SHOULD PATENT LAW DISCRIMINATE AGAINST CHEMICAL AND MEDICAL DISCOVERIES?*

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Recognition of the right to peaceably possess and enjoy what one had discovered marked the very first step in civilization. Until then man owned what he could actually occupy and hold for just so long as he was able to keep some other man from dispossessing him of it either by force or stealth.

The right to occupy and possess did not at the beginning depend upon original discovery. One might occupy a cave whatever evidences of previous discovery and occupancy he found in it. Not only that, he might possess himself of the evidences of occupancy that had been left while the owner, if owner he could be called, had gone forth with the crude weapon he had invented, in search of game or plunder.

What this marauder did was nothing more than he himself had suffered and nothing more than his victim had done to others and would do again. Of course this was not a very agreeable situation and a more satisfactory *modus vivendi* was found in a mutual recognition of the right of one to peaceably possess, occupy and enjoy what one had discovered.

This new condition resulted in two things that have made more for the progress of the human race than any other thing or group of things one can imagine:

1. The necessity of discovery in order to live, for if one could not live by what others had found, he must engage in a little research work on his own account.

2. The assurance that if one searched and found he would peaceably enjoy what he found; therefore, more heart and energy in searching.

It is not be to supposed that every individual member of the crude society of that prehistoric time heartily endorsed the new order of things. The communistic idea that one should profit by another's industry or good fortune prevailed among a class who soon became known as thieves for doing what had been considered in the earlier day both ethical and moral, and so this crude prehistoric society devised crude forms of government for the protection of what had come to be an ethical right, and thus by the slow but sure process of evolution, the first legal rights of property were established.

In these early prehistoric times the subjects of property were few.

Real property comprised the cave dwelling, or the cliff dwelling, or the crude shack on stilts out in the lake. These habitations were not investments. There were no title deeds and abstracts. There was no possession *in presenti* and no property *in futuro;* nevertheless this crude idea of one's owning a cave to live in and having a recognized right to hold it against all others supported by the power of the state—such as it then was—is the stock from which all our present forms of real property and interests in real property have sprung, by a natural process that it would be interesting to dwell upon if time permitted and that were our subject.

Personal property was confined to tangible property at first—the spoils of the hunt, the crude stone utensils and the skins of animals which served as clothing.

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The first intangible property was unquestionably the right of succession. The dawn of intelligence, the morning sun of reason, illumined the idea that the wife and children of a deceased man had the natural right before all others to occupy and possess the property he had died possessed of. There were no creditors in those days. Debit and credit developed very, very much later in the long continuing evolutionary process which has brought us to our present high state of civilization.

Man then began to become possessed of things he did not need, or had no further use for. He found others possessed of things he would rather have and that they did not want. The idea of the right of possession gave birth to the idea of the right of disposition and bargain and exchange followed.

Now, as we have seen, discovery and invention had existed from the very beginning. We are told that "necessity is the mother of invention." The necessity of shelter led man to look for a cave; the necessity of food led to the invention of crude implements of stone; and the necessity of heat led to the discovery of the first tedious methods of producing fire. But these early discoveries had no commercial value because there was no commerce. If a cave man invented a new instrument it sufficed him that he could use it. "Why should he worry" if his neighbor made one like it? He lost nothing.

But the idea of bargain and exchange developed into commerce. In the long history of evolution centuries are but days; and in few of the days the subjects of property had become so many, their character so complex, the necessities of man had so multiplied, that men had come to count their wealth, not in caves or even in lake-dwellings; not in the rude implements, the result of their own handiwork, not in the articles of bronze and brass, of iron and silver and gold that came in later years; but in that which represented all these things—MONEY.

Man had passed from the age of bargain and exchange into the age of bargain and sale, and while exchange still exists it remains what was at the very start—a mere convenience for trading something we don't want for something we do.

The great incentive of research had ceased to be actual necessity and had come to be profit and gain.

But as man originally had not recognized property rights in the particular cave another had discovered or in the particular stone implement another had made, he now recognized no exclusive property right in any new discovery or invention the most arduous research worker had wrought out. There was an instinctive, natural feeling that an inventor should have some suitable reward for his discovery; but the only recourse he had was in keeping his process or methods secret; and this is the explanation of what we now speak of as the "lost arts."

But the world continued to progress. The sun rose and set on many more evolutionary days, and kings began to grant monopolies to certain favorites for one reason and another, although ordinary monopolies were the object of the law's displeasure; contracts in restraint of trade were illegal, and forestalling, regrating and engrossing had come to be common law crimes.

But these monopolies granted by the Crown and the State were grounded on some benefit accruing to the public. Some of them, of course, were merely an expression of the royal favor; but even these were, or were claimed to be, in reward for some great service performed for the King, and therefore for the King's sub-

jects. Some grew out of the necessities of the case like franchises more recently granted railroad companies with covenants that similar franchises would not be granted competing companies.

What we know as the "Patent" was one form of monopoly granted by the Crown or State for the benfiet of the public. It was not an arbitrary invention of statutory law, although its existence and the scope of the monopoly granted is determined by and depends upon the written law. It traces its genealogy back through the ages in a straight line of descent as having come down to us from the cave man, in just as natural a course of the process of the evolution of things as any institution, manner, or custom we have.

Coming down to our own history, we find that the American Colonies granted patents to inventors, and later the states, which did not delegate this power under the Articles of Confederation.

On the 18th of August 1787 Charles Pinckney submitted certain propositions to the Committee of Detail of the Constitutional Convention then sitting, among which was one "to grant patents for useful inventions."

The Committee on Detail made no report on the subject, but on the 5th of September 1787, Mr. Brearley, of the "Committee of Eleven," reported the clause which now appears in the fundamental law of the United States of America.

It is interesting to note that in his first inaugural address President Washington used this language:

"I cannot forbear intimating to you the expediency of giving effectual encouragement as well to the introduction of new and useful inventions from abroad as to the exertion of skill and genius in producing them at home."

Thus one of the powers delegated to Congress by the Constitution of the United States is:

"To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

A patent has been judicially defined to be "a contract by which the government secures to the patentee the exclusive right to vend and use his invention for a few years, in consideration of the fact that he has perfected and described it and has granted its use to the public forever after."[1]

In harmony with this constitutional provision we now have a patent law which gives ample protection and therefore incentive to American research workers in the field of chemistry, medicine and pharmacy. And what sciences deserve more encouragement than these, affecting as they do the health and lives of our people?

It therefore seems remarkable to the lawyer, and even to the intelligent layman that a movement is actually on foot to deprive those who, above all others, should have the effectual protection of our patent laws, and to single them out as unworthy of the reward granted to inventors in other fields of discovery. That such a bill as the Paige Bill has been introduced and seriously considered seems unexplainable.

The Paige Bill provides that no patent shall be granted "upon any drug, medicine, medicinal chemical, coal-tar dyes, or colors or dyes obtained from

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[1] (Nat. Hollow B. B. Co. v. Int. B. B. Co., 106 Fed. Reporter, 693–701. Watson on the Constitution, Vol. I, p. 660).

alizarin, anthracene, carbazol, and indigo, except in so far as the same relates to a definite process for the preparation of said drug, etc." In other words, Mr. Paige proposes to grant a process but not a product patent.

To those who have some knowledge of medical and pharmaceutical history the matter is not so astonishing, and two explanations appear.

1. Medico-pharmacal prejudice founded on tradition.

2. The exploitation of the American public by German chemical concerns.

Treating of these in the order given, we are brought to remember that until very recent times the physician could not recover for his services upon an implied contract. He was supposed to be practicing from a higher motive than the despised tradesman. Doctors who did not have independent sources of income depended upon honorariums from patients who were grateful enough and able enough to give them. If it was a goose from a peasant or a crown from a gentleman it was all the same. This custom worked out poorly for both the public and the profession, and so, like a great many rules of the early common law, it was changed, when a courageous judge, defying precedent, declared that the laborer was worthy of his hire—in other words, that a professional man, in the absence of an express agreement, was entitled to recover what his services were proved to be reasonably worth.

For the same reason that a doctor could not recover for his services on a *quantum meruit*, he did not seek compensation of any kind for any discovery he might chance to make. This, however, was merely a matter of ethics and never a rule of law. What was a rule of ethics with respect to the relation between a physician and his patient was formerly also a rule of a law it is true, but the law changed because it was not just and we now find the most ethical physician sending out his bills periodically, entirely satisfied with the new order of things.

He is not so quick, however, in abandoning the companion rule of ethics respecting medical and pharmaceutical discoveries. On the contrary he would enforce his ethical tenets upon his fellows by a severe rule of positive law.

In this the physician is the successor of the religious zealot who sought to make the world believe as he believed, by the power of the state, the result being that it took centuries of religious wars for control of the state to demonstrate that both the state and religion have prospered by absolute separation.

When we look at the matter from the broader view-point of political economy and weigh it in the scales of jurisprudence, which is the formal science of positive law, the ethical reasons advanced in favor of the Paige Bill appear narrow and without weight.

The other explanation needs only to be referred to. We all know how the German houses have exploited America during the last twenty-five or thirty years. It is proposed to punish them by robbing the American chemist of every possible incentive to discover new products, and to encourage him to confine his efforts to inventing new processes for old products. This is the same wisdom the pet bear displayed which, desiring to relieve his sleeping master from the annoyance of a buzzing fly upon the master's bald pate, brought his huge paw down upon the fly and the master's head with such force that his master slumbered ever after.

Improvements in processes are desirable, of course. They are being made continually, but they are not being patented except in connection with new prod-

ucts, and this of necessity. We have in mind a new process for producing a certain well-known substance which reduces the cost of production one-half, but it is not patented, and never will be. The owner prefers to run the risk of being able to keep the process a secret rather than the risk of having it divulged in the specifications of a patent and being able to prove an infringement. And this is the case with thousands of private processes used in our laboratories.

But the public is not crying for new chemical and pharmaceutical processes. It wants new products. Our research laboratories are not maintained to invent new processes, but new products, and where is the reward for the initiative and enterprise of the manufacturers who are spending immense sums in salaries to research workers, in apparatus and supplies if product patents are not granted?

If such a measure as the Paige Bill becomes a law new products may be discovered, but the processes of making them will be kept secret, and in more than one case the secret will be buried in the grave of the inventor. We have personal knowledge of just such an instance in the varnish trade.

More recently the advocates of the Paige Bill have acknowledged the force of the objection that a patent on a chemical process is practically worthless and point out that our patent law should also be amended so that one charged with infringement of a process patent must bear the burden of proof, and actually demonstrate his ability to produce the product by some other process—probably a new process he has invented and upon which he is entitled to a patent. We are reminded that this is the German law.

Is this not all very incongruous? Think of it a moment. Remember that America is not Germany, nor her institutions our institutions, and you will appreciate the fact that this proposition involves a political revolution.

In America innocence is presumed until guilt is shown. Shall Congress be expected to do the injustice of first depriving an important class of inventors of earned reward for their inventions and then righting the injustice by establishing a principle that is recognized in all free countries as fundamentally wrong? The presumption of innocence is one of the sacred rights for the preservation of which our forefathers fought.

Again! If a man has discovered a new process he has the natural right to keep that process secret. The law recognizes and enforces that right, and yet the advocates of the Paige Bill submit a plan to correct the wrong the bill effects that involves the injustice of compelling another to disclose a trade secret as the alternative of being adjudged to have infringed a process patent. We modestly submit to the distinguished pharmaceutical jurist who suggested that adoption of German law into American jurisprudence that this might be held to be a violation of the 14th amendment to the Constitution of the United States, in that it was a deprivation of property without due process of law.

Let us emphasize the statement that a chemical process patent is practically worthless and the fact that this is admitted by the advocates of the Paige Bill; have we not shown that the method they propose for making a process patent valuable is not possible under our system of government?

The Paige Bill itself is un-American in that it discriminates. The spirit of our institutions demands that our patent law shall treat all inventors alike, and any bill that has the effect of giving a man who discovers a new toy, or a new

face powder, or a new dog collar a patent on the article itself, while it denies one to the man who may discover a substance that will be to cancer what antitoxin is to diphtheria, not only violates the foundation principle of equality before the law, but is supremely ridiculous.

But we are reminded at this point that we must forget the individual and remember the public. The answer may well be that whatever is unjust to the individual is injurious to the public. The sincerity of some who make this suggestion may also be questioned; but neither the sincerity nor insincerity of an advocate has anything to do with the merits of any proposition. The patent law is in the interest of the public. We have read that the patent is a contract by which the public buys the free use of the patent forever, in consideration of a monopoly for a few years.

The Constitution delegates to Congress the power to "promote the progress of science and useful arts."

How?

"by securing for limited times to authors and inventors."

What?

"the exclusive right to their respective."

Processes only? No, indeed!

"writings *and discoveries*."

Discovery is an inclusive word. It may be a process and it may be a product. There is no warrant in the constitution for discrimination between processes and products and the public owes to-day all that it enjoys over and above what they enjoyed in their day to the members of the Constitutional Convention of 1787, whose wisdom and foresight gave Congress the power to grant patents for products as well as for processes.

Lest we may be accused of generalization let us give one concrete reason why the trade and the public are both benefited by the product patent as applied to medicine. We all know how concerned the originator of a new therapeutic agent is to preserve the quality of his product. He has spent a moderate fortune in preliminary laboratory and clinical research, the results of which convince him of his duty to lay it before the profession; he is interested in its success, and therefore, naturally, in the quality of every lot he puts out. With him quality is the first consideration. He has a scientific pride in the substance. Supposing the substance is not patented, when do competitors think of entering the field? Not until the harvest is ripe, and the only concern of any one who is dishonorable enough to undertake to reap such a harvest is to get all of the crop he can. Quality? That's nothing. He'll overcome the advantage an originator naturally has by prices; hence prices are cut; dealers' profits are reduced; and the outcome of the whole matter is: the originator is wronged morally if not legally; the reputation the genuine product has gained is destroyed by inferior quality of competing brands; the trade loses the just profits the originator can no longer maintain; and the accumulated burden of moral injustice finally rests upon the shoulders of the public.

In the name of equal right and common justice we therefore submit that product patents should not be denied inventors in the field of chemistry, medicine, pharmacy and surgery.