The Pharmacist and the Law

PATENTEE CANNOT RESTRICT RE-SALE PRICES.

United States Supreme Court in Sanatogen Case, Denies Application of Patent Statute to Sale by Retailer Below Specified Price —Passage of Full Title Left Complainant Remediless — Case Analogous to Book Copyright Decision — Dick Mimeograph Decision Distinguished—Four Justices Dissent.

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The following is the full text of the opinion of the United States Supreme Court in the case of the Bauer Chemical Company against James O'Donnell, a druggist, of Washington, D. C., denying the right of the complainant to control the retail sale price of sanatogen, a patent medicine, as specified on the package. The decision of the court was by five against four. Justices White, Day, Hughes, Lamar and Pitney concurring in the prevailing opinion, and Justices McKenna, Holmes, Lurton and Van Devanter dissenting. The decision was rendered May 26, 1913, by Mr. Justice Day, the case bearing the record number of 951, October, 1912, term of the United States Supreme Court:

THE PREVAILING OPINION.

This case is on a certificate from the Court of Appeals of the District of Columbia. The facts stated in the certificate are:

"Bauer & Cie., of Berlin, Germany, copartners, being the assignees of letters patent of the United States, dated April 5, 1898, No. 601,995, covering a certain water soluble albumenoid known as 'Sanatogen' and the process of manufacturing the same, about July, 1907, entered into an agreement with F. W. Hehmeyer, doing business in the city of New York under the trade name of The Bauer Chemical Company, whereby Hehmeyer became and has since been the sole agent and licensee for the sale of said product in the United States, the agreement contemplating that Hehmeyer should have power to fix the price of sale to wholesalers or distributors and to retailers and to the public. The agreement further contemplated that said product should be furnished by Hehmeyer at manufacturing cost, the net profits obtained by him to be shared equally by the parties to the agreement. Since April, 1910, this product has been uniformly sold and supplied to the trade and to the public by the appellants and their licensees in sealed packages bearing the name 'Sanatogen,' the words 'Patented in U. S. A., No. 601,995,' and the following:

"'Notice to the Retailer.

"'This size package of Sanatogen is licensed by us for sale and use at a price not less than one dollar ($1.00). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent No. 601,995, under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injunction and damages.

"'A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation.

"'The Bauer Chemical Co.'

"The appellee is the proprietor of a retail drug store at 904 F street, N. W., in this city. He purchased of the Bauer Chemical Company for his retail trade original packages of said Sanatogen bearing the aforesaid notice. These packages he sold at retail at less than one dollar and, persisting in such sales, appellants in March, 1911, severed relations with him. Thereupon appellee, without the license or consent of the appellants, purchased from jobbers within the District of Columbia, said jobbers having purchased from appellants, original packages of said product bearing the aforesaid notice, sold said packages at retail at less than the price fixed in said notice, and avers that he will continue such sales."

The question propounded is: "Did the acts of the appellee, in retailing at less than the price fixed in said notice, original packages of 'Sanatogen' purchased of jobbers as aforesaid, constitute infringement of appellants' patent?"

The protection given to inventors and authors in the United States originated in the Constitution, Section 8 of Article I of which authorizes the Congress "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." This protection, so far as inventors are concerned, has been conferred by an act of Congress passed April 10, 1790, and subsequent acts and amendments. The act of 1790 (1 Stat. 109) granted "the sole and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention or discovery." In 1793 (1 Stat. 318) the word "full" was substituted for the word "sole," and in 1836 (5 Stat. 117, §5) the word "constructing" was omitted. This legislation culminated in Section 4884 of the Revised Statutes, the part with which we are dealing being practically identical with the act of 1870 (16 Stat. 198, § 22). It provides that every patent shall contain "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery."

The right to make, use and sell an invented article is not derived from the patent law. This right existed before and without the passage of the law and was always the right of an inventor. The act secured to the inventor the exclusive right to make, use and vend the thing patented, and consequently to prevent others from exercising like privileges without the consent of the patentee. Bloomer vs. McQuewan, 14 How. 539, 549; Continental Paper Bag Company vs. Eastern Paper Bag Company, 210 U. S. 405, 425. It was passed for the purpose of encouraging useful invention and promoting new and useful improvements by the protection and stimulation thereby given to inventive genius, and was intended to secure to the public, after the lapse of the exclusive privileges granted, the benefit of such inventions and improvements. With these beneficent purposes in view the act of Congress should be fairly or even liberally construed; yet, while this principle is generally recognized, care should be taken not to extend by judicial construction the rights and privileges which it was the purpose of Congress to bestow.

ANOLOGY BETWEEN PATENT AND COPYRIGHT STATUTES.

In framing the act and defining the extent of the rights and privileges secured to a patentee Congress did not use technical or occult phrases, but in simple terms gave an inventor the exclusive right to make, use and vend his invention for a definite term of years. The right to make can scarcely be made plainer by definition, and embraces the construction of the thing invented. The right to use is a comprehensive term and embraces within its meaning the right to put into service any given invention. And Congress did not stop with the express grant of the rights to make and to use. Recognizing that many inventions would be valuable to the inventor because of sales of the patented machine or device to others, it granted also the exclusive right to vend the invention covered by the letters patent. To vend is also a term readily understood and of no doubtful import. Its use in the statute secured to the inventor the exclusive right to transfer the title for a consideration to others. In the exclusive rights to make, use and vend, fairly construed, with a view to making the purpose of Congress effectual, reside the extent of the patent monopoly under the statutes of the United States. Bloomer vs. McQuewan, supra, 549. We need not now stop to consider the rights to sell and convey, and to license others to sell or use inventions, which rights have been the subject of consideration in the numerous reported cases to be found in the books. We are here concerned with the construction of the statute in the aspect and under the facts now presented.

The case presented pertains to goods purchased by jobbers within the District of Columbia and sold to the appellee at prices not stated, and resold by him at retail at less than the price of $1 fixed in the notice. The question, therefore, now before this court for judicial determination is, may a patentee by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold?

The object of the notice is said to be to effectually maintain prices and to prevent ruinous competition by the cutting of prices in sales of the patented article. That such purpose could not be accomplished by agreements concerning articles not protected by the patent monopoly was settled by this court in the case of Dr. Miles Medical Company vs. Park & Sons Co., 220 U. S. 373, in which it was held that an attempt to thus fix the price of an article of general use would be against public policy and void. It was doubtless within the power of Congress to confer such right of restriction upon a patentee. Has it done so? The question has not been determined in any previous case in this court so far as we are aware. It was dealt with under the copyright statute, however, in the case of Bobbs-Merrill Company vs. Straus, 210 U. S., 339. In that case it was undertaken to limit the price of copyrighted books for sale at retail by a notice on each book fixing the price at $1 and stating that no dealer was licensed to sell it for less, and that a sale at a less price would be treated as an infringement of the copyright. It was there held that the statute, in securing to the holder of the copyright the sole right to vend copies of the book, conferred a privilege which, when the book was sold, was exercised by the holder, and that the right secured by the statute was thereby exhausted. The court also held that it was not the purpose of the law to grant the further right to qualify the title of future purchasers by means of the printed notice affixed to the book, and that to give such right would extend the statute beyond its fair meaning and secure privileges not intended to be covered by the act of Congress. In that case it was recognized that there are differences between the copyright statute and the patent statute, and the purpose to decide the question now before us was expressly disclaimed.

Sec. 4952, Revised Statutes, a part of the copyright act, secures to an author, inventor, designer or proprietor of books, maps, charts or dramatic or musical compositions the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending them. While that statute differs from the patent statute in terms and in the subject matter intended to be protected, it is apparent that in the respect involved in the present inquiry there is a strong similarity between and identity of purpose in the two statutes. In the case of patents the exclusive right to vend the invention or discovery is added to the like right to make and use the subject matter of the grant, and in the case of copyrights the sole right of multiplying and reproducing books and other compositions is coupled with the similar right of "vending the same." So far as the use of the terms "vend" and "vending" is concerned, the protection intended to be secured is substantially identical. The sale of a patented article is not essentially different from the sale of a book. In each case to vend is to part with the thing for a consideration. It is insisted that the purpose to be subserved by notices such as are now under consideration—keeping up prices and preventing competition—is more essential to the protection of patented inventions than of copyrighted articles; and it is said that the copyrighted article may be and usually is sold for a lump consideration by the author or composer and that he has no interest in the subsequent sales of the work, while patented inventions require large outlays to create and maintain a market. To some extent this contention may be based upon fact; nevertheless it is well known that in many instances the compensation an author receives is the royalties upon sales of his book, or a percentage of profits, which makes it desirable that he shall have the protection of devices intended to keep up the market and prevent the cutting of prices. But these considerations could have had little weight in framing the acts. In providing for grants of exclusive rights and privileges to inventors and authors we think Congress had no intention to use the term "vend" in one sense in the patent act and "vending" in another in the copyright law. Protection in the exclusive right to sell is aimed at in both instances, and the terms used in the statutes are to all intents the same.

It is apparent that the principal difference in the enactments lies in the presence of the word "use" in the patent statute and its absence in the copyright law. An inventor has not only the exclusive right to make and vend his invention or discovery, but he has the like right to use it, and when a case comes fairly within the grant of the right to use, that use should be protected by all means properly within the scope of the statute. In Bement vs. National Harrow Company, 186 U. S. 70, the owner of a patent granted a license to the defendant to manufacture and sell harrows embodied in the invention covered by the patent. The license provided for the payment to the licensor by the licensee of a royalty of $1 for each harrow or frame sold and stipulated that the licensee was not to sell to any person for a less price than that named, and that the license was subject to change from time to time. The case was one arising upon license agreements, originating in a state court, and did not involve the construction of the patent act in the circumstances now disclosed.

DISTINGUISHING FEATURES OF DICK MIMEOGRAPH CASE.

Chief reliance, however of the plaintiff in this case is upon the recent decision of this court in Henry vs. Dick Company, 224 U. S. 1. An examination of the opinion in that case shows that the restriction was sustained because of the right to use the machine granted in the patent statute, distinguishing in that respect the patent from the copyright act. In that case a patented mimeograph had been sold which bore an inscription in the form of a notice that the machine was sold with the license restriction that it might only be used with stencil, ink and other supplies made by the A. B. Dick Company, the owners of the patent. The alleged infringer sold to the purchaser of the mimeograph a can of ink suitable for use with the machine with full knowledge of the restriction and with the expectation that the ink sold would be used in connection with the machine. It is expressly stated in the opinion that the machine was sold at cost or less and that the patentee depended upon the profit realized from the sale of the non-patented articles to be used with the machine for the profit which he expected to realize from his invention (224 U. S. 26). After commenting upon the copyright statutes and the resemblance between the author's right to vend copies of his work and the patentee's right to vend the patented thing, it was said (p. 46):

"To the inventor, by Sec. 4884, Revised Statutes, there is granted 'the exclusive right to make, use and vend the invention or discovery.' This grant, as defined in Bloomer vs. McQuewan, 14 How. 539, 549, 'consists altogether in the right to exclude every one from making, using or vending the thing patented.' Thus, there are several substantive rights, and each is the subject of subdivision, so that one person may be permitted to make, but neither to sell nor use the patented thing. To another may be conveyed the right to sell, but within a limited area, or for a particular use, while to another the patentee may grant only the right to make and use, or to use only for specific purposes. Adams vs. Burke, 17 Wall. 453; Mitchell vs. Hawley, 16 Wall. 544; Rubber Company vs. Goodyear, 9 Wall. 788, 799." (Italics in the original opinion.)

That case was distinguished from Bobbs-Merrill vs. Straus, supra, construing the copyright act, because of the difference in the terms of the copyright and patent statutes, the patent act conferring not only the right to make and sell, but the exclusive right to use the subject matter of the patent. It was under the right to use that the license notice in question was sustained, and it is obvious that the notice in that case dealt with the use of the machine and limited it to use only with the paper, ink, and supplies of the manufacture of the patentee. While the title was transferred, it was a qualified title, giving a right to use the machine only with certain specified supplies. It was said in the Dick case that "there is no collision between the decision in the Bobbs-Merrill case and the present opinion. Each rests upon a construction of the applicable statute, and the special facts of the cases."

It is contended in argument that the notice in this case deals with the use of the invention, because the notice states that the package is licensed "for sale and use at a price not less than one dollar," that a purchase is an acceptance of the conditions, and that all rights revert to the patentee in event of violation of the restriction. But in view of the facts certified in this case, as to what took place concerning the article in question, it is a perversion of terms to call the transaction in any sense a license to use the invention. The jobber from whom the appellee purchased had previously bought, at a price which must be deemed to have been satisfactory, the packages of sanatogen afterwards sold to the appellee. The patentee had no interest in the proceeds of the subsequent sales, no right to any royalty thereon or to participation in the profits thereof. The packages were sold with as full and complete title as any article could have when sold in the open market, excepting only the attempt to limit the sale or use when sold for not less than one dollar. In other words, the title transferred was full and complete with an attempt to reserve the right to fix the price at which subsequent sales could be made. There is no showing of a qualified sale for less than value for limited use with other articles only, as was shown in the Dick case. There was no transfer of a limited right to use this invention, and to call the sale a license to use is a mere play upon words.

The real question is whether in the exclusive right secured by statute to "vend" a patented article there is included the right, by notice, to dictate the price at which subsequent sales of the article may be made. The patentee relies solely upon the notice quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use. The appellee and the jobbers from whom he purchased were neither the agents nor the licensees of the patentee. They had the title to, and the right to sell, the article purchased without accounting for the proceeds to the patentee and without making any further payment than had already been made in the purchase from the agent of the patentee. Upon such facts as are now presented we think the right to vend secured in the patent statute is not distinguishable from the right of vending given in the copyright act. In both instances it was the intention of Congress to secure an exclusive right to sell, and there is no grant of a privilege to keep up prices and prevent competition by notices restricting the price at which the article may be resold. The right to vend conferred by the patent law has been exercised, and the added restriction is beyond the protection and purpose of the act. This being so, the case is brought within that line of cases in which this court from the beginning has held that a patentee who has parted with a patented machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act.

In Adams vs. Burke, 17 Wall. 453, Mr. Justice Miller, delivering the opinion of the court, pertinently said (p. 455):

"The vast pecuniary results involved in such cases, as well as the public interest, admonish us to proceed with care, and to decide in each case no more than what is directly in issue.

"The true ground on which these decisions rest is that the sale by a person who has the full right to make, sell, and use such a machine carries with it the right to the use of that machine to the full extent to which it can be used in point of time.

"The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee.

"But, 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."

Bloomer vs. McQuewan, supra; Goodyear vs. Beverly Rubber Company, 1 Cliff. 348, 354, 10 Fed. Cases, 638; Caffee vs. Boston Belting Company, 22 How. 217, 223; Keeler vs. Standard Folding Bed Company, 157 U. S. 659.

Holding these views, the question propounded by the Court of Appeals will be answered in the negative, and it is so ordered.

SPECIAL LIQUOR TAX LIABILITY.

Concerning the special tax liability of manufacturers of and dealers in flavoring extracts and soda-water syrups containing alcohol and alcoholic compounds containing drugs, Commissioner Cabell has issued a compilation of the various rulings on the subject, as follows:

In order for a manufacturer or a dealer to be exempt under the provisions of Section 3246, Revised Statutes, from special tax liability on account of the manufacture or sale of an alcoholic compound containing drugs or medicines, the preparation must conform to the following standard:

First: The preparation must contain no more alcohol than is necessary for the legitimate purpose of extraction, solution or preservation.

Second: As the minimum dosage each one ounce liquid of the completed preparation must carry in it approximately an average U. S. P. dose for an adult of some drug or drugs of recognized therapeutic value, either singly or in compatible combination.

For the manufacture or sale of preparations conforming to this standard the special tax of a rectifier or retail dealer is not required so long as the preparation is sold for genuine medicinal purposes. It should be remembered, however, that even though a compound conforms to this standard in its ingredients, as U. S. P. Jamaica ginger, for example, or other similar compounds, the sale thereof for beverage purposes under circumstances from which the seller could readily deduce an intention to use it as a beverage, would involve the seller in special tax liability as a liquor dealer.

Manufacturers using a formula which calls for drugs sufficient to conform to the standard herein should be very careful to see that the ingredients and processes used are such that the full strength called for by the formula is present in the product. The standard contained herein sets forth the maximum amount of alcohol and the minimum amount of medicinal ingredients necessary to change the alcohol to such an extent as to relieve the dealer from special tax liability. A common case of manufacturers incurring liability through failure to exercise this care is found in various beef, iron and wine compounds. The standard of this office (see T. D. 1358), based upon the formula on page 1821, Nineteenth Edition of the United States Dispensatory, is 1.4 percent of proteids and 0.2 percent of iron. Many samples of beef, iron and wine received in this office are markedly deficient in proteids, the claim being made after liability is asserted that the Dispensatory formula was followed, but that the beef extract must have been of a low quality, which circumstance, of course, does not relieve the manufacturer from tax liability.

Apothecaries are permitted under the exempting provisions of Section 3246, Revised Statutes, to carry in stock distilled spirits and wines and to use same in the preparation of tinctures and other U. S. P. preparations, and in the compounding of bona fide prescriptions, and no special tax is required for the sale thereof, provided the spirits or wine is compounded prior to sale with drugs sufficient in character and amount to so change the character of the alcohol as to render it unsuitable for use as a beverage. The sale, however, of spirituous liquors or wines not compounded as above indicated, even on a physician's prescription and for purely medicinal purposes, renders the person making such sale liable to internal revenue special tax.

In the same way the sale of alcohol for bathing purposes, even on a physician's prescription, renders the person making the sale liable to internal revenue special tax. If, however, the alcohol before sale is rendered by the apothecary unfit for beverage uses, in accordance with any formula approved for destruction of identity of alcohol in scientific institutions in hospital departments (see T. D. 1757), no tax liability will be incurred, but the burden of clearly proving this is on the person making the sale. In general exemption from liability to special tax on account of filling physicians' prescriptions is secured to apothecaries by having the prescription itself specify the precise nature and amount of the ingredients to be added to the compound, with the result that the compound thus prepared is rendered, as above indicated, unfit for beverage purposes.

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ABSTRACT OF LEGAL DECISIONS.

PATENTEE'S RIGHT TO FIX PRICE OF PATENTED ARTICLES SOLD. The United States Supreme Court has decided a case of the greatest interest to the owners and retailers of thousands of patented articles. The case was certified to the court by the Court of Appeals of the District of Columbia. The facts as stated in the certificate are as follows: Bauer & Cie., of Berlin, Germany, were the assignees of the United States patent, No. 601,995, dated April 5, 1898, covering a water soluble albuminoid known as "Sanatogen" and its process of manufacture. About July, 1907, they entered into an agreement with F. W. Hehmeyer, doing business in the city of New York under the trade name of The Bauer Cnemical Co., making him the sole agent and licensee for the sale of the product in the United States. The agreement contemplated that Hehmeyer should have power to fix the price of sale to wholesalers or distributors and to retailers, and to the public. It further contemplated that Hehmeyer should receive the product at manufacturing cost, the net profits obtained by him to be shared equally by the parties to the agreement. Since April, 1910, the product had been sold by the owners and their licenses in sealed packages bearing the following:

"Notice to the Retailer.

"This package of Sanatogen is licensed by us for sale and use at a price not less than one dollar ($1.00). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent No. 601,995, under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injunction and damages.

"A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation.

"The Bauer Chemical Co."

The defendant was the proprietor of a retail drug store in Washington, D. C. He purchased of The Bauer Chemical Company for his retail trade original packages of Sanatogen bearing the above notice. These packages he sold at retail at less than one dollar, and, persisting in such sales, the plaintiffs, in 1911, severed relations with him. He thereupon, without their consent, purchased the original packages within the District of Columbia from jobbers, and sold them at retail at less than the price fixed in the notice, and stated his intention to continue to do so.

The question in the case was: Did the defendant's acts, in retailing at less than the price fixed in the notice, original packages of Sanatogen purchased of jobbers, constitute infringement of the plaintiff's patent?

The opinion of the Supreme Court was given by Mr. Justice Day. The right to make, use and sell an invented article, he said, is not derived from the patent law. This right existed before and without the passage of the law and was always the right of an inventor. The act secured to the inventor the *exclusive* right to make, use and vend the thing patented, and consequently to prevent others from exercising like privileges without the consent of the patentee. Bloomer v. McQuewan, 14 How. 539, 549; Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 425. The right to make can scarcely be made plainer by definition, and embraces the construction of the thing invented. The right to use is a comprehensive term and embraces within its meaning the right to put into service any given invention. To vend is also a term readily understood and of no doubtful import. Its use in the statute secured to the inventor the exclusive right to transfer the title for a consideration to others. In the exclusive rights to make, use and vend, fairly construed, with a view to making the purpose of Congress effectual, reside the extent of the patent monopoly under the statutes of the United States. Bloomer v. McQuewan, supra, 549. The question for judicial determination was: May a patentee by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold?

That this could not be done in case of articles not protected by the patent monopoly was settled in Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, in which it was held that an attempt to thus fix the price of an article of general use would be against public policy and void. Whether Congress has conferred such a right of restriction upon a patentee has never before been determined by the Supreme Court. The case of Bobbs-Merrill Co. v. Straus, 210 U. S. 339, was made the copyright statute, from which the word "use" is absent. The plaintiff relied chiefly upon Henry v. Dick Co., 224 U. S., where the restriction was sustained because of the right to use the machine granted in the patent statute, distinguishing in that respect the patent from the copyright act. In that case a patented mimeograph had been sold which bore an inscription in the form of a notice that the machine was sold with the license restriction that it might only be used with stencil, ink and other supplies made by the A. B. Dick Company, the owners of the patent. The alleged infringer sold to the purchaser of the mimeograph a can of ink suitable for use with the machine with full knowledge of the restriction and with the expectation that the ink sold would be used in connection with the machine. It was expressly stated in the opinion that the machine was sold at cost or less and that the patentee depended upon the profit realized from the sale of the non-patented articles to be used with the machine for the profit which he expected to realize from his invention. (224 U. S. 26.)

It was contended in argument that the notice in the present case deals with the use of the invention, because the notice states that the package is licensed "for sale and use at a price not less than one dollar," that a purchase is an acceptance of the conditions, and that all rights revert to the patentee in the event of violation of the restriction. But the court held that it would be a perversion of terms to call the transaction in any sense a license to use the invention. There was no showing of a qualified sale for less than value for limited use with other articles only, as was shown in the Dick case.

The real question the court held to be whether in the exclusive right secured by statute to "vend" a patented article there is included the right, by notice, to dictate the price at which subsequent sales of the article may be made. The patentee relied solely upon the notice quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use. The defendant and the jobbers from whom he purchased were neither the agents nor the licensees of the patentee. They had the title to, and the right to sell, the article purchased without accounting for the proceeds to the patentee and without making any further payment than had already been made in the purchase from the agent of the patentee. Upon such facts as were presented the court considered the right to *vend* secured in the patent statute was not distinguishable from the right of vending given in the copyright act. In both instances it was the intention of Congress to secure an exclusive right to sell, and there was no grant of a privilege to keep up prices and prevent competition by notices restricting the price at which the article might be resold. The right to vend conferred by the patent law had been exercised, and the added restriction was beyond the protection and purpose of the act. That being so, the case was brought within that line of cases in which the Supreme Court from the beginning has held that a patentee who has parted with a patented medicine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act. The question propounded by the Court of Appeals was therefore answered in the negative. Messrs. Justices McKenna, Holmes, Lurton and Van Devanter dissented.

Bauer & Co. v. O'Donnell, U. S. Supreme Court, decided May 26, 1913.

MISBRANDING—"PACKAGE" — PRESCRIPTION. —Proceedings for misbranding were instituted against an Ohio corporation doing business and having its principal office at Lebanon, Ohio, where it maintained a sanatorium for the treatment of persons addicted to the drug and liquor habit. It also treated patients by correspondence. According to an agreed statement of facts the defendant shipped two boxes of medicine by railway from Lebanon to Washington, D. C. All the bottles contained alcohol as one of the ingredients, and some contained as another ingredient morphine in varying and diminishing quantities. The bottles were labeled "Maplewood Sanatorium. Ledger M. 45. 3,609. Directions: Take half a tablespoonful four times a day and as directed." The president of the defendant company, who was also its medical director, was a graduate of Columbia University and a specialist in treating patients addicted to liquor and drug habits. The agreed statement of facts stated: "It is a recognized fact by the medical profession generally that in the treatment of diseases, especially the drug habit, it is an important, and in most cases a vital factor, that the patient should not know the composition of the medicines given in such treatment." This fact was offered as a defense to the alleged misbranding, because correct labeling and branding would defeat the object of the treatment.

The information charged that each of the bottles contained in the packages was misbranded. It was held that it was not necessary to allege that the boxes containing the bottles were misbranded; the word "package" as used in the Federal Pure Food and Drugs Act having reference to the package which passes into the possession of the public, or the real consumer, and the words "original unbroken package" to the package in the form in which it is received by the vendee or consignee. It was also held that it was no defense that the sending of the medicine was a mere incident of the defendant's employment, the primary object of which was the diagnosis of the patient's ailment and the preparation of a prescription for the needs of his particular case.

Dr. J. L. Stephens Co. v. United States, (C. C. A.), 203 *Fed.* 817.

TAX ON BAY RUM IMPORTED FROM PORTO RICO.—The question was certified to the United States Supreme Court whether bay rum imported from Porto Rico subsequent to the passage of the act of April 12, 1900, and prior to the passage of the act of February 4, 1909, was subject to the payment of a tax equal to the internal revenue tax imposed in the United States, under sections 3248, and 3254 (U. S. Comp. Stat., 1901, pp. 2107, 2111), on "distilled spirit, spirits, alcohol, and alcoholic spirit." Section 3 of the act of 1900 provides that articles of merchandise of Porto Rican manufacture, coming into the United States, shall pay a tax "equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture." It was held that substance, and not name, was the test of the likeness, and that the imposition of a specific tax upon bay rum imported from Porto Rico, made by the act of February 4, 1909, was not a congressional declaration that bay rum so imported was not subject to a tax under prior statutes. The question of the Court of Appeals was answered in the affirmative.

Jordan v. Roche, 33 *Sup. Ct.* 573.

LICENSE TO SELL MEDICINES—ORIGINAL PACKAGES.—Appeal was made from a conviction of being a traveling person pursuing the occupation of selling medicines without a license. The defendant had a two-horse hack on which was painted the name of certain remedies, with which he traversed a county in Texas, selling these as a regular occupation. It was held that the resident agent of a foreign manufacturing corporation, who receives its goods in bulk, including patent and other medicines, unpacks them at his house, puts part in his team, and retails them from place to place, making his profits by commissions on his sales, was not engaged in interstate commerce, but was engaged in the occupation of peddling within the state, and was therefore liable for the license tax.

Shed v. State, Texas Criminal Appeals, 155 *S. W.* 524.

PURCHASE OF DRUG BUSINESS—VALIDITY OF CONTRACT.—In an action upon a written contract for the sale of a drug-store owned by the plaintiff "including the business of a druggist," the stock to be taken "at the invoice purchase price," which contract the defendant refused to carry out, one defense was that the contract was unenforceable, because the good will had been built up by acts in violation of the law, as the plaintiff, although a physician, was not a pharmacist or assistant pharmacist, and at no time had either in his employ. It was held that these allegations constituted no defense.

It was also held that a provision for the appraisement of the stock "at the invoice purchase price" meant that the goods were to be appraised at what had been paid for them when they were bought, not at what it would cost to buy them from wholesalers at the time of the appraisement.

Swisher v. Dunn, Kansas Supreme Court, 131 *Pac.* 571.

TRADE-MARK—INFRINGEMENT OF LABEL.—A trade-mark case as based upon a registered trade-mark for a face cream consisting of a drawing showing a circular center containing a woman's face, with the name of the article in a circle around the head. Practically the only resemblance between the two labels was the fact that both had a woman's head in the center. The trade-mark made no mention of coloring; besides which the defendant used green where the complainant used red. It was held there was no infringement.

Aubry Sisters v. Creme de Mohr Co., (C. C. A.), 203 *Fed.* 861.

NOTICES OF JUDGMENTS UNDER FEDERAL FOOD AND DRUGS ACT.

No. 2158. *Adulteration and Misbranding of Apple Flavored Vinegar Compound.* Product not apple vinegar but a solution of dilute acetic acid, colored and flavored with boiled apple juice in imitation of apple vinegar compound. Sharp-Elliott Manufacturing Co., El Paso, Texas. Fine of $100. Western District of Texas.

No. 2159. *Adulteration and Misbranding of Olive Oil,* cotton seed oil having been substituted in part. Gengars & Muselli, New York. Fine of $50. Southern District of New York.

No. 2160. *Same offense.* Robert Fanaro, New York. Fine of $75.

No. 2162. *Misbranding of Vanilla Extract.* Product labeled "1 Ounce full measuse," but did not contain that amount. Shippers, Van Duzer Co., New York. Forfeited. District of Columbia.

No. 2165. *Adulteration and Misbranding of Syrup.* Substitution of commercial glucose for drip syrup. Farrell & Co., Omaha, Neb. Forfeited. Colorado.

No. 2169. *Adulteration and Misbranding of Jamaica Ginger.* Product not a concentrated essence of Jamaica ginger as represented, but an appreciable quantity of capsicum had been substituted for Jamaica ginger, and label falsely represented it to be unequaled for colic, cramps, diarrhœa, flatulency and dyspepsia, and it contained 60.4 percent of alcohol not declared on the label.

Union Manufacturing & Packing Co., Salt Lake City, Utah. Fine of $10. Utah.

No. 2170. *Adulteration and Misbranding of Vinegar.* Product composed of dilute acetic acid and other substances in imitation of cider vinegar. M. H. & M. S. Place, Oswego, N. Y. Forfeited and released. Rhode Island.

No. 2172. *Adulteration of Candy Cigars.* Product contained arsenic. E. Greenfield's Sons, New York. Sentence suspended. Southern District of New York.

No. 2173. *Adulteration of Mineral Water.* Product contained B. coli organisms. Henry Schierer, New York. Sentence suspended. Southern District of New York.

No. 2182. *Misbranding of Beer.* Product labeled carbonated soda, absolutely non-intoxicating, but was in fact ordinary beer. Wheeling Specialty Co., Wheeling, W. Va. Fine of $15. Northern District of West Virginia.

No. 2185. *Adulteration and Misbranding of Vinegar.* Product contained water. Dawson Bros. Mfg. Co., Memphis, Tenn. Forfeited and sold. Eastern District of Louisiana.

No. 2186. *Adulteration and Misbranding of Phillips' Digestible Cocoa.* Product a compound of cocoa, sugar, phosphates and vanilla flavoring. The statement in a label on the back of the can as to the composition of the contents held not sufficient to correct the statement in larger type on the principal label on the front of the can that the product was cocoa. Shippers, Charles H. Phillips Chemical Co., New York. Forfeited and sold, Eastern District of Louisiana.

No. 2188. *Adulteration and Misbranding of Acetanilid Tablets and Nitroglycerin Tablets.*

(1) Acetanilid Tablets labeled "Acetanilid 3 grs.," but they only averaged 2.57 grains acetanilid per tablet. (2) Nitroglycerin tablets labeled "1-50 gr.," but contained only 0.012 grain per tablet. Sutliff & Case Co., Peoria, Ill. Fine of $10. Southern District of Illinois.

No. 2191. *Adulteration and Misbranding of Nux Vomica Tablets.* Product labeled "Nux Vomica Powd. Ext. 1-4 gr.," but tablets contained only one-sixth of a grain of nux vomica powdered extract. Sutliff & Case Co., Peoria, Ill. Fine of $10. Southern District of Illinois.

No. 2194. *Adulteration and Misbranding of Vanilla Extract.* Analysis showed: vanillin, 0.15 percent; coumarin, 0.13 percent; iodin test, positive; lead number at 44, 0.09; caramel, present. Misbranded and adulterated as imitation and by use of caramel to conceal inferiority. Ferris-Noeth-Stern Co., Baltimore, Md. Fine of $5. Maryland.

No. 2195. *Adulteration and Misbranding of Malt Saccharine.* Addition of ground malt. Ferris-Noeth-Stern Co., Baltimore, Md. Fine of $20. Maryland.

No. 2198. *Adulteration and Misbranding of Vanilla Extract.* Diluted and adulterated with inferior substances. Steinwender-Stoffregen Coffee Co., Fargo, N. Dak. Released on filing bond. North Dakota.

No. 2199. *Misbranding of Bitters.* Labeled "Pale Orange Bitters." Analysis, Alcohol, 32 percent; colored with caramel. Misbranded because label did not state quantity or proportion of alcohol. Betterman-Johnson Co., Cincinnati, Ohio. Fine of $25 and costs. Southern District of Ohio.

No. 2200. *Adulteration and Misbranding of Orange Flavor.* Analysis showed: orange oil, 2.5 percent; glycerin and gums present. Label stated "4 Drops equal a teaspoonful of ordinary extract xxx fourteen drops to equal an ounce." American Products Co., Cincinnati, Ohio. Fine of $25 and costs. Southern District of Ohio.

No. 2201. *Adulteration and Misbranding of Grenadine Syrup.* Product a solution of sugar and water, artificially colored and flavored and containing only an infinitesimal quantity, if any, of the juice of the pomegranate. Betterman-Johnson Co., Cincinnati, Ohio. Fine of $25 and costs. Southern District of Ohio.