

Case No. 4,565.

EVANS v. KREMER.

{Pet. C. C. 215;¹ 1 Robb, Pat. Cas. 66.}

Circuit Court, D. Pennsylvania.

April Term, 1816.

PATENTS—INFRINGEMENT—DEFENCE OF PRIOR USE—EVIDENCE.

If to an action for a violation of a patent right, the defendant plead the general issue; it is sufficient in the notice of special matter to state, that the plaintiff is not the original inventor of the machine, for which the patent has been obtained, if the defence is founded on such an allegation; and it is not necessary to state in the notice, who was the inventor, or who had previously used the machine. If the notice specifies some persons who used the machine, the use thereof by others may be given in evidence.

This was an action, for the violation of the plaintiff's patent right to the hopper-boy, part of his machinery for manufacturing flour. Upon the general issue, the defendant gave the plaintiff notice in writing, that at the trial, he should contend, that the plaintiff was not the original inventor of the hopper-boy, but, that the same had been used long before the plaintiff's discovery, in certain mills, which were mentioned by name in the notice. The defendant at the trial proved, that a hopper-boy had been used in the mills so specified in the notice, some years before the date of the plaintiff's first

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patent; and was proceeding to prove the use of it in other mills, not specified in the notice. This was objected to.

Ingersoll, Rawle and C. J. Ingersoll, for plaintiff.

Binney, Sergeant and J. R. Ingersoll, for defendant.

WASHINGTON, Circuit Justice. That the plaintiff was not the original inventor, is a plea in bar, and if this be the ground of defence, the plaintiff must come prepared to prove that he was. Had the defendant filed a special plea on this point, he need not have set out in his plea, the particular facts on which the plea was grounded, or specified the mills, where the hopper-boy had been used. Neither was it necessary for him to make such specification in his notice, when he chose to avail himself of the permission, granted by the act of congress [1 Stat. 322], of pleading the general issue, and giving the special matter in evidence. The special matter of the defence is, that the plaintiff is not the original inventor, for that the machine was known and used before the time when he claimed to be the inventor; and notice of this was sufficient without being more specific. This was sufficient to prevent surprise, and to warn the plaintiff to be prepared to maintain his title, in relation to the question of original discovery. To go further, might lead, step by step, to introduce a degree of nicety and precision in these notices, which would be productive of great inconvenience, and would render the privilege of pleading the general issue, rather disadvantageous to the defendant, than a benefit. The evidence was admitted.²

Before the opening was concluded, the plaintiff's counsel, because of the absence of their client suffered a nonsuit.

NOTE [from 1 Robb, Pat. Cas. 66]. The act of July 4, 1836 [5 Stat. 117], provides that whenever the defendant relies upon the fact of a previous invention, knowledge, or use of the thing patented, he shall state in his notice of special matter the names and places of residence of those who he intends to prove possessed such prior knowledge of the thing, and where the same had been used.

[NOTE. For other cases involving this patent, see note to [Evans v. Hettick, Case No. 4,562.](#)]

¹ [Reported by Richard Peters, Jr., Esq.]

² In the case of [Evans v. Eaton](#) [Case No. 4,559], the circuit court of Pennsylvania having admitted testimony similar to that which was allowed to be given in this case, upon the same notice; an exception was taken to the opinion of the court, and the principles laid down by the circuit court, in the case of [Evans v. Kremer](#), were recognized and affirmed, by the supreme court of the United States. [[Evans v. Eaton](#)] 3 Wheat. [16 U. S.] 503.