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Plant Patents as Applied to Avocados

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At different times during the last fifty years bills have been introduced in Congress designed to broaden the U. S. patent laws to include the patenting of plants. All such efforts failed until 1930, when an amendment including plants in the patent laws was passed unanimously and was signed on May 23, 1930 by President Hoover. No doubt the sentiment behind this action was to do something for agriculture by extending the benefits of the patent laws to farmers. While most nations have patent and copyright laws, this, so far as is known, is the first attempt ever made in the world to extend patent rights to plants. The administration of the law presented many new and strange problems to the U. S. Patent Office, the technical staff of which did not include botanists or horticulturists.

The grant of a plant patent gives the holder the right to exclude all others from reproducing, using, or selling his patented plant for the term of seventeen years. The law excludes from patent right all plants propagated by seeds such as wheat and cotton, and plants reproduced by tubers such as Irish potatoes and Jerusalem artichokes. It specifically covers plants capable of asexual reproduction such as apples, oranges, prunes, avocados and other budded or grafted plants as well as small fruits, berries, dahlias, roses, chrysanthemums, carnations, etc.; plants which root from cuttings such as grapes, and also mushrooms.

The person applying for a patent must show that his plant is new and distinct from other plants, and that it was not known or used by others in the United States before his discovery, and not described in any printed publication in the United States or foreign country before his discovery or more than two years prior to his application, and that it was not in public use or sale in the United States for more than two years prior to his application.

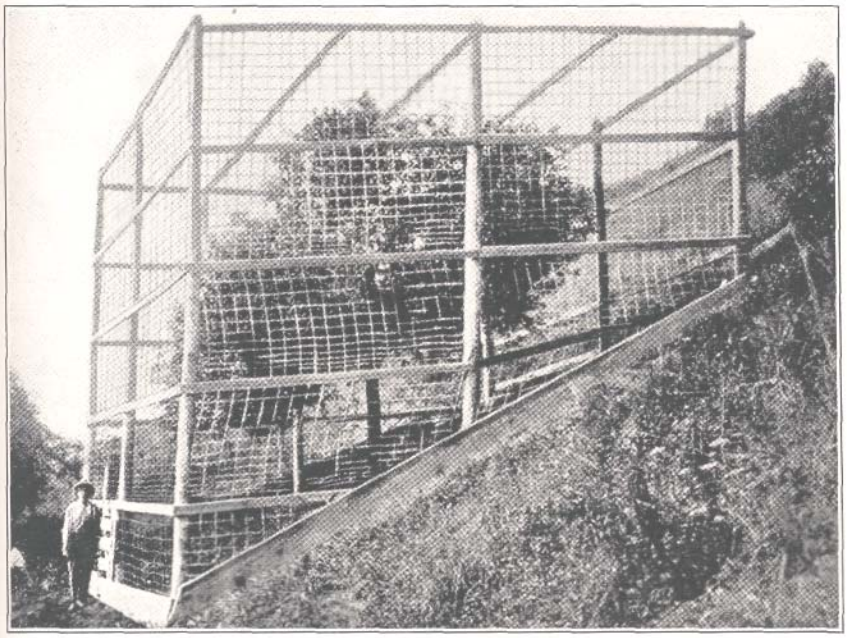
It should be emphasized that the patent is a grant of the "right to exclude others" from its use. This right can only be enforced through the Federal Courts in regular lawsuits which, if successful, may result in injunction to stop violation and such money damages as may be proved. A separate lawsuit is necessary for each person or firm violating.

Farmers should take particular note of the fact that there is nothing in the patent law which requires the new plant to be better than others in any particular. Officials of the Patent Office are concerned only with the question of whether the plant is sufficiently different to permit of identification by description and illustration. The patent office has established a new series of numbers beginning with "Plant Patent No. 1" and there is nothing in the law requiring a name in addition to number. In fact, names are ignored by the Patent Office.

It is required of every patentee that he give sufficient notice to the public by marking the patented plant. If, after a time, the marks disappear from the plant, and the patent is

infringed by unauthorized reproduction, then in case of suit for infringement no money damages can be recovered by plaintiff, except on proof that the defendant was duly notified of the infringement and continued after such notice to propagate, use, or sell said plant.

The costs of securing a plant patent vary. They consist of about $60.00, for patent office fees and the costs of the drawings and illustrations, together with attorneys' fees. Only attorneys registered with the Patent Office, who are trained in the technique of this work, are permitted to deal with the Patent Office. The fees of such attorneys are not low usually. The total cost of securing a plant patent may be anywhere from several hundred dollars up.



One of the Stark Bros. original Delicious apple trees protected from unscrupulous propagators before the plant patent law was passed.—*Reproduced by permission from Science News Letter, December 20, 1930.*

During the five years since the law became effective only about 150 plant patents have been granted. These fall into four classes: roses, other flowers, fruits, and miscellaneous plants. The largest number applies to roses, while some apply to dahlias, carnations, freesias, apples, plums, cherries, grapes, oranges and avocados. There is one patented mushroom. Inasmuch as all applications are held secret by the Patent Office until granted, there is no way of knowing how many avocado patents have been applied for. Two have been granted: No. 100 to Mrs. Jennie C. Gano of Whittier, and No. 139 to Rudolph Hass of La Habra Heights, California.

It is apparent that it will be very difficult to police against amateur infringement by reproduction and use because the values involved in any particular case would seldom, if ever, be sufficient to warrant the expense of a lawsuit in the Federal Court. It should not be difficult, however, to prevent unauthorized advertising for sale of commercial nursery stock of patented plants.

Plant patents may prove profitable when applied to roses, carnations, apples, or other plants which are widely grown throughout the United States, and where the volume of business offers adequate returns. This is particularly true of short lived plants which, like forcing carnations, are continuously reproduced in large commercial quantities. For long lived tree fruits, the inducements would be much less. For a tree fruit of very restricted geographical adaptation, such as the avocado, the inducement is small indeed.

Furthermore, the expenses of securing the patent would have to be met before much is known as to the range of adaptability even in the restricted avocado territory.

Once the expense of a patent is assumed, the holder, in order to make a profit on his investment, would have to advertise extensively, thus adding more expense. It is evident that a large volume of trees would have to be propagated, sold, and planted by someone before very much is known of the actual commercial value. In my opinion such a thing is contrary to the best interests of the avocado industry. For the past twenty years one of the functions of the Variety Committee of the Association has been to discourage and hold back commercial propagation of meritorious new seedlings until their value and geographic adaptation has been at least fairly well established. There is no doubt that the working of the plant patent law as applied to avocados is fraught with many difficulties and perplexities. No one can foresee just how it will work out. No doubt it will be a fine thing for the patent attorneys. I question whether it will be an advantage to the avocado industry.