BETWEEN

THE CLINTON WIRE CLOTH COMPANY ..... } PLAINTIFFS;

AND

THE DOMINION FENCE COMPANY, LIMITED, *et al* ..... } DEFENDANTS.

1907
March 25.

Patent for invention—Wire fences—Electrical welding—Infringement—Pioneer invention—Broad construction.

The defendants had made for them and had used a machine for making wire fences, the wires being, by the use of electrical currents, welded automatically at their points of intersection. It differed in a number of details from the machine described in the plaintiff's patent, but it made the same product in a similar manner and with similar devices.

Held, that giving a broad construction to the plaintiff's patent as being the first in which a successful method was devised and pointed out of making wire fences and other like products in the way described in such patent, the defendants had infringed the same.

ACTION for damages for the infringement of a patent for invention.

The facts of the case are stated in the reasons for judgment.

December 11th, 1906.

The case was tried at Toronto.

January 7th, 1907.

The case was argued at Ottawa.

W. Cassels, K.C., and *A. W. Anglin*, for plaintiffs;

J. B. Clarke, K.C., for the defendants.

Mr. *Cassels* contended that the plaintiffs' patent should be upheld because down to the time of its issue there had been a series of unsuccessful efforts by inventors to turn out some apparatus that would effectually and auto-

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matically make this woven wire fabric, which is of such enormous value to the fence industry. Perry's electrical welding machine was the first successful invention to emerge from all this experimentation. As soon as Perry had obtained his Canadian patent the defendants immediately started to get up a machine which would turn out the same fabric as that produced by Perry's invention. They applied to the Thompson Company in the United States and they replied that such a machine could not be made without infringing Perry's patent. The defendants then set about to make a machine for themselves, not utilizing Bates and Hutchins' machine, which was useless, but bringing upon the market a machine which is identical in every respect with the machine covered by the plaintiffs' patent. Then the defendants come here and ask the court to destroy the plaintiff's patent, not contending that the invention as a whole was ever before known, but simply that the art of electric welding was old. They say that as certain separate elements set up in the claims are old, that this heretofore unknown and unused combination of devices to produce a welded wire fabric is void for anticipation. Yet they failed to prove that in the state of the art at the time of the application for Perry's patent a skilled mechanic could, without invention, produce the machine. On the other hand, the evidence discloses that not only was this combination not known at the time of the Perry patent, but that all devices looking to a similar product were failures. (Cites *Terrell on Patents* (1); *Cannington* v. *Nuttall* (2); *Griffin* v. *Toronto Railway Company* (3).

Mr. *Anglin* followed for the plaintiff, contending that the various patents produced in evidence all demonstrated that the Perry machine was essentially a new thing when patented. On the question as to the liability of the direc-

(1) 4th ed. 78.

(2) L. R. 5 H. L. 216.

(3) 7 Ex. C. R. 411.

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tors of an infringing company, he cited *Edmunds on Patents* (1); *Frost on Patents* (2); *Spencer* v. *Ancoats Vale Rubber Company* (3); *Day* v. *Davies* (4); *Robinson on Patents* (5).

Mr. *Clarke*, for the defendants, contended that the state of the art at the time of Perry's application for the patent in question precluded his right to a monopoly; his patent is invalid for want of novelty and there is no invention or subject-matter within the meaning of those terms in patent law. The art of wire fence making was highly developed at the time, and the only improvement Perry sought to make was to substitute for a twisting device for joining the strand and stay wire, an electric weld at the joints. Now, there is nothing new in the application of Perry's electric weld; he simply applies a well-known art to the manufacture of wire fences, a matter that discloses no invention at all. All he did was to exercise ordinary mechanical skill and embody that which had been already disclosed in connection with two well-known arts. *Birmingham Cement Manufacturing Company* v. *Gates Iron Works*, (6); *Packard* v. *Lacing Stud Company* (7).

Mr. *Anglin*, replied, citing *Proctor* v. *Bennis* (8); *Betts* v. *Menzies*, (9); *Patterson* v. *Gas Light and Coke Company* (10); *General Engineering Company* v. *Dominion Cotton Mills* (11).

The JUDGE OF THE EXCHEQUER COURT now (March 25th, 1907) delivered judgment.

The plaintiff company brings its action against the defendants for an alleged infringement of Canadian Let-

(1) 2nd ed. 364.
(2) 2nd ed. 599.
(3) 6 Cutl. R. P. C. 46.
(4) 22 Cutl. R. P. C. 34.
(5) Vol. 3, p. 79.
(6) 78 Fed. Rep. 350.
(7) 70 Fed. R. 66.
(8) L. R. 36 Ch. D. 740.
(9) 1 E. & E. 990.
(10) L. R. 2 Ch. D. 812.
(11) 6 Ex. C. R. 309.

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ters Patent numbered 68,649, bearing date the eight day of September, 1900, granted to John Cranston Perry for alleged new and useful improvements in machines for making wire fences The invention, according to the specification, has relation to machines for making wire goods such as fences, mats, lathing, barbed wire, etc., and has for its object to provide a machine of the class specified, having provisions for automatically welding the crossed wires at their points of intersection, and thereby obviating the necessity of coiling the wires at said points whereby a greater quantity of finished product is turned out from a given amount of wire than heretofore. A further object of the invention is to provide the machine with automatic mechanism by means of which its general efficiency is enhanced, its movements are rendered even and accurate, and its product turned out neatly finished and in a high state of excellence. To these ends, it is stated, the invention consists of a wire fabric machine possessing certain characteristics, or features of construction and arrangements of parts, as illustrated by the drawings described in the specification, and pointed out with particularity in the forty-seven claims with which the specification concludes.

At the hearing, the case for the plaintiff was rested upon the five claims following:

"6. A machine of the character specified comprising a plurality of welding devices, adjustable mechanism for feeding wires to said welding devices and a support on which said welding devices are mounted adjustably with relation to each other.

"7. A machine of the character specified comprising a pluralty of electrical welding devices each including electrodes and a transformer, a main circuit in which said welding devices are arranged in multiple arc, and a circuit controller for each welding device.

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"33. A machine for making wire fence comprising means for feeding the strand wires, means for feeding the stay wires transversely thereof, and means for electrically welding said wires at their points of contact.

"36. A wire-welding machine comprising means for supporting a plurality of intersecting wires and means for automatically welding said wires at their intersections, said means including a plurality of transformers and electrodes and one or more circuit breakers; and

"40. A machine of the character specified, comprising a plurality of electrical welding devices, each including electrodes and a transformer, a main electrical circuit having a branch leading to each of said welding devices, a circuit close for each branch circuit and means for automatically operating said closers in succession."

The issues on which the case went to trial are these:

1. That Perry was not the first and true inventor of the alleged invention.
2. That there was no novelty in it.
3. That it was not useful.
4. That there was no invention or subject matter; and
5. That the defendants had not infringed.

In stating the conclusions I have come to in respect of the several issues stated, I wish further to limit the case by omitting from consideration claims numbered respectively thirty-three and thirty-six. As to these I express no opinion one way or the other and my findings are to be taken as having no reference thereto; but to the claims numbered respectively six, seven and forty only. Limiting the issues to these claims I have no difficulty in finding the first four issues mentioned in favour of the plaintiff. The fifth issue, namely, as to whether or not the defendants have infringed the plaintiff's patent, presents greater difficulty. The defendants have had made for them and have used a machine for making wire fences, the wires being by the use of electrical cur-

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rents welded automatically at their points of intersection. It differs in a number of details from the machine described in the plaintiff's patent; but it makes the same product in a similar manner, and with similar devices. If a somewhat broad construction is given, as I think it ought to be given, to the plaintiff's patent as being the first in which a successful method was devised and pointed out of making wire fences and other like products in the way mentioned, then I think the proper conclusion would be that the defendants have infringed the patent in question. In that view I find the fifth issue also in favour of the plaintiff.

With regard to the judgment, the plaintiff company does not ask for damages against any of the defendants. The injunction prayed for will go against them all, and there will be an order that the infringing machine, (without the drum) be delivered up to the plaintiff company. There will be costs against all the defendants, excepting Reive and Bundy, but against Harrington as liquidator, and not against him personally.

*Judgment accordingly.**

Solicitors for plaintiffs: *Blake, Lash & Cassels.*

Solicitors for defendants: *Clarke, Bowes & Swalbey.*

* On appeal to the Supreme Court of Canada, this judgment was affirmed.