

Duryea established the necessary plant, machinery, etc., to manufacture starch according to his in suspension process, and demonstrated, to the satisfaction of the defendant company, its commercial value, and starch has been and still is manufactured under this process and sold as "Diamond D."

Under sec. I., clause 3, the company, desiring to use this process, so notified Duryea, and on the 1st October, 1908, reimbursed him the cost of his outlay by the payment of \$1,000. This gave the company the right, at the expiration of the agreement, to an assignment of the Canadian starch patent or a license to manufacture under sec. VIII., clause 1, subject to payment of royalty. Two questions arise upon this clause, the discussion of which can best be postponed—the form of the grant or license, and the amount of the royalty to be paid.

The plaintiff denied the right of the company to the license, because he alleged that the company had failed "to apply fair and energetic trade methods in marketing" this Diamond D. starch. It was well established that fair and energetic trade methods were used; and upon the argument it was admitted that this contention absolutely failed.

On the 25th March, 1911, a notice was served, purporting to cancel any rights under the agreement, by reason of the failure to pay royalties.

As the action was commenced on the 18th November, 1909, for the purpose, *inter alia*, of having it declared that the company had no right to a license, it is obvious that this notice cannot be relied on, for two reasons: (a) because the plaintiff's rights must be ascertained and declared as of the date of the writ, and at that time no royalty was due; (b) because the plaintiff had denied and by his action was denying the right to a license, and this excused the company from making any tender of the royalty.

The agreement for a license, upon the principle established in *Walsh v. Lonsdale*, 21 Ch. D. 9, was equivalent to a license; and the company were, therefore, entitled to manufacture and sell the modified starch.

In the manufacture of this modified starch, knowledge and skill, not to be acquired from the patent itself, are necessary in order to enable the company to obtain the best results. The nature of this special knowledge and skill was not disclosed upon the hearing, but it was said that it related to certain secret testing methods, necessary to enable any predetermined degree of modification to be readily and accurately obtained.

This is the very thing which Duryea agreed to give to the company. The agreement provides that he "shall disclose . . .