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Sept. 17.

JOSEPH BROOK.....PETITIONER ;

AND

ELIZABETH K. BROADHEAD.....RESPONDENT.

*Patent—Manufacture of in Canada—The Patent Act (R. S. C. c. 61) s. 37  
—Interpretation.*

Section 37 of *The Patent Act* (R. S. C. c. 61) does not require the patentee, or his legal representatives, to personally manufacture his invention in Canada. So long as he puts it within the power of such person to obtain the invention at a reasonable price in Canada, he fulfils the requirement of the statute.

**PETITION** to the Minister of Agriculture, bearing date the 25th April, 1888, to have declared null and void the patent No. 6375, granted to L. W. Whipple, on the 31st July, 1876, for “improvements on machines for making napped fabrics,” on the ground that the invention had not been manufactured in compliance with the 37th section of *The Patent Act* (R. S. C. c. 61.) (1).

(1) SECTION 37.—Every patent granted, under this Act, shall be subject and be expressed to be subject to the condition that such patent and all the rights and privileges thereby granted shall cease and determine, and that the patent shall be null and void at the end of two years from the date thereof, unless the patentee or his legal representatives, within that period, commence, and, after such commencement, continuously carry on in Canada the construction or manufacture of the invention 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 legal representatives or his assignee 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 if any dispute arises as to whether a patent has or has not become null and void under the provisions of this section, such dispute shall be decided by the Minister or the deputy of the Minister of Agriculture, whose decision in the matter shall be final :

2. Whenever a patentee has been

In November, 1876, the patent was assigned to one Harriet T. Strong, who in March, 1882, assigned to the respondent. The machine is capable of manufacturing different classes of goods.

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The respondent denied the allegations of the petition, and pleaded want of good faith on the part of the petitioner.

September 3rd, 1889.

The case was heard before the Deputy Minister of Agriculture.

*Gundry and Powell* for petitioner ;

*Moffatt and Fisher* for respondent.

The petitioner's evidence consisted of his own and other statutory declarations, and of certain letters and contracts, by which it was established that in the year 1882, by deed of agreement, the respondent, for the royalty therein specified, licensed and conveyed to the Penman Manufacturing Company of Paris, Ontario, for the term of the patent, the right to manufacture horse and bed blanketings, and agreed to supply the patented machine for this purpose, at a certain rental,

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 term, grant to the patentee an extension of the term of two years on his proving to the satisfaction of the commissioner that he was, for reasons beyond his control, prevented from complying with the above conditions :

3. The commissioner may grant to the patentee, or his legal representatives or assignee for the whole or any part of the patent, an ex-

tension for a further term not exceeding one year beyond the twelve months limited by this section, during which he may import or cause to be imported into Canada the invention for which the patent is granted, if the patentee or his legal representatives, or assignee for the whole or any part of the patent, show cause, satisfactory to the commissioner, to warrant the granting of such extension ; but no extension shall be granted unless application is made to the commissioner at some time within three months before the expiry of the twelve months aforesaid, or of any extension thereof.

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the machine to remain her property and be returned to her at the expiration of the contract ; that three machines were thus supplied ; that the respondent by the deed divested herself of the right to manufacture or license others to manufacture the above class of goods. In April, 1884, another agreement, similar to the above, was entered into by the same parties, for a certain other class of goods ; it was further agreed that the Penman Manufacturing Company should not do anything to vitiate or lessen the interest of the respondent in the patent ; that in the spring of 1888, the petitioner visited the machines at the Penman Company's factory, with a view of procuring one, but found that his mill was not large enough to accommodate it ; that in March last, the petitioner wrote to Mr Broadhead, the husband and business manager of the respondent, stating that he had made some changes in his mill, and had a notion to go into the blanket business, and buy one or two of the machines, and asking the price thereof ; that Mr. Broadhead replied referring him to the contract by which the Penman Manufacturing Company had the exclusive right to manufacture these goods, and requesting him to make an arrangement with them, alleging that he would have no difficulty in doing so, as the company wanted to give up the business, as it was out of their line of trade, and that with regard to the machines, the respondent did not sell them, but would supply and lease them to him on the same terms as those made with the Penman Company ; that the petitioner stated in his declaration, that he would have used the machine in his factory, if he could have procured it.

The respondent's evidence consisted of her own and other statutory declarations, of certain letters and a telegram, and also the verbal testimony of her husband. By this evidence it was established, that before acquir-

ing the patent, the respondent had satisfied herself of its validity, and that the requirements of *The Patent Act* had been complied with ; that the invention had been manufactured in Canada within two years from the date of the patent and continuously therefrom, in the manner required by *The Patent Act* ; that immediately after the respondent acquired the patent, Mr. Broadhead canvassed the whole country trying to find a market or purchaser for it, but without success ; that there was no demand for it, until he succeeded in getting the Penman Manufacturing Company to take hold of it ; that one machine running full time would make more blankets than would be required to supply the demand of the whole Dominion, and could be made at any ordinary factory in about ten or fourteen days ; that the Penman Manufacturing Company never used more than one machine, and only occasionally, to make blankets, and they made more than the demand warranted ; that three machines supply the demand of the whole of the United States ; that the Penman Manufacturing Company, early in the present year, wanted to give up the business, and requested Mr. Broadhead to try and get some one to take it off their hands, at the same time informing him that the petitioner had declined to take it, not having room for it ; that Mr. Broadhead tried to get some one to take up the business, but without success ; that the Penman Manufacturing Company were the agents of the respondent in Canada, and had the power to sell or license to others the right to manufacture the goods upon payment of a royalty, while the respondent reserved the right to lease and supply the machines ; that she was at all times and still is ready and able to do so and never refused to supply them to anyone ; that the petitioner refused to obtain or use the machine unless he could buy it absolutely ; that the Penman Manufacturing Company having omitted to

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pay the royalty stipulated by the above contracts, the respondent, in the month of February last, instituted legal proceedings to recover the same and which are still pending; that the offer of the petitioner to purchase the machine was not serious nor made in good faith, but was made at the instance, and to serve the the purpose, of the Penman Manufacturing Company, in view of the pending lawsuit above referred to. This evidence is supplemented by the statutory declaration of one J. Thompson, who was the agent of Mrs. Strong while she held the patent, in which he states that the invention was manufactured in Canada within two years from the date of the patent. In the month of May last, Mr. Moffatt, the legal attorney of the respondent, wrote to the petitioner offering, on her behalf, to furnish him with a machine, at a reasonable price, if he should make a serious, *bonâ fide* and substantial proposal for it.

For the petitioner it was contended, that the allegations of the petition were fully sustained, and that Dr. Taché's ruling in *Barter v. Smith* (1), to the effect that the patentee was not bound to keep his invention in stock so long as he was ready to furnish it, or license the right of using it to any person desiring it, was erroneous; that, on the contrary, the patentee is bound to have it ready on hand to deliver it at any time to any one requiring it, and that the respondent had rendered herself unable either to supply or license the invention to any one by the terms of her contract with the Penman Manufacturing Company.

For the respondent it was argued, that the provisions of *The Patent Act* had been fully complied with; that the petitioner never seriously offered to purchase the machine, but his offer was the result of a conspiracy between him and the Penman Manufacturing

(1) Reported *ante*, p. 455.

Company, in the hope of defeating the respondent in the lawsuit above referred to.

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LOWE, D.M.A. now (September 17th, 1889) rendered his decision.

The main subject for the consideration of this tribunal is to ascertain whether the allegations in this petition are supported by the evidence adduced. The 37th section of *The Patent Act* does not require the patentee or his representative to manufacture the invention personally, but in such manner that any person desiring to use it may obtain it at a reasonable price. The evidence establishes that these conditions were complied with. The petitioner is the only person who is proved to have applied for it, and he could have obtained it, as he knew, from the Penman Manufacturing Company, and indeed from the respondent as well, as shewn by the letters of the company, and that of Mr. Moffatt above referred to; but he refused to have anything to do with it because he could not, as he expressed it, buy it out and out from the respondent. This was not required of the respondent by the terms of *The Patent Act*, as above stated, and as is clearly and ably shown at length by Dr. Taché in the case of *Barter v. Smith* (1), the ruling in which has been accepted as the settled jurisprudence on this subject.

I therefore decide that the patent, No. 6375, granted to L. W. Whipple, on the 31st of July, 1876, for "improvements in machines for making napped fabrics," has not become null and void, under the provisions of section 37 of *The Patent Act*.

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(1) Reported *ante*, p. 455.