

termining the rights of the parties can be proved, and consequently can be pleaded—but the Court will not allow any fact to be alleged which is wholly immaterial and can have no effect upon the result: *Rock v. Russell*, 84 L. T. J. 45.

Now, when a patentee knows of another person using his patented methods, he may say that that other is either (A) right or (B) wrong. He may say that he is (A) right because (1) the patent is invalid and the processes are open to the world, or (2) the user has been licensed by the patentee or has in some manner, directly or indirectly received the right so to use the patented methods from the patentee. In the former case, A (1), of course no action lies; in the latter, A (2), an action will or will not lie according as the user has or has not agreed expressly or by implication to pay the patentee or do something which is equivalent to paying for the right to use the patent.

If an action is brought for payment, the user may, of course, deny that he is using the patent under any agreement to pay, etc., or that he is using it at all. But, if he admits the use under the agreement, unless there be an express or implied warranty of the validity of the patent, or fraud is alleged, it is obvious that the validity of the patent is wholly immaterial—he has promised to pay, and the action is on the promise.

He may, of course, plead fraud, which is at the common law a form of non-assumpsit (though since the Common Law Procedure Act, at least, it must be specifically pleaded), because, when a contracting party discovers the fraud and repudiates the contract for that cause, he asserts that the contract is not in existence—whereas, if he does not repudiate, but goes on under the contract, he is considered to have waived the fraud and ratified the contract. The ordinary plea of fraud, therefore, contains an averment by implication that the defendant repudiates the contract on discovery of the fraud: *Dawes v. Harness*, L. R. 10 C. P. 166. Such a plea was made in *Lovell v. Hicks*, 2 Y. & C. Ex. 46, 481 . . . , *Hayne v. Maltby*, 3 T. R. 438 . . . *Chanter v. Leese*, 4 M. & W. 295. Or the defendant may set up an express warranty of the validity of the patent. That would go to the basis of the contract, and, of course, the invalidity of the patent would require to be proved. In both these cases, the invalidity of the patent could be pleaded as a defence. Cases of an express warranty are such as *Mills v. Carson*, 10 R. P. C.; *Wilson v. Union Mills Co.*, 9 R. P. C. 57; *Nadel v. Martin*, 20 R. P. C. 735.

As to an implied warranty . . . the Courts early decided that in the ordinary case of the sale or license of a patent there is no implied warranty . . .