2.

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claration; Smith denies, supported by Rakes' evidence, that he (Smith) had anything to do with the importation.

A patent is not a matter of privilege, it is a contract, and the interpretation ought to go to limit the conditions of forfeiture and not to extend them. As regards a process there are many ways of carrying the same process into operation, and each particular way of doing it is not necessarily connected with and cannot be taken as being identical with it.

The petitioner's counsel argued in rejoinder:—

That there could not be any doubt about the failure of the patentee to manufacture within two years of the date of his patents; he has not sold or produced any machine or mechanical combination to work his inventions in Canada within the time fixed by law, and he admits this in his petition for an extension of the delay primarily fixed by the statute, and having failed to manufacture his inventions within the extended period, his patents become null and void.

That as regards importation, it is equally clear that Smith has caused this to take place. Howland and Spink clearly could not purchase or import this machine without the assent of Smith, the patentee. Smith assented to the importation before it took place. If he had not given that assent he would have caused it not to be imported; therefore when he gave his assent he occasioned or caused its importation.

TACHÉ, D.M.A. now (February 15th, 1877) rendered his decision.

The importance of this case, serious in itself, is enhanced by the circumstance that it is the first of its kind in Canada, and that the legal interpretation and the appreciation of facts which it involves apply to very many patents granted, and, eventually, to all patents to

be in future granted. For these reasons ample time has been devoted to the study of the question, and it has been thought not only desirable, but almost necessary, to enter at some length into the explanation of the principles and construction of facts upon which the present decision is based.

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It seems proper to take up, first, the preliminary points raised in the case, which were at once decided as stated in the report of the proceedings hereinfore given.

It was asked that it be ruled that the *onus probandi* lies with the respondent, inasmuch as this tribunal, being an exceptional one, not restrained by any form of proceedings or subjected to any special kind of evidence, and having no power to compel witnesses to appear, is bound to exact from the respondent proof that he has complied with the requirements of the law; and, furthermore, inasmuch as to rule otherwise would be imposing upon the petitioner the duty of proving a negative.

The constitution of this tribunal is not of an unknown character; such jurisdiction is given to the administration in many countries; and in some, in the Austro-Hungarian Empire, for instance, that jurisdiction extends so far as to vest in the executive officer the exclusive power of deciding all cases concerning the invalidity or lapsing of patents. This tribunal is not devoid of all means of getting at the truth, the fact of not being restrained by fixed rules of procedure and stringent modes of evidence being a compensation for the want of power to compel the attendance of witnesses. It is self-evident that it was the intention of the law-maker to exact only one condition in the judge's mind in delivering his decision,—that he be convinced of the substantial justice of such decision on sufficient information, no matter how obtained.

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Notwithstanding that this tribunal is not restricted by fixed rules of practice, it is nevertheless bound to abide by the rules of common justice, by the dictation of common reason, and to be enlightened by such decisions as may be held to embody the common consent of mankind.

It is apparent that in this case, being one in which the petitioner urges the forfeiture of an acquired right which the respondent is presumed not to have lost or alienated, the burden of proof cannot be admitted to lie on him who holds a public title which must be taken as good so long as nothing to the contrary is established, even if the evidence involved the proof of a negative. In this case the evidence does not rest on establishing a negative, but on ascertaining the existence of positive facts.

It would not be right, however, to say—and this ought not to be taken as meaning—that in no case should the respondent be forced to make discovery; there might be cases in which, from the position of the parties and the aspects of affairs, this tribunal might be compelled to make use of all the latitude allowed it by the statute, in order to attain the ends of justice. The nature of the 28th section of *The Patent Act*, both in providing against certain mischiefs a certain remedy and in establishing a special tribunal to mete out the remedy, involves a policy which goes, on public grounds, beyond the limits of any particular case to be adjudicated upon. This is evidently the reason why the legislature has selected the Minister of Agriculture to constitute the tribunal to decide such questions, thereby availing itself of his practical knowledge of, and acquaintance with, the nature and bearings of such matters acquired in the daily working and dealings of the Patent Office.

It has been hinted in the argument, that should a

decision intervene declaring a patent null and void, it ought to specify that the patent was void at the date of the expiration of the delay mentioned in the law, and has stood null since to all intents and purposes. As this incidental question touches rights which do not come within this jurisdiction, it appears clear that, in duty and through respect for the higher courts, this tribunal is forbidden from entering such domain, even by expressing an opinion, being bound to restrict its investigations and decisions within the narrowest possible limits. The law orders that the Minister of Agriculture should say "*whether a patent has or has not become null and void,*" consequently the judgment is simply to decide *it has* or *it has not*, as the case may be ; all the consequences that may follow are to be adjudicated upon by the ordinary judges of such disputes between citizens.

There is a view of the subject-matter of patents for inventions invoked in this case which it is of great importance to examine, as bearing in a marked manner on the interpretation and construction to be put upon both law and facts connected with the working of patents ; the question comes to whether a patent should be held as an embarrassing privilege, a kind of onerous monopoly which constitutes the patentee as a sort of adversary to the liberty of the subject, and as opposed to public interest, by the very fact of his holding a position which, then it is argued, should be jealously watched and which ought to be made to terminate at the first opportunity.

It is universally admitted in practice, and it is certainly undeniable in principle, that the granting of letters-patent to inventors is not the creation of an unjust or undesirable monopoly, nor the concession of a privilege by mere gratuitous favor ; but a contract between the State and the discoverer.

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In England, where letters-patent for inventions are still, in a way, treated as the granting of a privilege, more in words however than in fact, they, from the beginning, have been clearly distinguished from the gratuitous concession of exclusive favors, and therefore were specially exempted from the operation of the statute of monopolies.

Invention being recognized as a property, and a contract having intervened between society and the proprietor for a settlement of rights between them, it follows that unless very serious reasons, deduced from the liberal interpretation of the terms of the contract, interpose, the patentee's rights ought to be held as things which are not to be trifled with, as things sacred in fact, confided to the guardianship and to the honor of the State and of the courts.

As it is the duty of society not to destroy, on insufficient grounds, a contract thus entered upon, so it is the interest of the public to encourage and protect inventors in the enjoyment of their rights legitimately, and sometimes painfully and dearly, acquired. The patentee is not to be looked upon as having interests in direct opposition to the public interest, an enemy of all in fact.

"The gain made by the inventor, when his invention "is known will be," says Agnew, "proportionate to "the amount of benefit which the public derive from "the use of it." (1)

"It is almost self-evident," says an able American "author, "or at any rate readily susceptible of proof, "that the magnificent material prosperity of the "United States of America is directly traceable to wise "patent laws and their kindly construction by the "courts." (2)

(1) Agnew:—The Law and Practice relating to Letters-Patent for Inventions. London, 1874, Page 4. (2) Simonds:—Manual of Patent Law. Hartford and New York, 1874. Page 10.

“The increasing development,” says Armengaux, “which inventive genius undergoes, is principally due to the protection, very insufficient as yet, which is granted by most governments to those who are the real promoters of Arts and Industry.” (1)

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These short quotations, which might be easily multiplied almost *ad infinitum*, are to show what view is taken of the matter by writers who have devoted a great deal of their life to the study and practice of the laws relating to the very important subject of inventions, and in the consideration of the influence on public prosperity of patents granted to inventors as the price paid for their discoveries.

The manner in which this tribunal should construe the law was argued in the sense of a strict literal interpretation of words, and quotations were made in support of this view. The soundness of the doctrine propounded in these quotations is undeniable and un denied.

In order that no doubt should exist as to the rules of interpretation adopted in the present decision, it is well to express them in plain terms. It is held that the words of the law constitute the body of the law in which dwells the spirit of the law, and that to separate one from the other would be the death of the law.

The legislature cannot adequately provide for the administration of the statutes, it cannot see into the details necessary to attain the object in view, it cannot foresee the combination of circumstances appertaining to each case; it does not go into the technicality of specific subjects, and it cannot prophecy what uses might be made of the language of the law; hence the necessity of legislation being followed, step by step,

(1) Armengaux :—Guide-Manuel de l'Inventeur et du Fabricant. Paris, 1853. (Préface).

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by jurisprudence. The very words which may be invoked, in a certain sense, as applicable to certain points in one case, might serve to defeat the object of the legislature in another case.

This tribunal, like all others, has to make sure of the intention of the legislature. A certain public advantage is sought for and a mischief provided against by *The Patent Act*, as applied to this case. The duty of the tribunal is, therefore, to see whether the advantage has been virtually and effectually withheld, and whether the mischief has been actually committed, and to apply the remedy, if need be, to attain the object in view, without undue and inadequate detriment to acquired and vested rights.

The provisions of the 28th section of *The Patent Act of 1872* were introduced into Canadian legislation *pari passu* with the extension of the privilege of obtaining patents for inventions, first, to all residents, and second to all-comers. Such provisions as to manufacture and importation do not exist in the patent laws of England or in the present patent laws of the United States, but they do exist in the patent laws of other nations.

The Patent Act of 1869, removing other disabilities, extended the right of obtaining patents to every resident for one year in Canada, and subjected all patented inventions to the condition of manufacturing within three years and of not importing after eighteen months. The decision of the question as to whether or not a patent had lapsed for reason of non-compliance was left to be pleaded and to the ordinary courts to adjudicate. The law of 1872 extended the right of obtaining patents to all-comers, and provided a special tribunal to apply the law in the manner mentioned in the 28th section hereinbefore quoted.

So far, the intention of the legislature, as shown by

the history of legislation, is evidently to guard against the danger of Canadian patents, granted to aliens, being made instrumental to secure the Canadian market in favor of foreign patents to the detriment of Canadian industry; for in the measure that the right of taking patents was extended, the remedy against the dreaded danger was made more ample. But at the same time the jurisdiction over such cases of disputes as might arise was transferred from the judicial tribunals to the administrative tribunals, evidently for the purpose of avoiding an over-strict application of the provision made against the possible evil of a patent being taken for the sole purpose of depriving Canada of the use of a useful invention. The 28th section is also intended as a sort of protective policy in favor of Canadian labor. The legislature has, certainly not without intention, provided for a kind of paternal tribunal, formed by the Commissioner of Patents, the natural protector of patentees, which intention can be no other than that every case should be adjudicated upon in a liberal manner.

The duty of this tribunal is, therefore, on one hand, after having satisfied itself of the facts, to apply the remedy if the mischiefs provided against by the statute have been really committed in intent or effect; and, on the other hand, to guard against the cruel injustice of inflicting such a punishment as the total destruction of an acquired and vested right, when no real damage was either intended or done. The common principle of justice which says that where there is no injury inflicted no damages are to be granted, and that when no offence has been committed no penalty is to be imposed, must govern this matter, as well as the principle that no offender should be sheltered from the punishment for offence or injury perpetrated by him.

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In order to arrive at a correct interpretation of the words *construction or manufacture of the invention*, it is necessary to well understand and carefully consider the nature of the obligation thereby imposed.

As to patents, it applies to *every patent granted*; as to subjects, it applies to every conceivable thing which may be invented or improved; as to persons who have the right to exact it, it applies to all inhabitants of the Canadian Confederacy; as to extent of territory, it applies to the whole Dominion from ocean to ocean, and to every Province and locality therein; as to time, it applies to thirteen out of fifteen years of the longest patent and to three out of five years of the shortest.

This simple enunciation of the nature of things to which the law refers, is sufficient to demonstrate that the law-maker could not have had in contemplation to force, on penalty of forfeiture, the patentee to actually fabricate his invention with his own capital, within specific establishments, with his own tools, and to keep it in stock for every moment of the existence of his privilege; and where? All over the Dominion, and whether he has purchasers or not!

The patent might be for a process, for an object to be used in conjunction with something else, or for an improvement on another patent still in existence; it might be for a railway bridge, switch, or spike; it might be for a mail-bag, and in all these cases it lies within the power of others than the patentee to say whether the invention shall or shall not be used at a given time or at any time.

Therefore, the real meaning of the law is that the patentee must be ready either to furnish the article himself or to license the right of using, on reasonable terms, to *any person desiring to use it*. But again, that desire, on the part of such a person, is not intended by

the law to mean a mere operation or motion of the mind, or of the tongue; but in effect a *bonâ fide* serious and substantial proposal, the offer of a fair bargain accompanied with payment. As long as the patentee has been in a position to hear and acquiesce in such demand and has not refused such a fair bargain proposed to him, he has not forfeited his rights.

If it were necessary to furnish a collateral proof of the intention of the legislature, within the law itself, of requiring on the part of the customers an actual substantial demand or request accompanied with a settlement of royalty, it would be found in section 21, (1) in which an exception to that obligation of demanding is made in favor of the Government, which is, by way of derogation to the general rule, allowed to make use of all inventions without going to the patentee, even during the two years delay, free of any blame for infringement, by resorting to a special and an exceptional mode of settling upon the price to be paid to the patentee.

The same rules of interpretation apply to the provision of the Act as regards importation. The law says that the patent shall be void if, after twelve months of its being granted, "the patentee, or his assignee or assignees, for the whole or a part, imports or causes to be imported into Canada the invention."

The evil aimed at by the legislature, in ordering the penalty of forfeiture, is the importation of patented inventions being made to the detriment of their being manufactured in Canada. If that was done even by other persons than the patentee, or his assignees, but with his consent, that would call for the application of the remedy, although the mere wording of the law might

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(1) Section 21 — The Government of Canada may always use any patented invention, paying to the patentee such sum as the Commissioner may report to be a reasonable compensation for the use thereof. — "The Patent Act of 1872."

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be pleaded as exonerating the patentee from the responsibility of having actually imported or *caused* to be imported. On the other hand the actual importation of a few machines, as models, or for the purpose of bringing the usefulness of the invention before the eyes of the Canadian public and thereby hastening the working of the patent in Canada, could not be reasonably taken as being the commission of the evil of injuring the manufacturing interests of the country. It may be, on the contrary, in some given cases, the best and promptest way of benefiting Canada with a new and yet unappreciated invention; and such an importation of a few models would be fostering the object of the law, which is—that Canadian industry and Canadian labor should, in the shortest possible time, be made to profit by new inventions.

The words *carry on in Canada the construction or manufacture*, with their context, cannot, therefore, mean anything else than that any citizen of the Dominion, whether residing in Prince Edward Island, in British Columbia, in Ontario, Quebec, or elsewhere on federal soil, has a right to exact from the patentee a license to use the invention patented, or obtain the article patented for his use at the expiration of the two years delay, on condition of applying to the owner for it, and on payment of a fair royalty. The words *imports or causes to be imported into Canada* cannot mean anything else than injury to home labor, which injury if actually done by or with the connivance of the patentee most decidedly entails forfeiture of his patent.

It has been argued, in view of meeting the above mentioned interpretation of the words *construction or manufacture*, that the statute has foreseen the difficulties of special cases and has provided for them by subsection 2 of section 28, in giving to the Commissioner the power to extend indefinitely the delay in

such cases as, for instance, would be illustrated by a patent granted for a graving dock.

The purport and effect of sub-section 2 is totally different from, and even at variance with, the meaning given to it in this argument. A delay does not at all remedy the condition of impossibility in which a patentee is to establish, at any time, manufactories accessible to a population scattered over the territory which extends from ocean to ocean, with an area amounting to millions of miles; it does not do away with the impossibility, at any time, of keeping articles in stock without purchasers, and so forth.

But this is not all;—sub-section 2, construed as is proposed by the said argument, would lead to a positive defeat of the intention of the legislature, which clearly is that the patentee must supply Canadian citizens with the invention when requested to do so by any one, on payment of a reasonable price or royalty.

The effect of the delay of two years and the effect of any further extension thereof mean that, during that time, the patentee is permitted to withdraw entirely (the Government excepted) the use of his invention from the Canadian public, that he can refuse the use of it to all and everyone, under any and every circumstance. It follows that the granting of a long delay would amount to depriving, during such time, Canadian industry of the use of such invention, which could not be imported and which the inventor would not be bound to furnish on any condition. As it is logically necessary to carry the argument to the extent that, as there are many cases in which the difficulty exists at all times, the delay, of necessity, should be carried to the whole duration of the patent, it amounts to saying that the Commissioner of Patents is empowered to grant, and in fact forced to grant, that Canada should remain for a long period of time, or

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the whole period of the duration of patents, *quoad* the utility of certain inventions, in a state of industrial inferiority as compared with other countries.

Another proof of the total error of the argument is that the whole of the 28th section applies to "*every patent granted*," precluding, in the very terms of the law, the idea that it intended to deal with particular cases; nay, expressly enacting that the same provisions are to apply equally to all patents, as a matter of course, in the legitimate sense which is naturally and equitably suggested by the nature of things in matters of inventions and patents of invention.

The views taken on the question at issue are fully sustained by the construction and interpretation put on similar or identical legal enactments in other countries. The jurisprudence established, and the doctrine laid down by jurists and patent experts, in countries where the patent laws contain the same provisions as ours about *manufacturing* and *importing*, appear, from extensive reading on the subject, unanimous. It will be sufficient to enter into a short exploration of this ground to prove the assertion of such common consent of nations in the matter.

In England the patent laws do not contain the same prescription as our statute presents, and no *specific* provision is made to secure to the public the use of the invention, or to home labor the benefit of its working; but there exists in the present letters-patent issued in England a proviso which shows, by analogy, what doctrine prevails on the general question of the obligations of the patentee, where he is bound to furnish his invention under pain of forfeiture.

Among the circumstances that cause English letters-patent to "*cease, determine and become void*," is the following: If he, the patentee, "shall not supply or " cause to be supplied for our service all such articles

“ of the said invention as he shall be required to supply by the officers or commissioners administering the department of our service for the use of which the same shall be required, in such manner, at such times and at and upon reasonable prices and terms as shall be settled for that purpose by the said officers, &c.” This shows that it is not supposed that the legitimate obligation of the patentee towards the customer is to keep open shops, to keep stock; but to supply the invention only when requested to do so by a formal demand accompanied with a settlement of the royalty.

Similarly to the laws of England, the present patent laws of the United States do not contain the condition of lapsing for reason of non-manufacturing or of importing; the absence of such provisions from the patent Acts of these two prominent manufacturing countries is, it must be conceded, antagonistic to the idea of Draconian interpretation of the said conditions where they do exist.

The obligation of manufacturing in the United States did exist for a certain time; it was introduced by a short Act in 1832; this Act was repealed by the Patent Act of 1836, but a provision of the kind was maintained in the last mentioned statute. By the 15th section the defendant, in an action of damages, was permitted to plead the general issue. At the end of the enumeration of defects, we read:—“..... or that the patentee, if an alien at the time the patent was granted, has failed and neglected, for the space of eighteen months from the date of the patent, to put and continue on sale to the public, on reasonable terms, the invention or discovery for which the patent issued; in either of which cases, judgment shall be rendered for the defendant with costs.”

The provision of this clause was invoked in one case

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of an assigned alien's rights (*Tatham vs. Lowber*) (1) where it was decided:—

“That even if the plaintiffs took their right with the condition attached to alien patentees, yet they had satisfied the statute: that they need not prove that they hawked the patented improvement to obtain a market for it, or that they endeavored to sell it to any person; but that it rested upon those who sought to defeat the patent to prove that the plaintiffs neglected or refused to sell the patented invention for reasonable prices, when application was made to them to purchase.”

The French legislation, as does the legislation of most countries, contains conditions similar to those of the 28th section of our Patent Act of 1872.

The doctrine and jurisprudence adopted on the subject is amply summed up in the quotations of two eminent writers on patents and patent laws, which will follow after citing the text of the law.

The French law reads thus:—Article 32, “Shall be deprived of all his rights \* \* \* \* \*  
 “2. The patentee who shall not have worked his invention in France, within a delay of two years from the date of the signature, or who shall suspend his operations for two consecutive years, unless he show cause for such inactivity. 3. The patentee who shall have introduced into France articles manufactured in foreign countries similar to those guaranteed by his patent.”

It must be remarked that the proviso at the end of paragraph 2 of the French law is similar in effect to the means adopted by our statute for making the non-manufacturing a *condition* of nullity to take effect only when rendered applicable by an administrative decision. The nullity enacted by the French law can be

pleaded in courts ; the nullity enacted by our Act is *conditional* upon a decision of the Minister of Agriculture, who alone is to say whether the condition is to be enforced or not.

Renouard, after quoting Arago's speech, in the *Chambre des Députés* (1844), against the stringency of the then proposed legislation, goes on to explain how it is to be understood :—

“The tribunals will appreciate, he says, according to circumstances, whether it has been worked or not ; whether or not the working has been interrupted ; if the reasons of not working are sufficiently justified.” (1)

This was said by a magistrate of the highest order and a specialist, in anticipation of the judicial decisions which afterwards confirmed his views of the matter. Many years after, Bédarride, reviewing the jurisprudence established on the subject, recapitulates it, and exposes the doctrine in the following sentences :—

“The spirit of the law is therefore indubitable. It intends to punish only voluntary, premeditated, and calculated inactivity.” (2)

It is to be remarked that Bédarride is not a loose, but rather a strict, interpreter of laws ; he holds that the laws of France do not admit of prætorian interpretation, and are not to be mitigated by the courts no matter how severe and hard they may be. Bédarride again says :—

“The voidance in paragraph 2 of Article 32 touches only voluntary inactivity. The law wishes to punish for inaction only the one who has willingly remained idle. *It would have been really too unjust* to extend the penalty to the one who has abstained on account of circumstances independent of his will.” (3)

(1) Renouard : *Traité des Brevets d'Invention*, Paris, 1844—page 243.

(2) Bédarride : *Commentaires des lois sur les Brevets d'Inven-*

*tion, Marques de Fabrique et de Commerce, &c., &c.*, Paris, 1869—Volume I, page 448.

(3) Bédarride, Vol. I page 450.

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As regards the importation, Bédarride says :

“The prohibition having for its unique object the protection of national labor, it would have been unreasonable to extend it to cases in which such protection could not be injured.” (1),

“The judicial authority, exclusively inspired by this spirit, refused to apply the penalty of forfeiture when the importation, *although unauthorized*, was not in its nature susceptible of damaging national labor.” (2)

“It is proper to decide to-day as it was decided by the Courts of Douai and Paris in 1846 and in 1855. It should not be considered as a violation of the prohibition of the law, where the importation is a few specimens of the articles, or the importation of machines, having no other object in view than to find either associates or licensees for the invention.” (3)

It would only be a matter of time and labor to extract similar authorities and decisions from the records of other countries, where the laws are either identical or similar to our statute in this respect. All this shows, to borrow the very words of Renouard, “how the practice of nations solves, by common sense and experience, the questions raised by necessity.....”

The questions of law having been thus established, it remains to examine the facts of the case and to confront them with the meaning of the statute. The evidence adduced is ample to give any one a clear and unmistakable knowledge of the state of affairs.

As to manufacturing, it is proved that none of the respondent's inventions were put up in Canada within the time prescribed ; but no proof is given that he has refused to furnish them to anyone at any time. On the contrary, it is shown in the clearest manner

(1) Bédarride, Vol. 1, p. 455. (2) *Ibid.* Vol. 1, p. 457.  
 (3) *Ibid.* Vol 1, p. 463.

that he has not been requested by any one to be supplied with them during the time of inactivity.

As to importation, it is proved that the machines imported at Thorold by Messieurs Howland and Spink, more than twelve months after the date of the patent, are Smith's invention No. 2257; that Smith was neither the consignor nor the consignee, nor the owner thereof; that he did not actually import them but that he consented to the importation, which action amounts to causing them to be imported. It is clear that Smith's consent in this instance was not intended to defy the law, that it did not cause any appreciable injury to Canadian industry, but had for its object to bring the merits of his patents and process before the Canadian public, with the honest intention of manufacturing in Canada, as his efforts to introduce his process in Lawson's mill prove.

The petitioner, aiming at the Process of Milling patented under No. 2409, has tried to connect Patent No. 2257 with Patent No. 2409, as being necessarily dependent on each other in the way of cause and effect or rather object and means, but has failed in that, and by his evidence has, in fact, proved the contrary of his proposition, in establishing that Smith's process does not require any special plant or machinery, but can be added to any mill by ordinary tools and workmanship, and with ordinary materials, which is, besides, made plain by a careful study of the patents.

The petitioner has also tried to prove unwillingness on the part of the patentee to furnish the Canadian market at the same time that an active demand is alleged to have existed in Ontario for several years for such processes of milling as Smith's, an assertion which is poorly sustained by Barter's third declaration and his own Trade Circular (hereinbefore analysed),

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and by the fact that one of the witnesses who makes this assertion, Mr. Lawson, had no Middlings Purifiers of the sort in his own mill at Thorold, in May, 1876, when he refused the offer made by Smith to himself (Lawson) to have one put up for him, he having objected to the ordinary price charged for royalty.

The petitioner insisted on the point that the three petitions of the respondent (documents hereinbefore analysed) are a virtual admission of his having failed to comply with the exigencies of the statute. It would be hardly fair to take even an unconditional admission of the sort, made under the circumstances and in error, as carrying with it the necessary destruction of the patent. The petitions referred to are not, however, an admission of that kind. The patentee, after a statement of facts, says he "submits that his acts as aforesaid are a sufficient compliance with the terms of the said 28th section of *The Patent Act of 1872*"..... He has been unable, "for reasons aforesaid, to comply literally with the terms of the said section," and he concludes by asking for a "declaration that the said patent has not become forfeited," and also for "an extension of time to commence the manufacture."

It is clear that the patentee was conscious of having complied with the spirit of the law, but was apprehensive of the interpretation given to the words on account of threats. He asked for an extension of delay, a long time after the expiration of the statutory delay, which extension can, of course, be granted by the Commissioner only as a continuation (without interruption) of the respite of which it is the mere prolongation. When the statutory delay has expired, a patent then is either voided or in operation, according to the spirit of the law, and no other proceeding

on the point in question can intervene, unless a dispute is raised.

These few remarks seem sufficient to show the real meaning of this incident, and to prove that the fact of the patentee having presented the said petitions, or the terms of such petitions, cannot, in the least, affect his position.

The counsel for the petitioner has argued in favor of the conclusions of his dispute from an official answer given to a letter written to the Patent Office, at his (the counsel's) advice, *pendente lite*. As this is a matter of constant occurrence, and as it gives an occasion of showing how necessarily different is an answer to a question put in the abstract from an decision of a case presented with all its bearings and particulars, it is of importance to the Patent Office and to the public to dispose of the argument.

The letter written contained the following question :—“Is it considered as ‘*construction*’ sufficient to hold the patent, if an article composed of various parts is *imported in parts* and put together and constructed in a Canadian manufactory?”

The letter in answer was as follows :—“You ask if the manufacturing clause of *The Patent Act* would be complied with by importing the whole of the parts of a machinery to be only put together in Canada? Evidently this would not be in compliance with the requirements of the law.”

To such an interrogation no other than an answer based on the supposition of a breach of the law could be safely given. But if, departing from the abstraction of the above given question, the investigation were made as regards a certain patent, under specific circumstances, the conclusion might be widely different from the general answer. In fact, it is not difficult to imagine a case in which the importation of

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all and every one of the component parts of an invention, to be simply put together in Canada, would not be an *importation* within the meaning of section 28 of *The Patent Act*, but, on the contrary, would be the only means of obeying the statute as to manufacturing, and therefore, to all intents and purposes, a full compliance with the spirit of the law and the nature of the contract. Such would be, for example, the case of a patent granted for a *composition of matter*, all the ingredients of which would be products not to be found in the country; a compound of exotic gums and extracts, for instance, or a medicine composed of portions of tropical plants.

This is sufficient to illustrate the difference of cases, every one of which must stand on its own merits, viewed in the light of the facts confronted with the spirit of the law.

The conclusion is, that the respondent,—having refused no one the use of his inventions, and the importation, assented to by him to be made, being inconsiderable, having inflicted no injury on Canadian manufactures and having been so countenanced, not in defiance of the law, but evidently as a means to create a demand for the said inventions, which the patentee intended to manufacture and did, in fact, offer to manufacture in Canada,—has not forfeited his patents.

Therefore, George Thomas Smith's Patents No. 2257, for a "*Flour Dressing Machine*," No. 2258 for a "*Flour Dressing Machine*," and No. 2409 for a "*Process of Milling*" have not become null and void under the provisions of section 28 of *The Patent Act of 1872*.