Letters from a great number of prominent pharmacists, offering their cooperation and encouragement, should be here acknowledged; these all show, not a narrow, selfish or sordid view of the subject, but evidently face the problem on the high plane of the public good.

It is the belief of your Committee that when the problem of irresponsible dispensing on the part of either pharmacist or physician is clearly understood, and when properly presented to our legislators, it will engage their attention and with them, and with the support of the people, we shall find a satisfactory solution of the problem.

Dr. Albert Schneider informs the Committee he hopes to submit a separate report as member of this Committee. He thinks the resolutions of the Kansas Association unnecessarily harsh "though the main idea is all right." He further believes that those resolutions should also deal with the prescribing and practicing pharmacist. Dr. Schneider has made suggestions from time to time regarding this Committee work, through the Pacific Pharmacist.

ALBERT SCHNEIDER,
L. E. SAYRE,
E. V. HOWELL.
Committee.

REPORT OF THE COMMITTEE ON PATENTS AND TRADEMARKS.

F. E. STEWART, CHAIRMAN.

The decision of the Supreme Court of the United States, handed down March, 1912, although opposed by the dissent of three judges, the Chief Justice giving the dissenting opinion, settles the law in regard to the rights of patentees under the patent laws as they now exist.

The Court holds that under the present laws it is a good contract and enforceable when the owner of a patented mimeograph machine sells it with the condition annexed that the purchaser shall use in operating the machine only stencils, paper, ink and other supplies as sold by the patentee.

It is evident that this gives the patentee more than he is entitled to by enabling him to monopolize the sale in connection with his invention of articles unpatented and the sale of which is otherwise free.

It is further evident that such a power in connection with patents which approach the nature of necessities, is capable of abuse and creates unfair monopoly.

The eminent Chief Justice denounced this decision with indignant eloquence. The Attorney General asked the Supreme Court to rehear the case, but was refused. Impressed with the fact that the decision has opened the way to one of the worst forms of oppression which a monopoly can practice, the President of the

United States on May 10, took a step toward revision of the patent laws, which have remained practically unchanged since 1870. He sent a special message to Congress, asking for legislation to authorize him to appoint a commission to investigate the patent laws and report what changes were necessary to make them fit modern conditions.

In this message the President called attention to the fact that large corporations bought patents for improvements and suppressed their manufacture. "The public," said the message, "never received the benefit of such machine inventions during the life of the patent."

The President referred to the patent laws of other nations and wrote:

> It is worthy of careful consideration, whether or not legislation on some such lines should be enacted to prevent our patent laws from being made the basis of unjust monopoly extending beyond the legitimate protection to inventors required to promote science and the useful arts, or the means of stifling improvement and the progress of the arts.

The President urged that procedure under the patent laws be simplified and that the burden of proving the invalidity of a patent be placed upon him who would infringe upon it.

In conclusion, the President wrote:

> Great care should be taken in any revision not unduly to interfere with vested interests which have been properly created under the existing laws, or to impair the efficiency of a system from which so much benefit has been derived by the country.

All persons who have investigated the subject will admit that our patent laws as applied to materia medica have been made the basis of unjust monopoly; that these laws have not promoted progress in medical science or in the arts of pharmacy and drug-therapeutics; that the protection afforded by them has enabled alleged therapeutic inventors to build up a great commercial business in monopolized products which has been carried on in unfair competition with the medical and pharmaceutical professions; that tens of thousands of alleged new remedies have been introduced under the protection afforded by the patent and trade-mark laws during the past thirty years, and not one-tenth of one per cent. of them have proved of any especial medicinal value; that the advertising system used for creating a demand for them has been justly characertized as a "system of fraud, error, humbug and lies, and reform is greatly needed."

The President has called attention to laws of other nations in relation to patents. Take for example, Germany.

The German patent law excepts from patent protection: "(1) inventions the applications of which are contrary to the laws or public morals; (2) inventions relating to articles of food, whether for nourishment or for enjoyment, and medicines, as also substances prepared by chemical processes in so far as the inventions do not relate to a definite process for the preparation thereof."

Patents are granted, however, for processes and apparatus for manufacture, and Section 35 provides a method for protecting the inventors of processes for preparing new products in the following manner: "If the invention relates to a process for the production of a new substance, all substances of like nature are considered as having been made by the patented process until proof to the contrary is given."

Medicines are excluded from patent protection not only in Germany, but also in France, Austria-Hungary, Italy, Japan, Denmark, Norway, Sweden, Portugal, Russia and a number of other countries.

Other classes of inventions excluded from protection in many countries, as well as Germany, are foods, chemical products and inventions relating to war material.

In all these countries exclusion from protection of inventions relating to medicines or foods does not generally extend to those relating to processes or apparatus for their manufacture. In all foreign countries which exclude chemical products from protection, except Switzerland, inventions relating to chemical processes may be patented, and in nearly all such countries it is expressly provided by law that a patent for a chemical process by which a new chemical product is made shall in effect cover such product, unless it be shown that the product was made in fact by some other process. In other words, when a new product is discovered, and a process of manufacture is patented, no person is permitted to compete with the original patentee unless he is able to show that the process he is to employ for that purpose is not an infringement upon the patented process.

Under the United States patent law, no class of useful inventions is excluded from protection. Any person who has discovered a new product to be used either as food or as a medicine, may patent the same, and thereby acquire a monopoly of its production for a period of seventeen years. Foreign manufacturers take advantage of the United States patent law and patent their products in the United States. The monopoly thus acquired enables them to obtain a high price for their patented products during the life of the monopoly. The profit thus secured is not used for the benefit of the American industries, but is applied to building up the industries of foreign countries at the expense of the American people.

A commission was appointed under act of Congress, approved June 4, 1898, to "revise the statutes relating to patents, trade and other marks, and trade and commercial names." It was urged before this commission, both at its hearings and in written communications read before it, that the United States patent law should be amended to exclude from patent protection both medicines and chemical products generally, at least in so far as such inventions are the inventions of subjects or citizens of the foreign countries which exclude this class of inventions from patent protection, and it was contended then, and has been the contention ever since, that subjects or citizens of foreign countries should not be allowed to receive in this country patents for inventions which are not patentable in their own country.

In spite of all the protests the American Pharmaceutical Association and the National Retail Druggists' Association have placed before Congress, the United States patent laws have not been amended to protect the American people. Consequently, in considering the question before us, it must be clearly understood that what we have to say in condemnation of the patent system applies exclusively to the United States. While it may be perfectly ethical for German physicians to cooperate with German chemical houses in the method which they have chosen for introducing new materia medica products in Germany, it is certainly not ethical for the American medical profession of the United States to cooperate with

manufacturers in the methods taken for the introduction of the product in this country.

The Hippocratic oath imposes the obligation upon each member of the medical profession to report the results of his experience and observations in the practice of the healing art to the common fund of knowledge, that his fellow-members may have the benefit of his inventions and discoveries. The proper introduction of new materia medica products requires the use of the educational machinery of the profession, i. e., the professional press, societies, colleges, text-books, pharmacopoeias, and dispensatories. It is, therefore, essential that the profession shall have the control of this educational machinery to prevent the danger of exploitation and the teaching of error, and shall not allow that control to pass into the hands of commercial houses engaged in the materia medica supply business. Because this fact has been lost sight of, and the control of the practice of the pharmacological arts has largely passed out of the hands of the medical profession and become vested in commercial houses presided over by business men who are not familiar with professional obligations, and who are engaged in introducing new materia medica products to commerce by advertising, that portion of the medical press accepting advertisements is placed in the position where it is attempting to simultaneously carry on a professional propaganda in the reading pages and a commercial propaganda in the advertising pages concerning the same materia medica products.

The President urged that procedures for the patent laws be simplified, and that the burden of proving the invalidity of a patent be placed upon him who would infringe upon it. This is quite in line with Section 35 of the German patent law, which provides that "if the invention relates to a process for the production of a new substance, all substances of like nature are considered as having been made by the patented process until proof to the contrary is given."

It has been suggested by your chairman in various reports that the German process patent law shall be properly modified and made applicable in this country. To this it has been strenuously objected that it is unconstitutional in this country to place the burden of proof upon would-be infringers, for under our system of jurisprudence a man is considered innocent until he is proved guilty. President Taft is recognized as an able constitutional lawyer, yet recommends that the burden of proving the invalidity of a patent be placed upon him who would infringe upon it. It is evident, therefore, that the objectors are either ignorant or something worse when making this objection.

The President calls attention to the necessity of so revising the patent laws as not unduly to interfere with vested interests which have been properly created under the existing laws. It is, therefore, essential to ascertain what rights the inventors have under the common law.

"An inventor has no right to his invention at common law. He has no right of property in it originally. The right which he derives is a creature of the stature and of grant, and is subject to certain conditions incorporated in the statutes and in the grants. If today you should invent an art, a process, or a machine, you have no right at common law, nor any absolute natural right, to hold that for seven, ten, fourteen, or any given number of years, against one who

should invent it tomorrow, without any knowledge of your invention, and thus cut me and everybody else off from the right to do tomorrow what you have done today. There is no absolute or natural right at common law, that I, being the original and first inventor today, have to prevent you and everybody else from inventing and using tomorrow or next day the same thing.[1]

"The policy of the patent law is, primarily, a selfish one on the part of the public, and only secondarily intended for the benefit of inventors, and then as a means to an end only. The Constitution of the United States gives Congress the 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'; thus showing, in this fundamental legislation, that the object sought is a benefit accruing to the public.[2]

"The theory of the law is, that the promotion of science and the useful arts is of great benefit to society at large, and that such promotion can be attained by securing to inventors and authors, for limited times, the exclusive right to their inventions and writings. That such theory is correct, it is needless to say. It is almost self-evident, or at any rate readily susceptible of proof, that the magnificent material prosperity of the United States of America is directly traceable to wise patent laws and their kindly construction by the courts.[3]

"The patent laws promote the progress of the useful arts, in at least two ways: First, by stimulating inventors to constant and persistent effort, in the hope of producing some financially valuable invention; and, second, by protecting the investment of capital in the working and development of a new invention from interference and competition till the investment becomes remunerative."

"A patent is a contract between the inventor and the government representing the public at large.[4] The consideration moving from the inventor is the production of a new and useful thing, and the giving to the public of a full knowledge thereof by means of a proper application for a patent, whereby the public is enabled to practice the invention when the patent expires. The consideration moving from the government is the grant of an exclusive right for a limited time, and this grant the government protects and enforces through its courts.[5]

"The stature enacts, 'That, before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the Commissioner, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding and using it, in such full, clear, concise, and exact terms, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same."

When the object of the patent law and the nature of the patent privilege are considered, it would seem as though the patent system, if properly applied to medicine, would do more than anything else to promote progress in medical science and in the useful arts of preparing medicine and administering the same for the treatment of the sick, yet since the time of Hippocrates, who lived about 400 years before Christ, until the present, the medical profession has opposed the monopoly of inventions relating to the treatment of the sick.

Why should the profession take this attitude?

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[1]Am. H. & L. S., & D. Mach. Co. vs. Am. Tool & Mach. 4 Fisher's Pat. Cases, 294.

[2]Simond's Manual of Patent Law.

[3]Day vs. Union Rubber Co., 3 Blatch. 500: Kendall vs. Winsor, 21 Howard, 327.

[4]Ransom vs, N. Y. 1 Fisher's Pat. Cases. 252.

[5]Simonds's Manual of Patent Law.

There are many reasons, not the least of which is that the monopoly (created by the patenting of materia medica products or by registering their names as trade-marks and claiming them as private property) enables manufacturers to commercially control medicinal products and introduce them to the medical profession or to the lay public by misleading advertising.

The new product, therefore, becomes a secret nostrum. The secrecy relates to the therapeutic information concerning the product. No matter if its identity is disclosed (as it is in the case of patented synthetics), if the therapeutic value of the product is exaggerated, and its untoward effects, therapeutic limitation, or merits as a remedy in comparison with other remedies used for the same purpose, are suppressed or minimized, the new product is a secret nostrum.

The statute enacts that the inventor shall publish his invention "in such full, concise, and exact terms, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound and use the same." Chemical inventors are usually not educated in medicine, consequently not in position to teach the medical profession how to use their inventions as therapeutic agents.

Moreover, as a rule, it is not the inventor who attempts to do the teaching, but the manufacturing house engaged in the commercial introduction of the product by advertising. The great objection to the system of introducing controlled materia medica products by advertising is that commercial houses assume to teach the profession what they themselves do not know.

On the other hand, physicians who have tested them cannot safely teach the profession how to use controlled materia medica products, for if they speak disparagingly of them they are liable to lawsuit, and if they praise them, they will probably be accused of selling their integrity to the manufacturing houses. Many such cases are on record.

While favoring the patenting of processes and machinery used for manufacture, your committee is not in favor of product patents, believing that the patent systems of foreign countries which exclude medical inventions from patent protection is to be preferred to our product patent system.

Next, in regard to trade-marks. This is a very different question. The function of a patent is to create a monopoly of the thing patented, during a period of seventeen years, the function of a trade-mark, on the contrary, is not to create a monopoly, but to stimulate competition.

What is a trade-mark? A trade-mark is a commercial signature affixed to his brand of goods by the manufacturer to show that he made them. A trade-mark indicates the ownership or origin of the *brand,* not the ownership of the *product,* as some would have us believe.

Condensed milk is the name of a product, and "Eagle" Brand, "Anglo-Swiss," and "White Cross" Brand are names of brands. Trichlormethane is a product. The name is long and unwieldy, so a short, euphonious name was coined for it, viz., "chloroform." But the name "chloroform" is just as much the name of a product as trichlormethane; and when the product is ordered by one name, the dispenser is justified in dispensing it under either name. Hexamethylenamine is

the official name of a product. On turning to the National Dispensatory and other text-books it will be noted that various synonyms are given for this. Each of these synonyms is claimed by the manufacturer as a trade-name or trade-mark. The question arises, are druggists justified in purchasing hexamethylenamine under that name and dispensing it in physicians' prescriptions when the product has been specified under one of the so-called trade-names? Ask the several manufacturers who claim these names as trade-marks, and they will answer that druggists who purchase the product under the name of hexamethlyenamine and dispense it when it is prescribed under any of the trade-names are guilty of fraudulent substitution. If the so-called trade-names are in fact brand names, the manufacturers are right and the text-books are teaching fraudulent substitution. Conversely, if the text-books are right, the manufacturers are wrong.

The name of a product cannot be a trade-mark. "Sugar" cannot be a trade-mark on sugar nor "salt" on salt. Each new product must have a name of its own under which it may be manufactured and dealt in, and such name becomes by use a noun of the common language, and all who have the right to make the product have an equal right to deal in it under the name by which it is generally known. This has been clearly shown in the decision of the United States Supreme Court in the Singer Sewing Machine case, which reads as follows:

> The result, then, of the American, the English, and the French doctrine universally upheld is this, that where during the life of a monopoly created by a patent a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machine, by referring to it in advertisements, and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and therefore that the name must be accompanied with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of the fact.

How about the names of products which have not been patented? Can they be owned by the manufacturer? The manufacturers of proprietary medicines say "yes." Their claim is based on two other claims, the first being that unpublished formulas or methods of manufacture are trade secrets, and, therefore, the property of the manufacturers; and the second, that the names, being coined, are, therefore, the property of the inventors thereof. These are the claims of the so-called "proprietary" medicine manufacturers. They are erroneous. It has been decided by the courts again and again that any person who discovers a trade secret by legitimate means has a right to use it. When a secret is divulged, it is a trade secret no longer. As pointed out by the court in the celebrated Angostura Bitters case, while the medicine is monopolized the name of the product and the name of the brand are one and the same. But when the secret is divulged, the question arises whether the name is that of the product or the name of the brand, and the court decided that the name Angostura Bitters is the name of the product on the ground that, the secret having been divulged, any person had an equal right to manufacture and deal in it. The same point came up incidentally

in the decision of the United States Supreme Court in the Miles Medical Company case, in which attention was called to the fact that any person has the right to make and sell unpatented medicines if they know how to make them and obtain their knowledge legitimately.

It is commonly believed that when a person coins or invents a name he possesses a natural right to its exclusive use because it is a "child of his brain." This, however, is an error. Authors and inventors do not possess a natural right to prevent others copying their respective writings and discoveries. Copyright and patent-right are grants, not natural rights.

Many believe that invented names may be patented or copyrighted. This is also an error. As stated in Circular No. 19, issued by the Librarian of Congress, "the copyright laws contain no provision under which protection can be obtained upon a mere name or title. Entry cannot, therefore, be made in the copyright office for coined names; names of articles of manufacture; names of games or puzzles; names of products, or names of medicines."

Others believe that coined names may be "trade-marked," just as inventions may be patented. The trade-mark law creates no such right. You cannot trade-mark a name. You can register it as a trade-mark, but no right to its exclusive use is granted thereby. If you use it as a trade-mark you have a right to prevent others from using it as a brand mark on the same class of goods. But if you use the name of the product itself you have no one to blame except yourself if the name becomes a noun of the common language, and therefore common property.

The manufacturers of antipyrin, acetphenetidin, and many other German synthetics, patented their products under the chemical names, and registered the coined names as trade-marks. Now, as the right to use a trade-mark is a natural right, and is protected by the common law—a manufacturer having just as much right to use his commercial signature for the purpose of indicating the source of the brand of his product as he has to sign his name to a check—that right does not expire like a patent. Consequently, the manufacturers hoped by this scheme to defeat the object of the patent law, which is to promote progress in science and useful arts by granting inventors the exclusive right to their inventions for limited times, in exchange for the publication of full knowledge thereof by the proper application for patent. However, "Uncle Sam" had something to say about this. He said it in the decision of the Supreme Court of the United States in 1895, in the Singer Sewing Machine case just cited.

As stated by a well-known judge, "the names of medicines are either descriptive or deceptive. If they are descriptive they cannot be trade-marks, and if deceptive, the manufacturers of the medicines cannot go into court with clean hands to defend their trade-mark claims." However, each case must be settled on its merits, for the question must always arise whether the name under discussion is the name of the product itself, or the name of the brand of the product.

The well-known house of Merck and Company has solved the problem in relation to the names of new materia medica products by listing each one under the common or generally adopted name and then adding all of the so-called trade-

names or trade-mark names as synonymous therefor. For instance, we find saccharine listed as follows:

Saccharin Merck,—Refined:
(Benzolysulphonic Imide; Garantose; Glusidum; Gluside; Glycophenol; Glycosine; Saccharinol; Saccharinose; Saccharol; Saxin; Sykose; Zuckerin; Glusimide; Agucarina; Toluolsüss; Anhydroorthosulphaminebenzoic Acid; Benzosulphinide (U. S. P.); Neo-saccharin.)

In doing so, Merck merely followed the lead of most of the text-books on materia medica, including dispensatories.

It is evident, therefore, that the solution of the trade-mark problem is entirely under the control of the medical and pharmaceutical professions as represented by the professional press, including the publishers of medical and pharmaceutical journals and text-books. No matter what brand of a product a pharmacist may have in stock, he is justified in dispensing it, irrespective of the name employed by the physician in prescribing it, if the physician is consulted and his wishes ascertained. This is not fraudulent substitution.

After considering this important subject from the various points of view above presented, your Committee recommends the following:

1. That patents relating to new materia medica products should be limited to processes and apparatus for manufacturing.

2. That the burden of proving the invalidity of a patent be placed upon him who would infringe upon it, as suggested by President Taft.

3. That legislation against lying in advertisements relating to medicine should be secured.

4. That the trade-mark laws should be amended by adding a paragraph, making it apparent that where a man makes a new article which has no proper name, or common appellative, and gives it a name by which it alone is known, he cannot hold an exclusive right to that name under the law of trade-marks.

The trade-mark law itself would thus make it plain that anybody has the right to sell a so-called proprietary medicine under its own name, and trade-mark rights will be restricted to names which contain the name of the manufacturer, or consist of some fanciful name which leaves the common appellative open to the public.

It is gratifying to note that at the recent meeting of the American Medical Association a committee was appointed to request that the Board of Trustees of that body sue for the annulment of the trade-mark registration of an article intended to be sold as a medicine and instructed the chairman of the Council on Health and Public Instruction to endeavor to secure a modification of the present patent laws eliminating product patents on substances used as medicines.

S. L. HILTON,
SOLOMON BOEHM,
L. G. BLAKESLEE,
L. W. GRIFFIN,
F. E. STEWART, Chairman.