

Mr. Justice Miller explains this with unexampled precision and clearness in *Adams vs. Burke*: "In the essential nature of things when the patentee, or a person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and parts with the right to restrict that use. The article in the language of the Court passes without the limits of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention (black ours) in that particular machine or instrument it is open to the use of the purchaser without further restriction on account of the monopoly of the patentee" (black ours).

That passage is informed with meaning. Why does the patentee part with the right to restrict the use? Because the right to use the machine is the very thing parted with by the sale.

The machine is utility embodied and externalized in a particular form. That is all it is. The purchaser could easily get elsewhere the same materials in different form and composition and at a much smaller price. He wants that particular object because of its special utility, owing to its unique formation. When the patentee sells it he annuls, waives and foregoes, his right to exclude from the use of that specimen. The consideration is paid only for the right to use; that is all there was to sell. To say that a patentee can sell a patented article, and at the same time in virtue of his right to exclude, restrict the right to use, is on a par with saying that a baker can sell a loaf of bread, and at the same time restrict the right of the purchaser to eat it. It is to say that the patentee can sell his right to exclude in exchange for the purchase money, and yet still have that right. Such sale is a contradiction in terms. The vendor cannot part with, and at the same time withhold, the sole subject matter of the sale. And if he imposes conditions and restrictions, these do not qualify the title or ownership of the chattel. We must sharply demark a sale with conditions or restrictions from a conditional sale. The two things are

quite different. A conditional sale is a transaction whereby the right to enjoy and use the chattel, the ownership, does not pass from, but remains in the vendor, until a condition is complied with, namely payment of the purchase money. The vendor does not consent to the transfer of ownership until that contingency is made certain. But a sale accompanied by a restriction upon the right to use the thing sold is wholly unlike a conditional sale. It is a completed sale at the time of the transaction. The title and ownership is exchanged for the purchase money. The ownership of the purchaser is not inchoate, or contingent upon the performance of some condition. The restriction is the subject matter of a consent of the parties quite apart from the sale and transfer of the chattel. In such case we have two legal acts; a transfer of the right to use and an agreement to use only in a certain way. The sale, in and of itself, operates to give the purchaser a right of unrestricted use and unlimited disposition: he stands in the shoes of the seller.

The restriction, then, is a concession exacted by the vendor and yielded by the vendee. It does not pass anything to the vendor, it only cuts down the rights of the vendee. It is thus the exact antithesis of a license. The latter takes from the rights of the licensor and enlarges the rights of the licensee. The licensee gains a new right where he had none before: the licensor suspends his right to exclude in the particular instance. If the restriction, in the case of the sale, is done away with, the vendee has only the rights vested in him by the sale, the ownership of the chattel. If the license is done away with, the licensee has nothing whatever and the licensor resumes all the rights he ever had before the license was granted. The restriction is a matter of contract totally dissevered from the transfer of property. This is why Mr. Justice Miller says that "the particular machine or instrument is open to the use of the purchaser without further restriction on account of the monopoly" (black ours). This is why Chief Justice Taney says, "Contracts in relation to it (a patented

machine sold by the patentee) are regulated by the laws of the State, and are subject to state jurisdiction.”

This renders perfectly clear the meaning of the Supreme Court, in *Keeler vs. Folding Bed Co.* (157 U. S. 659), when it states: “One who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchaser is not a question before us, and upon which we express no opinion.

**It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws.”** (Black ours.)

It is conceived that the dissenting opinion in the cases of *Adams vs. Burke*, and *Keeler vs. Folding Bed Co.*, and the various attempts to limit the plain language of those decisions to the particular facts there in dispute, are all founded on a misunderstanding of the patent right. For example, Mr. Justice Brown lodged a strong dissent in *Keeler vs. Folding Bed Co.* As circuit judge, he tried the earlier case of *Hobbie vs. Jennison*, reported in 40 Fed. Rep. 887. Throughout that opinion it is clear that the Court is entirely dissatisfied with the reasoning of *Adams vs. Burke*, and yields only because of the force of the decision as a compelling authority.

His subsequent dissent in *Keeler vs. Folding Bed* is foreshadowed in this passage: “Were this an original proposition, we should be strongly inclined to hold that the vendor of a patented article, who sells the same for the purpose of or knowing that it will be resold or used in territory belonging to another is equally amenable to suit as if the sale were made in such other territory. The patent laws give to the patentee the exclusive right to use, as well as to manufacture and sell, within the territory properly belonging to him, but it is difficult to see how this right can be properly protected, if the assignee of other territory, who may perhaps possess greater facilities, superior

energy or a larger amount of capital than himself, may flood his territory with the patented article, by means of the easy device of selling and passing property within the territory owned by himself.”

It is clear that such contention is founded on an erroneous conception of the nature of the patent right, and the effect of an assignment of the right for a particular district. The second sentence above is misleading: The patent laws do not give the patentee an exclusive right, but rather a right to exclude. An assignment of the right for a territory gives the assignee the whole right for that locality. It is a complete and thorough-going subdivision in the category of locality. In that locality, the assignee has all the rights which the patentee formerly had; and the latter has none. In his territory, the assignee can maintain suits for infringement, grant licenses or further assign the right; and when he makes and sells an article in his territory that sale operates to pass the article without the limits of the monopoly, and from under the protection of the patent law, just as completely as a sale by the patentee in the territory by him reserved. There is no escape from this conclusion. At all times the article is altogether distinct from the incorporeal right. When the owner of the right to exclude consents that the article shall pass without the limits, it passes and becomes the absolute property of the purchaser. The assignee acting within his district, has all the power to consent that the patentee has anywhere. The only limitation upon the right of a territorial assignee is as to the territory within which he may exercise it; but acting within that territory, he has all the liberating power that the original patentee ever had. When he gives his consent and the article passes, no part or parcel of the patent right is granted. Of course, territorial assignees are competitors as among themselves and with the patentee. But this is so because of the fact that in making and selling, they do not exercise any right granted by the patent.

The view set forth in the minority opinions would lead to this: That a patentee could subdivide his right into as many parts as there

are states in the union, each assignee possessing the right for one state, and having no power to confer on a purchaser the right to use the thing sold beyond the borders of the state. If the patent was on a locomotive, purchased by a large railroad having a system of tracks in a dozen states, the use of the locomotive in every state other than in the one where it was purchased would constitute a separate and distinct infringement, and subject the owner to suits for damages and an injunction in all those states.

The law is that when the article is once passed beyond the limits of the right to exclude by one who has that power, if only within a township, that article has become unfettered from the patent monopoly and is the absolute property of the purchaser.

The opinion in *Keeler vs. Folding Bed Co.* concludes thus: "The conclusion reached does not deprive a patentee of his just rights, because no article can be unfettered from the claim of his monopoly without paying its tribute. The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration."

In the dissenting opinion in *Keeler vs. Folding Bed* there seems to be a complete identification of an assignee with a licensee so far as respects the patent right. Thus it is said: "Under this rule a patentee may assign (black ours) his right to make and sell the patented article in every state in the union, except his own; may there establish a manufactory, and may, by his superior facilities, etc., undersell his own licensees" (black ours).

Of course an assignment of the right to make and sell, without including the right to use, is not an assignment of any part of the patent right. See *Waterman vs. McKenzie* (1890), 138 U. S. 252.

But again there is a wide difference between an assignee proper and a licensee. The latter has no part of the monopoly, while the former owns the whole of it for a locality. The inconvenience, if any,

inherent in the circumstances supposed, certainly cannot be obviated by the patent law. It can only be done by contract.

Moreover, the dissenting opinion in *Keeler vs. Folding Bed Co.* states the import of the decisions in the two earlier cases of *Bloomer vs. McQuewan* and *Mitchell vs. Hawley* in a way that appears confusing. Of *Mitchell vs. Hawley* it is said (157 U. S. at 669): "In this case the purchaser from the original grantee (black ours) of the term was held affected with knowledge of the terms of the grant from the patentee, which expressly took from the assignee (black ours) the right to sell or grant any license to use the machines beyond (black in the text) the expiration of the original term. This case seems to be a limitation upon the general doctrine of the prior cases, that, by a purchase of the patentee, the patented article is thereby taken out of the monopoly. So far as the case is pertinent at all to the instant case (i. e. *Keeler vs. Bed Co.*) it favors the position taken by the court below."

We find it beyond us to read such a construction into the decision in *Mitchell vs. Hawley*. There, the vendor was not an assignee of the whole monopoly for a limited territory; he owned no part of the right to exclude, much less the entire right for a defined locality. Not having the right to exclude his consent could by no possibility pass the thing sold beyond the limits of the monopoly. He was a mere licensee, acting within the authority conferred upon him by a permission of the patent owner. Obviously he could not confer upon the purchaser a right to a more extensive use than the permission authorized. The passage quoted confuses an assignee and a grantee with a licensee. We have commented on this same confusion in the statutes. The transferee of the entire right or an undivided interest in the entire right is nominated an "assignee", whereas the transferee of the entire right for a locality is designated a "grantee". We have never been able to understand why a subdivision of the same right, but in a different category, should necessitate a confusing substitu-

tion of the language of grants for that of assignments, but it so stands and the gratuitous transition has entailed much wasted effort.

The case of *Bloomer vs. McQuewan* is subjected to this interpretation (157 U. S. at 688): "The question in that case, however, concerned only the rights of an assignee of a patent (black ours) which had been extended, and the point decided was that the assignee (black ours) was entitled to continue to use the patent (black ours) during the extended term. In this connection there can be no question of the propriety of the language quoted (i. e. when the patented machine passes to the hands of the purchaser it is no longer within the limits of the monopoly). It would indeed be a strange principle to hold, that a party who had bought a patented article during the original term of the patent, should be obliged to pay an additional royalty for its use, if the term were extended."

This passage is even more perplexing. In the first place in *Bloomer vs. McQuewan*, the defendant was not an "assignee" of the patent. He did not assert a claim to any part of the right to exclude. Moreover, what conception of things can be thought into the phrase "to use the patent during the extended term"? How can one ever be said to "use a patent", a right to exclude, unless by employing those words we mean bringing an infringement suit and thus excluding others?

We have given much anxious thought to *Bloomer vs. McQuewan*. The case is exceedingly difficult to understand because the opinion embodies, in many portions, the misleading phrasology of the Act of 1836. The defendant is several times called an "assignee", but when we shift our thoughts from the words and get down to the things dealt with there is no difficulty. In that case the owner of the patent for the original term sold to the defendants "the right to construct and use" and vend to others the right to construct and use a Woodworth's planing machine "within the limits of the city of Pittsburg and Allegheny County." Subsequently the Congress by special en-

actment, granted an extension of the patent. The plaintiff became the owner of the patent for the extended term, and, as such, sued the defendants for infringement on the ground that their use of the machine was an invasion of his right to exclude for the term as extended. The only point of difficulty is to determine what the defendant got when the owner of the patent sold him "the right to construct and use the machine and to vend to others such right "within the limits of the City of Pittsburg and Allegheny County". Neither party to the transaction expressed any contemplation of an extension of the patent. Both negotiated on the assumption that the expiration of the original term would end the patent owner's right to exclude. As they then viewed it, the utmost that the vendor could sell was the right to use the machine for the original term; after that any one would be free to make and use the machine. This must have been the common view point, for neither could have foreseen that the Congress by special grant would extend the patent and no such contingency was provided for in the sale contract. The defendants bought the right to make and use the machine, and they bought the full measure of this right as respects the duration. They owned the materials and furnished the labor to construct the machine. When they thus made the machine, their rights with respect to it clearly were these: To use their materials wrought into the formation of the invention for the full period of the original term of the patent and to sell the right to such use to others; the right to so make and so use and sell, the patent owner had sold them. Beyond that term he could not have sold them the right. That would be like a lessee for twenty years selling a term for 25 years. "The patent right gives no title in the thing made in violation of the patent" (Belknap vs. Child, 161 U. S. at 24), much less title to the thing made pursuant to a right purchased from the patent owner. So that the defendants owned the title to the physical embodiment of the invention and as respects the duration of the right to use and sell, the patent owner had given the full measure of



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the consent at his disposal. In point of the duration of the right to exclude, the owner of the patent withheld nothing and imposed no qualification. The defendants, at the expiration of the term would go on using the machine which they owned, the right to use being open to all persons.

In other words, the owner of the patent by selling the right to make the machine, and use it for the full term of the patent or to sell it to others for such use, passed the machine without the limits of the monopoly. The transaction was no different from what it would have been if the owner of the patent himself had made the machine and sold it to the defendants to use for the full term of the patent or to sell to others for such use. That is the utmost that any patentee can ever sell, namely the right to use the thing sold for the term of the patent and to confer that right on others. Now the Court held that a subsequent extension of the patent could not operate to destroy the defendant's right to continue using the machine. Said the Chief Justice: "The Fifth Amendment of the Constitution of the United States declares that no person shall be deprived of life, liberty or property without due process of law. The right to construct and use these planing machines, had been purchased and paid for without any limitation as to the time for which they were to be used (black ours). They were the property of the respondents. Their only value consists in their use, and a special act of Congress, passed afterwards, depriving the appellants (respondents?) of the right to use them, certainly could not be regarded as due process of law. Congress undoubtedly have power to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. But it does not follow that Congress may from time to time, as often as they may think proper, authorize an inventor to recall rights which he had granted to others, or reinvest in him rights of property which he had before conveyed for a valuable and fair consideration". In

other words the defendants owned the machines; not only the physical substances of which they were made, but the right to use them during the term of the patent from the patent owner; the right to use them after that term was a "natural" right which the patentee could not grant..

But what about the qualification "within" the limits of the "City of Pittsburg and Allegheny County"? There was no attempt to use the machine elsewhere, and consequently no contest as to the meaning and effect of this limitation. But it is clear that this limitation was merely contractual and had no binding effect except as a contract between vendor and vendee. If the defendants had used the machines elsewhere they could not have invaded the patent right: By the sale of machine the patent owner passed that particular physical embodiment of the invention beyond the limits of the monopoly. He fully consented to its use and sale, not only within the territorial limits specified but throughout the United States. The restriction imposed was a mere contractual limitation upon the purchaser's right of complete dominion to use any where and every where. It was a restriction exactly on par with those in all the cases we have been discussing.

Had the defendants used the machines elsewhere, their only liability, if any, would have been for breach of contract. For the Court said: "Contracts in relation to it (i. e. patented machine purchased from the owner of the patent) are regulated by the laws of the state and are subject to state jurisdiction."

It thus appears that *Bloomer vs. McQuewan* is not only not in conflict with *Adams vs. Burke*, but both decisions announce precisely the same principle: "In the essential nature of things when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article in the language of the Court, passes without the limits of the monopoly. That is to say, the patentee or his assignee having in the act

of sale received all the royalty or consideration which he claims for the use of the invention in that particular machine, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentee.”

It is receiving the consideration which the patentee claims for the use of his invention in the particular specimen and parting with title to that specimen that causes the patented article to pass without the limits of the monopoly. That is the physical manifestation of the patentee's consent to the use. He transfers the object and at the same time consents to its use, and thereafter the physical thing and the use of it are liberated from the monopoly.

Bloomer vs. McQuewan denied the right of the patentee to limit the use of a patented device which he had sold, in the category of **time**. Adams vs. Burke denied the right to limit the use in such case in the category of **place**; but the principle underlying each case is the same and applies with equal force to the facts involved in the other. The opinion in the one case applies to the facts in the other. Both announce a rule that a sale by a patentee, places the purchaser, with respect to the thing sold, in the shoes of the vendor. If the patentee could have used the article unrestricted in **time** or **place** so also can his successor to **that** article, the purchaser. This follows from the initial postulate that the article is entirely distinct from the incorporeal right to exclude.

Bloomer vs. McQuewan, Adams vs. Burke, and Keeler vs. Folding Bed Co. are profound expositions of an exceedingly elusive principle. They are closed to a hasty glance or a cursory perusal. Nothing short of unintermitted and persistent attention will ever bring the average reader to a correct apprehension of their vast import.

Third: A License; A sale of personal property passes all the interest or property in the thing sold to the purchaser, whereas a license does not pass any. The license is a mere permission.

If a patentee delivers possession of his patented machine to an-

other and licenses the other to use it, the latter is a licensee, but obviously does not own the machine. Likewise if the patentee licenses another to make a specimen of the machine, and to use it for one year's time, at the expiration of the year the licensee's right to use the machine terminates, although he may own the materials of which it is made. "Title to the thing manufactured does not give the right to use the patented invention" *Belknap vs. Schild*, 161 U. S. at 24. But in either case supposed, the right of the licensee to use springs from a mere permission of the patentee. The latter has not irrevocably parted with the right to use that machine. In the first instance the machine has not passed without the limits of the monopoly; and in the second, the patentee consented to the making of the machine only on condition that it could be used for a limited period. At the expiration of that period the machine is within the limits of the right to exclude and under the protection of the patent law.

The cases included in the two groups we have discussed confuse the right to exclude with an exclusive right: they overlook the effect of a sale of a patented article to release it from the monopoly of the patent, and finally they concede no greater rights to a purchaser from the patentee and owner of property than is allowed to a mere licensee who enjoys the thing used by virtue of a mere permission of the licensee.

Finally the cases announce an unthinkable notion of infringement, which invariably and necessarily involves, a making, using or selling without the consent of the patentee. When the patentee has himself made and sold the article he has irrevocably consented to the free use and sale of that article by the purchaser. The purchaser in using the article or selling it, may do so under circumstances that violate his contractual obligation to his vendor, but he does not infringe upon the right of the patentee to exclude. Moreover, the validity of the contract violated depends not upon the patent law, but upon the law of contracts and the public policy of the government.

Whether the contract restricting the use or sale of the article is valid must be determined by the general principles of law and statutes applicable to all contracts in restraint of trade. That brings us to the next and final topic of this writing.

### **COMBINATIONS IN RESTRAINT OF TRADE IN PATENTED ARTICLES.**

Text writers generally, and without exception so far as we have discovered, announce the proposition with unimportant qualifications, that the law inhibiting contracts in restraint of trade does not apply to contracts pertaining to trade in patented articles. Startling as is this proposition, we have a greater extreme vouched for in the assertion that patented articles are not articles of commerce or trade at all. This last statement is little short of amazing. It is not worth while to quote passages from the books as we shall come upon the expressions first hand in the cases to be considered.

In a general way the argument is much like this: The statutes and principles of public policy condemning restraints of trade are levelled at illegal monopolies. Under the patent law a patentee has a legalized monopoly in his patented articles. Therefore, it cannot be that the statutes forbidding restraints of trade apply to trade in patented articles. It requires no ingenuity to show that such an argument comes to nothing. The word "monopoly" as used in legislation inhibiting restraints of trade is not only not synonymous with the same word used in connection with the patent right but is totally foreign to it. The "monopoly" of a patent is not of things or possessions: it is of a pure abstraction, a notion, an incorporeal creation of the mind. The "monopoly" to which public policy is opposed is of goods, tangibles, corporeal objects, subject to manual dominion. The patent monopoly is entirely comprehended within the naked right to exclude.

The difference is obvious. Suppose A. has on his land a mineral spring sending forth a water possessing medicinal qualities unlike any other water in the world. And suppose the water has certain properties that create for it the strongest demand, causing it to sell at a fabulous price. A, has in such case a genuine, thorough going monopoly. He has the sole right of selling because he owns and has dominion over the one subject matter of all the sales. For the same reason he can exclude all other persons from selling. But suppose some one, a hundred miles away, sinks a well and intercepts the supply at A's spring and it ceases to be. A. has now lost his monopoly and another instead has it.

Now suppose A invents a process by which chemicals are compounded and dissolved resulting in a water unlike anything hitherto known and far more precious. He obtains a patent on his process and product. Then other persons may possess all the materials necessary to make the identical liquid; they may possess these in much greater abundance than the inventor and in conjunction with facilities for manufacture that make the production of the liquid far easier at their hands than by the inventor. Nevertheless they cannot make, use or sell the mixture without the inventor's consent.

Suppose again that X invents a corliss engine and gets a patent on the same, but has no means or facilities for manufacturing or multiplying specimens. His patent monopoly is complete but to him, in his condition, it is profitless because what men want to buy, sell and use is the engine, not the notion of it.

Suppose finally that a vast aggregation of capital is employed to buy up all the timber and lumber of the nation and succeeds in so doing. Here is a monopoly in virtue of complete physical dominion over the thing dealt in. There is no abstract right to exclude others. But others are excluded from dealing in lumber for the reason that the source of supply is completely vested in an ownership in which they cannot participate.

A natural monopoly or an industrial monopoly consists in a more or less complete possession of the actual, physical objects dealt in. The patent monopoly consists only in the right to prohibit others from possessing, using and selling the thing patented without the patentee's consent.

It is entirely negative. It does not imply the existence of an available supply of the tangible objects. The thing described in the patent may be undesirable or unmarketable, but this does not impair the patent monopoly. And when the patented article is made and available for sale in great quantities it is not in any manner related to the right to exclude. When the article is sold and used there is no sale or use of the incorporeal right. A restraint of trade in a notion, an incorporeal, intangible right is utterly inconceivable. A corporeal object is the only possible subject matter of trade and commerce. Trade and commerce in this has not the remotest bearing on the incorporeal right; likewise of a restraint of trade in the same. Finally, forbidding restraints of trade in the tangible objects does not in any manner abridge, affect or infringe upon the incorporeal right. When the State of Kentucky completely suppressed all trade in the patented Aurora oil of Patterson it did not take from or cut down the patentee's right to exclude. In that commonwealth he still had an irrefragable right to bring infringement suits and exclude every one from making, using or selling the oil itself. In the instance of *In re Brosnahan*, the State of Missouri entirely interdicted trade in the patent protected oleomargarine, but this did not touch the patentee's right to exclude others from making, using or selling the thing invented. Though every state in the Union had passed similar statutes and enforced the same, the negative power in the patentee to prohibit others from engaging in the business of supplying and using the patented article, would have remained unimpaired for the full term of the patent. These cases drive home the true conception of the nature of the

patent franchise. They vividly bring out the elemental fact; the right to make, use, and sell does not come from and is not in any manner related to, the patent law. That right is a "natural" right, antedating governmental institutions and laws, protected by the latter but also limited and qualified by the latter.

These cases cannot be brushed aside with the suggestion that the articles, trade in which was suppressed, were inherently harmful and the traffic therein necessarily inimical to the welfare of the citizens. That was undoubtedly the conception underlying the statutes construed in the two cases mentioned. But we entirely mistake the power of a state to control its internal affairs when we limit it to regulating or suppressing the sale of things conceived to be essentially harmful in the only use to which they can be put. Fire arms are indispensable in the day of the nation's agony in war; arsenals are crowded with them, the Constitution guarantees to every citizen the right to own and possess them, and yet it is everywhere a crime for a private citizen to carry a loaded fire arm concealed on his person. Bread is not only not harmful in its use, but is the very symbol of the corporeal things necessary to be available in order to maintain and prolong existence. It is from of old called the staff of life. A contract, combination or conspiracy to decrease the supply, or increase the price of bread is a crime of the deepest dye. It arouses all the latent resentment of society and men's hearts grow hot in contemplation of the enormity of the offense.

The fact is that, with isolated exceptions, the law deals not with things, but with persons. The force of it is directed to controlling the acts of men: it is not exerted on inanimate objects. Crimes and wrongs are attributes of the existence of members of society. What is deemed harmful in law is the tendency, the quality, of an act of men, not a quality or property of an inanimate object. The unlawfulness of a contract in restraint of trade is predicated on the implication that the subject matter of the restrained traffic is useful and



desirable. The gist of the wrong is in interposing an artificial, restrictive barrier between the source of supply and the ultimate destiny of the thing demanded. What is vaguely called the police power of the State is not exhausted in regulating the handling of those things, the ordinary use of which usually results in harm.

The "police power" in its casual acceptation is a misnomer. "Every right acknowledged to the individual by the state may be abused by him to the detriment of the State. The State must therefore confer upon the government the power to watch for and prevent (black in the text) such abuse. This (black ours) is the police power. Its realm is, therefore, the counterpart of the realm of individual liberty. It is the guard which the state sets upon the abuse of individual liberty. It does not prescribe the method according to which that liberty may be enjoyed, but it fixes the point past which it may not be pursued, and contains summary governmental authority for preventing its abuse." Burgess: Political Science and Constitutional Law, Vol. I, page 216. This is the true conception of the police power. The individual may abuse his right to bear arms by carrying them concealed upon his person; then, the abuse of his liberty becomes a crime; he may abuse his right to make and sell carbolic acid by making and selling the same to unwitting infants; then his selling becomes a crime. He may abuse his right to make and sell bread, and to contract to sell the same, by entering into a contract, combination or conspiracy to fix the price, decrease the amount, or cheapen the quality of the bread, then the contract, combination or conspiracy becomes a crime. The state, with rare exceptions, such as the inflammable oil and the artificial butter, acknowledges the pre-existing right of every patentee to make, use and sell and contract for the sale of the tangible embodiment of his mental labors, but when the patentee enters into a contract, combination or conspiracy to limit the output, fix the price or in any manner restrain trade in his patented article, which has been made by him or some one under his authority,

such contract, combination or conspiracy is an abuse of the patentee's acknowledged right as surely detrimental to the state as any contract in restraint of trade and as inevitably within the enumeration of crimes in every instance of anti-trust legislation as is a similar contract with reference to bread or meat. There can be no consistent withholding of assent to this proposition. A fire arm may be patented, but it is a crime to carry one concealed on the person. An automobile may be patented, but one may not be driven without a license, and the attempt to do so is a misdemeanor. A medicine may be patented, but an attempt by the patentee to administer it without the license requisite may send him to jail (see 4 Ohio 294). A clothes wringer may be patented, but when the patentee, even, sets about selling it as an itinerant peddler without first complying with a town ordinance, he violates the law (See *People vs. Russell*, 49 Mich. 617), and is liable to punishment the same as a vendor of an unpatented article. All these are instances of the exercise by the state of its power to protect the members of society from an abuse of his acknowledged rights by the individual.

It is an entire misconception of the rights of the individual, of the power of the state over the individual, and of the nature of the patent franchise to suppose that the state has any less control over trade in patented articles than in unpatented articles. Try to imagine the utterly unacceptable consequences to which we are inevitably driven by the opposite theory. Suppose A invents an exceedingly useful implement for farming purposes and there is very great demand for it. He manufactures the same and has on hand a large quantity of them for sale. He has not applied for a patent and need not do so for two years (R. S. 4886).

The article is unpatented and we will suppose A enters into various contracts and combinations that concededly restrict trade in the implement, both within the scope of the Federal anti-trust act and the acts of many of the states. These contracts are all operative for

two years. Then by hypothesis A has been guilty of a crime under both national and state law. Now he applies for and obtains a patent and at the same time renews his former contracts and participates in the same combinations, operative to the same ends. Can it be seriously asked that we accept the conclusion that what, in the first instance, was a series of crimes has now become innocent and harmless acts because A has the right to exclude others from selling the implement without his consent? Is the right to exclude others from selling an excuse for contracting and combining with others to abuse his own and their right of selling? Can there be any answer but an unhesitating negative to the stinging questions propounded by Mr. Justice Miller in the case of *In re Brosnahan* in reference to the copyright, but equally applicable to the patent right? "Can he (owner of the copyright) violate the law because no one else can? Does the copyright confer on him a monopoly of vice and an immunity from crime"?

Let us carry the supposition a step in advance. Imagine that after the patent has been secured and the patentee has renewed all his former connections, then, there is a contest over the validity of the patent and it is declared absolutely void for want of novelty by the Supreme Court of the United States: that neither adds to or takes from, the right and power of the patentee to make, use and sell his implement, it only releases the inhibited spontaneity of others to do the same thing. Does the determination that the implement had been made and in use more than two years prior to the application for a patent, convert a series of innocent acts into misdemeanors and felonies? Or suppose such contracts and combinations are entered into six months before the date of the expiration of the patent and are to run for one year. Then the day after the patent expires dealers scattered throughout the nation, who, the day before were parties to a perfectly legitimate business, have become infamous law breakers and vile conspirators although conducting their business in precisely the same

manner as they did the day previously. Thus whether or not men have committed a crime under the laws of any one of a half hundred of States is dependent upon the records of the Patent Office at Washington.

If those records are in proper form and contain truthful statements, then all members of the combination are innocent. But if the patent was obtained by fraud, if the certification of the existence of novelty in the invention was untrue in point of fact, or if for any reason there is not a valid patent on the implement, then the members of the combine are guilty of crimes. Thus the determination of the guilt of men hinges upon the validity of a patent, and whether or not all the participants in the combination have acted in a manner detrimental to society depends upon who was the first to conceive of the implement as vouched for by the Patent Office. And yet, under any and all of these circumstances, without exception, the manufacturer's own right to make, use and sell the implement has remained exactly the same. Procuring a patent did not enlarge, the invalidation of the patent, in whatever manner, did not diminish it. That right existed before the patent was obtained, it remains unimpaired after the patent right is gone, and during the existence of the patent it was not enlarged. It is not within the duty of patient analysis to catalogue all of the grotesque absurdities that are consequent upon the assertion that the state has no power to prohibit a contract in restraint of trade in patented articles.

We discard words and deal with things. In *Patterson vs. Kentucky* Mr. Justice Harlan said: "The right of property in the physical substance, which is the fruit of the discovery is altogether distinct from the right in the discovery itself. The right to sell the (patented) Aurora oil was not derived from the patent: that right existed before the patent, and unless prohibited by valid local laws could have been exercised without the grant of letters patent."

In *Webber vs. Virginia*, Mr. Justice Field said: "The legislation

respecting the (patented) articles which a state may adopt after the patents have expired, it may equally adopt during their continuance. It is only the right to the invention or discovery, the incorporeal right, which the state cannot interfere with. Congress never intended that the patent laws should displace the police powers of the states, meaning by that term those powers by which the health, good order, peace and general welfare of the community are promoted.”

Those two quotations announce the principles that control. The fact that an article is patented is utterly irrelevant to the inquiry as to whether or not a given contract restrains trade in that article. The whole argument that state legislation as to restraints of trade has no application to a contract pertaining to patented articles, is grounded upon the false assertion that the patent invests the inventor with the right to make and sell and to contract in that regard. Until that fallacy is thought away, the erroneous conclusion will persist

It is equally clear that a contract restraining trade among the states in a patented article is a violation of the Federal anti-trust act. Many authorities posit some sort of conflict or interference between the anti-trust act and the patent law and then resolve the conflict by asserting that the latter statute is the more fundamental and at the point of interference overrides the former. In dealing with a contract on its face, clearly in restraint of interstate commerce in a patented article the difficulty of upholding the contract, is, in this view, obviated by working out an exception to the anti-trust act in the case of patented articles. But this cannot be done by any possibility. There is no imaginable conflict or interference between the two statutes. The patent law has nothing to do with trade or commerce: no casuistry can read into it any provision as to trade and commerce or as to agreements, contract, and combinations in restraint of trade and commerce. It is not a criminal statute and has nothing to do with the punishment of crime.

On the other hand the anti-trust act has nothing whatever to do

with the creation of incorporeal franchises: property in notions and thoughts, that exists for seventeen years and then passes utterly away. It does not involve the right of any person to make, use or sell anything whatever. A man may engage in interstate trade and commerce or not, just as he sees fit without consulting that law. The whole policy and all the provisions of the statute are exhausted in declaring all agreements, contracts, and combinations in restraint of interstate trade and commerce and attempts to monopolize that trade, null and void as contracts and criminal as the acts of persons. How is it possible for a patentee as patentee in the exercise of his patent right to restrain trade? He has the sole right to make and sell the article, but that is not a patent right.

Restraining infringers from making and selling the article does not by any stretch of inference imply a contract, agreement or combination in restraint of interstate commerce. Excluding others in not entering into a contract of any kind. Assigning the patent right is not restraining interstate trade, by a contract or otherwise. We have seen that the only manner in which the patent owner can exercise his patent right is in excluding others through the medium of infringement suits, and in assigning his right in the three ways provided for by statute.

No exercise of the right in any one or all four of these ways can possibly be construed as a contract in restraint of trade. No subject matter of interstate commerce or trade can be brought into existence by any exercise of the patent right. Nor is it possible to suppress the patent right in a way indirectly to restrain trade. For the right is entirely negative and if the patentee should agree not to exclude persons that would tend to encourage and increase trade.

The surmise that the Federal anti-trust act does not apply to contracts in restraint of trade in patented articles is just as untenable and leads to results just as absurd as the analogous contention with

reference to state legislation. It is not necessary to repeat the argument in detail to suggest its applicability.

We must, however, keep constantly in mind that the Federal anti-trust act was enacted pursuant to the power of congress to control interstate commerce, whereas the state statutes originate in the power of the respective states to control their entire internal affairs.

The National government, having no police powers, may regulate intercourse or traffic among and between the states, but cannot legislate in reference to such commerce under the guise of protecting the morals, health or welfare of citizens within the states. *United States vs. DeWitt* (1869), 9 Wall 41.

One and the same contract or combination may restrain interstate commerce and also commerce within a given state. In such case the arrangement violates both state and national statutes.

Whether a given contract in restraint of trade violates one law or the other is not dependent upon the character of the restraint or the precise manner of its imposition, but upon whether the trade restrained is interstate or trade internal to an isolated state.

It becomes important then to consider with some nicety the character of a contract which comes within the legislative inhibition of restraints on trade. This question is the same whether we have in mind interstate trade or trade in a single state. It is sometimes said that a contract in restraint of trade is one that is opposed to public policy and then this is turned about to the assertion that public policy is opposed to restraints of trade. This is using undefined terms to formulate a meaningless proposition. Neither statement throws any light on what is meant by either term. We have to push the matter further back than this. We turn to the great case of *Northern Securities Co. vs. United States* (1903), 193 U. S. 197. This cause was elaborately argued by the ablest lawyers in the nation. The question as to restraints of trade was probed to the very bottom by all members of the court and the three opinions handed down comprise a vast re-

pository of learning on the subject. No one needs any other source from which to gain clear, exact ideas as to what is meant by a contract or combination in restraint of trade. A very short consideration of some of the propositions there asserted will serve our purpose.

We deliberately select the dissenting opinion of Mr. Justice Holmes, for he laid down an exceedingly concise and exact definition of such contracts which was apparently narrower than that which met the approval of the majority. And if a contract comes within the narrower classification, necessarily it will be comprised within the broader. At 193 U. S. 404, Mr. Justice Holmes said: "Contracts in restraint of trade are dealt with and defined by the common law. **They are contracts with a stranger to the contractor's business (although in some cases carrying on a similar one) which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would**" (black ours).

In order to indicate clearly that he meant exactly what he had written down, ten lines later he reiterates: "Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business and the trade restrained was the contractor's own."

He further says: "The objection of the common law (not of the anti-trust act) to them (such contracts) was primarily on the contractor's own account." In those three propositions we have a perfectly clear, tangible, and precise delineation of a contract in restraint of trade. Suppose we apply that definition to the cases we have already discussed.

Take for example the Heaton case. There the owner of the patent sold the machine to the shoe manufacturer and received the purchase price. He was not in the shoe business nor interested in the shoe business of the purchaser. The latter owned the machine and bore all the burden of ownership, such as interest, taxes, insurance and repairs. The vendor was a total stranger to that business, yet under the court's decision, the purchaser was bound by a contract which completely did



away with his freedom in the business and trade of buying staples. He could buy staples from no one else at any price and no one else could sell them to him. Nay, he could not have initiated the business of making even his own staples. And there was no sort of consideration for this alleged covenant that destroyed the purchaser's freedom. The vendor could have raised the price of the staples, made them of poorer quality and even decreased the supply and still the purchaser had no freedom in the matter of availing himself of the staples necessary for his use.

This is delivering control of the contractor's business into the hands of a stranger with a vengeance. The same is true of the Neo-style cases, which are precisely analagous.

In the Rupp and Rivet cases, the same result was reached. The staple wire and rivets were common articles of trade and commerce. Anyone has a right to manufacture and sell or to purchase the same. The plaintiffs leased their patented machines to the users and exacted a stipulation that the lessees should confine their purchases of the unpatented article exclusively to the lessors. The lessors were strangers to the business of the lessees. The latter paid a rental for the use of the patented machine, but not for the privilege of purchasing staple wire and rivets from the lessors: these could have been purchased elsewhere. Moreover we cannot find in either case any suggestion that the lessors had agreed to supply the articles, monopolized, at any price. The lessees were by the Court compelled to purchase common unpatented staple articles, like nails or screws, exclusively from the lessors at whatever arbitrary price the latter should dictate. They might raise the price, cut down the portion allowed to the lessees, or furnish articles made of cheap or shoddy material, and yet the lessees were helpless. Without any consideration whatever, the freedom of the lessees to buy these articles wherever they saw fit and on the most favorable terms they could negotiate, was gratuitously construed away by the Court. We know of no more terrifying illustration of the

maxim that the power to construe is the power to destroy, than that afforded by these decisions.

When we come to the graphophone and phonograph cases, the restraint of trade is even more glaring and exaggerated. The owners of the patent in every instance had sold the instruments and transferred the perfect title to the purchasers. In *Bloomer vs. Millinger* (1863), 1 Wall 340, the Court said: "They (the patentees) are entitled to but one royalty for a patented machine (black ours), consequently, when a patentee has himself constructed the patented machine and sold it, or authorized another to construct and sell it, he has then to that extent parted with his monopoly, and ceased to have any interest in the machine sold" (black ours).

This principle is repeated over and over again by the Supreme Court. It precisely fits the phonograph and graphophone cases. There the patentees had received the full royalty from the jobbers and had ceased to have any interest in the instruments sold. In the *Victor Talking Machine* case if The Fair had taken every instrument in its possession and sunk it to the bottom of Lake Michigan, no right or interest of the plaintiff would have been even infinitesimally affected. The plaintiffs in all those cases were strangers to the jobber's business, outside of it and totally disconnected from it. The same is true of the dealer. Both jobber and dealer, in virtue of an inalienable right guaranteed by the Constitution and laws to every man to sell his own property without external restraints, had the right to sell the instruments at such prices and to such persons as they saw fit or to give them away or hurl them into a junk pile. Under the ruling of the courts, the vendors were not only permitted to completely suppress all freedom of the jobber to trade in his own property, but the dealer between whom and the vendor there was no privity of contract, was crushed in the vise of the same despotism. If a jobber or dealer had found himself in the midst of a panic, overstocked with these instruments, and had been closed in on by the kind hearted banker: if in

that hour of sudden terror and perspiring anguish, searching for ballast to dump overboard in order to save himself from bankruptcy, he had seized upon these instruments and sold them at a sacrifice, the courts would have mulcted him in damages for doing so. If the instruments had become shop worn, broken or abused, if they had become unmarketable in virtue of improved devices superseding them, still they could not have been sold at less than the "licensed" price without the seller subjecting himself to the abounding wrath of a Federal Court. And there was no qualification or limitation put upon the "license condition." It was not limited as to time; a sale of the machine at a cut price ten years after the date of the contract, would have been "infringement." Had the jobber died, gone into bankruptcy, or had a great conflagration destroyed the entire city except a few blocks including the jobber's place of business, still a sale at a cut price consequent to any of these disasters would have sent the seller to jail for contempt. Yet there was no consideration for this monstrous covenant. The patentee received the full compensation for his articles. Not one thing did he do or agree to do, suffer or agree to suffer, in consideration of this suicidal pledge given by the purchaser.

No case can be found involving any more perfect and absolute restraint of trade than these cases. These contracts as means of restraining trade were far more vicious than any that have ever been denounced by the Supreme Court under the Anti-trust Act.

The Addyston Pipe Co. case is tame in comparison. There the restraint only affected the freedom of the members of the combination in the first instance to sell the pipe. There was no attempt on the part of the seller to prevent the purchaser from dealing with the pipe exactly as he saw fit.

It is very clear that the contracts involved in all the cases we have discussed dealing with the right to restrict the use or resale of an article violated the statutes prohibiting restraints of trade.

These were common law contracts, the remedy, if any, to enforce which, was limited by state laws as interpreted by the State Courts. The Heaton case arose in Michigan. If the plaintiff had brought suit in the State Court its own pleadings would have constituted as complete confession of a crime as any penitent horse thief ever made.

Most of the Neostyle cases arose in New York. In 1899 the legislature of that State passed an Act (laws 1899, Chap. 690) which provided among other things, the following: "Every contract agreement, arrangement (black ours) or combination whereby competition in this State in the supply or price of any article or commodity of common use (ink and paper) is or may be restrained or prevented or whereby the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented is hereby declared illegal and void "and every person who shall enter into any such contract" is guilty of a **misdemeanor** (black ours) and on conviction thereof, shall if a natural person, be punished by a fine not exceeding **five thousand dollars** or by imprisonment for not longer than one year, or by both such fine and imprisonment; and if a corporation, by a fine of **not exceeding five thousand dollars**" (black ours). By every valid method of reasoning that is law that should have been meted out in the Neostyle cases. That was the statute the Court of Appeals of New York applied to the Book trust in its attempt to monopolize the sale of uncopyrighted books (see 177 N. Y. 473) but the Court of Appeals committed the great blunder of supposing that a combination to restrain trade in copyrighted books did not come within the plain meaning of the statute. But the decision of the Supreme Court in the case of *Bobbs-Merrill Co. vs. Straus* shows that this was wrong and at least some of the New York judges now recognize the error (see 127 App., Div. N. Y. 935 and 86 N. E. 525).

The graphophone cases involving contracts enforceable only under the laws of the States of Iowa and Illinois undoubtedly called for an application of the Anti-trust Acts of those States. And within

those statutes the contracts were criminal and the parties thereto subject to punishment by fine and imprisonment or both.

We go back now to the Northern Securities Case. After defining contracts in restraint of trade Mr. Justice Holmes proceeds (193 U. S. 404), "Combinations or conspiracies in restraint of trade, were combinations to keep strangers to the agreement out of the business, (black ours). The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words they were regarded as contrary to public policy because they monopolized some portion of the trade or commerce of the realm." Here then, is a clear and precise definition of a combination or conspiracy as distinguished from a contract, in restraint of trade.

It is illegal because of its effect on persons out of the combination who are prevented from engaging in the business, and because of its effect on the public in raising prices, decreasing the supply or deteriorating quality or all three. And it must be constantly borne in mind that the final and vital objection to a combination or conspiracy is the power incident to combined and confederated action. In this Northern Securities Case at page 340 the Court said: "In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy; men can often do by the combination of many what severally no one could accomplish, and even what when done by one would be innocent. **There is a potency in numbers when combined** (black in the text) which the law cannot overlook, where injury is the consequence."

We will now take up the cases dealing with combinations and conspiracies in restraint of trade in patented articles. But before discussing the cases which involve the precise question we are studying it is worth while to glance at those cases where infringement

suits have been brought and the defendant has set up as a defense that the plaintiff was a party to a combination in restraint of trade. This defense has always failed and must of necessity fail, but the remarkable part of it is that other courts have set up the rulings in these cases as authority for the proposition that there can be no combination in restraint of trade in patented articles and that the state Anti-trust Acts do not apply to such combinations. But there is not the remotest connection between the two propositions. Maintaining a suit for infringement has no relevancy whatever to a contract or combination of any kind.

Thus in *Strait vs. National Harrow Co.* (1892) 51 Fed. 819., the plaintiff brought suit to obtain an injunction to restrain the defendant from instituting an action against the plaintiff for infringement on the ground that the defendant had entered into a combination in restraint of trade! That bill of complaint ought to be inserted in the office boy's note book. The plaintiff sought to exclude the defendant from excluding the plaintiff. In other words the purpose was to unpatent the patentee. The Court said: "In a suit brought for the infringement of a patent by the owner any such inquiry (as to patentee's being a party to an unlawful combination) at the behest of the infringer would be as impertinent as one in respect to the moral character or antecedents of the plaintiff in an ordinary suit for trespass upon his property. Even a gambler, or the keeper of a brothel, cannot be deprived of his property because he is an abnoxious person or a criminal."

That is the true ground on which all cases of the character are decided. The following belong to the same class.

*Edison Elec. Light Co. vs. Sawyer-Mann Co.* (1892 C. C. A. 2d Cir), 52 Fed. 592;

*American Soda Fountain Co. vs. Green* (1895) 69 Fed. 333;  
*Columbia Wire Co. vs. Freeman Wire Co.* (C. C. Mo. 1895),  
71 Fed. 302;

General Electric Co. vs. Wise (C. C. N. Y. 1903) 119 Fed. 922;

In all these cases the defendants sought to answer the charge of infringement by asserting that the plaintiffs were violating the Anti-trust Act. It would have been just as relevant to allege that the plaintiffs had not paid taxes assessed against their property or that they were using the mails as a part of a scheme to defraud.

But what is to be thought of this passage in the opinion in the Columbia Wire Co. Case: "In consideration that the patentee will give his invention (black ours) to the public with full drawings and specifications so as to enable the public freely to use it at the expiration of 17 years, a grant is made to him of an exclusive right to the monopoly (black ours) of the patented article or device during that term. The rights so acquired by the patentee under a grant from the United States are entirely inconsistent with the patentee's being made subject to the Anti-trust laws of the several States. Under this grant he has been given, and for the consideration already alluded to he is entitled to maintain, a monopoly in the disposition and use of the patented article or device."

This passage is entirely aside from the question before the Court. The suit was one for infringement and the defendant's plea that the plaintiff was an unlawful combination did not invite the above propositions which are cited in other cases as authority for the assertion that the State Anti-trust Laws do not apply to combinations in restraint of trade in patented articles. It is for this reason that we have marked the paragraph for examination. What is meant by the word "invention" in the first sentence? The patentee never does give to the public the manufacturd tangible article. "Invention" is put in as something additional to the drawings and specifications and yet we know that the latter is all that the patentee ever does give to the public. The drawings and specifications do not enable the public freely to use anything but the drawings and speci-

fications. A book describing a horse does not enable the reader to possess himself of the horse.

Then we have "a grant is made to him of an exclusive right to the monopoly of the patented article." What can be an exclusive right to a monopoly? The Supreme Court has been saying for 60 years that the sole right granted by the patent is the right to exclude. How can there be an exclusive right to the right to exclude? That appears like adding to white, whiteness. Then we have this jump from that sentence. "The rights (viz; right to exclude) so acquired by the patentee under a grant from the United States are entirely inconsistent with the patentee's being made subject to the provisions of the Anti-trust Laws of the various States." Now why is this? The answer appears to be "the (patentee) has been given a monopoly (right to exclude) in the disposition or use of the patented article."

But we entirely deny the conclusion. The patentee has the right to exclude others from making, using or selling the device without his consent. That is all he gets by the grant. His own right to make, use or sell is not in any manner affected. Chief Justice Taney in 1852 announced this as the law and the Supreme Court has been reiterating it ever since, even as late as 1908 (210 U. S. at 424). Now suppose the patentee is himself manufacturing a patented wire fence and selling the same and he enters into a contract with a rival concern whereby he agrees to cut down his output by half or establish a uniform fixed price the same as his rival, can there be any possible doubt that that would be a violation of the state Anti-trust Act? The patent laws do not purport to give a patentee any immunity from criminal statutes. They make no provision as to his right or power to contract, much less confer on him some mysterious privilege, in the exercise of which, he can invade the laws of a state. The right acquired by the patentee from the United States is not affected by the Anti-trust Laws of the several



states. Those laws do not forbid the patentee to bring infringement suits or to assign his patent. They only forbid him from entering into contracts or combinations whereby trade in his patented article is restrained. That the Anti-trust Acts do validly provide this we have no doubt. "The legislation respecting the article which the State may adopt after the patents have expired it may equally adopt during their continuance. It is only the right to the invention or discovery, the incorporeal right which the state cannot interfere with," *Webber vs. Virginia*.

It is next in order to consider the various phases of the litigation in connection with the combination known as the National Harrow Co.

There are at least nine reported decisions involving this combination and two altogether distinct features of the law are dealt with in these cases. But subsequent use to which the decisions have been put does not indicate that the marked cleavage between the two groups of decisions, has been heeded. A brief statement of the facts will suffice for noticing all the cases. The National Harrow Co. was organized as a holding corporation. Practically all concerns in the United States engaged in the business of manufacturing and selling harrows were interested in the corporation. That is to say, each of such concerns assigned to the holding company all patents which it owned on harrows and took back from the National Company an exclusive license to manufacture just the harrows covered by the patents assigned and no others. The licenses were all similar, and established the price at which harrows were to be sold. A royalty was to be paid on each harrow sold. The result of the combination was that the National Company owned about 85 patents covering practically the entire business in improved harrows and each licensee conducted the same business after, as before, the assignment of its patents, except that a uniform schedule of prices was to be observed. Now this phase of the National Harrow Company was before the

courts for consideration at least five times and every time was declared to be an illegal combination in restraint of trade.

Those decisions are:

- Strait vs. National Harrow Co. (1891) 18 N. Y. Sup. 224;
- National Harrow Co. vs. Quick (1895 C. C. Ind.) 67 Fed. 130;
- National Harrow Co. vs. Hench (1896 C. C. Pa.) 76 Fed. 667;
- National Harrow Co. vs. Hench (1897 C. C. A. 3d. Cir.) 83 Fed. 36;
- National Harrow vs. Hench (1897 C. C. N. Y.) 84 Fed. 226.
- National Harrow Co. vs. Hench (1897 C. C. A. 3d. Cir.) 85 Fed. 991.

In all five of the foregoing cases the Courts declared the combination known as the National Harrow Company to be an illegal restraint of trade. The license contracts were held unenforceable and, too, the licensees were held entitled to rescind them and free themselves from liability for royalties.

One of the decisions—National Harrow Co. vs. Quick—seems questionable on principle. There the complainant instituted a suit for infringement against one who was not, and never had been, a licensee. The court denied the relief on two grounds: 1st. That the complainant was an illegal combination and 2d, that the harrow sold by the defendant was not an infringing device. As to the first ground the court said: “It seems to me that the Court cannot sustain the present bill without giving aid to the unlawful combination or trust represented by the complainant.” However, we cannot escape the conclusion that this was a fact irrelevant to the right of the complainant to prevent infringements of its patented device. The right to exclude others, granted to the patentee by the government, is not conditioned upon compliance with all laws declaring the public policy of the nation.

We regret that in none of these cases was there any attempt to analyze the nature of the patent grant for the purpose of demon-

strating that combinations in restraint of trade in patented articles violate the law to precisely the same extent as a similar combination dealing in an unpatented article.

Thus in 83 Fed. 36, the Court of Appeals for the 3d Circuit said: "The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact." Again, "Such combinations are conspiracies against the public interests and abuses of patent privileges. The object of these privileges is to promote the public benefit, as well as to reward inventors." In addition to this it might have been pointed out that the patentee is not enabled to make and sell the patented article in virtue of the patent grant; that a license is a common law contract and its legality or illegality must be determined by the same tests that are applied to other ordinary contracts.

Now the other phase of litigation involving the National Harrow Co. is altogether distinct and different from the foregoing. As to this phase we have three reported decisions dealing with the same state of facts.

These are:

National Harrow Co. vs. Bement & Sons (1897) 21 App. Div. (N. Y.) 290;

National Harrow Co. vs. Bement & Sons (1900) 163 N. Y. 70;

National Harrow Co. vs. Bement & Sons (1902) 186 U. S. 70.

The National Harrow Co. here involved is not the same corporation as that considered in the other cases. It bears the same name and style, but is quite distinct, being organized under the laws of a different State. And it is only necessary to devote a little space to the report of the Supreme Court's decision to show that there was no combination involved in the case at all. The suit was originally instituted in the State Court in New York. No phase of the patent law was involved. Bement and Sons, according to the finding of the

referee, had sold outright certain patents to the National Harrow Co. and received a satisfactory compensation therefor.

Bement and Sons then obtained an **exclusive** license to manufacture the harrows described in the patents assigned and at the same time agreed to manufacture no other type of harrow. The license was to be operative for the full term of the patents; it provided for a royalty and liquidated damages in case of breach. There was attached to the license a schedule of prices to be maintained by the licensor, but we should never forget a fact that is not mentioned once in all the citations and applications of this decision. It is this: the National Harrow Co., the licensor, **Reserved the right to decrease the selling price and to make the terms of payment and delivery more favorable to the purchasers.** (See 186 U. S. at 72 paragraph 4). In this license the owner of the patent had complete control over the price at which the harrows were to be sold and was not restrained by contract in its freedom to establish prices on its patented articles. The referee not only did not find that there was a combination of the various harrow manufacturers, but he distinctly found that the contracts in suit were not part of a scheme and combination to restrain trade. The suit was brought to recover royalties and damages and to restrain future violations of the contract.

In the course of the opinion, Mr. Justice Peckham at least eight times specifically asserts that there was no proof before the court of the existence of a combination among the manufacturers of harrows.

These assertions are as follows:

1. "The only Federal question raised in the record is as to the validity of contracts A. and B., with regard to the act of congress on the subject of trusts. If facts not found by the referee are necessary for the purpose of connecting those contracts with others not found in such report, we cannot supply the omission to find those facts. (black ours)".

2. "The referee made no finding of any fact connecting the

contracts A. and B. with prior contracts of a like nature including other parties, as alleged in the answer of the Defendant”.

3. “The omission of the referee to find from the evidence (black ours), that the contracts A. and B. were a combination of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered into the same kind of contracts with plaintiff as those denominated A. and B., and that there was a general combination among the dealers in patented harrows (black ours) to regulate the sale and price of said harrows, furnishes no ground for this court to assume such facts.” (black ours).

4. “The contracts A. and B. are to be judged by their own contents alone and construed accordingly.”

5. “When he (the referee) speaks of all the contracts in evidence the referee plainly means all the contracts in evidence between the parties to this action, for it was of such contracts only that he had been speaking. There were, in fact, other contracts than those designated A. and B. between those parties, and such other contracts had been put in evidence, and previously referred to by the referee. He, therefore, must have included what is termed the escrow agreement in his finding, that all agreements made by the defendant with the plaintiff were valid. That agreement is set forth in the margin.”

6. “There is no finding by the referee that this agreement was ever signed by anyone other than the parties to this action, or that any other person received the licenses from and made contracts with, the plaintiff, similar to the ones entered into between these parties.”

7. “In the absence of any finding as to the escrow agreement having been signed by others, it must be regarded as unimportant, (black ours) and we are brought back to the question whether these contracts, A. and B. irrespective of any con-

tracts not found by the referee as in any way connected with, or forming a part thereof, (black ours) are void as a violation of the Act of Congress.”

After pointedly stating at least seven times, as just indicated, that the Court was not dealing with facts involving a combination, the Court returns to the matter at the conclusion of the opinion and again emphasizes the absence of any proof as to combination.

8. “It must, however, be conceded that the escrow agreement above set forth, looks to the signing, by the parties mentioned therein, of contracts similar to those between the parties to this suit, designated A. and B. and containing like conditions relating to the patents respectively, owned by such parties.

But there is no finding by the referee that such contracts were in fact entered into by those other parties nor that they constituted a combination of most if not all of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made. If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the Act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and become effective as an illegal combination. As between these parties, we hold that the agreements A. and B. actually entered into were not a violation of the Act. We are not called upon to express an opinion on a state of facts not found.” (black ours).

We have never read an opinion in any case where the Court exercised more vigilant and persistent care to define the exact scope of the decision than is here illustrated. The court through all varying forms reiterates the entire absence of any proof of a combina-

tion and concludes with two terse sentences, defining both affirmatively and negatively, the limitations of the decision.

What the case involves is this: One licensor and a single licensee; an exclusive license for the full term of the patents; a fixed royalty. The price at which the article was to be sold was entirely dependent upon the dictate of the owner of the patent. The licensee agreed to sell at the price fixed in the license, but the licensor had the right to change prices by lowering them. It is thus seen that the only restraint, if such it can be called, imposed upon the licensor was an inhibition against his raising prices. Aside from this the owner of the patent was free to make prices such as he saw fit whereas, the licensee had no power or voice in the matter whatever. The owner of the patent at all times was free to meet the changing conditions of supply and demand. Its royalty was a fixed amount on each harrow sold and was not computed as a percentage of the total value of the harrows sold. So that the owner of the patent was free to make its own price on the patented article to be sold, and so far as the facts in contest indicated, it had every motive for making the price such as to bring about the largest number of sales. The license was exclusive and the owner of the patent had certainly a right to grant an exclusive license. There was no stifling of competition, for the sole maker and vendor of the harrows was the licensee. Whether the price agreed upon was exorbitantly high or was reasonable; what was the reasonable value of the harrows; what other similar implements were on the market,—does not appear in the record. Looked at from every view point there was no element of combination in the case and no restraint of trade within the meaning of any decision of the Supreme Court. Apparently the defendant made the mistake of supposing that ugly allegations of the existence of a combination unsupported by any proof would constitute a defense. But it has long been settled that allegations without

proofs carry a suitor no nearer the goal than proofs without allegation. Either without the other is useless.

When the Bement case is properly understood as to the facts involved the decision presents no difficulty whatever. The gist is in these sentences: "The general rule is absolute freedom in the use or sale of rights (black ours) under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property (that is patent rights, not chattels) imposed by the patentee and agreed to by the licensee (black ours) for the right to manufacture, use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal." Again the Court says the Anti-trust Statute "clearly does not refer to that kind of restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof (black ours), restricting the terms upon which the article may be used and the price to be demanded therefor."

But this case has nothing in common with such decisions as the Heaton, Neostyle and graphophone cases. Here the condition was imposed by the patentee upon a licensee to make and sell the article. Until the licensee sold the harrows they were within the limits of the monopoly. The licensee in selling the harrows made no attempt to restrict the right of the purchasers to use or resell the implements. It did not place a brass plate on each harrow, reading, "Licensed for use only in connection with other implements supplied exclusively by the vendor" or "This harrow is sold under a license which restricts the right of the purchaser to resell the same to the price named and any one selling or purchasing the harrow at a less price is an infringer of the patent." There is nothing akin to that in the



case. The Bement case, by no distorting sophistry, can be made to support the two groups of cases previously discussed.

All the cases we have met with thus far where the courts found a combination in restraint of trade in patented articles resulted in the decision of the courts that the combination was illegal.

We now come to an unexpected and unforeseen result to the opposite in the case of,

**United States Consolidated Seeded Raisin Co. vs. Griffin & Skelly Co. (1903 C. C. A. 9th Cir.), 126 Fed. 364.**

It is not worth while to state the facts in any detail here or to examine at length the reasoning of the Court to sustain its judgment. It is sufficient to say that no clearer case of a combination can be found. Eight concerns were interested. The plaintiff was a mere dummy, and to it, the other concerns assigned the patents respectively owned by them. Then licenses were issued to each assignor. The licenses were not exclusive, but mere permissions to use the machines and processes. Notwithstanding this, the licensor agreed not to license other parties without the consent of four of the licensees. This is a clear restraint on the owner of the patents. A committee of four was appointed to determine to whom licenses should be issued. This was another restraint on the owner of the patents.

Aside from this the assignment of the patents and instituting the license system was a palpable ruse to combine competing businesses under a single control. The licensees agreed not to use any other machines during the life of the contract than those furnished by the licensor.

As to this combination the Court said: "We think the principles announced in that case (Bement Case) must control our decision of the question here presented." Then we look with both eyes to find what possible construction is to be put upon the Bement Case. And here it

is: "That such a contract (black ours) is not void as against public policy, in that it tends to create a monopoly has been decided by the Supreme Court in the (Bement Case.) In that case (black ours) a contract had been entered into between the National Harrow Company and various other corporations and firms engaged in manufacturing float spring tooth harrows, their frames and attachments, under various patents, 85 in number, which were assigned to the National Harrow Company. That corporation then entered into contracts with the other parties to the agreement and gave to each a license very similar to the license in question in the present suit" (black ours).

The court posits the assertion that the combination was not illegal entirely on the above interpretation of the Bement case. It may seem strange that the Court should construe the Bement case as authority for a proposition that the Supreme Court stated specifically at least eight times was **not** involved, but let us judge not. If there is any similarity at all between the Bement case and the one now under notice other than that each had to do with a license agreement we have never been able to discover it.

We do not deem it necessary to attempt to make clearer the fact that the Bement case affords no warrant whatever for this decision, and since the Court grounded its judgment on a totally mistaken supposition of the Bement case there is nothing at all to uphold the decision. The Court overrides the California Anti-trust Law by flourishing the baseless dicta from Columbia Wire Co. case but we have already dealt with that. The Supreme Court of California has applied the very same law to declare illegal a combination under patents. See Vulcan Powder Co. vs. Powder Co. (1892) 96 Cal. 510. And we must remember that this was a common law contract, the validity of which depended entirely upon state laws. The Court had no jurisdiction apart from the fact that there was a diversity of citizenship and more than \$2,000.00 in amount involved. We cannot believe that the Seeded Raisin Case adds much color or reason to the false notion that a con-

tract in restraint of trade in patented articles does not come within the Anti-trust Acts. Thus far, we have dealt with about six cases involving combinations to restrain trade in patented articles. In all of them, except the mistaken judgment just noted, the combination was declared illegal.

We come now to a case where a combination of the character was upheld and by the most remarkable process of reasoning anywhere to be found in the books. It is the case of

**Rubber Tire Wheel Co. vs. Milwaukee Rubber Tire Works  
(1907 C. C. A. 7th Cir.), 154 Fed. 358.**

This is a case of great importance because it is the only stronghold of those who cling to the notion that the Anti-trust legislation is not applicable to a combination in the restraint of trade in patented articles. We shall study the opinion with all the insight, precision and thoroughness at our command. If the decision is a sound one it is exceedingly valuable to know it. Whether or not it is sound must be determined by the holdings of the Supreme Court of the United States.

Before going into the case we must take notice that here the point of view is shifted from what it was in the two groups of cases involving restrictions on the Use and Resale of Articles which the patentee has sold. There the restraint was imposed on the purchaser and inhibited his freedom in the use and sale of his property. We saw that the effect of the court's action in upholding the restriction was to confiscate the purchaser's property in the resale cases; and in the cases of use, it was to drive supposed "contributory infringers" out of a lawful business and give the patentee a monopoly in an unpatented article after he had sold his patented article and received the purchase money.

But here the locus of the restraint is different: it is not imposed on the purchaser in the first instance though the burden of it falls on him ultimately. In every case of a combination or contract in restraint of trade the purchaser, the ultimate consumer, pays the full cost of the restriction. That is what men combine and conspire for, to oppress and rob the public. It is never for any other purpose. The real object

is to deprive the purchaser of a free and open market and compel him to pay for the article more than he would have to pay if the law was observed and the market left open.

In the class of cases typified by the one now to be discussed the point at which the restraint is applied is on the parties who sell the article to the purchaser. The restraint is capitalized in the price at which the combination sells to the public. The restraint here is imposed upon the patentee by the other members of the combination and on each member of the combination by the united influence of all others, so that there is no freedom whatever on the part of any member.

Two other observations need to be made before we take up a consideration of the facts involved. *First:* The suit was on a contract to recover royalties: the Federal Court had jurisdiction only in virtue of the fact that there was a diversity of citizenship and more than \$2000.00 involved. It was not an infringement suit, therefore, the validity or invalidity of the contract is to be determined by the general laws applicable to Wisconsin contracts including the Anti-trust Act of the State and the Federal Anti-trust Act. *Second:* The court expressly declares that the case is not within the principles of the Bement case. "We cannot dispose of the question on the authority of Bement vs. National Harrow Co. for according to our reading the question was expressly excepted from the decision; and so, aided by the declaration of general principles in that and other cases, we must formulate our own answer." This is gratifying. We have the Bement case eliminated and the court is going to formulate its own answer. There is no use to have a power to reason without using it. And the privilege of reasoning is entirely ignoble unless one dares to think his thoughts to the bitter end and then convert them into rules of conduct. To think is difficult, to act without thinking is easy, to act consistently in precise conformity to accurate, consistent thought is very rare. We shall see that the court had an opinion of its own and put that opinion into effect, and in studying the opinion we are brought to face an unexpected result, an unforeseen possibility of the patent law.

### THE FACTS.

The facts are not difficult to understand, but a careful statement of them is advisable. As before stated, the suit was grounded on a license contract and the object of it was to obtain a judgment for royalties under the contract. The patent pertained to an automobile tire, and the license contract was entered into consequent upon the following happenings:

The complainant was the owner of patent No. 554,675. Prior to the decision in this case the patent had had an eventful court history. It had been sustained as valid and infringed in a number of Circuits, but by the Court of Appeals for the 6th Circuit it had been declared void for want of novelty (116 Fed. 363) and the Supreme Court of the United States had denied a writ to review this decision (206 U. S. 285). The patent has since been involved in infringement suits but at this point we are concerned only with the legal status of the patent at the date of this decision. After the decision of the Circuit Court of Appeals for the 6th Circuit the "manufacturers of tires disregarded the patent, paid no royalties and cut the prices of the respective qualities to 50 and 40 cents a pound." That was very bad. Notwithstanding this condition of affairs "all of the parties to the contracts in suit entered into the arrangement in good faith, believing that the patent was valid and **that the adverse decision was erroneous.**" What is to be thought of a set of men who "in good faith" believe a patent to be valid when the highest court in a circuit has declared the patent absolutely void?

However, in this lamentable state of affairs "all of the manufacturers **that had been infringing**, except two small concerns, came into the pool." That was a consummation devoutly to be wished. The defendant went into the "pool," which had these characteristics. Plaintiff licensed 18 concerns of which defendant was one, to make, use and sell the tires under the patent for one year; each licensee's share of the trade was fixed at a certain proportion of the whole, defendant's at 2

per cent; two qualities of tires were to be made; the minimum selling price of the first quality was established at 65 cents per pound, of the second quality at 55 cents per pound.

Each concern agreed to pay plaintiff monthly 4 per cent of its sales, and if in any month its sales proved to be larger than its proportionate share of the total sales for that month, to pay plaintiff an additional "royalty" of 20 per cent of the amount over its quota; plaintiff agreed to employ a commission of five persons to supervise the transactions of all the parties (now listen: remember we are dealing with the Czar), and **"to turn over to the commission all royalties in excess of two per cent."** We must stop now and carefully examine the operative effect of this "pool." It is full worthy of the closest scrutiny, for nothing like it was ever known in a law book before, and we hope will never be there seen again. We have already noted the fact that the competitive prices of the tires were 50 and 40 cents a pound; it is so stated by the Court. The "pool" prices for the corresponding qualities are 65 and 55 cents per pound, the gross advance in each price being 15 cents per pound. To study the effect of this wonderful transformation in the business of supplying rubber tires we will consider the changed status of the first quality tire. It is entirely fair to the "pool" to thus proceed as the per centage of increase is smaller than in the case of the cheaper quality, though the unit increase per pound is the same. Let us suppose a sale by a member of the "pool" of 10,000 pounds of the first quality at 65 cents per pound. In this sale we want to consider the interest of four parties. 1st. The owner of the patent. 2nd. The licensee manufacturer, who was an "infringer." 3rd. The "pool"; and 4th, The public, impersonated in the purchaser. In these "pool" cases the interest of the people are always put last though the money of the people is kept always in the front.

1st. Then the owner of the patent. Ten thousand pounds are sold for \$6500.00, of this sum the patent owner gets 2 per cent or \$130. To start with this result is amazing. By hypothesis he is a Czar and has a complete monopoly. This court said in the Victor Talking Machine

Case (123 Fed. at 426) "that whether purchasers come or not is purely his own concern, and if purchasers do come, the courts will enforce the terms of the sale." Again "the field of using is as much within the monopoly as" the field of making and selling. Let us apply that logic here. The competitive price of this 10,000 pounds was \$5000.00. Surely it is safe to assume that that was not below cost, as we read nothing of bankruptcies among those who sold it at that sum. Suppose then that \$5,000.00 represents the cost of the 10,000 pounds though we have to stretch credulity to the cracking point to make such supposition. The Czar has increased this to \$6500.00 which leaves \$1500.00 clear profit, over and above all expenses. What idiotic prepossession induced the Czar to accept \$130.00 in royalties in lieu of this \$1500.00 in profits from sales? How long could the ordinary business man escape having a guardian appointed if his friends knew that every week and month he was deliberately sacrificing an assured profit of \$1500.00 for a "royalty" of \$130.00? How long would the stockholders of a corporation hesitate to demand the expulsion of a board of directors who would accept a "royalty" of \$130.00, when by the Patent Laws of the United States, the corporation was entitled to earn and could have earned \$1500.00 instead?

There is no use to say the patent owner was not equipped to manufacture the tires. It could readily have hired them made. There is no use to mumble about the owner of the patent having no facilities for selling. One who has produced "a new integer in the useful arts" greatly in demand, does not experience difficulty in selling it. This then, is the first amazing and shocking result of this "pool." The Czar who can exclude all persons whatsoever, even to the Federal government, drops a profit of \$1500.00 to pick up a royalty of \$130.00. What must we think of the stockholders of that corporation?

2nd. We must consider the licensees, who formerly were "infringers." A bona fide license granted in good faith under a valid patent must of necessity imply a financial benefit to the licensor and a tax or burden upon the licensee. The licensor parts with a right which he

might withhold; the licensee gains a permission that he could not force and assumes a burden in the royalty.

While doing the licensed act is profitable to the licensee nevertheless he could not have done the act at all without the license and the sale of the privilege must result in a profit to the licensor, or he would not sell it. Likewise the paying the royalty must gain the licensee a new right or he would not pay it. We have already seen that the licensor here gained nothing by the licenses; on the contrary for every \$130.00 received in royalties, it sacrificed an assured profit of \$1500.00 in sales. We turn now to see what burden the license cast upon the "infringing" manufacturer when he entered the pale of the "pool." The price at which he formerly sold the 10,000 pounds was \$5,000.00; under the "pool" regime he gets \$6500.00 for the same subject matter. This represents a gross increase in his profit of \$1500.00. Out of this \$1500.00, he pays a total royalty of 4 per cent or \$260.00; which is divided between the "pool" and the patentee, one-half going to each. By taking out a "license" and selling 10,000 pounds of tires at the "pool" price, the manufacturer makes a clear net profit of \$1240.00 in excess of the profit he made on the sale of the identical goods prior to the license. Did anyone ever before hear of such a beneficent Czar? His charity is not only very costly to himself but is vastly profitable to the licensee.

Here the licensor not only did not charge any royalty at all but hired the licensee to operate under the license for he enabled the licensee to make a profit of \$1240.00 in addition to what was made without it. If licensor and licensee had each spoken their respective attitudes the result would have found some such expression as this: Licensor: "I have a valid patent on the rubber tires, can exclude every one from selling the same and I can realize a profit of \$1500.00 on every 10,000 pounds sold. But if you, Mr. Licensee, will come into my 'pool' I will allow you to make \$1240.00 on every 10,000 pounds sold and all you need to do is divide \$260.00 between me and my 'pool.'"

Licensee: "I do not believe that you have a valid patent and I care nothing about a permission from you to manufacture and sell tires.



But if you and your 'pool' will enable me to make on every 10,000 pounds sold an additional profit of \$1240.00 without any cost to me, and the courts can be persuaded that this is legal because pulled off under much talk about 'patent monopolies,' I am not such a fool as to decline the offer; for I am in the business to get the people's money."

This, then, is the second amazing result that comes out of the remarkable circumstances here given. The licensee is given a bonus of \$1240.00 on every 10,000 pounds just for the privilege accorded to the patent owner of calling him a "licensee."

3rd. The "pool." We come now to a more interesting phase of the matter than we have yet noted. The "pool" is not the owner of any interest in the patent. It is neither a licensor or a licensee. It is labelled here "a commission of five persons" employed by the owner of the patent. The name by which it goes is of no importance; what we want to deal with is the thing, not its cognomen. This commission could not grant a license and did not manufacture any tires. Let us see what was its mysterious function.

The book says that each licensee paid to the licensor a royalty of four per cent and in addition 20 per cent of the amount of its business in excess of its determined quota of the total business. Further, the licensor turned over to the commission "all royalties in excess of two per cent." That means that the owner of the patent turned over to the "pool" one-half of the royalties, and all of the twenty per cent paid in by the licensees who exceeded their respective quota. We think it distinctly worth while to see how this would work in a concrete instance. Suppose the business for a given month totalled \$100,000.00. This is a mere bagatelle in comparison with the amount in fact involved, but it will serve for illustration.

Suppose of this total business, licensee, A, did \$5,000.00. Then all other licensees combined did a business of \$95,000.00. A's per centage was 5/100 and that of the remaining licensees, in the aggregate, 95/100. Now the month following the total business is \$105,000.00, of which A does \$10,000.00 and the other pool members \$95,000.00 as

for the preceding month. Something must be done in such case. A is growing too fast. He was entitled to do 5/100 of a total of \$105,000.00, or \$5250.00; instead he has pushed up to \$10,000.00 or exceeded his quota by \$4750.00. The other members of the "pool," by the law of fixed quotas, were entitled to do an aggregate business of 95/100 of \$105,000.00 or \$99,750, instead they have fallen short \$4750.00. Here the "pool" steps in, takes twenty per cent of the \$4750.00, which represents the sum in excess by A's quota, said twenty per cent, amounting to \$950.00, and distributes the same among the other "pool" members; thereby making good to them twenty per cent of their loss, due to indolence and inertia. Remember that no part of this \$950.00 goes to the owner of the patent. It is not a tax imposed by him to limit the licensee's business.

This is not a case where each licensee was limited to making a certain number of tires. The patentee got nothing out of the twenty per cent at all. On the other hand A had to pay the full royalty of four per cent on his total sales of \$10,000.00 and in addition had to give approximately ten per cent of the total sales to the other "pool" members simply because he was industrious and energetic and they were going on in the same old rut. The patentee gains nothing by the transaction; and at first glance the "pool" seems not to profit by it. But when we look closer we see that the first impression is wrong. One may always carry in one's mind the irrefutable presumption that the manipulators of a "pool" do not do anything whatever without being paid well. We look at the book again and it says: from the moneys so put into their hands (i. e., by the patentee, turning over all "royalties" in excess of two per cent.) the commission **after deducting their expenses and compensation for services in supervising and auditing,** (black ours) were to" distribute monthly to any lazy licensee 20 per cent of the cost to him of his indolence. "Expenses and compensation for their services." There's the rub. Lobster salad, champagne, black cigars, automobiles and little flunkies running everywhere, these are some of the items of expenses of "pool" managers. These are necessary to put

up a front and keep a bluff going. And "compensation for their services in supervising and auditing." What this really means is watching the licensees to see that they do not "cut prices." This is weighty business. The licensees have been induced to sign a contract under which every sale is a crime and it requires vigilance to make 18 licensees constant in crime. If one obeys the law and sells at his own price, a competitive price, he must be punished. It is just like 12 jurors who have secretly agreed to return a verdict in keeping with a compact of bribery, and one breaks over and is about to follow the court's instruction to render a verdict according to the law and the evidence. The man who can bring such a juror back and make him keep the corrupt bargain he has made, is, in this age of shame and lawlessness, well paid always. He ought to be, for he is playing dangerously near the portals of the penitentiary in performing the services. Hazardous employments always come high. It was for similar services that the "commission" here was to be paid, including expenses, out of the funds turned over by the owner of the patent. In the transaction supposed, A has fared thus on his sales amounting to \$10,000; he has paid \$200.00 to the patentee as a royalty; \$200.00 to the "pool" in royalties, and \$950.00 to the "pool" as a tax on his industry and as a tribute to the criminality of the commission. Not a thing does A gain by paying the \$1150.00 to the "pool," except that it is a step on his part in violating the law and a link in the chain that keeps the other licensees violating the law. Of course, the patentee gains nothing whatever by this payment. But the "pool" has something more to do than transfer the 20 per cent from the industrious to the shiftless members of the combine. It is to accumulate \$50,000.00; to distribute any sums in excess monthly among the concerns licensed. Then the "pool" has power upon the written consent of a majority of the parties at interest (including one patentee and 18 licensees) to purchase tires from any or all of the parties hereto at the prices named in the license and to "dispose of such tires to the trade at such prices as said commission shall deem to the interest of all the parties hereto" (black ours.)

Now we appreciate the real purpose of the \$50,000, and the use to which it is to be put by the "pool". Mr. Justice Holmes in the Northern Securities case, said that a combination or conspiracy in restraint of trade is a conspiracy to keep strangers out of the business. That is exactly the purpose for which this "commission" accumulated the \$50,000. Sell the tires to the trade at such prices as said commission shall deem to the interest of the combine. In other words, if a new concern starts in the business, go to its customers and give away the tires if necessary or sell them at such price as will destroy the custom of the new concern and "keep strangers out of the business." Undoubtedly the "commission", with this barrel, should have been successful for the opinion says "all of the manufacturers that had been infringers, **except two small concerns** (black ours) came into the "pool." No doubt the "pool" has long since put them out of business or brought them within the fold. Here then we have a "commission" with \$50,000 accumulated for the sole purpose of destroying other persons who attempt to start up in a legitimate business. This fund was accumulated from the licensees, not from the patentee, though it went through his hands. This then is the third amazing result of the combination dealt with. But the most important interest has yet to be considered.

4th. The Public. We must now take a look at the interests of the people and see how they fare in this mix-up. The people, the consumers, the ultimate purchasers and users of these tires, must be given some after-thought at least. Without them the patentee's patent would be worthless; the "pool" could not exist. Without the ignorance and credulity of the public, the "commission" would be given employment of far more certain duration and tenure, accompanied by a gratuitous supply of food and clothing, according to a well-known practice. Moreover the "pool" always has a care that no other "pool" shall be formed to do unto it even as it does unto the people. For example, if the workmen form a "pool" of their own to increase cost of their labor to the "pool," the latter straightway rushes into a court of equity crying "combination" and "conspiracy," and gets an injunction against the

labor "pool." And if it runs into another "pool" in the business of supplying raw materials needed in manufacturing, it smiles a knowing smile and says, "Don't try to work my own game on me. You can go on fooling the people and taxing their stupidity. We are doing the same thing. But you must cut the 'pool' price to us and we will do the same to you. This is a case where we must hang together or hang separately. Highwaymen never attempt to hold up one another; but many times they share the spoils of their separate robberies." And it is done even so. There is this bond of sympathy and apostate honor between all "pools." Well, let us take the interests of the public in hand now and see how thoroughly the fleece is shorn off. We will make a rough estimate of what the public would purchase from the "pool" in the course of a year's time. No statistics are given in the opinion but by a little thought we can get at the matter pretty accurately.

The report states that the defendant's quota of the business was 2 per cent. There was a claim for royalties for several months (the contract only run for one year) amounting to \$4,000. From this we can easily form an accurate estimate of the business done during the period by the combination. The defendant owed \$4,000.00 in royalties which amounted to 4 per cent of its sales. The total amount of its sales for the period obviously may be arrived at by taking one-fourth of \$4,000 for one per cent, and multiplying this sum by 100. When this is done, we have \$100,000, 4 per cent of which is \$4,000, the amount of royalty sued for. But by the authentic report, the defendant's quota was just 2 per cent of the total, so that we must multiply the 2 per cent represented in the \$100,000 by 50, in order to arrive at the grand total—100 per cent—\$5,000,000—the business done during the period by the combination. Thus by following the method of the scientist who, possessed of only the maxillary bone, reconstructs the entire skeleton of a mastodon, we have all the huge proportions of the business accurately delineated before the mind's eye. There is no guess work or speculation about it. Granted, the defendant's royalties of 4 per cent aggregated \$4,000, the sum total of the combine's sales for the period, must

have been \$5,000,000, or the multiplication table is no longer reliable. We will suppose these sales were all of first quality at 65 per cent per pound. This is the part of fairness to the combination as the percentage of increase in the price was slightly less in case of the high priced tire than in that of the second quality. This supposition seems reasonable, too. For most people who own automobiles thus far, are themselves in some sort of a "pool" and thereby take occasion to buy the high priced article, if for no other reason than to have the reputation of being "swell" and advertising the fact that the possessor, too, understands how to take the money from the people. Now the advance in the sale price of the first quality was from 50 to 65 cents per pound or exactly 30 per cent. Here, then, is where the dear people come out. Before the formation of the "pool" in connection with the unassailable "license system," the people, the automobile riders, could have purchased the same quantity of the identical tires at 50 cents per pound, or a total cost of \$3,500,000 whereas under the regime of the "pool" manipulated by the "commission," they pay \$5,000,000 for the same thing. By the court's own statement the manufacturers were selling the same "infringing" tire at 50 cents per pound prior to the "pool," so that the utmost aggregate they would have gotten for the quantity mentioned would have been \$3,500,000, whereas they in fact obtained \$5,000,000, or \$1,500,000 in excess of the former price. Now let us do a little "auditing and supervising" here, of transactions between the "pool" and the people and then go over the "pool's" books apart.

First let us see what effect the "pool" had on the pocket-books of the people.

People's Investment in rubber tires.....	\$5,000,000
Competitive sale price of tires.....	\$3,500,000
"Pool" price of same tires.....	5,000,000
<hr/>	
Cost to the people of the "license system and "supervision, auditing," "expenses and services" of "commission" .....	\$1,500,000

That is the balance sheet of the people in account with the "pool." But we are strong on details and we desire now to go over and "audit and supervise" the accounts of the "pool." The balance sheet here, indicating the profits and losses is very remarkable. Here it is:

"Pool's" sales to the people for the period.....	\$5,000,000
To 2 per cent net royalty to the Czar.....	\$ 100,000
To 2 per cent royalty to "commission" for expenses, services and anti-competition fund....	100,000
To competitive sale price of tires.....	3,500,000
To licensees' swollen profits in excess of competitive prices, under the "pool" system.....	1,300,000
	\$5,000,000

That is the ledger account of the "pool" and the people and of the "pool" in account with itself.

Now, reader, you are prepared for a few ideas about these "pools" and business generally. Business has many diversified aspects but the one phase which always is to be found in all of its changed forms is other people's money. That is invariably the case. A "pool" is a device whereby all the concerns in one line of business make a concerted assault on the people. They are like a string of highwaymen who waylay every road, so that the people cannot escape, for there is no road uninfested. A "commission" keeps tab on all the "pool" members, whistles to enable them to keep up their courage and punishes any one who falters in the desperate work.

A patent is the latest devised means of proving an alibi when the people complain of being robbed. Thus far it has served its purpose. When the sort of thing described in this case can be done right under our eyes and be stamped with approval by the courts right before our eyes, we ought not to wonder that some men can afford to build libraries, endow hospitals, foundling asylums and colleges, ride in yachts and play golf to drive away the time. But we do wonder and shall continue to wonder why the courts should continue to punish petty thefts. It

may seem strange that a man who steals \$10, it may be, to dull the edge of a gnawing hunger or fence his limbs from the cold, should be sent to jail as a thief, while a set of men who steal \$1,500,000 should be commended for contributing to the progress of science and the useful arts, but let us judge not, that we be not judged. We have not yet examined the attempted legal justification for this, but shall do so presently. We may say, however, that if such a result can be justified under the supreme law of the land, it would be worth walking bare-footed from the Gulf of Mexico to the St. Lawrence River to learn how. Thus far no case has foreshadowed that such a thing was coming. Let us see then what is to be said as to the law of this "pool," "license system" and "commission":

### THE OPINION.

The defendant pleaded the Federal Anti-trust Act, the Anti-trust Act of Wisconsin, which prohibits Wisconsin corporations (of which defendant was one) from entering into any arrangement or contract intended to restrain competition in the supply or price of any commodity constituting a subject of commerce within the State.

The defendant further pleaded that the patent was invalid, known by the parties to be invalid and that the license system was fraudulently devised to enable the parties to evade the laws against combinations in restraint of trade.

At 154 Fed. 361, the court goes into the merits of the case. "The Wisconsin (anti-trust) statute is eliminated not only because it is not involved in any assignment of errors," What a strange start this is. The Wisconsin statute was pleaded in the answer as a defense to an action on a Wisconsin contract. The Court below held the contract invalid and gave judgment for the defendant. It was the plaintiff that appealed from that decree. There was no occasion for the defendant to bring up any assignment of errors. Now, because the defendant did not assign as an error, the publication of a public statute, contravened



by the contract sued on, the Court will "eliminate" the statute. Suppose a criminal is convicted of murder and appeals. In the assignment of errors he omits all reference to the statute punishing murder with death. Would the Appellate Court "eliminate" that statute on murder? The Federal Courts are bound to take notice of State statutes, exactly the same as they do of National laws. As early as 1835, in the case of *Owings vs. Hull*, 9 Peters 607, at 625, Mr. Justice Story said: "The Circuit Courts of the United States are created by Congress, not for the purpose of administering the local law of a single State alone, but to administer the laws of all the States in the Union, in cases to which they respectively apply. The judicial power conferred on the general government by the Constitution, extends to many cases arising under the laws of the different States. And this Court is called upon in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the States. The jurisprudence is, then, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established: but it is to be judicially taken notice of, in the same manner as the laws of the United States are taken notice of by these Courts." (black ours). This has always been the law and is the law today. See *Martin vs. B. and O. Railroad Co.* (1894) 151 U. S. 673 at 678.

The Wisconsin Act, then, cannot be eliminated" on that ground. We turn to the other reason, "but also because a State cannot subtract from the right conferred upon a patentee (black ours) and his assigns by the Federal laws." For this proposition we are cited to the *Columbia Wire Co. Case*, and *The Seeded Raisin Co. Case*. We have already seen that the statement in the former case was not only unfounded, but was a mere aside remark, not within the issues. This was taken up and made controlling in the *Seeded Raisin Case* and now we have the two decisions yoked as authorities. Fortunately each time the rule is announced, we have a varying statement of it and thus it can be exam-

ined from all view points. Here we have a new formulation of it. "A State cannot subtract from the right conferred upon a patentee \* \* \* by the Federal laws." We will stick to the Court's simile, dangerous as figures of speech always are in argument. Before we can determine whether a given subtraction can be made, we must ascertain the minuend and the subtrahend, and if it turns out that the two sums are in different categories, the operation becomes impossible and no result is derivable. We cannot subtract ten horses from twelve stars. In the problem given the minuend—the right conferred upon the patentee—is the right to exclude others. We concede without a struggle that the State of Wisconsin cannot subtract from that right. It cannot impose conditions on the right of the patentee to bring suits for infringement, or to assign his patent. And we stoutly deny the legislature of that State has attempted such a thing in the Anti-trust Act. The statute does not attempt to punish a patentee for keeping his device to himself and excluding others from its sale or use. On the other hand, the patentee and all other persons have a right to enter into contracts, to enjoy and dispose of the fruits of their own labors, and to employ contracts as a means of doing this. This is a fundamental right of every citizen, not derived from any law, State or National. It is the same for the patentee as for any one else. This general right to contract is the minuend in our calculation. From this, the State of Wisconsin *can* subtract the right to enter into contracts and combinations intended to restrain competition in the supply or *price* of any commodity constituting a subject of commerce within the State. And when that juristic subtraction is carefully made, the remainder is momentous; it is a crime. We think the computation made in this case is erroneous because the minuend was not properly understood, and the result consequently is altogether unaccountable.

We proceed, and have this further observation on the power of a State over trade in patented articles: "For the protection of the physical or moral health of its citizens, a State may restrain the use of 'the

corporeal thing or article brought into existence by the application of the patented discovery, (citing *Patterson vs. Kentucky*) but **such a laying on of hands does not touch the monopoly of the federal grant.** (black ours). Nothing in this record questions the innocence of rubber tires." But the power of a State is not limited to the protection of the physical or moral health of its citizens. In what manner is the "physical and moral health" of citizens threatened or imperilled by cast-iron pipe (175 U. S. 211), blue stone (44 N. Y. Supp. 787), wire cloth (14 N. Y. Supp. 277), candles (47 Ohio St. 320), or cotton bags (14 La. Ann. 168)? Are not all these equally as "innocent" as rubber tires? And yet contracts in restraint of trade, in all of them, have been declared illegal and void, and these decisions are recognized as enunciating the public policy of the Nation. We quite agree that "such a laying on of hands does not touch the monopoly of the federal grant," which consists altogether in the incorporeal right to exclude others, which is beyond the laying on of any legislative hand, but such a laying on of hands, does touch, or ought to be made to touch, contracts, conspiracies, and combinations in restraint of trade in articles of trade and merchandise. These are no part of the "monopoly of the Federal grant." We hear the voice in *Webber vs. Virginia*, crying out like a prophet in the wilderness: "The Legislation respecting the articles which a State may adopt after the patents have expired, it may equally adopt during their continuance. It is only the right to the invention or discovery, the incorporeal right which the State cannot interfere with."

Now we pass over to consider the Federal Anti-trust Act. The State statute was eliminated for that it was not involved in any assignment of errors and also because a State cannot subtract from the monopoly of the federal grant. The federal statute also is to be "eliminated," but for a different reason. The National law is "eliminated" after this extensive fashion: "Under its constitutional right to legislate for the promotion of the useful Arts, Congress passed the patent statutes. The

public policy thereby declared, is this: Inventive minds may fail to produce many useful things that they would produce if stimulated by the promise of a substantial reward; what is produced, is the property of the inventor; he and his heirs and assigns may hold it as a secret till the end of time; the public would be largely benefited by **obtaining conveyances of these new properties** (black ours); so the people, through their representatives, say to the inventor: **“Deed us your property, possession to be yielded at the end of 17 years, and in the meantime we will protect you absolutely in the right to exclude every one from making, using, or vending, the thing patented, without your permission.”** (black ours.) How can it enter into the heart of man to conceive a meaning in those sentences? The only “conveyance” made by the patentee is of a piece of paper. The property consists in a collocation of words comprising a description. If I deliver to another, a highly embellished and accurate description, in writing, of an air-ship, I hardly render it possible for the donee to sail away in the air-ship described. All the inventor “conveys,” is a specification, and it may be, a drawing. “Deed us your property,” and he does deed a written description, “possession to be yielded at the end of 17 years,” but possession of the only thing deeded, is yielded in the very act of deeding. “And in the meantime (i. e., after the property has been deeded to the people), we will protect you absolutely in the right to exclude from making, using, or vending the thing patented, without your permission.” We have here to contemplate, two things: one is a mere description, an expression in words of the inventor’s thoughts; the other is a physical object symbolizing those thoughts. The written description is deeded to the people and possession is given at once. The physical object is never deeded to the people except in return for their good money, and possession is not given on any other condition before, during, or after the 17 years. What the people, in substance, say, is this: Give us a full and accurate description of some useful thing concerning which you can truthfully swear that it originated in your own “cares and sweat” and

we will see to it that for 17 years no one else shall be permitted to make, use, or sell that thing without your consent, but we cannot and do not, enlarge or restrict your own right to deal with what you have made. You, yourself, will have all the privileges and be subjected to all the limitations that pertains to any other person in dealing with his own.

For the above passage, the Court cites a number of authorities, none of which requires any notice except the case of *Good vs. Daland*, 121 N. Y. 1.

If the reader is curious and desires to account for some of the strange seeming expressions in the opinion in the *Bement* case, let him consider carefully the case of *Good vs. Daland* and follow Mr. Justice Peckham from that opinion to the *Bement* case. During the interim, we cannot find that the writer of the two opinions wrote anything else on the nature of the patent grant.

We think the Anti-trust Act of Congress is not yet eliminated, but the effort to accomplish that result is not yet ended. We go on with the struggle: "Congress put no limitations excepting time, upon the monopoly (right to exclude). Courts can create none without legislating." That is true, but it is also true that *by legislating*, the Courts are adding to the "monopoly" many things that Congress never dreamed of in connection with the patent laws. "The monopoly (right to exclude) is of the invention, the mental concept as distinguished from the materials that are brought to give it a body. Use of the materials, as noted above, may be enjoined as injurious to the public; but that does not invade the monopoly. Use of the invention cannot be had except on the inventor's terms." Now let us get our bearings again. The monopoly has for its subject matter, the invention, which is a mental concept. That's the first proposition. The next is that restraint upon the use of the physical thing that gives body to the mental concept, does not invade the monopoly which embraces only the mental concept. Down to the last one of the sentences quoted we have the three :

terms, monopoly, mental concept, and invention, used synonymously; each as the equivalent of the other two and all three designating an invisible, intangible, intellectual process. In the last sentence quoted, the word "invention" is switched over to designate a physical, dimensional, gross object. "Use of the invention (mental concept) cannot be had except on the inventor's terms." We have here, then, the same double use of the word "invention" as in the Victor Talking Machine Case. Of course when one makes use of the same word to denote two things entirely distinct, contradiction, in the literal sense, is inevitable. The fact is that the word "invention" is an exceedingly deceptive one. It may easily have four separate counterparts in our thinking; it may refer to an activity, either mental or physical, or a product either mental or physical. The poet "invents" a poem. The poem is his invention. A genius "invents" a telegraph. The telegraph is then the "invention" of the genius. But after all it is the thing and not words that is important. We proceed: "Without paying or doing whatever he (the inventor) exacts, no one can be exempted from his right to exclude." But from what, "the mental concept" or "the materials brought together to give it a body?" "Whatever the terms, Courts will enforce them, provided only that the licensee is not thereby required to violate some law outside of the patent law, like the doing of murder or arson." Now we know that the Court has been using the word "invention" latterly, as a name for the "physical materials," because a license of a mental concept or of a right to exclude is altogether inconceivable. The problem is now stated: "Does the requirement that the licensee join other licensees in a 'combination' or 'pool' to control the prices and output of an **innocuous** (black ours) patented article, violate the Sherman law?" Consistency required the Court to interpolate the term "innocuous" into the problem, for the reason that it had just "eliminated" the Wisconsin Statute because the article was innocent. If the article had been dangerous, like nitro-glycerine or arsenic, the Court's logic would have conducted to the result that the combination was sup-

pressable under the State law. Since the article is not noxious, the State has no power to prohibit restraints of trade in it. Now we swing to the opposite boundary and inquire whether or not the Federal Act applies to a restraint by contract in the trade in an "innocuous" patented article, the suppressed correlative being, that such Act does not forbid the restraint if the article is harmful to the morals and physical health of the citizen. But neither State or National statute predicates anything whatever on the character of the article, as harmful or innocent. Congress has no power to legislate in the domain of police protection to the citizens of the States. On the other hand the State Anti-trust Acts do not classify articles or commodities as innocent or harmful, forbidding restraints of trade in the latter and winking at the same in the former. Many persons would aver that beer (27 S. W. Texas 692) and whiskey (156 Ill. 448) are far from innocent, but State statutes have been successfully invoked to destroy restraints of trade in both. In *Patterson vs. Kentucky*, the patented oil was suppressed as dangerous but not under any Anti-trust Act. It was suppressed under a statute announcing the public policy of the commonwealth to protect its citizens from the particular danger inherent in the inflammable nature of the oil. The Anti-trust Acts are intended to protect citizens from the danger of the vicious tendency of men to contract, combine, and conspire to limit and restrict trade in any and all articles, regardless of the supposed innocent or harmful character of the articles in themselves.

We go now to learn how this "innocuous" patented article is to fare under the Sherman Act. "Congress, having created the patent law, had the right to repeal or modify it, in whole or in part, directly or by necessary implication. The Sherman law contains no reference to the patent law. Each was passed under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public." Let us stop a moment and see whither we are tending. Thus far we have repeated for us in various forms, the assertion that the two statutes are quite distinct, each dealing with its own isolated sub-

ject matter. One is to encourage progress, science, and the useful arts; the other to punish crimes committed in connection with interstate commerce. This is our premises. The interrupted sentence continues: "the necessary implication is not that one iota was taken away from the patent law" (by the Anti-trust Act). So we might say with equal force that not one iota is taken away from the currency law by the Bankruptcy Act, but that does not define the scope and operation of either of those laws. Now attend to the amazing conclusion that flows from this long contrast based on negatives; **"the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several States."** (black ours). That is the necessary implication from the conceded fact that the patent law and the Anti-trust Act were passed under separate and distinct grants of power and each contains no reference to the other. A parallel argument is this: a bankrupt is not guilty of perjury in making a false oath in a bankruptcy proceeding because the currency law prohibits a private citizen from coining the money of the realm.

If patented articles are not articles of trade or commerce among the several States, then, obviously the whole discussion past, as well as that yet to follow, is interdicted as an idle and foolish waste of time. A patented article is certainly an article, even though it be patented. If that article is sold in one State and shipped into another, why is not that an article of trade or commerce among the several States? But then we have the mystifying qualification,, "unless or until they are released by the owner of the patent from the dominion of his monopoly." That looks queer. Let us experiment with it; try it out. That is the only way to determine whether it is words or things we are handling.

Suppose X, an inventor in Massachusetts, has a patent on an adding machine; he has made 5000 of them and they are still within the "dominion of his monopoly." He determines to load them on a freight train and take them to the far West for sale. He is destined for, and arrives in, a State considerably westward to the Mississippi River.



There are odd statutes on the books of this State; one provides that no hotel keeper shall furnish for guests, bed sheets less than nine feet in length. X, the patentee, does not object to that. Perhaps he is grateful for it. But there is another statute (let us suppose) adopted late in the session of 1907, which provides that any non-resident patentee coming within the State and possessed of patented articles not yet released from the "dominion of his monopoly," shall pay a tax equal to 10 per cent of the value of these articles. The collector reads the law and demands the tax. The patentee rushes into a Federal Court crying out about his constitutional rights and a restraint upon interstate commerce. But the State's attorney-general is lean and hungry-looking. His light burns late at night and he has read the latest decision. He informs the Court that the legislature has acted within its prerogative. The Court looks puzzled but is determined not to be trapped by this astute official who toils at the law when others dream dreams and see visions. The attorney-general then says: "The latest statement of the law is that 'patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several States.'" He starts to lay down the volume and show that the adding machines are still unreleased, but the Court quickly interrupts with "Hand me that book." We can easily imagine that shortly after the passage is perused, something breaks loose in that Court room. But it is useless to idle thus. In *Webber vs. Virginia*, the Supreme Court held that a patented sewing machine was an article of interstate commerce and that the State of Virginia could not tax interstate trade in it. In the *Bement Case* the Court held that the patented harrows were articles of interstate commerce and trade. It is clear, beyond questioning, that any article or thing whatsoever, patented or unpatented, that is sold and transported from one State into another, is an article of interstate trade or com-

merce. The obvious meaning of plain words precludes any other notion.

We switch from this argument to an entirely different one. No decisive conclusion is drawn from the premises that patented articles are not articles of trade among the States. We are still in search of a principle of cancellation by which this troublesome anti-trust act may be eliminated. A different theory is now advanced.

“The evils to be remedied by the Sherman law, are well understood. Articles in which the people are entitled to freedom of trade, were being taken as the subjects of monopoly; instrumentalities between which the people are entitled to free competition, were being combined. The means of effecting, and the form of combination, are immaterial; the result is the criterion. The true test of violation of the Sherman law is whether the people are injured, whether they are deprived of something to which they have a right.”

We have an entirely new argument to deal with, and yet no decisive result is in sight. The argument here, is this: The Sherman law only forbids restraints of trade in articles with respect to which the people are entitled to freedom of trade or free competition. The people are not entitled to freedom of trade or free competition in patented articles. Therefore, the Sherman law does not apply to restraints of trade by contracts in patented articles. This, too, is a rope of sand. The patent law says nothing expressly or impliedly about freedom of trade and competition. It says that the patentee shall have the right to exclude others from selling. That does not mean that he may exclude himself by a contract or combination. On the other hand, the anti-trust act deals with persons, not abstractions. It makes it a crime for the persons engaged in interstate trade to restrict their freedom to trade by contracts, combinations and conspiracies. “Free competition” and “freedom of trade” are mere abstractions that we apply to describe the results of men being free to trade and free to compete in the trade. No legislature or Court can create either trade or competition, much less

free trade and free competition. Men always have and always will trade, and their trade will be free and competitive if only they are forbidden to contract, combine and conspire to eliminate the natural spontaneity and competitive feature. This is the sole function of the Anti-trust Act; it is entirely negative. It says to every embryo trader: "You may engage in interstate trade or not, just as you please. It makes no difference in the policy of this statute whether you trade or not, so long as you are free in the matter. But you are forbidden to enter into any contract, combination, or conspiracy, the effect of which is to restrain trade or commerce among the States." Now the patentee has the sole right of trading in his article. He personifies the freedom of trade in his patented article. If he enters into a contract, combination, or conspiracy, whereby his freedom to trade in that article is restricted, that is the most palpable, the most emphatic violation of the statute conceivable. The freedom of the only person who has any freedom of trade in the article, is gone. The restriction is thoroughgoing and not partial. The patent law made the freedom of all other persons to trade in that article contingent upon the consent of the patentee. Now he has gone and pledged his sole and unvexed freedom to a combination or a band of conspirators. That is the awfulness of a restraint of trade imposed upon a patentee by contract or combination. Suppose a man has invented an entirely new typewriter and patented it. He has manufactured several thousand, and is selling them throughout the nation very cheaply. The concerns engaged in manufacturing and selling the old and costlier machines, foresee disaster in their inability to market their manufactured product and in the loss incident to investments in equipment soon to become worthless. They go to the inventor of the new machine and persuade him to enter into a contract whereby for a consideration of \$1000 a month, he agrees not to sell any more of his machines for 5 years. Can sophistry or ingenuity devise an argument to show that that would not constitute a violation of the anti-trust act? And yet the case in hand is just as em-

phatically a violation of the same law. But we do not want to interrupt following this argument to the end.

Next we have this: "Grant (the patentee) produced a new integer in the useful arts." The Court of Appeals for the Second Circuit is called upon to vouch for that. But the Court of Appeals for the 6th Circuit had held just as positively that Grant had produced nothing of the kind: that the patent was void for anticipation (116 Fed. 363) and the Supreme Court had refused to review the finding. How about that? But we waive this for the moment in order to follow closely the steps of the argument. This brings us to the top of page 363. Here we start off again. We take the liberty of accompanying the ill-defined term "monopoly" with a pair of parentheses enclosing the words "right to exclude." We have this: "The only grant to the patentee was the right to exclude others, to have and hold for himself and his assigns a monopoly (=right to exclude others) not a right limited or conditioned according to the sentiment of judges, but an absolute monopoly (=right to exclude others) constitutionally conferred by the sovereign law-makers. Over and above an absolute monopoly (=right to exclude others), how can there be a further and an unlawful monopoly (=right to exclude others) in the same thing?" That is like attempting to lift one's self off the ground by pulling on one's boot-straps. It's very well to call the patent a monopoly, but in that event we are inexorably compelled to inform the term "monopoly" with this precise, limited meaning,—the right to exclude others. It's an incorporeal, abstract, negative, inhibitory power. Its exercise results only in paralysis of the trade of others, in the subject matter of the exclusion. That's its only possible use to the possessor. The exercise of that right never resulted in the making, using, or selling of anything whatever. It precludes and interdicts the natural inclination of others but leaves the scope of the patentee's own right and power to make and sell, exactly as it was prior to the patent, and as it will be after the patent has expired. We shall see that this is overlooked in the sentences that now succeed.

“If the plaintiff were the sole maker of Grant tires, how could plaintiff’s control of prices and output injure the people, deprive them of something to which they have a right?” It could not injure the people at all. If the plaintiff were the sole maker of the tires, he could put his own prices on them, \$5.00 per pound if he saw fit, and it would be nobody’s business. It’s the sovereign right of every sovereign citizen to put his own estimate on the value of what is his, and, as was said in the Victor Talking Machine Case, whether purchasers or tenants come, or not, is a matter of his concern alone. But the patent law does not confer this right and the Anti-trust Act does not abridge it in any manner whatever. This is a right older than both of those statutes and is not affected by either. “Is a greater (why the comparative?) injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly?” (black ours). No injury at all is predicable under the first supposition. Under the hypothesis (now posited) the injury is as certain as anything in law. The patent law does not say that the patentee may authorize a pool or combination to do anything; it does not even confer on him the right to contract in any regard. On the other hand the Anti-trust Acts says that any person who shall enter into any contract, combination, or conspiracy in restraint of trade, is guilty of a crime. When the plaintiff authorizes a pool or combination to control prices at which he will sell his tires, he thereby enters into a combination to restrain trade. His freedom to trade in his patented article has been bartered away to strangers to the business. Who ever supposed progress in science and the useful arts could be encouraged by placing a pool or combination in control? A pool or combination never invented anything but a scheme and makeshift to evade the law, deceive the Courts and extort money from the public. Take the Addyston Pipe Case and apply the question there. Each member had the unqualified right to determine at what price he, acting independently, should sell his own pipe. “Is a greater injury inflicted if one pipe manufacturer authorizes a pool or combination to

do what the same manufacturer can do directly?" The Supreme Court has already answered the question. But when more closely inspected, the interrogation is meaningless, "if plaintiff authorizes a pool or combination to do what plaintiff can do **directly.**" (Black ours.) The contrast between the plaintiff fixing its own prices and authorizing a pool or combination to fix prices, is not a contrast hinging on a different form of exercising the same right and expressed in the terms "directly" and "indirectly." The contrast is between a lawful act and a crime. When the plaintiff fixes his own prices, he is doing a lawful act, whether the thing priced is patented or unpatented; when a pool or combination fixes prices, a crime is committed, whether the article is patented or unpatented. The very existence of the pool or combination to fix prices and thereby restrain trade, is criminal. Whoever joins the pool or combination, enmeshes himself in the criminal law. There is no agency in crime; a man cannot "authorize" a pool or combination, to do an act which, if done by him, would be lawful. We might as well attempt to conceive of "authorizing" another to steal or murder. Following upon this question we are told: "To say yes means that substance is disregarded, that mere words confer upon the people some sort of a right or interest counter to the monopoly (right to exclude), when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured." We cannot so agree. The people are perfectly willing for Grant to exclude to his heart's content; they have never yet said, however, that he can take a right which he has in exclusion by virtue of their desire to encourage him and turn it over to a pool or combination to gouge the pockets of the public. The people have not said this and never will say it. In the next paragraph the Court says: "But worthless patents and other suppositions cases are not on review." However, we have just been wrestling toughly with three formulated by the Court.

At the bottom of page 363, we go forward. "None of the provi-

sions of the contract, in our judgment, touched any matter outside of the monopoly (right to exclude) under the patent." We are deeply persuaded that all of them except the 2 per cent net royalty, which was a mere pretext, "touched" nothing but what was outside of the right to exclude. "The control of prices and output, for reasons already stated (black ours) did not deprive the public of any right." This is certainly a remarkable result to be justified on the ground of the "reasons already stated." Let us rub our wearied eyes and glance back at all the "reasons already stated" and see how this height of assured confidence is attained. The control of prices and output did not deprive the public of any right, because:

1st. The Wisconsin anti-trust act is "eliminated" because (a) it is not included in the assignment of errors; (b) a State cannot subtract from the incorporeal right to exclude others; (c) rubber tires are innocuous to the physical and moral health of the citizens.

2nd. The Federal anti-trust act does not apply because (a) the patented tires are innocuous patented articles; (b) patented articles unless and until released from the dominion of the patent, are not articles of trade or commerce at all; (c) the people are not entitled to freedom of trade in patented articles; (d) the patentee had the right to exclude others, not a right limited or conditioned according to the sentiment of the judges, but an absolute right to exclude, and over and above an absolute right to exclude there can be no further and unlawful right to exclude in the same thing; (e) if a man can lawfully control the sale of his own goods, he can authorize a pool or combination to do the same thing.

These are the "reasons already stated" and for these "reasons" the control of prices and output, "did not deprive the public of any right." Those reasons we must leave to justify what they will.

"Both before and after the period covered by the contract, the market was demoralized, and the owner of the patent was getting nothing except by the slow and expensive process of litigation; but the pub-

lic was not entitled to profit by competition among infringers. What bearing has that on the legality of the scheme? How was the "market demoralized?" By men making their tires and selling them. "The owner of the patent was getting nothing except by the slow and expensive process of litigation." What other method has the patent law provided? Is it possible to read into the statute some quick and cheap method whereby the patentee may "get" something? "The public was not entitled to profit by competition among infringers." But how can we speak of them as "infringers?" One Court of Appeals had finally determined, not only that the tire made by the defendant in that suit did not infringe the plaintiff's patent, but that said patent was void and of no effect whatever; that it could not be infringed for there was nothing to infringe. The Supreme Court had declined to review this adjudication. How can it be said that there could be an infringement of such alleged patent? But plaintiff's conduct completely belied the notion that it regarded any of the combine members as infringers. The plaintiff with its eyes wide open accepted as its full compensation for its patent, 8 per cent of the swollen profits that the "infringers" made in addition to the price at which the tires previously had been sold. Because it had a "valid patent," it deliberately threw away 92 per cent of its potential profits. Because there was a "valid patent," the "infringers" consented to bend the pregnant hinges of their stiff knees to the Czar, and contribute 8 per cent of an extortionate grab from the public, but only on condition that they be allowed to pocket the remaining 92 per cent without molestation on account of the anti-trust laws. No one can point out another instance of such consummate magnanimity on the part of any owner of a valid and valuable patent. Did Westinghouse follow such a course with his air-brake? Did Morse exemplify such idiocy with his telegraph? Did Bell exhibit such slobbering business charity with his telephone? "The internal agreements relating to royalties, proportioning the business, supervision and penalties, did not affect or concern



the public at all." That depends entirely upon whether or not the entire scheme of which the matters mentioned, were component parts, was legal or illegal. If, as we contend, that scheme constituted a crime in that it was a violation of the anti-trust act, then the public was deeply and vitally concerned. When we arrive at the point that the public is denied the right of being concerned in the enforcement of the criminal laws, it is time for the public to retire into unobtrusive oblivion and leave the "pools" and combines unvexed to divide the spoils.

"Equally innocuous in our view, was the matter stated in the fifth conclusion of law" (by the lower Court). That conclusion was this: "That the contracts authorized the creation of a fund for crushing competition in inter-state commerce throughout the whole country, not only in Grant tires but in all other rubber tires." This is facilely disposed of thus: "First, the public was not injured, because the finding of fact is that the provision was never acted upon in any way." But this is a totally irrelevant circumstance. The single question is whether or not the combination had it in its *power* to injure the public. To what extent it has exercised that power, or whether it has exercised it at all, is quite beside the mark. The Supreme Court has expressed this view of the law with emphatic earnestness. In the Northern Securities Case (193 U. S. at 340) the Court quoted from the Supreme Court of Ohio, this view and accentuated its approval of the language quoted by couching it in glaring italics. The language is: "*Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.*"

But, again, "Second, if a defense had been predicated on the presence of that provision in the contract, it would have been unavailing, because that provision is separable from the royalty and other valid parts of the contract." (black ours). But is it? The rule is: "Whenever the unlawful part of the contract can be separated from the rest,

it will be rejected and the remainder established. *McCulloch vs. Virginia* (1898) 172 U. S. at 115. Now how is it possible to separate the stipulation providing for the bludgeon fund from the remainder of the contract? The fund was accumulated from royalties; it was placed entirely in the keeping of the commission. The patentee had no power of supervision, no right under the contract to purchase tires and give the same away. The licensees consented to pay the money from which the fund was derived, in contemplation of the distinct use to which the payment was to be applied. Do away with that fund. Then the patentee is not entitled to receive it. The licensees are under no obligation to pay it, and the commission is out of a job, except to "supervise and audit," and a bookkeeper hired at \$75.00 per month could do that. The fund and its designed use was the very kernel and essence, the innermost strength of the entire scheme. Destroy that, and the whole structure falls to the ground.

Still other grounds are laid to support this clever crime. "And, third, the owner of the patent had the right, either alone or through licensees, to accumulate funds with which to push the Grant tire on the market, and in so doing to undersell the makers of other tires and the infringing makers of Grant tires." We have become so familiar with amazing statements in this opinion, that the repetition of them ceases to be impressive. By long association, we suppose that a circus man becomes accustomed to handling a boa constrictor without unusual emotions. Let us paraphrase this sentence and apply it in a well-known instance:

"The Blank Oil Company had the right, either alone or through secret rebates from all the railroads, to accumulate funds with which to push its oil on the market and in so doing to undersell the vendors of other oil." That is what it comes to. To "undersell the infringing makers of Grant tires." Has it come to that? Here is the owner of a "valid patent," an absolute monopoly, that cannot be subtracted from by the States, that is enforceable against the sovereign will of the Na-

tional government. The law provides that such patent owner shall recover threefold the damages suffered by infringement, and an injunction can be obtained at midnight while the infringers sleep. By the use of that sacred writ, the patentee can send the infringers to jail amid the lamentations and tears of their dear ones. Is the price of justice so dear, or withholding infringement suits so sweet, that the patentee is reduced to the miserable expedient of underselling the brazen pilferers of the products of his genius? Let us suppose that a man has written a great book like "King Lear." It is inestimably precious in the eyes of all serious minded readers. The author gets a copyright and begins to multiply and vend copies. At the same time, the copy is pirated by two dozen publishers, and the market flooded with cheap editions. What would be thought of the author if he should go to his authorized publisher and say: "We have left, only one expedient; the slow and expensive process of litigation is out of the question; we must accumulate a fund to enable us to undersell the pirates. They are selling the book very cheaply. It may be that we will have to give away copies, but that is our only hope to defeat infringers of the copyright." That is exactly parallel with the Court's justification of the scheme here involved.

"It is not for the defendant's sake that Courts listen to the defense that he ought not to pay because his promise was under an arrangement to injure the public." That is quite true. But how about the public's "sake"? When is that to get a hearing?

"The public is not injured by an arrangement to compete with adversaries for the public's patronage." We agree, but what is to be said of an "arrangement" the sole purpose and result of which was to wipe out all competition for the public's patronage as between the 18 parties to the "arrangement," force the said patronage to bear an additional burden of 30 per cent and then illegally to destroy all competitive adversaries for that patronage, outside of the "arrangement"? Let us summarize the justification of this fund and its purpose.

1st. The provision was not acted upon.

2nd. The provision was separable from other valid parts of the contract.

3rd. The provision was legal and valid.

4th. The Court for a defendant's sake will not enforce a statute adopted for the public's sake.

5th. The public is not injured by an "arrangement" which destroys all competition between all but two small manufacturers of an important commodity and provides for the destruction of those two. In the Threshing Machine Case just following the one under discussion, (154 Fed. at 371) this Court characterizing an argument of counsel said: "Naught plus naught; the sum of two naughts is a substantive quantity." It is only by adopting that method of computation that we can ever obtain a substantive result from an aggregation of the reasons just summarized.

### CONCURRING OPINION.

We will glance briefly at the concurring opinion. The member of the Court that stood sponsor for this opinion, was unwilling to go the length of conceding that "patented articles are never under any circumstances, articles of trade or commerce among the several States, within the meaning of the Sherman Act." This refusal was made on the ground that it was not thought that that "premise is essential to the conclusion arrived at." We think the point is well taken. Any one of the dozen premises posited by the majority opinion was all that was "essential to the conclusion arrived at" without hazarding so many of no greater strength or weakness. For example, this would have been sufficient: "A State cannot subtract from the right conferred upon a patentee and his assigns by the federal laws." Why not say: This is a contract controlled by the laws of Wisconsin, assert the last quoted proposition, and add, "judgment for the plaintiff"? There is no use to pile up sound reasons for a judgment; one is enough, and to

assert more than one is to increase the hazard incident to an after inspection of one's logic.

With the reservation noted, the concurring opinion expands. "The patentee, in this case, in good faith, believed the patent valid, as did also the parties entering into the contracts." We have already seen how naive and trusting was that faith, and though small as a grain of mustard seed, it enabled the faithful to move mountains. An old saw has it that none are so blind as those who do not wish to see. The members of this combine found it exceedingly profitable not to see any bad faith in the "arrangement."

"Whatever, therefore, their effect may have actually been, the contracts were not intended to affect prices, except as the parties believed they had the right, because of the patent, to fix and maintain prices." But what conceivable force and effect can be given to the belief of the parties as to their rights to restrain trade? The Anti-trust Act does not say that only those contracts *which the parties believe are in restraint of trade* are criminal. The statute says nothing about anyone's belief or good faith. It does not deal with faith but with works. In the majority opinion here it is said: "The means of effecting and the form of the combination are immaterial; **the result is the criterion**" (black ours). Now we have a new criterion set up. The combination is legal, provided only the parties have faith and believe it is legal. So it seems that the Courts in the realm of jurisprudence hold out a more palpable and luscious reward to faith than religion offers to zealous adherents to the creed. Good faith and belief, however preposterous and contradictory of conduct, are not to the Court's thinking what the Good Book calls them, wells without water, and clouds without rain, but are a purse full to bursting and a defense to crime.

"Now were the patentee the manufacturer, he would unquestionably have had the right to fix and maintain his own prices." However, not in virtue of the patent law or because he was a patentee, but merely because he had manufactured the goods, owned them and of course

would have the right to say at what price he would sell them. This right over his own property every man has, from a peddler of shoe-strings to a dealer in gold mines, but the patent law has nothing to do with that. Such right is what, in the Victor Talking Machine Case, was called "a natural right." The sentence goes on, "and were the other parties to the contract manufacturers for the patentee, at a given figure for such manufacture, the patentee's right to fix and maintain the selling price would still remain; nor could this be questioned were he to make the manufacturers his selling agents." But under both suppositions the tires would belong to the patentee in exactly the same sense that potatoes belong to a farmer where the latter has grown the potatoes on his land and hired one set of men to dig them and another to peddle them to the consumer on a commission or for a wage. After entertaining these three perfectly innocent and trite suppositions we are invited to accept this: "How, then, does the contract under review, make a case in which the patentee, through his manufacturer, is not entitled to fix and maintain prices—how is the arrangement, in effect, different in any way of restraining trade or competition, from the arrangement just supposed, in which the patentee unquestionably has that right?" Let us back off and take a look at this. Let us first inquire, Is it not singular that both the majority and minority opinion here dispose of the merits of an issue involving literally millions of dollars in the form of interrogations supposedly admitting of but one answer? In the first opinion, at the top of page 363, the entire puzzle is gotten rid of by three rhetorical questions. Here in the concurring opinion the same method is employed without the citation of a single authority. The matter is sufficiently difficult, it would seem, without the confusion of questions, one following another. Every case propounds a problem to the Court and what we naturally expect to find in the opinion is a solution; something positive, apodictically certain. Instead, we have a problem made even more problematical. After this breathing spell, we go back to this last question and see what

is the answer to it. The "contract under review" does *not* make a case in which the patentee through his (the patentee's) manufacturer is entitled to fix and maintain prices. The licensees were *not* the patentee's manufacturer; the tires when made by them were not the property of the patentee. The licensees bought the material, hired the labor, employed their own facilities in making the tires, and when the tires were made, they (the licensees) owned them. When the licensees sold the tires, they sold their own property, not that of the patentee. When they fixed the prices, they dealt with their own property, not with that of the patentee. See *Belknap vs. Schild* (1895). 161 U. S. at 23 and 24. That is the answer to the first part of the question propounded. As to the second part: The "arrangement" in effect was different in the way of restraining trade and competition from the arrangement "just supposed" in this. In the arrangement "just supposed," the tires under all three hypotheses were the sole property of the patentee; he was the only proprietor of the business. There was no contract whatever with a stranger to the business and no semblance of a combination or conspiracy in restraint of trade. The "arrangement" in the "contract under review" embraced a combination by which the patentee surrendered all power under his patent to a pool; no licensee could sell his own goods at his own price. Moreover no licensee and the patentee could alter or vary prices. The freedom of all nineteen parties to the contract was completely destroyed and no one could do anything without the consent of the pool. Observe that the patentee and nine separate and distinct licensees conducting businesses entirely isolated and apart, by mutual consent, could not have changed the prices or terms at which such nine licensees were to sell tires of their own manufacture.

The whole power under the "arrangement" was vested in mere numbers. A majority in number completely overrode the minority, and yet there was no basis for this surrender of individual freedom. Each licensee had assumed a separate and distinct obligation to the

patentee; each obtained a permission available for his individual enjoyment. Each licensee must pay his royalty regardless of what all the others did. Having fulfilled his obligations to the patentee, each licensee had a right to enjoy the non-exclusive permission granted to him by the patentee regardless of the desert and disposition of all other licensees. Each licensee conducted his affairs singly and separately, bore the burdens and enjoyed the benefits of his enterprise without sharing either, with any other licensee. The patentee and any one licensee by mutual consent might have cancelled the contract as between them without affecting the rights of any other licensee. Thus it is clear that each licensee was a stranger to the business of every other licensee, although engaged in the same line of business. But the entire control of the aggregate business of all parties was vested in the "pool." The "pool" was a connecting ligature by which all the licenses were as effectively bound together and the individual freedom of each obliterated, as the Siamese twins. The "pool" was not legitimately engaged in any phase of the business; it was neither licensor nor licensee; it owned no patent and paid no royalty; yet its restraining power gripped the freedom of every licensee into forced servility. It had the power to make and unmake any licensee. Suppose an "infringing manufacturer" has sprung up in a territory, the trade in which was principally supplied by licensee X; this "infringing manufacturer" is cutting prices to all of X's customers. Suppose further that X has become obnoxious to the "pool" and the "pool" is anxious to be rid of him. By occupying a purely negative attitude, by refusing to allow X to cut prices and declining to purchase tires and undersell the "infringing manufacturers," the "pool" could shortly eliminate X. Thus the "pool" could play favorites; could despotically control the fortunes of any licensee or a minority of them. It is in this manner that the interrogation propounded in the minority opinion is easily answered.

This opinion continues: "True, in the case under review, the manu-



facturers, as to the public, are not competitors; (now listen) but neither would they be in the cases supposed." But for entirely different reasons. In "the cases supposed" there was only one vendor, one proprietor, a single, indivisible interest. One concern cannot compete with itself. In "the cases supposed" there was no semblance of restraint. How can a man, acting alone, restrain himself by contract? In the case "under review," competition between eighteen separate and independent concerns was wiped out by a combination or pool.

The sentence continues: "In both cases the public suffering nothing except what the patentee had the right to exact." Again we must dissent. In "the case supposed," the public "suffered" the exercise of the right of every man to freely demand what price he will for his goods; in "the case under review," the public "suffered" the commission of a crime. We advance to, "for so long, at least, as the patentee is not exacting, as the value of his invention (let us ask what is meant by 'invention' here; the incorporeal right or the rubber tire?) an unreasonable sum, (and his action in that respect is not here questioned) it is within his own right to say whether the price exacted (for what?) should be retained by himself or shall be distributed among the people manufacturing for him" (black ours.)

It always may be observed that difficulties multiply as we undertake the rounding out and final completion of any task. Right here, in next to the last sentence of this concurring opinion, the whole involved and intricate difficulty of this case is again thrust before us. We are compelled briefly to restate and resolve the problem running all through. Let us unfold these phrases and inspect them isolatedly. "So long, at least, as the patentee is not exacting, as the value of his invention, an unreasonable sum, it is within his own right," etc. What is meant here by "the value of his invention"? If one has a rubber tire and owns it, he may demand his price for it, \$2.00 or \$5.00 per pound. No court and no government can possibly compel him to sell it for less. Likewise, if one has a valid patent

on a tire, he has an inalienable, an irrefragable right, to exact any sum whatever as a royalty for the consent granted to another to make and sell a tire which, within the meaning of the patent law, is a duplicate. Instead of 2 per cent., he may charge 100 per cent. The patentee has two entirely distinct and separate subject matters, altogether within his disposition. In the instance we have before us, the two subject matters are a rubber tire of a given construction and weight, and an incorporeal right to exclude others from enjoying a replica of that tire, in making, using, or selling it. Let us suppose now that the patentee here contemplated, has a number of the tires manufactured and on hand ready to sell. Two men, conveniently designated as A. and B., come before him. A. wants to purchase 100 of the tires manufactured and then ready for sale. B. wants the privilege himself of making 100 similar tires out of materials and with labor to be supplied by him, B. The patentee can refuse to sell to A. or if he consents to part with the tires to A. he can exact as a compensation for his consent, any sum of money, whatever; whether it is reasonable or unreasonable. Likewise, he can refuse to permit B. to make 100 of the tires, or if he consents, he may exact as a royalty, any sum whatever, reasonable or unreasonable. He may consent or not, just as he pleases, in either case. His determination in either case is absolutely within his power. His right to grant or withhold his consent in either or both instances, cannot be made to hinge on any "at least," pointing to the reasonable or unreasonable character of his demand. But let us observe with all concentrated speculation that in neither case is the patentee parting with or withholding his "invention," if by that word we mean the subject of his patent grant. The incorporeal, intangible property in a notion he does not sell in either case. What A. wants is so many pounds of rubber and other materials belonging to the patentee and wrought into a particular composition and form. What B. wants is the permission to take his own materials and employ his own hands to bring his own raw substances

into the particular formation and likeness. The patentee did not "think out" the rubber, cloth, metal, and other materials; he thought out only a hitherto unknown combination, juxtaposition, or specialized assemblage of them. B. desires to obtain no more than the permission to follow that unique pattern in imparting to his raw materials a new and demanded utility.

Suppose the patentee grants the wish of both A. and B. A. gets 100 physical things fashioned into a form, in accordance with the patentee's ideas. For this, he pays the purchase money, which is a compensation for two factors. 1st, so many pounds of rubber and other materials; 2nd, the idea, pattern, or conception of the inventor embodied and externalized 100 times. Then A. owns absolutely those 100 tires, and it is not possible to separate the value of the tires from the value of the pattern externalized in them. No mutuality of consent between the patentee and A. could by any possibility result in a partial rescission of the sale whereby the patentee could take back his incorporeal factor and leave the physical objects with A. One might as well attempt to separate the convex from the concave of an arc. A. in virtue of his purchase, owns the 100 tires; they are his and the patentee has no interest in them. When the patentee parted with them, he accepted the purchase money and precluded a continuance of his interest in those specimens of materials, each unit physically symbolizing his thought. On the other hand, B. desires to be possessed of the same things A. acquired by his purchase. But B. has it in mind to arrive at the same acquisition by a different method. He has already or can easily obtain, all the materials, appliances, and facilities for supplying himself with the identical tires. Not one tangible, visible, dimensional thing does he need from the patentee to put himself in possession of what A. obtained by his purchase. But he must obtain from the patentee a permission to think the latter's thought, to inform his materials with the pattern, plan, and scheme of the inventor. By reading over the patent specifications, he

can learn exactly how this is to be done. But without the let or permission of the patentee, his hand is stayed, his spontaneous tendency to create the physical likeness of the imaged object that his mind has perceived and pronounced good, is inhibited and bottled up. When the patentee grants the permission, there is no transfer of anything whatever to B. The latter has no more and no different possessions after the letting, than before. His inhibited tendency to fashion certain given materials into a highly specialized combination, is limitedly released. That is all. B. makes the tires. What is due to the patentee? B. does not owe him for the materials, the time, and labor; or the factory cost of making them; all these B. supplied to himself and derived them not from the patentee. All that B. owes to the patentee is a compensation for the permission to externalize and embody the inventor's mental image. This compensation is called a royalty and well may it be so called, for it is the tribute which mean men render to genius. The idea, the plan, the schematized abstraction, the hitherto unrealized form of combining materials,—that is the fruit of the inventor's own "cares and sweat". It is a fruit that does not materialize by reason of the "cares and sweat" of ordinary mortals. It is, by the inventor, spun out of the inner texture of his mental web, like the mansion of the spider drawn out from the vital center of the builder.

The patentee may exact what royalty he will, reasonable or unreasonable, but when the royalty is paid, the tires belong as absolutely and completely to B as do those which A, within our supposition, has purchased. The property in the notion, or incorporeal idea, is not related to property in the rubber tires. In the two instances supposed, the patentee obviously cannot dictate the price at which A will sell the tires which he (A) has bought and paid for. It is equally certain that the patentee has no more right or power as patentee to say at what price B will sell his (B's) tires. The patentee never had any interest in the materials composing B's tires and he has been paid a royalty for

the privilege of utilizing his mental concept in 100 concrete embodiments. He is entitled to but one royalty for each separate symbol of his thought, and he has that. After he has received that, his reward as patentee cannot be enlarged or cut down by any disposition made of the physical objects.

Let us now get back to our text. The patentee in this case exacted a most niggardly sum, 2 per cent, for the privilege of externalizing the inventor's thought. That was for the obvious reason that he had learned that the alleged inventor had not invented anything. Indeed, "his action in *that* respect is not here questioned," to use the language of the Court. But there was an entirely different exaction in this case; that with respect to the selling price of the rubber tires, which were manufactured and owned by the respective licensees. That was most earnestly questioned. With reference to that the answer says (cf. l. c. 360) "by reason thereof (viz., the license agreement) the price of the articles of commerce mentioned in plaintiff's complaint, was raised beyond the former price thereof and beyond the natural and legitimate price thereof" (black ours). That is how that was questioned.

The sentence over which we have been so long hovering, ends thus (so long as the patentee is not exacting an unreasonable sum for his invention): "It is within his own right to say whether the price exacted should be retained by himself or shall be distributed among the people manufacturing for him" (italics ours). But the licensees did not "manufacture for him"; they manufactured for themselves. They owned the tires they manufactured, just as they owned the materials out of which they were made. "The price exacted,"—but for what? If by this is meant the royalty exacted, of course, the statement is correct. For the patentee might have distributed that among the Hottentots, and it would have been no one else's business. But the price exacted for the tires was the concern only of the licensee. That price was theirs, and constituted no part of the patentee's assets. Whether the royalty as such, was "reasonable or unreasonable" was of

no moment whatever. But the exaction of the "pool" as to the selling price whether "reasonable or unreasonable" was illegal; it was criminal.

Finally, we have the last word on the subject. "The contracts, therefore, in the case before us, having been made in good faith, and not as a mere subterfuge, I can see in them nothing that the Sherman Act was intended to prevent." It is to be observed, without effort, that this last sentence is disparate from the preceding argument. It is not a connecting link or culminating step in a progressive contention. It is complete in itself. We have it asserted that the contracts did not violate the anti-trust Act *because* they were "made in good faith and not as a mere subterfuge." Frankness, guilelessness, naive straightforwardness, with whatever grievous consequences its manifestation is attended, is a defense to crime. But we know it is not even a defense to a civil liability. If a man takes my watch in "good faith and not as a mere subterfuge," he is nevertheless liable in damages for conversion. We do not read anything about bad faith and subterfuges in the great cases before the Supreme Court where contracts have been declared illegal as in restraint of trade. It may be that the industrious counsel who represented the defendants in all those cases, were essentially remiss in their duty in not pointing out the evidence of good faith and the absence of all indications of subterfuge and legal ambushades. However, if this surmise is well founded, the Anti-trust Act should be legislatively interpolated so as to strike at only those contracts, combinations, and conspiracies in restraint of trade entered into in bad faith or as crafty subterfuge. If that ever should be done, we may expect a more abundant proof of "good faith" than any one has yet dreamed of. And when this novel justification has been put in, it may be the Courts will say to the big, lubberly, innocent seeming ones: "Go your way; your faith has made you whole." When that day comes, there will be joy for a little while among the few, and then terror everywhere. For we believe that men are going to continue

to feel the strength and weakness of the law in their works and not in their faith.

Let us summarize the reasoning of this concurring opinion in the form of short propositions.

First. Patented articles under some circumstances may be articles of commerce or trade among the several States.

Second. But if we concede that the articles here involved are such, the contracts do not illegally restrain trade for the following reasons:

- a. They were entered into in good faith.
- b. The patentee could maintain prices on tires of his own manufacture.
- c. The patentee could maintain prices on tires which he has hired others to manufacture for him.
- d. The patentee could maintain prices on his own tires sold through his agents.
- e. The case under review does not differ from that suggested in b, c, and d.
- f. So long as the patentee does not exact an unreasonable royalty, he can "pool" the business of his licensees.
- g. This all follows because the contracts were made in good faith and not as a subterfuge.

At the outset, we stated that if the result set up in this case can be justified by accepted principles of law, it would be worth the extreme of human exertion to learn how. We have studied this opinion long and intently but cannot see the glimmer of the road to such justification. According to the deepest incursion we have been able to make, the decision cannot be supported or explained in the terms of the law of the land. There is no sound proposition or principle underlying it. The only support for it that we can discover by the most earnest speculation, is that which rests upon a mistaken conception of the patent grant and a misconstruction of the anti-trust legislation.

The lower Court held the system of contracts invalid, among other

reasons, for that they operated to restrain trade in the territory comprised by the Sixth Circuit. Whatever view any one may take of the patent law and a patentee's rights over his patented article, that point was undoubtedly well taken. In the Sixth Circuit the patent was a dead and gone thing. The Court of Appeals had so declared it and the Supreme Court had refused to modify or review its declaration. The decision of the Court of Appeals struck and thrust through the heart of the patent; it did not stop with deciding that the defendant in that case had not infringed. The Court went to the extreme boundary of the defense and wiped the patent out; repudiated the claim of novelty, denied that the inventor had discovered anything, and concluded that all his "cares and sweat" had only resulted in something that was old. In the opinion, here considered, the decision of the Court of Appeals for the Sixth Circuit, is referred to as "an erroneous decree." Maybe it was. Nevertheless, it was law for the Sixth Circuit, and the proposition for which that decision stood, was this: patent No. 554,675 to grant for an improvement in rubber tired wheels, is void. It is impossible to believe that that Court of Appeals would have vibrated back and forth, holding the patent valid as against one defendant and void as against another. The defendant in the case tried out was held not to be an infringer because there was nothing to infringe. There was no right on which to predicate a trespass in the Sixth Circuit. So that if we accept all of the scattering philosophy of this opinion, still we have no support whatever for the combination so far as it was operative in the territory of the Sixth Circuit. If we say that the Anti-trust Acts of the States do not subtract from the patent grant, yet in the Sixth Circuit there was no patent right. If we say that patented articles are not articles of trade and commerce within the terms of the Federal Anti-trust Act, yet, in the Sixth Circuit these tires were not and could not be patented articles. If we say that the people are not entitled to freedom of trade in patented articles, that does not help us in this Circuit. Nor



can we talk about good faith in the validity of the patent in so far as trade in the tires was carried on in that Circuit. Faith is of things not seen, but the patent had been completely and utterly destroyed in the Sixth Circuit. No man who could read plain English, could honestly aver a faith in the validity of the patent in those States. We do not think the faith of this combination in the validity of the patent was half so large as a grain of mustard seed.

But see what happened. In the short space of time covered by the period for which a royalty was claimed, the "pool" extorted from the people the sum of \$1,500,000 in excess of the competitive price. We cannot hesitate or doubt as to the vital concern of the people in this combination and the emphatic approval stamped upon it by the Court. By the deliberate, unequivocal figures embodied in the opinion, the people were taxed \$1,500,000 through the existence and operation of this "pool." That fact cannot be glossed over or explained away. It stands incontestably. To the extent of the sum named, the people, literally and not figuratively, were held up. There was no alternative. They had to pay that blood money or do without the goods. The excessive sum extorted by the "pool" from the people, is so large as almost to stagger an ordinary mortal, unfamiliar with extending ciphers after the dollar sign, as "pool" members are. This sum of \$1,500,000 would pay the salary of all the judges of the Supreme Court for 15 years; it would pay the salary of the President for 20 years, or the salary of three judges of the Court of Appeals for 70 years. All these sums are sweated out of the people by taxation and they complain not, for the officers of the government are the servants of the people and the laborer is worthy of his hire. But there is no excuse or justification for this enforced contribution to the "pool." It cannot be upheld by any law; it cannot be excused by exigencies of business; it cannot be palliated or solved by any economic theory. The decision runs counter to the decisions of the Supreme Court; it flouts the statutes and public policy of the Nation; it tenders an inexplicable

affront to common sense in treating seriously the pompous asseverations of "good faith" on the part of the members of the "pool." It is fortunate indeed, for the tranquility and peace of the Nation, that the people are blind to much that goes on; it is well that they are not sensitive to a blow at their welfare delivered obliquely, instead of directly and in the open. Otherwise, insurrections, clamorous gatherings like the Boston tea-party, the haggard and ominous countenances of seething crowds would be familiar without reading history or fiction. In the case of *American Banana Co. vs. United Fruit Co.* (1908), 213 U. S. at 356, Mr. Justice Holmes said: "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the Courts." So it is. But suppose the Courts turn aside at an ambiguity like the term "monopoly," explain away the real circumstances indicated by the words "right to exclude others" and attenuate the public force until it falls as harmless upon men engaged in crime as shadows upon the water. What then? Suppose that the public force is turned awry and thick-skinned citizens, conspirators against the welfare of the people, by sophistry and skilful word jugglery are enabled to shove by justice. What becomes of the equilibrium on which the republic rests—love of liberty and reverence for law? How long and to what extent the Courts will be instruments by which the public force will be brought to bear upon men, is a matter for curious speculation. But one may safely forecast that the public force is an abiding factor of civilization, growing more irresistible all the time. The people are not only the source of the force, but in the final analysis, determine under what circumstances it shall be brought to bear. If the Courts nullify the force by stating away the circumstances for its application, the people will never abnegate the force. Instead, they will themselves wield the force without tempering its ferocity through the conserving deliberation of the Courts. History bears witness to this familiar instance of power resumed by the ultimate sovereigns. When such a period is ushered

in, the money grubbers and commercial pirates, the industrial boll weevils, are swept away like gnats in a tornado. They do not bother about labored ingenuity in the Courts to justify holding on to millions wrung illegally from the hard-wrought accumulations of the inglorious and unprivileged multitude. It is well for them if they are permitted to enjoy a bowl of soup and a trencher of bread at the rear veranda of a day servant's cottage. The woe is on him by whom the offense comes.

Oh, reader, the final word in this rubber tire case you will find in 210 U. S. at 439. There this is written:

"Milwaukee Rubber Tire Works Company, Petitioner, vs. Rubber Tire Wheel Co., on Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

June 1, 1908. **Dismissed, per stipulation**" (*italic ours*).

That is what happened to that case. The pool "dismissed, per stipulation." That was a wise pool, a wise stipulation, and a wise dismissal. The pool had no thought of pleading its miraculous justification by faith before the all-seeing eyes of that great tribunal. The pool knew, and its counsel knew, that there was no more chance of convincing the Supreme Court of the legality of its system of contracts, of its sandbagging commission, of its valiant good faith, than there is of driving a forty-horse power automobile through a finger ring. It will not be surprising if the Courts of other Circuits assume the same attitude towards this decision that the Court rendering it did towards the decision of the Court of Appeals for the Sixth Circuit adjudicating the tire patent void. In good faith, they will regard the decision erroneous.

**Indiana Mfg. Co. vs. Case Threshing Machine Co. (1907 C. C. A., Seventh Circuit), 154 Fed. 365.**

This is a companion case to the rubber tire case just discussed, and because of the extended space devoted to that decision, it seems inappropriate to dwell at any length on this. The two decisions were

promulgated on the same day. In fact, the decision in the rubber tire case is the principal authority relied on here. The question involved was whether or not an illegal combination was built up by all the makers of threshing machinery becoming licensees of the owner of a patent on a stacker, the terms of the license fixing a uniform sale price of \$250.00 for each stacker sold by a licensee. The Court justified the scheme in this way: "The public could not force it (the licensor) to license another device. Have not the people been given something beyond their power to demand, in a policy that permits a customer to get a stacker as a part of the separator of his choice, not merely in connection with a favored separator?" Such an argument if heeded, will sustain any combination that ever was schemed out. Take the Addyston pipe case. The public could not force a single member of the combine to make or sell a single foot of pipe. Let us ask there: Have not the people been given something beyond their power to demand, in a policy that permits a customer to get a quantity of the pipe even though at a trust price? Back in the rubber tire case, the Court said: "The means of effecting and the form of the combination are immaterial; the result is the criterion." Here the Court parries the charge of combination with this: "This (the combination) resulted, without any concert of action on the part of the licensees, solely from a policy pursued by appellant through a course of years." What difference does that make if "the criterion is the result?" Another charge was founded on the number of patents merged in a single ownership. The Court disposes of this by positing a hypothetical case of two "competing patents" owned by one person and then follows this comment:

"The public has no right in either invention; therefore the public has the right to have them both in the market competing for buyers Naught plus naught; the sum of two naughts is a substantive quantity." Let us test this facile computation. There are two bakeries in a town and only two; they constitute the sole source of the bread supply.

The "public has no right in either"; it cannot force either to sell bread, much less both. Suppose the two proprietors enter into an agreement to raise the price of bread to 10 cents a loaf. Naught plus naught; the sum of the two naughts is a crime. That is not the Threshing Machine case, but it is a fair test of the strength of the argument expounded. It is not necessary to dwell on this opinion at length. It is of a part with the Rubber Tire case, and went the same road. It, too, was taken to the Supreme Court and, too, was "dismissed without costs to either party per stipulation" (207 U. S. at 603). The pool when dragged to the front door of the Supreme Court, always escapes dissolution and the hot branding iron of condemnation in some way and as a last resort "per stipulation." But what would happen if the government itself should start out after the pool. What recourse then could be had "per stipulation"?

**Blount Mfg. Co. vs. Yale Towne Mfg. Co. (1909 C. C. Mass.),  
166 Fed. 555.**

In conclusion we come now to deal with a truly magnanimous opinion. The case entitled as above is vastly important. No decision that we have anywhere chanced upon, evinces more care and precision than the one here to be considered. The argument exhibits the sure and easy progress of complete mastery. It is unfolded without dogmatism and convinces without triumph. When the premises are fairly laid out we feel instantly the tightened grip of the conclusion. The preliminary propositions force the conclusion announced with all the inexorable certainty of an euclidean demonstration. The understanding is captivated and bound by the irrefragable ligatures of ultimate thinking. Indeterminate prepossessions, obstinate prejudices and undefined vagaries are squeezed out like liquid from a pulpy mass under hydraulic pressure.

### THE FACTS.

Properly to understand the searching analysis we must possess ourselves of a lively apprehension of the facts. The statement of facts though luminous as far as it goes, is slight and elliptical. It requires some pondering to give weight to the circumstances stated only by inference. It appears that the suit touched the affairs of four concerns, but we need attend to only three, as the participation of the fourth is not dwelt on with any decisive result. The three concerns on whose business we desire to focus attention, were engaged in manufacturing and selling "liquid door checks."

The three concerns at interest here we shall designate abbreviatedly as The Blount Co., The Yale Co., and the Corbin Co. All owned patents on door locks and manufactured and sold said locks so patented. They underwent the ordeal of business pursuant to a three-cornered agreement. The Blount Co. sued the Yale Co. under the terms of the tripartite arrangement which affected those two. But the Court found it necessary to pull in the line that fastened the Corbin Co. When this was done, it was found that the contractual lines radiated from each concern to the other two. All three were bottled up in the same liquid container and pressure exerted on or by, any one, was transmitted equally to the other two. The three concerns were organs of one body; the individual business identity of each was lost in the tessellated uniformity of a combine or pool. The three concerns, each a stranger to the business of the other two, struck a triangular truce in the bitter war of competition, engraved upon their respective shields the catching industrial insignia, "In unity there is strength," and thereafter went forth to conquer the elusive patronage of the public, not singly and isolatedly, but in bands like grasshoppers or ants, guarding all exits of supply and answering every inquiring demand with the chorded harmony of three separate voices blended into one. In such circumstances one hears the full choir

of the pool. It is pleasant to those who sing but woe to the dancers.

The Blount Company had a contract with the Yale Co.; this is called exhibit A. The Blount Co. had also a contract with the Corbin Co. called exhibit B. Thus the Blount Co. stood at the apex of the isosceles arrangement, while the Yale and Corbin concerns were stationed at the disparate bases. Here we have the affairs of commerce sublimated to the clarified beauty of geometry. The Yale Co. as an "associate" signed exhibit B. Thus the two contracts read as one instrument brought all three concerns into juristic contiguity. The rights and interests of the parties were interlocked this way: The profits under exhibit A were arrived at by striking the difference between "contract cost" and the selling price of the locks. Apparently this sum was distributable in equal parts to the Blount and Yale concerns. But in making such distribution, an accounting was first to be had under exhibit B between Blount and Corbin. Then the sum derived under the terms of exhibit A, was to be "increased or diminished by one-half of the net amount received in settlements" under exhibit B. It is not entirely clear to our understanding just how the second sum could be added to the first so as to "diminish" the first, unless, indeed, the contingency of a minus quantity was contemplated. At any rate, the plan comprehended "the maintaining of prices, the pooling of profits, the elimination of competition and the restraint of improvements." Prices were to be determined from time to time by agreement between the three concerns. This was the course deliberately marked out although each concern owned patents protecting the subject matter of their respective industrial efforts.

The Blount Co. sued the Yale Co. for an accounting under the arrangement just delineated. The Yale Co. admitted the existence of the triangular compact and asked the Court to measure the same by the law of the land. It demurred to the petitioner. The Court meted out the law and removed the enclosing boundaries of the agreements.

### THE OPINION.

Extended comment on the language of this opinion would be a tantalizing excrescence. The thing is clear beyond the occasion of extended elucidation.

We start: "If relating to ordinary articles of trade or commerce, it seems reasonably clear that these contracts would be in violation of 'The Sherman Anti-trust Act' and therefore unenforceable. The complainant contends that the demurrer should be overruled, because such contracts are legal and valid when the subject matter of the contract comprises solely articles, the manufacture and sale of which are protected by patents."

We have the issue clearly defined in that statement. The Court restates the issue again: "The principal question is whether the fact that the articles to which the agreements relate, embodying patented inventions is sufficient to make the Sherman Act inapplicable." It is open to the observation of any careful reader that the Court does not once stray away from that inquiry. Unavailable props are at once discarded. "This question was not passed upon by the Supreme Court in the (Bement Case). **That decision related to restraints and conditions imposed in connection with the grant of patent rights**" (black ours). The Court next brushes aside the Rubber Tire and Threshing Machine cases with this,—“the decisions are not directly in point.” At any rate those decisions do not “point” in the direction traveled by the Court here. On the contrary the sponsor for this opinion turned about face and marched point blank opposite. We gladly follow. “It seems self-evident that a contract which is only co-extensive with the monopoly conferred by letters patent, and which creates no additional restraint of trade or monopoly, does not conflict with the Sherman Act.” We cannot conceive of a more accurate abstract of the actual decision in the Bement case than that.

“The monopoly granted by letters patent is of a particular inven-



tion. (Think of the Threshing Machine case!) Devices thus protected by patents are as a matter of fact in commercial competition with both patented and unpatented devices. A contract whereby the manufacturers of two independent patented inventions agree not to compete in the same commercial field, deprives the public of the benefits of competition and creates a restraint of trade which results, not from the granting of letters patent, but from agreement. While the monopoly of the patented articles is not increased, the monopoly of the commercial field is increased by the 'unified tactics' as to prices."

That paragraph is within the firm grasp of an unmystified apprehension. Later in the opinion the Court writes of "independent patents," but we are not treated to the unthinkable monstrosity of "competitive patents." What possible determinate meaning can be attached to this last phrase? How can we go about conceiving of "competitive patents" or "competition" between different patents? Let us take the patents protecting respectively the monotype and linotype printing presses. Those are instanced in the Threshing Machine Case. One patentee has a right to exclude others from making, using, or selling the monotype machine. The other patentee has the right similarly to exclude from the linotype device. But this does not implicate any possible competition between the two respective rights to exclude, and those two rights to exclude comprise the whole of the two patents. "Competition" is not apposite to abstract, incorporeal, rights. We cannot predicate the juridical meaning of competition with reference to incorporeal rights. Juristically speaking, competitors are always persons; competition is between the tangible instrumentalities of trade conducted by persons. As the Court says: "**D**evelopments (black ours) thus protected by patents, are as a matter of fact in commercial competition with both patented and unpatented devices." This is inevitably so. Webster defines competition as "The efforts of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms." The essence of the

phenomenon is the struggle for the custom or patronage. The struggle is not confined to contestants offering identical objects, or even objects regarded as commercial or industrial equivalents, capable of being substituted one for the other. The acme of competition may be evinced between the proprietor of a popcorn cart and an itinerant balloon vendor, for the patronage of a small boy who has only one hot dime. The thing sought is the patronage always. The strugglers limited sum, he has long been accustomed to look before and after. The problem is to economize in the expenditure for his household cooking. He has already a sturdy coal range but desires to progress for the prize are many. The factors on which the contest hinges are all of the seductive attributes of the thing dangled before the eyes of the dispenser of the patronage, together with the alluring glamour with which the vendor succeeds in investing the object offered for sale. Suppose a man whose means are such that in laying out his beyond the use of that. He may go down town, after reading the alluring advertisements in the magazines, and post himself as to the advisability of buying a gas range, an electric stove, a steam heated device or a fireless cooker, and yet end up by purchasing a year's supply of coal for the old stove. Now the vendors of all these distinct contrivances are in competition as among themselves and with the coal dealer for the contents of the anxious man's purse. Each holds out all the known inducements to compel a severance between the man and his money. All of the devices mentioned may be patented but that does not lessen the intensity of the strife.

Webster illustrates the above stated definition with this excerpt: "When competition does not act at all, there is complete monopoly." That is the sort of thing with which Court is here dealing.

The Court next cites and quotes from the decisions dealing with the National Harrow Combination. These decisions are ignored in the Rubber Tire, Threshing Machine and Seeded Raisin cases.

"While the contracts provide that the parties are licensed to use

patented inventions of the other, this does not alter the fact that by the terms of the contract each party is restrained in the exercise of its rights, and in the sale of articles made solely under its own patents" (black ours).

There's the rub. That is the hand of the stranger in the contractor's business. That is what Mr. Justice Holmes in the Northern Securities Case, nominated a contract in restraint of trade. "If as a result of mutual licenses, there is put upon the market an article embodying the inventions of both patentees, so as the effect of the exchange of licenses a new article of commerce is developed, it is doubtful if the public is thereby unlawfully deprived of any of its rights or expectations of free competition. (That is a twister.) Where, however, each patentee continues to make his own goods under his own patents, and seeks to enhance his profits by an agreement with competitors, who make either patented or unpatented articles (the circumstances now in hand), then it seems to follow that the agreement of each to restrain his own trade cannot be regarded merely as an incident to the assignment of patent rights. The patentee then restrains his own trade, not for the purpose of enhancing the value of the license which he grants (Bement Case), but for the purpose of enhancing the value of his trade by removing competition." That is the precise purpose and result of all such agreements. What conceivable reason has one patentee for agreeing to maintain an arbitrarily fixed price on his patented article unless it be the consideration tendered to induce another person (it may be a patentee) to agree similarly to restrain himself in disposing of his goods? If there can be no competition in the trade in patented articles, what possible motive had these parties for entering into this arrangement? If a patented article, in virtue of the fact that it is patented, is thereby energized with an irresistible selling potency, so that competition is ineffective to lessen its chances of extracting the consumers' money, why should the own-

ers of distinct patents bind themselves together and each forbid the other to be free in seeking that money?

The opinion continues. "A sale or license, with a covenant not to compete, made as an ordinary incident to enhance the value of the thing conveyed, is not within the Sherman law." Now that is the exact point to the Bement Case. There the patentee granted an exclusive license for the full term of the patent. In other words, the license contract operated to place the business of manufacturing the kind of harrows described in the patent entirely in the hands of the licensee. The exclusive feature of the license, that is to say the stipulation on the part of the patent owner not to engage in the business, was easily validated as a concomitant to enhance the value of the license granted. The decision has been cited to the exact point by the Supreme Court. Thus in Cincinnati Packet Co. vs. Bay (1905), 200 U. S. at 185, Mr. Justice Holmes, expressing the view of the full Court, said: "Whatever differences of opinion there may have been with regard to the scope of the (Anti-trust Act) there has been no intimation from anyone, we believe, that such a contract, made as part of the sale of a business, and not as a device to control commerce, would fall within the Act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute (citing prior decisions and then continuing with this), and it was so **decided in the case of a patent**" (black ours; citing the Bement Case). The maintenance of price feature in the Bement Case is a stumbling block. That stipulation, considered in the light of the precise facts presented to the Supreme Court, is absolutely meaningless. What conceivable harm could result to the licensor in such case from the action of the licensee in cutting prices? The licensor had stipulated for a royalty of so much on each harrow sold. His profits were fixed at a certain sum, regardless of the amount at which the implements were sold. We repeat that so long as one sticks in the circumstances actually proven to exist in that case, the selling price clause of the contract is

inexplicably foolish. But when we glance outside of the record and at the circumstances heatedly averred, but not proven by the licensee, the thing is sensible and clear. The license in contest undoubtedly was designed with the consciousness that it would be one of many similar licenses pertaining to other harrows, patents for which were owned by the licensor. The licensor foresaw competition between a multitude of licensees operating under separate contracts and selling competitive equivalent implements. The stipulation as to the selling price was a reservation by the licensor in all the contracts and was intended to enable him to control, restrain and repress competition between all the disparate licensees. And the scheme was admirably adapted to vest this power in the licensor to the fullest extent. For the licensor was left free to lower the price. Now the trouble with the wretched case is that the defendant failed to prove the existence of the scheme. The combination was alleged to exist, but there was no proof of it. The answer averred much ugly stuff of a multitude of licensees, of similar contracts, of uniform prices, of competition wiped out, but the proof failed as to all this. The actual record on which the defendant asked judgment was like the play of Hamlet with the principal character left out. A conspiracy was asserted but only one party to the alleged conspiracy was shown to exist. There could be no conspiracy or combination between a single licensor and one licensee. The appearance of restraint, affirmable of the exclusive feature of the license, was no restraint at all, as it was an incident to the sale of a business. The maintenance of a fixed price was harmless for two reasons. First, it left the owner of the patent at liberty to lower prices whenever the conditions of the business made it advisable. Secondly, the licensee's agreement to maintain prices was not articulated in any scheme or combination to affect, generally, prices in such implements. The covenant was not given in consideration of an analogous stipulation on the part of other manufacturers similarly to impede the distribution of their products. On the contrary, the agree-

ment to maintain the schedule of prices was insulated, ran only to the licensor in his capacity as owner of those patents under which defendant was licensed and bore no reference to other similar undertakings.

The counsel for the defendant apparently expected the Court to fill up the gaps in his proof by conjecture and surmise, stimulated into activity by heated allegations in the answer, unpropped by any proof. The Court declined to embark on any speculation; held itself bound by the record, and that the record did not warrant the finding of any combination. This wide gaping discrepancy between the pleadings and the evidence easily accounts for the studious and almost redundant expressions in the opinion, to the import that the Court cannot assume the existence of a combination where the trier of the facts had deliberately asserted there was none. But we can discover no warrant for citing the Bement Case as authority for the proposition that a patentee, as patentee, and by virtue of some vigour peculiarly invested in him by the patent law, can stipulate the price at which a licensee shall sell the patented article. We think that the Supreme Court of Massachusetts uttered sound doctrine when it stated (193 Mass. at 611) that "The decision (in the Bement Case) would have been the same if the article had not been patented." To put the case in this light, suppose A has a factory completely equipped for making ax handles. B has no such factory. A hires the use of the factory to B for five years, the terms being that A shall not, during the period, engage in the business; that B shall pay a rental for the use of the equipment and shall maintain a fixed schedule of prices, subject to A's rights to lower the same. We know of no process of reasoning whereby such contract can be brought within the category of agreements illegal because in restraint of trade. Yet to our discernment that is a fair abstracted statement of the Bement Case.

The opinion digressed from, continues:

"By the terms of the present contracts, each party limits its trade in goods made under its patents."

After a glance at the Rubber Tire Case, we have this:

**“The question whether agreements concerning patented articles are within the Sherman Anti-trust Act, must be determined by a consideration of the nature of the rights conferred by the grant of a patent”** (black ours).

Now we have that consideration stated with unmistakable directness.

**“While it is the ordinary privilege of the owner of patent rights to use or not to use them without question of motive, the grant of letters patent confers upon the patentee no right not to use his own invention, or to make an agreement in restraint of trade in that article, save in connection with an assignment of the rights conferred by letters patent. The proposition than an agreement not to manufacture, or an agreement to restrain trade, is within some rights of nonuse conferred upon a patentee, seems unsound, if we consider the nature of the grant of letters patent. The right of the patentee or the assignee to withhold the invention, is quite apart from any grant contained in the letters patent. The privilege of restraining others is granted to the owners of letters patent. He is given no right or privilege to restrain himself. By the terms of the patent he has the exclusive right to make, use and vend. The right to make, use and vend he has without the grant of letters patent. When we say that a patent grants an ‘exclusive right’ we do not mean that the right to make, use and vend is granted, but only that the patentee’s existing right is made exclusive by the grant.”** (black throughout paragraph ours).

There we have meaningless common places, reiterated as a matter of rote, enlivened, energized and truly expounded. That is the mark of penetrative insight. That “consideration” is buttressed by two Supreme Court decisions. Then we have the same proposition stated differently, further clarifying the matter. Incidentally we get a new light on the frequently quoted paragraph as to the right of nonuse in the Heaton Case.

**“The right of a patentee to suppress his own, rests upon ordinary considerations of property right** (black ours). The public has no right

to compel the use of patented devices or unpatented devices, when that is inconsistent with fundamental rules of property. When a patentee agrees, however, to restrain his own trade in the article of his own invention, not as an incident to the granting of rights, but for the purpose of enhancing his price by the removal of competition, he is then quite outside the sphere of any right granted him by the government. He may engage in interstate trade or not as he pleases; but being engaged in that trade, he is subject to all restrictions upon interstate traders" (black ours). Observe that by the use of the term "traders" the Court recognizes the fact that the objective point of the Anti-trust Act is persons and not abstractions.

Near the bottom of page 559, we came upon this: "It must be recognized that an inventor stands in a special relation to the product of his faculties. When he has secured his patent, he may derive profit from an agreement (black ours) not to use it." The second of these two sentences appears to us to squint. It is the only sentence in the opinion which is even slightly ambiguous. What is meant by "an agreement not to use" the invention? Are we to understand by this an agreement not to use as an incident of a sale of that privilege to another? If so, the Court has already dealt with that right in admirable fashion. The words of the sentence seem open to the unstrained construction that a patentee may derive a profit from an agreement not to use his invention, entered into designedly to suppress the patented article as a factor in commerce. But then this construction is repelled by a strong passage on the page following:

"Granting that nonuse of an invention is fully within the right of an owner of a patent, it does not follow that he may by agreement bind himself to nonuse, save in connection with an assignment of his letters patent. Ownership of a patent involves no obligation to use, nor does ownership of other property. Nonuse ordinarily violates no law; but contracting with another, putting it in the power of another to com-



pel one not to use, is a contract in restraint of trade, designed for the purpose of suppressing competition'' (black ours).

Two more extracts must suffice though the entire opinion is worthy of the intense study fabled to have been devoted to Thucydides by Demosthenes. "If there is secured to the patentee all profits legitimately arising from the manufacture, use, and sale of his invention, that is all that is within the terms of the grant. (That is a correct definition of the rights of the owner of a patent in the category of the natural right and in an affirmative aspect, complementary to the negative right to exclude others.) To prohibit contracts (black ours) for the suppression or restraint of his own trade by the application of the Sherman Anti-trust Act is not inconsistent with his right to manufacture, use and vend. That the Sherman Act interferes with some supposed right granted by the patent, to suppress an invention, is an unsound proposition, for the reason that letters patent grant no such rights (black ours), either in terms or by reasonable implication."

Again. "The profit which arises from suppressing an invention, from nonuse, flows from commercial tactics and not from the use of the invention. The public interest which forbids contracts in restraint of trade, arises from no right in the public to create trade by compulsion, but only from the expectation of the ordinary course of conduct, and the harmful results of interference with it by monopolistic schemes. (Those sentences contain a profound implication which searches beyond the facts in contest.) The inventor who has not patented his invention cannot make an agreement in restraint of interstate trade without violating the Sherman Act, even though he is in fact an inventor. The rules of public policy, expressed in the Sherman Act, apply to him, and I do not think are affected by his taking out a patent, except in the single particular of an assignment or license. The Sherman Act is not inconsistent with any rights acquired by the patentee when it prevents agreements in restraint of trade which are not designed to make valuable the right to use. There is no inconsistency between

the grant of an exclusive and assignable right to make, use and vend, and the prohibition of an agreement restraining or suppressing the sale of the article in interstate commerce, because any profit from such an agreement does not arise from the value of making, using and vending. There is no inconsistency between the proposition that an inventor may withhold his invention from use as he sees fit, and the proposition that he may not make an agreement whereby, for the advantage of a competitor, trade in his patented article is restrained or suppressed" (black ours).

Such an argument must prevail by the irresistible force of demonstration. Granted, that all the inventor obtains by the patent franchise is the right to exclude and that the Anti-trust Act inhibits every trader who does an interstate business from entering into a contract whereby his trade in his goods is restrained, the conclusion that a contract of the patentee restraining his trade violates the act, is relentless, compelling, inexorable.

Let us now attempt an abstract of the various arguments advanced to support the decisions that we have discussed and then in conclusion turn the whole matter about for a view in a different aspect. In summarizing the arguments we place in contrast the views of the Supreme Court. The various legal propositions advanced to justify the paradoxical rule may be brought under the following heads:

1. The patent franchise grants to the patentee the exclusive right to make, to use, and to sell. This is assumed as the law in all the cases; in a number of them it is expressly so declared.

The Supreme Court:

1852. *Bloomer vs. McQuewan*: "The franchise which the patent grants consists altogether in the right to exclude every one from making, using or vending the thing patented, without the permission of the patentee. This is all he obtains by the patent."

1878. Patterson vs. Kentucky: "The right to sell the (patented) Aurora oil was not derived from the patent; that right existed before the patent and could have been exercised without the grant of letters patent."

2. The purchasers of a patented device accompanied by a notice (or sold under a contract) restricting the purchaser's right to sell or use the thing purchased, is, as to such right to use or sell, a mere licensee, and any use or sale in violation of the contract is an infringement of the patent. This view is expressed in all the cases. Sometimes such sales are called "conditional" or "restrictive;" at other times it is said the vendor sells only a part of his monopoly and reserves to himself as an ungranted portion of his monopoly the right to control the future use or sale. The climax is reached in Brodriek Copygraph vs. Mayhew (1904), 131 Fed. 92: "He (the patentee) is at liberty to fix any price for the machine and as well reserve any benefit in its use."

The Supreme Court:

1873. Mitchell vs. Hawley: "Complete title to the implement or machine purchased becomes vested in the vendee by the sale and purchase, but he (the purchaser) acquires no portion of the franchise, as the machine, when it rightfully passes from the patentee to the purchaser ceases to be within the limits of the monopoly."

1873. Adams vs. Burke: "In the essential nature of things, when, the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention

in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees.”

1894. Keeler vs. Folding Bed Co: “As between the owner of a patent on the one side, and a purchaser of an article made under the patent on the other, the payment of a royalty once, or, (N. B.) what is the same thing, the purchase of the article from one authorized by the patentee to sell it, emancipates such article from any further subjection to the patent throughout the entire life of the patent. It follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place; whether a patentee may protect himself and his assignee by special contracts brought home to the purchaser is not a question before us, and upon which we express no opinion. It is, however, obvious, that such a question would arise as a question of contract and not as one under the inherent meaning and effect of the patent laws.”

1852. Bloomer vs. McQuewan: “And when the (patented) machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the Act of Congress. And, if his right to the implement or machine is infringed, he must seek redress in the Courts of the State, according to the laws of the state, and not in the Courts of the United States, nor under the law of Congress granting the patent. The implement or machine becomes his private, individual property, not protected by the laws of the United States, but by the laws of the state in which it is situated. Contracts in relation to it are regulated by the laws of the state, and are subject to state jurisdiction.”

1908. Bobbs-Merrill Co. vs. Straus. “The owner of the copyright in this case did sell copies of the book in quantities and

at a price satisfactory to it. It has exercised the right to vend, what the complainant contends for embraces not only the right to sell the copies but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose to do so, unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum would give a right not included in the terms of the statute.”

3. Violation of a license contract, is per se an infringement. This position is expressed or assumed in all the cases. It is emphasized in the Rupp and Rivet cases.

The Supreme Court:

1850. Wilson vs. Sanford (In a suit involving breach of a license contract): “The dispute in this case does not arise under any Act of Congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles. If the case made by the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, depended altogether upon the rules and principles of equity, and in no degree whatever upon any act of Congress concerning patent rights.”

1878. Hartell vs. Tilghman: “If it (license contract) is to be rescinded it can be done only by mutual agreement, or by the decree of a court of justice. If either party disregards it, it can be specifically enforced against him or damages can be recovered for its violation. But, until so rescinded or set aside, it is a subsisting agreement, which, whatever it is, or may be shown to be,

must govern the rights of these parties. Such a case is not cognizable in a court of the United States, by reason of its subject matter."

1902. *Excelsior Wooden Pipe Co. vs. Pacific Bridge Co.*: "It may be freely conceded that if the licensee had failed to observe any one of the three conditions of the license, the licensor would have been obliged to resort to the state courts, either to recover the royalty or to procure a revocation of the license."

When the legality of a license contract under letters patent is attacked on the ground that its terms violate the law against restraints of trade by contract, several positions are assumed to escape the force of the objection.

4. It is said the patentee does not have to sell his patented product or license any one else to do so. Therefore, if he elects to do that which is not compellable he can state the terms on which his consent can be had. This view was glaringly voiced in the *Heaton, Rubber Tire and Threshing Machine* cases. The premised assertion as to the right of non activity in so far as it differentiates this right in the patentee from the same right in the owners of other private property is the expression of an unreality. The same may be said of the man who grows potatoes. (*Park vs. Hartman.*)

"It is the privilege of any owner of property to use or not use it without question of motive." (1908. *Paper Bag Patent Case.*)

The assertion when predicated of all owners of private property is a meaningless platitude

From the conceded existence of the right of non use in the owners of all private property, nothing can be concluded as to the right to enter into a contract in restraint of trade in chattels.

The law does not have as one of its objects compelling private industrial activity; nor does it punish voluntary, non contractual quiescence. The sluggard is left to his deserts; he has his reward

5. The Federal Anti-trust Act is brushed aside with various conflicting suggestions.

(a). The patented articles are not articles of interstate commerce. Nearly 30 years earlier this was anticipated and invalidated by *Webber vs. Virginia*.

(b). The patent law overrides the Anti-trust Act; the sufficient answer to which is that they are not in conflict at any point.

The patent law creates in the patentee the naked right to exclude; the Anti-trust Act forbids all contracts, in restraint of interstate trade. The two laws might be represented by two circles whose circumferences do not touch.

The Supreme Court:

1878. *Patterson vs. Kentucky*: "The right of property in the physical substance is altogether distinct from the right in the discovery itself. The right to sell the (patented) Aurora oil was not derived from the patent."

1903. *Northern Securities Case*: "Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the Anti-trust Act has prescribed the rule of free competition among those engaged in such commerce."

6. The State Anti-trust Acts are avoided under various indeterminate reasons, expressed in inconclusive phraseology.

(a). The State Anti-trust Act cannot subtract from the right conferred upon the patentee by Congress. This is true, but the State Anti-trust Acts do not have such purpose or effect. They have to do with contracts pertaining to tangible, visible objects; not with incorporeal franchises.

(b). The right acquired by the patentee from the government is inconsistent with the patentee's being made subject to the provisions of the Anti-trust Acts of the various states. The unexpressed assumption here, is that the government grants to the patentee the right to make, use, and sell. The assumption and the predicate thereon are

wholly unsupported. The Anti-trust Acts of the states are all enacted in the exercise of the reserved or police powers.

People vs. Russell (1883), 49 Mich., 617. Judge Cooley: "The patent laws do not determine personal capacity to contract or prescribe the requisite for sales of patented articles, or impose the customary restrictions which are supposed to be important to the protection of public morals. A patentee must obey all other regulations of police which are made for general observance."

The Supreme Court:

1852. Bloomer vs. McQuewan: "Contracts in relation to it (patented article) are regulated by the laws of the state."

1878. Patterson vs. Kentucky: "The right of property in the physical substance which is the fruit of the discovery is altogether from the right in the discovery itself."

1880. Webber vs. Virginia: "The legislation respecting the articles which the state may adopt after the patents have expired, it may equally adopt during their continuance. It is only the right to the invention or discovery, the incorporeal right, which the state cannot interfere with. Congress never intended that the patent laws should displace the police powers of the states, meaning by that term those powers by which the health, good order, peace and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the state over all property within its limits."

It is a grievous mistake to suppose that the police power of the state over the sales of personal property is limited to suppressing traffic in noxious goods. In *Gibbons vs. Ogden*, Chief Justice Marshall said:

"Of course, there is no limit to the power to be derived from the purpose for which it is exercised. If exercised for one purpose, it may be also for another. No one can inquire into the mo-



tives which influence sovereign authority. It is enough that such power manifests its will."

### CONCLUSION.

If we glance back at the long elaboration which we have just inflicted on the reader, certain reflections are forced upon us in the mass. In every contention or argument, there is an ultimate fact as to which the disputants are agreed: The argument that grows up is a clash of contradictory opinions or mutually destructive assertions about the fact conceded by both sides. Always there must be this common starting point, otherwise no dispute can be initiated, much less pressed out into detailed argument.

This common ground may be a fact, the existence of which, is established by proof unquestioned by either side. Or it may be an assertion which is assented to by all parties. In the discussion just terminated the rallying point for all the divergent views takes this latter form, of an assertion which is assented to by those who deduce the variant conclusions. The assertion which gains the assent of all courts and text writers is this: The patent right consists altogether in the right to exclude every one from making, using or selling the thing invented without the patentee's consent. The Supreme Court, as we have shown, has striven for decades to thump this idea into the heads of those who peruse its decisions. But more than this, the proposition is, in form, assented to by all the lower courts whenever they come in the way of defining the patent right. We have noted this repeatedly, but even though the assertion in question is expressed and formally assented to, we find it nullified in the application and denied in the result.

This is poignantly to be regretted, for it seems to be a denial of, a refusal to accept, a consequence that is unequivocally bargained for in the universally approved definition of the patent right. If there is anything in the world by which men ought to consent to be bound,

it is the limitations which they deliberately impose upon themselves in argumentation or exposition. Unless they will consent to the compulsion of their own admissions, such a thing as a conclusion is out of the question.

When it is said that the patent franchise consists altogether in the right to exclude, the consequence, that the patentee as patentee, has no power to sell or restrain the sale of his patented article seems to us wholly irresistible. It presses in on us with all the persistency of water straining against a dam. It is no more to be escaped than the result of 20 when we have multiplied 10 by 2. It is not a conjectured conclusion, dubiously verifiable by experience. It is simply a different form of asserting the same proposition.

It may be that we can get the notion here sought to be enforced clearer by one further brief effort. In Holmes on The Common Law, page 214, we have this: "A legal right is nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given to a man, he has a legal right, and this right is the same whether his claim is founded in righteousness or iniquity."

Those thoughtful words are not found in a discussion of the nature of the patent grant, but they throw light thereon obliquely. "Just so far as the aid of the public force is given to a man he has a legal right." How far is the aid of the public force given to a patentee by the patent law? Just so far as to enable him to exclude others from acting in the way of making, using and selling the thing he has invented without his consent. But not a whit further, according to the solemn and deliberate reiteration of the Supreme Court.

Look again. On page 220 of the volume just quoted, we have this further illumination: "Again, a large part of the advantages enjoyed by one who has a right are not created by the law. The law does not enable me to use or abuse this book which lies before me. That is a

physical power which I have without the aid of the law (black ours). What the law does is simply to prevent other men to a greater or less extent from interfering with my use or abuse." That passage also hits the patentee: a large part (we might say the larger part) of the rights enjoyed by him are not created by the patent law. The patent law does not enable him to use or abuse the invented thing before him,—the fruit of his "cares and sweat". This is a physical power which he has without the aid of the patent law.

What the patent law does is simply to prevent other men for 17 years from interfering with his use or abuse, which they do when they themselves make a specimen of the thing invented without his consent, or use such specimen so made without his consent or sell such specimen so made without his consent.

But the patentee's own right to make, use and sell is not an advantage created by the patent law. That right of the patentee (in the language above quoted) is "nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force". Thus one who occupies the status of a patentee has two separate and distinct claims upon the aid bestowed in the public force. One is to protect him in the exercise of "certain natural powers", viz: making, using and selling. The other is to protect him in the exercise of a certain artificial, made power, generated in him by the national government, viz: to exclude others. The patentee, as patentee, has a claim on the aid of the public force only in this second function. All men have the first claim, though it is not infrequently denied to them. The aid of the public force, given through the instrumentality of the patent law is not scattered or diffused: it is bent and confined to one narrow specific object, namely to exclude, inhibit and interdict the activity of others. When the patentee's own right to make, use and sell is imperilled, he does not, and cannot, invoke the aid of the public force through the medium of the patent law. He employs a dif-

ferent incantation and evokes a far broader, more durable and more terrific force. He calls down upon the head of his antagonist that great force that is designed to protect every man in the enjoyment of the fruit of his own cares and sweat. Thus it is manifest that when we define the patent right as an "exclusive right to make, use and sell," we misdescribe the thing. We speak as if the patentee may lay claim upon the public force through the promise of it in the patent law to enable him to make, use and sell. But that is not true. And it is well for the patentee that it is not true. For if that were the case, when the patent should expire, the aid of the public force would be denied him as a protection in his right to make, use and sell.

When we employ the above quoted phrase, we misconceive the bent of the public force as directed through the patent law. We confuse and obliterate the distinction between the patentee's two claims for aid in that force. The stereotype phrase would lead to the conclusion that the patent grant created the right and then quantified it in the degree signified by the term *exclusive*. This is not the case. The patent grant does not create the right at all. The right is a mere permission to exercise certain natural powers: the source of this permission is hidden away back in the unlifting mists of civilization. The patent grant does create a right, but it is something else. It does create in the patentee the power to exclude others, but that is all that it creates, despite mountainous implications to the opposite. The patentee, in virtue of his being the beneficiary of two separately derived advantages, may be said to have the "exclusive right to make, use and sell". But it is of vast importance not to lose sight for one moment of the fact, that the fructifying advantage enjoyable by him comes not from the patent law, and the exclusive feature of his right is a mere correlative to the interdicted claims of others. His right is exclusive as a consequence of the negation of their rights. The exclusive feature of his right is, in the first instance, a

mark, not of his strength, but of their weakness. The patent law, as said in the *United States vs. American Bell Telephone Company*, does not give him a use, which save for the patent he did not have before, but only separates to him an exclusive use. And this is done by recognizing the use to which he had entitled himself before he applied for the patent and parting it off to be enjoyed by him alone, while at the same time it is denied to others who have not his consent. Thus we come around to a repetition of what so often we have said: the patent right is purely negative.

The patentee's advantage through it is confined exclusively to his power to frustrate and inhibit the spontaneous activity of others: he is enabled to hold in check their tendency to make, use and sell without first obtaining his consent.

Furthermore, in the cases, a number of phrases are thrown loosely about with the effect of confusing the subject. The word "monopoly" as applied to the patent franchise is misleading unless consciously affixed to a single aspect, in the right to exclude. To call the patentee a "czar" is to employ a figurative epithet that implicates many false notions. A czar, whose powers are exhausted in negation, all of whose edicts are comprised in a stilted redundancy of "thou shalt not" is wanting in the essential attribute of imperative power. The patentee is a man of authority only in the sense that he can say to one "go not" and he goeth not, but he can not say "go" and thereby impel the going.

What meaning can be thought into such expressions as "fruit of the patent," "product of the patent," and "made under a patent," or "made in the exercise of a patent right?" The only "fruit" or "product" of a right to exclude, is exclusion. No other thing can possibly be derived from it. An article cannot be made "under a patent," if by such indeterminate verbiage is meant that the patent grant enabled the patentee to make it or even protected him in so doing. To say that an article was made, or used or sold by the pat-

entee "in the exercise of a patent right" is a gratuitous occultation; the phrase is devoid of meaning. It might be asserted accurately that "under a patent" or "in the exercise of a patent right," others than the patentee are forbidden to make the article. In so far as the phrases in the connection implicate an aid or protection to the patentee, they are purely negative and indicate nothing further than the restraint imposed on others. Finally, the words "patented article" are apt to have a false counterpart in our thinking. From the manner in which these two words are bandied about, one might readily infer that a patent owner who has made and has in his possession a specimen patented article, with reference to that chattel, is vested with rights unique in character, fundamentally different from his rights in his other personal property; that the law of contracts and of sales, applicable to him and his property in that article is *sui generis*; that the sale of a horse is one thing and that of a patented device is quite another; that a contract with reference to a patented article is in complete contrast with a contract pertaining to an unpatented chattel. According to this view, a breach of contract of the former kind is an infringement of a patent; while a broken contract of the latter kind gives rise to a claim in damages and nothing more. But again this view is wholly unfounded. A patented article when brought into existence by or under authority of the patentee, is an ordinary chattel, governed as to the disposition of it through the medium of a contract or sale by the same law that prevails in reference to other chattels.

These terms and epithets and many other like expressions do not envisage the patent right. They are glinted out in sporadic attempts to express an erroneous preconception of the thing struggled with. They are inadequate forms of expression and should be discarded in the interest of precision and distinctness.

In *Gibbons vs. Ogden*, Mr. Justice Johnson said: "One-half the doubts in life arise from defects of language."

One further aspect deserves notice. "A legal right is nothing but a permission to exercise certain natural powers." Of course, the right is the correlative of a duty. The duty is an obverse, a counterpart of the right. One who claims the benefit of the right must of necessity concede and submit to the burden of the duty. The right demarks the benefits accruing to the possessor and, the burdens imposed on others. The duty, on the other hand, delineates the claims of others and the burden impressed on the asserter of the right. The aid of the public force, when invoked to protect the right, at the same time presses home the burden of the duty.

A patentee can invoke the aid of the public force, given through the patent law, to exclude others, but in so doing he is hedged about with limitations. The aid is pledged for a limited period only: it can be had only through certain tribunals. If one poses as a patentee, when in fact he is none, and labels a thing patented when it is not, he may become a victim of the public force, instead of its beneficiary.

When the patentee sets about making and selling his patented article, or licensing another so to do, as we have already seen, he does not and cannot, claim the protecting aid of the public force pledged through the medium of the patent law. He is then acting in a right that is protected and limited by the public force brought to bear under the circumstances defined by other branches of the law, older, more fundamental than the patent law.

In the sphere of this right, the aid promised is qualified and conditioned by many inescapable burdens. If the patented article, a right to make, use and sell which is claimed, is in contemplation of law deemed harmful in the use for which it was designed the aid of the public force to protect the right of making and selling may be denied the patentee. This happened in the cases of *Patterson vs. Kentucky* and *In re Brosnahan*. In these instances the authoritative expounders of the circumstances under which the aid of the public force

is given or withheld conceived it necessary, completely to subvert the right to make and sell on the part of the patentee, in order that the claim of the people to the aid as a protection against a harmful thing, might be recognized and enforced. Now the aid of the public force to put down and annul all contracts in restraint of trade is solemnly and unmistakably pledged to the people in the anti-trust legislation. These compacts, agreements and conspiracies are recognized in legislation to be as dangerous to the welfare of the people as arson, larceny or homicide. They are placed in the same category of dreaded acts and catalogued as crimes. A crime is a blow at the welfare of the community. It is a stab at the heart of institutional stability. That is true, whether the crime consists in killing a member of society, or in knotting the arteries of commerce with ligatures that impede and interrupt the freedom of trade. When a patentee enters into a contract, agreement, or conspiracy the effect of which is to restrain trade in his patented article he no longer is in a position to invoke the aid of the public force. On the contrary he has erected a lightning rod calculated to attract and bring down upon himself the consuming fire; the destructive might of that force.

Reverting now to the starting point of this summary, the three groups of cases discussed in the preceding pages evince a misdirection of the public force.

All of the opinions assent to the proposition that the patent franchise is completely bound up and comprised in the right to exclude others. In the Heaton case this is expressly conceded. In that case the owner of the patent had made the machines and sold them. No one had interfered with him in the enjoyment of that right. He had claimed and received the aid of the public force, pledged through the patent law, in full, heaped and rounded measure. The purchaser had paid for the machines and owned them. He had a right to use them. He was entitled to the full bent of the public force to protect him in that right. The defendant was likewise entitled to the advantages



accruing to him in the exercise of his physical power in making and selling unpatented staples. This was a sovereign right; the legislature of Michigan had vehemently denounced any attempt by contract or combination to repress this right as a crime deserving the punishment meted out to barn burners and burglars. The decision had the effect of wrenching the public force out of its declared function, of giving the patentee an aid he was in no wise entitled to; concomitantly, the decision had the effect of denying to the purchaser and the defendant an aid which to them, was guaranteed by a law more fundamental than that by which the Court was created.

The characterization applies to the Neostyle, graphophone and phonograph cases. The distortion of the aid of the public force exhibited in the Rubber Tire case is even more flagrant.

In the instance of the rubber tire patent our Court of Appeals had finally repudiated the claim of the patentee to the aid of the public force through the patent law. The patentee overtly abandoned his claim through that medium; he gave up infringement suits, artificially characterizing them as "slow and expensive." Nevertheless, the patentee succeeded in parrying the fell thrust of the public force directed against combinations and conspiracies in restraint of trade by a hollow incantation concerning the protection granted by the patent law which he had in fact found inoperative to the end proposed. The aid of the public force which was dedicated to the people, by a strange transmutation, was converted into a defensive bulwark for the combine and its straw man, the patentee. We have a strange feeling, as if the armoury of the people had been ransacked at night while the sentinel was off guard and one of the most effective weapons delivered over to an insidious enemy.

Finally, if it be objected that what has gone before is wire drawn, fabricated ingeniously and expounded with abstract over nicety, we may fall back on a curt and blunt view; a sort of coarse rule of thumb. We turn again to Holmes on The Common Law. On the very first

page we chance upon this: "The substance of the law at any given time pretty nearly corresponds, so far as it then goes, with what is then understood to be convenient." Let us, then, regard these cases from the short view of convenience. We get an abrupt shock direct from the Supreme Court. In *Keeler vs. Folding Bed Co.* (157 U. S. at 667) that Court, in denying the rule enforced by the decisions which we have pertinaciously criticized, used this language: "The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration." It seems perfunctory to attempt an illustration of that which the brooding care of the Supreme Court has marked off as clear beyond the need of illustration. But if we ruminates the rule slightly the inconveniences of it accumulate in multitudes like drops of summer rain. In the case of *Cortelyou vs. Johnson* the Court of Appeals set forth some of them. Enforce the rule generally, and the entire public will soon be inextricably entangled in the meshes of infringement charges. A woman purchasing a patented egg beater for 9 cents may be an infringer because she did not pay the "licensed price" of 10 cents. Consider the Coffin plate in *Adams vs. Burke*. Suppose it sold with this metal plate inscription: "This lid is sold subject to condition that it can be used only in conjunction with a mortuary receptacle supplied by the patentee-vendor." The distracted relatives unwittingly violate the "license" and make use of a stranger's enclosure. Will the Court send its ubiquitous marshal prowling into the church yard to finger the resting places of the wearied sleepers in search of infringing property? Under this rule, the most implacably righteous citizen in the nation may involve himself in a hundred charges of infringement every year merely because he does not notice and heed the fine print warnings posted promiscuously about on the chattels which he buys and pays for.

Glancing further at this view of the matter we find this pretentious postulate of hard common sense "Law should follow business."

Bigelow: The Law of Bills, Notes and Cheques (2d Ed.) 7. We reverently venture the assertion that not one member of the judiciary who wrote the opinions heretofore dwelt on at length would himself spontaneously submit to the business regulation justified by these decisions. The proposition that one who goes into a department store and purchases and pays for an article which the proprietor owned, is an infringer, because he did not pay the price which the manufacturer said must be demanded for it, contradicts and overrides every conscious and every unconscious prepossession concerning business affairs.

Aside from any law relevant to the transaction, the notion is revolting. We instinctively recoil from it. We feel that the thing is beyond justification or intelligible explanation. Almost weekly the average citizen is purchasing various articles, patented and unpatented. He certainly does not distinguish the character or extent of his ownership in the two classes by reference to the accident of their being patented or unpatented. If we should confront one who had just purchased a pound of butter and also a patented door lock with the double pronged affirmation, that as to the butter he was absolute owner, but as to his right to use the lock he was "obviously a mere licensee" we might expect to titilate his sense of humor or arouse his resentment, but we certainly could not reasonably hope to engage him in serious debate. Waiving any question as to the title of the vendor, the purchaser knows that the butter and lock are his, to do with as he pleases. He would risk his business fortune on the certitude of that conviction. For when one buys a chattel from the owner he has, holds, owns, enjoys that thing. This is law, business practice, morals and the rules of physical force fused into one and the same indisputable theorem of society. No one can discover a warrant for doubting it at this late day. No amount of argument can upset even a mean man in that conviction.

For this bearing there are some ancient land marks. Their original finger pointings are still encrusted in stiff Latin. It may be that

this is an instinctive attempt on the part of society to preserve its juridical postulates against the thoughtless effacements of undue familiarity with maxims couched in the vernacular. For, after all, common places are great truths which from long being lodged in the flimsy texture of men's thoughts have lost the attribute of weight and ceased to arouse. We have these venerable stops interpreted by the lexicographers.

**Pretium in loco rei succedit**, the price takes the place of the thing. **Nemo praedo est qui pretium numeravit**, he is no robber who has counted out the price. **Imaginaria venditio non est pretio accidente**, it is not an imaginary sale at which the price is paid. No one knows how far back we should have to go to find a man whose memory run contrary to those truths.

It seems worth while to throw out one more anchor to secure us in this mooring. We are unable to go further in the argument from an analytical view point. Of late we have been tugging at the matter from the standing ground of convenience. This is always, to a degree, a treacherous procedure.

For the argument from inconvenience, frequently is bottomed upon an uncleared prepossession, an obstinate prejudice rooted in the conglomerate mass of individual experiences and past adumbrations of thought. But all of us live on the past and by the past are saved or destroyed. Nothing is more natural or praiseworthy than an attempt to conserve what is past, to give a rational explanation for it, to justify it in the light of subsequently derived reflections, and to force the past into unbroken continuity with the present and effective use in the future.

If the view combatted in these pages is to guide us in the future, what are we to think of the decisions already promulgated by Supreme Court in interpreting, upholding and enforcing the Anti-trust Act? It seems to us that by a slight alteration of the facts, in a mere accidental aspect, that all those decisions can be turned into a sound-

ing brass and a clanging cymbal. Let us regard them for a moment. Those decisions may be roughly parted off into two groups. One group has to do with contracts in restraint of trade, effective as between the manufacturers and vendors of chattels. Typical here are *Addyston Pipe & Steel Co., Montague vs. Lowry*, 193, U. S. 38, and the very recent case of *Continental Wall Paper Co. vs. Voight*, 212 U. S. 227. The other group comprises the carrier cases, and is represented by the *Northern Securities* decision. But we must keep in mind that any such classification is a conscious artifice.

All of these decisions are reducible to a common finality. "Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the Anti-trust Act, has prescribed the rule of free competition among those engaged in such commerce." Again "the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this." (193 U. S. at 331.) That, according to the Supreme Court, is the philosophy underlying the Anti-trust Act. It is true that the Act says nothing about competition, or free competition and it says nothing about forcing into existence, by proffered subsidy or threatened penalty, either competition or free competition. Nevertheless, competition and free competition undoubtedly was the industrial phenomenon prospectively contemplated and pronounced desirable by the people through Congress. That fact presses in on us at all angles. The method adopted to realize the desired condition was to forbid and remove all obstacles designed to swerve the irresistible momentum of trade out of the line of least resistance. Trade and commerce are wholly irrepressible; the attempt to completely suppress either would be as hopeless as trying to dip the ocean dry with a gourd. By a necessary law of men associated in geographical contiguity and struggling to appease an insatiable desire for patronage from a patronage that is at all times limited, competition is wholly inevitable, unless it be repressed by compacts that bottle up the spon-

taneous tendencies of the traders. The Anti-trust Act as expounded by the Court, hits at every restraint on the freedom of interstate traders regardless of the locus of the pressure. Whether the ligature that fetters this buoyant propensity to trade binds the vendor or the distributor of the subject matter, makes no difference. Either circumstance frustrates the accomplishment of the law. The people are bent on having interstate traders and their trade as free as the unlashd, speeding winds.

Now take this, "the Anti-trust Act has prescribed the rule of free competition among those engaged in such (i. e. interstate) commerce."

Suppose in the Addyston Pipe Co. case the fact had been that the defendants were selling a pipe that embodied a patented improvement of some kind. It is easily conceivable that the pipe might have contained a uniting device, a lip or joint that was patented; it might have been coated with a patented non-corrosive or tempered to resisting toughness by the amalgamation of a patented metallic compound. In spite of all this, the defendants would have been interstate traders; the subject matter of their trade would have been an article of interstate commerce. The combination shown to exist unavoidably would have been characterized as a restraint of that trade. Can any one imagine that the Supreme Court would have held the combination without the pale of the law because it involved a patented article? Look at *Montague vs. Lowry*. Suppose the tiles, mantels, and grates had all embodied patented improvements. Such a state of facts is readily imaginable. Patented designs may have ornamented the mantels. The tiles might have been cut in an unique form so as to be secured by interlocking after a patented fashion. But it is impossible to believe the Supreme Court would have reached a different result had such facts formed a part of the proof.

Then we come to the Northern Securities case. In that great case the Court tore away the manacles that fettered the freedom of

three carriers to distribute goods. There was no question of rate-fixing in the case. The Federal government has no power to deal with a state corporation for a mere abuser of franchise. That government has no power under the Anti-trust Act to segregate occupations into public and private pursuits. There the Court declared the industrial entanglement illegal because its operative effect was to restrain interstate traders. The fact that the defendants were the beneficiaries of state franchises, implicating public duties, was not of even slight (much less essential) importance. The defendants were engaged in interstate commerce; they were bound to each other in such a manner that the Court regarded their individual freedom to trade as bartered away by a compact. This was sufficient. There can be no doubt whatever, that the complicated industrial machinery of the three railroads embraced literally hundreds of patented improvements. The railroads doubtless owned many of the patents and enjoyed many other improvements protected by patents through license arrangements. Now, who would not smile at the presumption that would have attempted to stay the terrific sweep of that opinion by an eleventh hour suggestion that the Court was dealing with patented devices, with "instrumentalities of commerce" among which the people were not entitled to free competition? Yet that was the fact; the Court did in fact lay down the law governing trade and competition in the use of patented appliances.

We may go further and press out to an extreme of absurdity. Patented processes and patented machinery are very extensively employed in all our great industries. Sewing machines and flour mills are patented. The patentee of the machine or the mill has the right to use or license his apparatus or not, just as he sees fit. If he does license the use of it, he can state the terms of the license and the courts will enforce the terms of the contract. That is what we are told. Very well. The clothing manufacturers and the flour millers get together,

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as did the makers of rubber tires. They discover an easy way around the whole vexatious Anti-trust program. The respective patentees are persuaded to issue a "license" for a nominal royalty, and bring all the manufacturers into a pool, at the same time elevating the price of clothing and bread 100 per cent. and making a dead uniformity of price for all the traders. Let us not hear it muttered that bread and clothing are not patented. That is beside the question. The producing means are: the patentee is a Czar, and he can dictate the terms upon which their use may be enjoyed. This whole contention about contracts in restraint of trade in patented articles not being prohibited by the Anti-trust Act is a gratuitous misconception of both the patent law and the Anti-trust legislation.

The patent laws and the anti-trust acts are not in conflict: They do not clash or interfere in their operation. The Federal Act is a regulation of interstate commerce. The state acts are regulations of the trade and commerce internal to the respective states. These statutes are criminal laws forbidding and punishing attempts by contract or combination to restrain trade or commerce. The patent laws have nothing whatever to do with trade or commerce. They have nothing to do with sales of chattels or with contracts in that regard. Those laws do not import any regulation of trade or commerce. They do not so much as empower or authorize the inventor to engage in trade or commerce; nor even protect him in so doing. They leave the inventor, trade and commerce as they were. Those laws grant to the inventor an incorporeal franchise empowering him to exclude others. That is all the patent laws accomplish. The right to exclude is no part of trade or commerce; it is not a tangible commodity; it cannot be traded in, handled or consumed. Exercising the right to exclude is not engaging in trade or commerce.

An incorporeal franchise cannot be the subject matter of trade and commerce. This right is the sole resultant of the patent laws. On the other hand the physical, material subject matter of the patent



is entirely distinct from the incorporeal right to exclude. The property in the right is one thing; the property in the tangible, manufactured article is another thing. A policeman is vested with the power to keep trespassers off the court yard grass, but his official power to exclude is not to be confused with the grass and flowers. No more is the incorporeal right to exclude to be confused with a patented article. Patented articles form a large part of all trade and commerce. The patentee's right to make, use and sell them is not derived from the patent law. His right to contract with reference to them is not derived from or sanctioned by the patent law. If he is making, using and selling the patented article within a given state, he is subject to the law of that state applicable to all property within its borders. This is exactly what was said by the Supreme Court in *Webber vs. Virginia*: "Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the state over all property within its limits."

If the patent owner engages in interstate commerce, the only protection he can claim is that applicable to all persons similarly engaged. The anti-trust act denies to him the right to enter into a contract or combination that will operate to restrain trade in his patented article. And this is not a denial of any right or privilege sanctioned in the remotest degree by any patent statute. The patent statute has no more to do with contracts, combinations, trade and commerce than the anti-trust act has to do with the creation and assignment of incorporeal franchises.

Trading is a sovereign right of sovereign citizens. When an individual contracts to restrain his trade, he thereby denudes himself of an attribute of industrial freedom. He lowers himself to the condition of an industrial serf, subject to the beck and call of strangers to his affairs. When a corporation enters into such a compact, it has shown itself unworthy of further protection. The Supreme Court

challenges all men to the noblest conception of the exalted privilege of engaging in interstate commerce. It is a truly kingly prerogative. The products of men's cares and sweat can be hurled across an Empire with almost the rapidity of shadows on the water, without let or hindrance from any State. The facilities for transportation have already been worked up to almost diabolical perfection. Strawberries may be relished at breakfast which the evening before were picked from a divine soil five hundred miles away. Maine and Texas, Oregon and Florida may exchange products with all the ease of boys seated on the front steps swapping knives. Wonders more paralyzing are in sight. Men now living may yet contemplate the actuality of great white albatross of commerce swooping across the continent: taking the wings of the morning in the East and with the setting of the sun, lowering their burdens in the citron groves of California. Then, indeed, the heavens will be filled with shouting and the horizon darkened with the troops of sailing argosies. Tennyson's dream will yet turn reality, though the reality, as is always the case, will be stranger than the dream. If, and when, that day comes, the Supreme Court will turn to the Anti-trust Act and *Gibbons vs. Ogden*, and declare that the aerial inter-ocean and inter-state commerce, too, shall be free from contractual restraints. *Gibbons vs. Ogden* is as surely impregnated with the force of imaginative insight as *Hamlet* or *Faust*. That great decision as well as the whole overpowering magnitude of inter-state commerce cannot be fully apprehended unless the inquirer's "reach exceeds his grasp." It is one of the fundamental tenets of a masterful people that trade and traders shall be free. The real sovereigns of this great nation are unalterable in that conviction.

But we must end the whole matter. In the Northern Securities case, Mr. Justice Holmes in speaking of the Anti-trust Act, said: "The statute of which we have to find the meaning, is a criminal statute. The two sections on which the government relies, both make certain acts crimes. That is their immediate purpose and that is

what they say. It is vain to insist that this is not a criminal proceeding." Those lapidary sentences are terrible; but they express the truth. Men who enter into contracts, combinations, and conspiracies in restraint of trade, are thumbing the touch hole of a cannon, whether they know it or not. For the present, business men generally, many of whom would shudder at the thought of stealing a roll of bills or burning an enemy's house, yet regard such combinations formed by them as mere conventional crimes. They even regard their acts in forming them as clever, smart, and more than respectable. The lower Courts at times seem fascinated by the very magnitude and far-reaching effect of the broken law; they almost explain away the viciousness of the crime by dressing up the respectability of the wrong-doers. Somehow, we are reluctant to divest these combinations and conspiracies of the protective coloration of business exigency and invest them with the harrowing aspect of thorough going crimes. The atmosphere that shimmers about such acts does not seem to affect our sensibility like that which we appreciate when we reflect on theft or fratricide. It is so natural when we come to deal with fair named, high stationed, "influential" law violators, to condemn in terms of slack censure that all but condone the offense. But when we come to mete out the deserts of some inglorious criminal, some unobtrusive short changer heaved up out of oblivion by the merciless hand of the law, the air quivers with severe speech and acrimonious denunciation. The vocabulary of acerb invective is plundered for blistering epithets with which to seal the doom of a detested criminal. We marvel not at this; but we do marvel at the unbalanced emphasis, at the disproportionate resentment evoked by proof of the respective crimes. Both are heinous, but a conspiracy or combination in restraint of trade strikes us as being informed with more horror. It bulks larger to an eye fixed upon the welfare of persons in the mass. Theft, arson, kidnapping, or homicide, injure directly only the premeditated victims, though an individual criminal act unpunished,

threatens the welfare of hundreds. But the injury inflicted by a combination or conspiracy in restraint of trade directly, of its own operation, unjustly deprives thousands of their property. It is not what the conspiracy connotes or implies, but what is actually signified or denoted by it, that is terrorizing.

The lawyers who defend the actions brought to enforce the Anti-trust Act, hazard some amazing defenses. At times they concede the violation of the law for the sake of argument, and then offer as a defense the exigencies of trade, the "convenience of business," the appalling confusion incident to an enforcement of the act. "Why not analogously justify embezzlement on the ground of the defendant's urgent need of the money? Why not explain away the wrong of counterfeiting by eloquent dissertations on the inadequacy of the circulating medium? Why not glorify perjury by delineating the indicted man's irrepressible tendency to give rein to a flighty imagination? Again, these lawyers always confront the courts with one of two sophistries; they say the time is out of joint. Either the people are too much aroused about combinations and it is dangerous to take the cue of enforcement from their excited passion; or on the other hand the people are apathetic and indifferent. The statute no longer expresses the keynote of public sentiment and the courts should emasculate its literal severity in the interest of "business convenience." Such a thing might come about, for the power to construe carries with it always the power to destroy. But there is great cause for profound thanks in the intrepid attitude of the Supreme Court. It has given abundant proof that it will not temporize the cleaving power of the act to accommodate "special interests" or to fend the remorseless consequences of criminal conduct.

The people know the inestimable importance of the law. It cannot be repealed or attenuated into ineffectiveness by insidious amendments. It is there to stay. Some of these days the public mindedness of the people's prosecutors will be aroused to a vivid apprehen-

sion of the vital import of this legislation, both national and state. The mighty nation, awakened to its untried strength, will rise to the full stature of its indomitable will, and snap all the cords that fetter its trade like a giant leashed in horse hairs or spider ropes.

Macaulay reminds us of a narrative in Oriental folk lore. The spirit of liberty had been taken captive and imprisoned. She begged for liberty and offered her captors all sorts of rewards if they would but free her. Furthermore, she promised not to avenge the insult she had suffered. But all her entreaties fell on deaf ears. The captors only accentuated her galling servitude by derisive flings and insolent jeers. Finally, having satiated the brutal appetite for unmitigated torture, the arrogant tantalizers, in a thoughtless moment, released the outraged spirit, whereupon she pounced upon them, astonished and amazed, and tore them limb from limb.

One extreme always is followed by another. The rebound is inevitable. It may be that combinations and conspiracies in restraint of trade have not grown sufficiently portentous to initiate the crashing reaction. But it cannot require much further development to reach the point of exasperating recoil. We think the long receding tide has even now set in on an incoming inundation.

It is conceivable that the day may soon come when the people's prosecutors will regard combinations and conspiracies in restraint of trade in the same light as they now regard counterfeiting, mail robberies, or kidnapping.

When that day of the people's wrath does come, spluttering about "constitutional rights" and liberty to contract, sophistical temporizing about the sacredness of property and the importance of "business" will be unavailing. These will but exasperate the avengers and add to the confusion like "rockets hurled into a midnight storm."

The Supreme Court of the nation, that ultimate conservator of our safety, the noblest governmental institution on the planet, which we pray will ever stand, but which, if it ever should go down with all

## CONCLUSION.

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else, will fall like the last sentinel on the battlefield, like the last oak in the tornado,—it has more than once announced the only rule that points to security or appeals to patriotism. In *United States vs. Lee* (1882), 106 U. S. 196, these mordant apothegms come hot and quick: “Under our system (of government) the people are the sovereign. No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. It is the only supreme power in our system of government.” This was reinvigorated in the *Northern Securities* case (193 U. S. at 350): “So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulation of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all.

Harm, and only harm, can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases, or because the rule in its operation, may possibly affect the interests of business, is to endanger the safety and integrity of our institutions and make the constitution mean not what it says; but what interested parties wish it to mean at a particular time and under particular circumstances. The supremacy of the law is the foundation rock on which our institutions rest” (black ours). That is the rainbow in the sky; when that ceases to reappear, then government of the people, by the people, and for the people, will indeed perish from the earth.

THE END.

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