

The Harvard Law School Record

VOL. 4 NO. 9

CAMBRIDGE, MASS., WEDNESDAY, AUGUST 6, 1947

PRICE TEN CENTS

NUERNBERG ANALYZED IN REVIEW

Procedural Aspects Of Trial Examined In Current Issue

Scheduled to appear shortly, the July issue of *The Law Review* presents as its leading article, "The Nuernberg Verdict," by four former members of Justice Jackson's staff. This issue is the first to be published under the direction of the newly-elected board of officers headed by President Albert M. Sacks.

Harold Leventhal, LL.B. Columbia, 1936; Sam Harris, LL.B. Yale, 1936; John M. Woolsey, Jr., LL.B. Yale 1941, and Warren F. Farr, LL.B. Harvard, 1930, Lecturer on Law here, all ex-members of the "Staff of the U. S. Chief of Counsel for Prosecution of Axis Criminality," qualify themselves by their experience at Nuernberg for their thorough critique of the trial's accomplishments. In the authors' words, "It is the purpose of this article to attempt an estimate of the work of the tribunal on the more important aspects of the case, in terms of the trial and the judgment rendered."

Most material on the Nuernberg trials published so far has involved the question of the legality of the whole program. Through this article, however, the *Review* presents an entirely different approach to the trials. Here the aim is to appraise in some detail the rules of law as used in the Tribunal's opinion as applied to the facts brought out during the trials.

After discussing aspects of the trial procedure, the article proceeds to examine each of the four counts of the indictment; conspiracy to wage aggressive war, crimes against the peace, war crimes, and crimes against humanity. With each count, the article analyzes the Tribunal's verdict, contrasting the factors leading to conviction of some

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End of Right to Accumulate Unused Patents Seen in Recent Decisions

BY JACK BRONSTON, 3L

Can the owner of a patent hold it without exploiting it commercially, and still retain the right to bring an infringement suit to keep anyone else from using it? Up until two years ago, the answer would have been an emphatic "yes," backed by overwhelming citation. However, in two recent cases the Supreme Court has made a significant change in position. *Hartford-Empire Co. v. U.S.*, 322 U.S. 386, 65 Sup. Ct. 373 (1945), clarified in 324 U.S. 570, 65 Sup. Ct. 815 (1945); and *U.S. v. National Lead Co.*, —U.S.—, 67 Sup. Ct. 1634 (decided June 23, 1947). On a finding in part by the District Court in each case that an accumulation of unused patents for the purpose of deterring competition had violated the Sherman Act, the Supreme Court upheld decrees which required the defendants to license their patents at a reasonable royalty to any applicant. A minority of the court in each case felt that the patents should



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be licensed royalty-free, but there was no dissent as to the general proposition that an anti-trust "compulsory licensing" decree might effectively destroy the patentee's right to keep the patent out of circulation.

As anti-trust decisions, these cases do not answer the question as to an individual's right to sue for the infringement of an unworked patent. However, the cases recognize that an accumulation of unworked patents merely for their litigation value is an abuse of the patent grant, and it has been previously held by the Supreme Court that an abuse of the patent grant can constitute a basis for denying the patentee the right to bring an infringement suit. In *Morton Salt Co. v. G. S. Suppinger Co.*, 314 U.S. 488, 62 Sup. Ct. 402 (1942) the patentee required the licensee of a machine for filling cans with salt tablets to use only a certain brand of salt in the machine. The Supreme Court considered this an abuse of the patent grant, and when the patentee sought to bring an infringement suit against a competing company, the suit was dismissed because of the abuse by the patentee. In the course of the opinion, Mr. Chief Justice Stone said that "the successful prosecution of an infringement suit . . . is a powerful aid to the maintenance of the attempted monopoly . . . and is thus a contributing factor in thwarting the public policy underlying the grant of the patent." 314 U.S. 493. The question as to whether the case involved a violation of the anti-trust laws was specifically dismissed as irrelevant; the patentee had misused his patent right and its benefits were

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NEWS BRIEFS

Although a bill to increase subsistence allotments for ex-servicemen was passed by the Senate, the House, through inaction, has prevented this measure from becoming law at the session of Congress recently adjourned. Since it is impossible that this matter will be reconsidered if Congress is reconvened before next year, relief cannot be expected before next year.

No action was taken on the Buckley Bill which would ban the dissemination through the mails of literature advocating racial or religious discrimination. This bill was erroneously referred to as a measure to deny G.I. benefits to Communists and Communist sympathizers in a recent issue of the *RECORD*.

BOARD MAKES NEW CHANGES

Training Film And Case Revision Progress Made

John J. Shea, 3L, announces progress in all summer activities of the Board of Student Advisers. Currently the Board is engaged in handling the summer calendar for the courts of Ames as well as revising *Introduction to Advocacy* and producing a training film.

The second round in the Ames circuit has been completed, and the Board will present a prize to the Morgan Club, second term winners. At present three clubs lead in the third term qualifying round with three victories and no losses. They are the Blackstone, Kent-Scott, and Pow Wow-Marshall Clubs. Seven other clubs have only one loss and two wins.

The script for the forty-five minute movie introduction to legal research and the use of the law library is ready for production. There has been some delay in arranging for photographic work because the Harvard Film Service has been undergoing a reorganization and independent incorporation. However, Faculty Assistant Albert L. Goldman expects that the fall class may yet have the benefit of this helpful orientation film.

Introduction to Advocacy, the Board's guide to work in the Ames Competition, has been revised under the direction of James W. Perkins, 3L, and the proof is ready for correction.

In addition, a Board Committee headed by Frank I. Davis, 3L, now a member of the *Law Review*, has drafted rules which it will follow in excusing persons from the Ames competition during the first year. To obtain an excuse, the Board insists that the student submit a petition in advance to the Chairman of the Board. Generally there are three bases for a release from the competition: 1, prolonged sickness; 2, death or serious sickness in a student's family; 3, birth of a child to a student's wife.

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MEDICAL POLICY IS DEFENDED BY DEPT.

Present Facilities Are Best Possible Says Dr. Contratto

In commenting on a recent editorial in the *RECORD*, Dr. Contratto, acting head of the Hygiene Department, has stated that the present organization for caring for students' medical needs is most favorable from the student point of view. He feels that for the present fee of \$15.00 per semester, the student is offered better protection, more facilities and a higher quality of service than any other system would provide.

Whereas the Blue Shield and Blue Cross insurance plans do not guarantee the insured a hospital bed, the Hygiene Department always has beds available for students at the Stillman Infirmary, Dr. Contratto said. In cases requiring surgery or cases of very serious illness, which Stillman does not handle, the Hygiene Department has priority in obtaining beds at the Peter Bent Brigham, Massachusetts General and Beth Israel hospitals.

Furthermore, Stillman Infirmary provides 113 beds and enough doctors to care for 113 patients at all times, regardless of the number of students actually confined to the infirmary. There are permanent nurses for only 75 patients, but the Hygiene Department hopes to bring the nursing staff up to full strength by fall.

These facilities, according to Dr. Contratto, provide an invaluable insurance to students in case of epidemic or an abnormal number of injuries. The nurses and doctors for 113 potential patients are hired on a yearly salary, both for the insurance reason and because competent personnel are difficult to obtain on a temporary basis.

In regard to the doctors' salaries, Dr. Contratto says that they are lower than the amount which could be made by doctors devoting full time to private

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CRUISE CLOSES SOCIAL SEASON

Last PBH Dance For Term Is Set For Saturday

The last dance of the summer season, sponsored by the Law School Committee of Phillips Brooks House, will take place next Saturday, August 9, on the steamer *Steel Pier*. Gangplank time is between 8:30 and 8:50 at Foster's Wharf, 370 Atlantic Avenue.

The wharf is about a 10-minute walk north on Atlantic Avenue from the subway entrance at South Station. For those with cars, public parking lots are available in the vicinity and street parking is permissible.

No set-ups will be available as the boat has a bar and also a cafeteria for students who care for a snack.

Tickets are on sale at Gannett House from 1 to 5 p.m. on Wednesday, Thursday and Friday. The Committee announces that tickets have been selling rapidly and suggests that they be purchased immediately to avoid being left at the dock.

Faculty Adviser Chides Delegates For Timidity in Education Reform

At the closing plenary session of the National Student Conference on Legal Education at Columbia University, Professor Harry W. Jones (U. of Cal.), the faculty observer, criticized the conference discussion groups. He accepted their diagnoses but found the remedies advocated rather contradictory. He implied that the suggestions were too conservative, that the delegates had been too kind to a system with which they were openly dissatisfied. The logical conclusions of the panels would be a required pre-legal course of study, a one year casebook method study, and the devotion of the last two years to what is now graduate level work in specialized training. This was very different from the broad areas of reference keyed by Lloyd Garrison and Judge Frank in their talks.

Neither the hot New York days nor the long hours of work seemed to dampen the vitality of the delegates to the Conference. Indeed, if the law schools, like the courts, are to exist in "a hardy climate of opinion," this appears as the first attempt to add some inclement weather to the self-criticism of school committees. The conference consisted of ten panel groups, each one dealing with a particular problem of legal education. The difficult task of drawing the opinions and recommendations from these discussions, correlating the panels and drafting the official report has gone to John Pemberton, Jr., '47. This report is to be published by the West Publishing Co. and distributed to law schools throughout the U. S., England and Canada. The following summaries of the conclusions reached at these ten panel discussions are drawn from material submitted by the Harvard representatives, Chairman John A. King, 3L; Kingman Brewster, 3L; Robert A. Hendrickson, 3L; Charles D. Aldrich, 3L; Jerome Rappaport, 3L; David Martin, 1L; Paul C. Sheeline, 3L; Roy Tolles, 3L; James Perkins, 3L; and graduate Walter Glass, '47.

1. *The Availability of Legal Education*: Regarding the economic conditions affecting admission policies, the group favored law school standards independent of any rule of "supply and demand," or any controls set by bar associations. Harvard maintained this position against a strong dissent by Columbia, which echoed Dean Smith's view that lawyers out of work become "dangerous malcontents." There was a split on the question of government subsidization outside the G.I. Bill, with general recommendations for additional grants-in-aid and scholarships.

2. *Placement of Graduates*. The group felt that placement offices should be maintained by each school, and that there be an immediate survey of fields where legal training might be utilized. Arbitrary restrictive practices by bar groups were roundly condemned, the panel feeling that "weeding out" should be done in the first year of law school, suggesting the use of legal aptitude tests. General assent was voiced for increased

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Alumni Records Office To Furnish Up To Date Information On Grads

Would you like to locate some friend of yours who graduated from the Law School five years ago? Do you possess information about recent developments in the career of some former student? If the answer to either of these questions is "yes," you should drop by the Alumni Records Office, located in Langdell Hall basement, rooms 12 and 13. This office, organized within recent months, is setting out to provide complete alumni services of the type normally supplied by undergraduate colleges, and for the same general goal—benefit to Law School men in the years following graduation.

Formerly known as the Student Histories Division, the office now has a new name and will play an important part in the overall task of helping graduates maintain beneficial contacts with the Law School, other graduates, and prospective employers. The office will deal with the histories of all former students, whether they graduated, discontinued voluntarily, or were requested to depart. The eventual aim is to have a complete folder for each student, covering not only his records while in school but his subsequent career, including, in the case of a graduate still living, his most recent place of employment, his current address, and even the size of his family! Both Miss Goodwin and Miss MacCrellish, who are at work on this vast project, admit that such complete records are as yet the exception rather than the rule, but point out, "Our office is very new and practically unknown to most of the students, who don't

yet realize that we may be able to help them or that they can help us." In this early stage the two-way aspect is very important and it is hoped that students and graduates will take the initiative in supplying information to the office, concerning themselves or others. For instance, the office has a file of 18,000 addresses of former students, but after an early post-war mailing 3000 cards were returned because of incorrect addresses. The office attempts to find the correct addresses by sending follow-up cards to home addresses, checking national lawyer directories, and following any encouraging leads, but obviously a great deal of work could be avoided if graduates would keep the office informed of changes of address.

The biggest job at present is getting the mass of information concerning past students organized for prompt and efficient reference, and this is being done in inverse chronological order. The job is relatively easy for recent graduates, all of whose records are contained in individual folders. Further back, the records are less systematic and information must be gathered from various sources and combined in alumni folders, one for each graduate. Eventually, musty archives will be examined for information concerning those early graduates whose names are linked with the early history of the school itself.

Already the office is finding itself called upon to supply information for a variety of purposes. Miss Kimball, who

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The Harvard Law School Record

Published weekly on Wednesdays for twelve weeks of each term by *The Harvard Law School Record Corporation*, Austin Hall, Cambridge 38, Massachusetts. Subscription price: \$2.00 per term mailed, \$6.00 per year mailed; student subscription \$1.50 per term mailed, \$4.50 per year mailed. Individual copies \$1.00 each at the Law School; \$1.50 each mailed. Business and Editorial Offices, Austin Hall, Cambridge 38, Massachusetts. Telephone KIRKland 7600, extension 133.

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CHANGES OF ADDRESS should be sent to the RECORD office, Austin Hall, Cambridge 38, Massachusetts, at least three weeks in advance to insure prompt delivery.

"Entered as second class matter November 19, 1946, at the post office at Boston, Massachusetts, under the Act of March 3, 1879."

Editorials

Day by day war between the United States and Russia seems closer. Such is the tenor of talk among law students. War is spoken of as inevitable, but no one seems to know just why. Behind the talk seems to be a dread that communism will sweep the world unless we go to war to wipe out its proponents. There is an inference that communism and "The American Way of Life" are incompatible.

Even assuming that communism and democracy cannot exist side by side, and no convincing reasons have yet been advanced as to why they cannot, war is unnecessary.

If communism is a religion, as many observers assert, and as such is gaining converts, then it is up to the established religions to reexamine their tenets; to cut away a great deal of the excess verbiage and sanctimonious hypocrisy which insulates them from life.

If communism as a political system is a threat to democracy, then it is up to believers in democracy to show that it is the better system. Flag waving and Fourth of July oratory do not hide lynchings, dishonest, inefficient government or social, economic and political discrimination. A devotion to the democratic ideal and a willingness to sacrifice to make it work are more effective means of combat.

If communism as an economic system presents a threat, it behooves us to take a long and careful look at ourselves. The United States during the last few years has presented the picture of greed run wild, which has undoubtedly brought more converts to the communist fold than communist propaganda could hope to do.

In the words of Auxiliary Bishop Sheil of Chicago, "... if there is a war in the future, it need not be a war of arms. It must be a war of ideas and of competing social systems." If our ideas are better and our social system more dynamic and more capable than the communists' of fulfilling the aspirations of men the world over for the better, freer, more just life, then we need have no fear of any "Red Peril."

It is time law students began to apply the analytical skill they learn in law school to life, instead of repeating labels and slogans. On them, in large measure, will depend our chances of avoiding a shooting war which, while it may destroy communism, will undoubtedly mean an end to democracy as well.

H. K.

Letters to the Editor

To the Editor of the RECORD:

As a subscriber to your interesting publication, I wish to compliment your entire staff on the splendid work you are doing.

I have just finished reading in the June 25th issue, the article entitled "Roscoe Pound's Last Class Will Not Be Forgotten By His Students," and it recalls to me the last class of Professor Joseph Beale which I, as a student, attended in 1937. I had written a letter to my brother Harry, who was graduated from the Law School in 1930 and who was a student under and a great admirer of Professor Beale.

"Dear Harry:

"Beale gave his last lecture today to an undergraduate class and I thought you would be interested in the grand finale given to a grand old man.

"... He began his lecture on Receivers and until 11:45 was very businesslike, etc. At that time he laid aside his books and be-

gan; at first, he had difficulty in speaking, but then slowly, gently and like a father near the end, talked to us as if we were his children.

"... His voice was weak with emotion and his eyes were filled with tears which he tried hard to withhold. At the end of the hour the other section joined ours and the class presented him with a gold watch as a token of esteem amidst applause seldom if ever heard in Harvard. This token came as a complete surprise to him and he cried with gratitude. His acceptance speech was heart-rending! ... The applause grew in intensity as Beale, too moved by emotion, stood with bowed head and a handkerchief at his face, motionless.

"And so a great man had a great ending and his only wish was that we at the end of our careers were made to feel as happy as we had made him feel.

"I can well understand your love for him; he certainly personified 'to live is to function; that is all there is in living.'"

"Abe."

With best wishes for your continued success,
I am

Yours very truly,
Bangor, Me. Abraham J. Stern

Dear Editor:

You have been putten some pictures in the RECORD with some kind of writting under them which I can not read. (I believe I herd my Pop say it was frinch.) Are they supposed to be funny? I like funnys but I can not read frinch (if that is what it is.) If they are supposed to be funny I wish you would put under them what they say so I can laff too.

Sincerely,

Sonny

P. S. My Pop can not read frinch too (if that is what it is) and I herd him say he did not appree appresh get the point, so will you please put in the American?

S.

P. P. S. My Pops friens who study with him can not read frinch and they do not like them too.

S.

P. P. P. S. If you can not read frinch too, just forget about this letter.

S.

Sonny, to show you we can read frinch, we publish the translation so you can laff too.—Ed:

Lawyer—Your case is advancing step by step. Client—For four years now you've been telling that to me, and if it keeps advancing like this much longer, I'll not have the shoe leather on which to keep in step with it.

The Book Shelf

FOR THE DEFENSE, Lloyd Paul Stryker, Doubleday, \$5, 590 pp.

For the Defense by Lloyd Paul Stryker is an effective dramatization of the life of Thomas Erskine, leading barrister of England in the reign of George the III. But, unlike conventional biography, the substance of the drama is not an estimate of Erskine's worth as an individual. It is rather a brief in praise of the sociological function of the defense attorney as the indispensable defender of civil liberties.

This thesis necessitates a concentration on Erskine's criminal cases of political significance, in particular the defense of those accused of criminal libel or treason, and a detailed sketch of their historical background. This method, though it seldom attempts to bring Erskine to life except by occasionally invoking his name in vain, might have been justified, had Mr. Stryker made his thesis more convincing.

Specifically, the problem 18th century faced was the extent to which civil liberties can be extended to the advocates of the violent overthrow of a constitutional but not representative government. Is the right to assemble and to incite to revolution a "natural" right in the sense that any governmental curb on it deserves no obedience? Or is it a right created by government and therefore revocable in whole or in part? Is the mere fact that a government is not representatively elected enough to invalidate their decrees, however wise they may seem? To those who equate law with force the question seems academic, but to the late 18th century it was all important. The adherents of Tom Paine worshipped the divine right of the ballot and had a touching faith in the infallibility of majority opinion. Burke was inclined to doubt that human progress is, of necessity, directly proportional to civil liberties, and with Madame La Guillotine working overtime in Republican France his arguments had a certain cogency. Erskine's sympathies were with the Painites.

The entire problem, with its both historical and contemporary significance, seems to demand some philosophical discussion and thoughtful historical inquiry in a work wholly devoted to the sociological importance of an exponent of one side of the conflict. Mr. Stryker, himself a well-known trial lawyer gives it neither. He recognizes the fact that in the late 18th century western world civil liberties were both defied

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Gallery

STANLEY E. QU
Chief Justice

"Qua (may his shadow never grow less) is rather young for his age, being born in Lowell, Mass., in 1880. He has attained the altitude of two yardsticks and weighs about 10 stone. He is orthodox in religion and belongs to the G.O.P., but his future is not yet revealed."

This is the statement of the Dartmouth Year Book for 1901 concerning Stanley E. Qua. His future of that time has now become an honorable past. Forty-three years after his graduation from Harvard Law School he has been appointed Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts. Mr. Qua has been on the bench since 1921. In that year his old classmate from both Dartmouth and Harvard Law School, Governor Channing Cox appointed him to the Superior court. Then in 1934 he was elevated to the Supreme court bench by Governor Joseph B. Ely.

Mr. Qua's ancestors came to the colonies in 1770. They had previously fled to County Armagh, Ireland from the Scottish Highlands. He is the son of Francis W. and Lelia Qua. His father, also a member of the bar, was active in both city and state politics. At one time his father was city solicitor for Lowell and at another a member of the State Legislature.

The present Chief Justice finished high school at the age of 16 and then entered Dartmouth. At Hanover he distinguished himself scholastically and in outside activities. When he graduated he was in the top five men in his class. He was a member of Phi Beta Kappa and a Rufus Choate Scholar in 1898 and 1899. His numerous extra-curricular exploits included work on the Daily Dartmouth and membership in the Dartmouth Press Club. In the sports field he was interested in snowshoeing and tobogganing in the winter and swimming in the summer. He was a member of Alpha Alpha Omega and Chi Pi fraternities.

For two years after his graduation from Harvard Law School where he again established a brilliant record, he worked in Boston in the law office of Walter L. Badger and then returned to Lowell to work for his father. While working with his father he became interested in city affairs and was elected a member of the city council in 1908, just four years after he graduated from law school. He was re-elected and also sat as a member of the board of aldermen.

In 1909 he married Miss Anna M. Tixbury of Haverhill, a graduate of Goucher College. They had three children, Harriet, Marshall and Constance. Mrs. Qua died in 1937.

Nine years after his graduation from law school he formed a partnership with Albert S. Howard and Melvin G. Rogers. He was still a member in this firm when he was appointed to the bench. As a result of his work on the Massachusetts bench, Justice Qua has come to be regarded as one of the most capable appellate jurists in the country.

Dean Pound said of the new chief justice "I am in agreement with all of the lawyers who have a high opinion of Mr. Qua and I think that he is exceptionally well fitted for the position."

Sub Judice

THE PONY EXPRESS WAS FASTER *

The established routine for handling claims letters was held adequate to protect the Pennsylvania Railroad from a charge of secretly and surreptitiously interfering with an attorney's contingent fee contract in a recent decision by the Court of Appeals of Ohio. Jenkins, an employee of Pennsylvania, was injured while at work for the company and was visited by their claims adjuster shortly after the accident. No settlement was reached, but the adjuster promised to call in the near future. About a month later, Jenkins signed a contingent fee contract with the firm of Levin & Levin, of Lorain, Ohio, agreeing to a 50-50 split on the proceeds of any settlement or suit. Two days later the adjuster called, Jenkins concealed his contract with the attorneys, and a \$1500 settlement was reached, the check being delivered eight days later. Meanwhile, the attorneys had mailed a letter of notice containing a copy of their contingent fee contract to the offices of the Pennsylvania Railroad at Philadelphia. Considerable evidence was taken at the trial to establish the routine for handling such letters, and it was disclosed that the letter was not stamped with a "date-received" stamp in the office of the Chicago Chief Claim Agent until the day after Jenkins took the check in settlement.

The attorneys changed their ground of attack against the company on appeal, abandoning their "surreptitiously and secretly" allegation in favor of a simple approach to the effect that notice to the mail clerks in Philadelphia was notice to the Pennsylvania Railroad. The court rejected this contention, holding that

knowledge coming to an agent or employee of a corporation on a matter not within the scope of his authority is not knowledge of the corporation. The attorneys likewise failed to prove any negligence on the part of the railroad in its handling of its mail, the delay of nine days between the mailing of the letter in Ohio and the receipt by the proper authority in Chicago not being considered excessive. Jenkins was held liable for 50% of the settlement. *Levin v. Pennsylvania R. Co. et al.* 73 N. E. (2d) 102.

"IF OTHERWISE ADMISSIBLE" *

John Bouiss found certain aspects of his tour of duty with the Army of Occupation in Japan somewhat enjoyable. He made the acquaintance of a "woman of one-half white and one-half Japanese blood." In the fullness of time the acquaintanceship ripened into something more. "They cohabited and although appellee's moral character is not in issue the record shows that in Japan she also openly engaged in immoral practices with various other men." At length John sailed for home and somehow his "friend" managed to secure unauthorized passage upon the same ship. They were married on the high seas and upon arrival in Seattle John's wife was taken to the immigration station. The authorities denied her permission to enter since she had no visa and was "an alien ineligible to citizenship and not entitled to enter the United States under any exception of paragraph (c), section 13 of the Immigration Act of 1924, 8 U. S. C. A., sec. 213 (c).

John's wife then petitioned the district court for a writ of habeas corpus on the ground that as the lawful wife of a citizen of the U. S. serving in the Armed Forces she was lawfully admissible as a non-quota immigrant under Public Law 271, approved December 28, 1945, 8 U. S. C. A. Sec. 232.

The Circuit Court of Appeals had no difficulty in reaching a decision that she was rightfully denied permission to enter, for the 1945 Act contained a clear limitation in the otherwise blanket grant of admissibility to wives of servicemen. Congress had seen fit to include the words "if otherwise admissible under the Immigration laws," thus incorporating by reference its racial limitations upon naturalization. The right to naturalization extends only to "white persons, persons of African nativity or descent, descendants of races indigenous to the Western Hemisphere, and Chinese persons or persons of Chinese descent." John's wife also failed to make the grade under the half-blood exceptions set out in the pertinent regulations. One-half white blood was fine, and if she had had just a little less than one-half Japanese blood, she would have been admitted. *Bonham v. Bouiss*, 161 F. (2d) 678, (C. C. A. 9th, May 7, 1947).

IN RE HEIGHO REVISITED *

In line with our policy of freshening up the old familiar cases, we submit the case of *Hubbard v. Commonwealth*, 202 S. W. (2d) 634, (Court of Appeals, Ky., May 23, 1947). More specifically, we suggest that you recall those trying hours in the first term when Prof. Glueck struggled with his conception of proximate cause, and, still more specifically, with good old *In re Heigho*, 18 Idaho 566. That was a case, you will recall, in which Heigho went to B's house and engaged B in a violent fight. B's mother-in-law was present and became badly frightened and died within thirty minutes of a heart attack. Heigho sought release through habeas corpus, but the court felt that there was sufficient ground for a prosecution of manslaughter and that the case should go to the jury. Best forgotten are the mental gymnastics which developed in and out of class as the result of that case.

And then there was that old one about the pregnant woman who became frightened because D fired a pistol in the street. She gave premature birth to her child, then became sick and died. The court there held the death not the natural and probable consequence of D's act. *Commonwealth v. Couch*, 106 S.W. 830.

In August, 1945, Robert Hubbard was home on furlough from the army. He was arrested for being drunk in a public place and, being too drunk to be tried, was ordered by the county judge to be committed to jail. He resisted. With the aid of several others, Dyche, the jailer tried to incarcerate him. He resisted. The group of men fell to the floor in the resulting scuffle and Hubbard continued to kick at anybody within reach. Dyche finally gave up, saying "Somebody is going to have to take my place, I am done." He died within a half hour. Three doctors testified that his death was due to acute dilation of the heart, but that the physical exercise and excitement were calculated to accelerate his death.

The court thought the conviction of voluntary manslaughter should be reversed since "the cause of death was not due to a corporal blow or injury or to some hostile demonstration of overt act directed toward the person of the decedent. ... The failure of the man's diseased heart was the cause."

Alumni Notes

Alumni are especially invited to forward contributions to this column to the Record Office, Austin Hall, Cambridge (38), Mass.

Ex. '02—Edwin Henry Cassels died July 8 at Glencoe, Ill.

LL.B. '07—Nathan Pereles, Jr. was married Milwaukee, June 17, to Miss Rose E. Olson.

LL.B. '12—Freeman Day, a member of the New York, Illinois, and Oregon bars, has recently been admitted in Massachusetts, and has opened offices in Boston.

LL.B. '15—Thomas J. Hargrave has been named chairman of the Army-Navy Munitions Board. The Board is charged with formulating plans for industrial mobilization in the event of an emergency. Hargrave is president of Eastman Kodak Co.

LL.B. '22—Lloyd W. Dinkelspiel has been elected to a 10-year term on the board of trustees of Stanford University. He is a member of the San Francisco law firm of Heller, Ehrman, White & McAuliffe.

LL.B. '34—Mrs. Jane Parker Emswiler and Lionel Peabody Marks were married in New York City on July 12. Marks, who served as a commander in the Navy during the war, is an attorney with the Texas Company, petroleum products firm in New York.

LL.B. '35—Stuart Duncan Day Pearl was recently elected treasurer of the Harvard Club of London, England.

LL.B. '36—Daniel H. Rider, son of the late Rev. Daniel Rider, has been appointed legislative counsel for the Lord's Day League of New England. Rider served for three years during the war as a lieutenant at naval air stations. Formerly associated with the firm of Badger, Pratt, Doyle & Badger, he now has his own law office at 73 Tremont Street, Boston.

LL.B. '42—Henry Frederick Lippitt, 2d. is with the New York office of the U. S. Atomic Energy Commission.

BOOK SHELF—(Continued)

and damned, but he does not probe the problem. The penalty of writing a biography with a message is that the message must be proved not assumed.

In addition Erskine does not lend himself too well to Mr. Stryker's thesis. He seems to have been a congenial soul, with slightly confused liberal sympathies and a rare gift for advocacy. Sheridan said of him "Erskine in his gown and wig has the wisdom of an angel; but the moment he puts them off he is nothing but a schoolboy."

The factual details of Erskine's success are interesting in themselves. His third case, the defense of Lord Gordon on a charge of inciting to riot, established him as the foremost barrister in the country. His income rose along with his preeminence at the bar. Like most of the able men of the time he served in the House of Commons, but his influence there was inconspicuous. Rumor, which the author discounts, had it that Erskine was afraid of Pitt, the Younger, who dominated the politics of the period, ceding only intellectual leadership to Burke. Erskine held only one judicial post, the Chancellorship, for the brief period of fourteen months. His claim to fame rests almost entirely on his powers in persuading a jury.

Therefore Erskine's technique of advocacy is worthy of note. Early in his address to the jury he would characteristically identify himself with the accused, impress them with his sincerity, put himself on trial. Then he would promote the jury from their box to the bench with a psychologically sound assurance that they were the real and sole bulwark of English liberty. His case he would found on a single point and every shred of evidence would be circumspectly examined with reference to it. And his conclusions were emotional appeals neither shallow nor irrelevant, if one makes the necessary allowances for 18th century rhetoric and draws no comparison to Burke.

On the whole Mr. Stryker's brief is reasonably impartial, well-organized and vivid. Stylistically it is occasionally grandiloquent, but no one interested in the crises that faced the close-knit, exceptionally talented English society of the late 18th century will find it dull.

JOHN H. BERMINGHAM, 2L

LES AVOCATS ET LES PLAIDEURS



L'avocat — L'affaire marche, l'affaire marche!

Le Plaidier — Vous me dites cela depuis quatre ans; si elle marche encore longtemps comme ça, je finirai par n'avoir plus de bottes pour la suivre!

(See "Letters to the Editor" column for English translation.)

HYGIENE—(Continued)

practice, but staff members are motivated to a great extent by a desire to perform public service.

The facilities offered by the Hygiene Department for the \$15.00 fee include one week at the Stillman Infirmary, clinics at the various colleges to give medical advice, a physical examination to every student when he enters the university and another examination anytime he so desires, psychiatric help, and individual attention to veterans with special physical defects. Dr. Contratto stated that the clinics do not dispense free medicine because the majority of cases do not require medicine, and those that do need medication are usually of so serious a nature that they are sent to Stillman.

Schools which also provide medication and surgery and a longer hospitalization period probably own hospitals and take outside patients, which decreases the overhead maintenance of a full hospital staff, he said.

In reference to the possibility of obtaining more service per dollar by a student group health insurance program, Dr. Contratto stated that to his knowledge two insurance companies have investigated the matter, but neither was able to offer a program as satisfactory as the present facilities for a reasonable premium.

"On the whole," Dr. Contratto concluded, "the Hygiene Department offers a very high quality of service. As for special cases of needy students, I don't know of any boy who has actually suffered because of lack of money."

REVIEW—(Continued)

of the defendants with those leading to the acquittal of others. The conspiracy count, which was handled by the U. S. prosecution staff, was the least successful from the point of view of getting convictions; the court finding only eight of the twenty-two defendants guilty on this count. The fact that this count was the furthest departure from previous international concepts of criminality is offered as an explanation of the Tribunal's action. The article concludes with an estimate of the verdict on the six Nazi organizations indicted, and discusses what the prosecution attempted to accomplish in this aspect of the case and whether it proved worthwhile.

The remaining article in the issue is "The Inconvenient Federal Forum," by Robert Braucher, LL.B. Harvard, 1939, Visiting Professor of Law. It is a comprehensive evaluation of forum non con-

veniens with emphasis on the federal courts in which the latest developments are stressed. Fear of abuse of process and trial convenience are held to be the two contributing elements in a court's decision to refuse to hear a cause, and the extent to which courts rely on one or the other is examined.

The other departments of the Review present the usual quota of painstaking research. A note on choice of law in defamation and privacy cases is the first published attempt to probe into this intricate aspect of the conflict of laws. Among the book reviews, Prof. Mark D. Howe has adversely criticized Curtis' "Lions Under the Throne," and Prof. E. Merrick Dodd has discussed Prof. Ballantine's latest work on corporation law.

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BEAGLES, MORRIS PLAY GAME TODAY

This afternoon the Legal Beagles, leaders of the Langdell Softball League, risk their perfect record of five victories when they meet undefeated Morris, winner of four diamond contests. During the past week, the Beagles shaded the then third place Palsgraf Polecats by 2-0 in the advanced innings of a close game.

Standing of the Clubs

Legal Beagles won 5-lost 0, Morris 4-0, Athletics 2-0, Counselors 5-1, Trover Boys 3-1, Sheriffs 4-2, Hastings 3-2, Palsgraf Polecats 3-2, Chancery 2-2, Divinity Hallers 1-3, Lincoln's Inn 1-3, Perkins 1-3, Revisers 1-4, Tax Dodgers 1-4, Blackacres 1-5, Arsonists 0-5.

PANELS—(Continued)

ing the availability of legal services to lower income groups by cooperative schemes and legal aid societies. (In a concluding address, Judge Jerome Frank suggested a government subsidized fact-finding agency to equalize legal services by preventing prohibitive costs.)

3. *Program Planning:* Definitive pre-legal educational requirements were opposed, while course recommendations for college students were considered sufficient. Harvard held a position against any type of requirement other than a specified time at college, commenting on the attributes of a varied student body as contrasted to one with a group leveled by "requirements." The panel favored a greater degree of guidance and orientation in the first year, rather than any extension of the three-year course.

4. *Teaching Methods:* The general

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dissatisfaction with the case method did not end in any agreement as to a remedy. The group did feel that a variety in techniques would help, namely, a combination of the case system, problem method and seminars. The Harvard delegate opposed any return to a lecture method, which was suggested by schools which apparently considered the law school to be a three-year cram course for the bar examination. The inadequacy of training in independent research was noted.

(To be concluded next week—Ed.)

RECORDS—(Continued)

heads the office, is now busy on the 1948 edition of the *Harvard Law Quinquennial*, a comprehensive alumni directory, which is a function of the Alumni Records Office. Alumni records are frequently furnished the Placement Office. Occasionally a prospective employer checks directly with the Alumni Records Office, as in the case of FBI inquiries on Law School graduates taking positions with the Atomic Energy Commission. In cooperation with the Placement Office, material on the placement of each graduating class is supplied the Record. In addition, the office stands ready to help you locate your friend who graduated a few years ago and seems to have dropped out of sight.

"Our office," points out Miss Goodwin, "hopes to supply the school and its graduates with complete, modern alumni records, for the benefit of all concerned. We hope students will feel free to come in often, either to give or receive information. In either case, we shall be happy to see them."

S. E.

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Calendar

LEGAL WORLD
Ames Competition

The final Qualifying Round (third term) Argument, Argument 7, is to be held tonight.

Harvard Law Wives

John P. Eustis of Claus Gelotte will speak on "How to Improve Your Snapshots." It is suggested that those who are interested bring their bad shots and Mr. Eustis will give advice as to what was done wrong. The time is Wednesday, August 6th, at 8 p.m.

National Lawyer's Guild

A meeting of the National Lawyers' Guild is scheduled for August 8 at Kendall House, from 3 to 5 p.m. Mr. Toepfer of the Placement Office, will be guest speaker.

Tennis Tournament

The first and second rounds of the tennis tournament are to be played this week. The list of matches for men's singles has been posted on the Langdell South bulletin board. Not enough interest has been displayed to warrant a men's doubles or mixed doubles tournament.

Southern Law Students

Students from the South are invited to participate in a general discussion to take place at Kendall House tonight at 7:30.

Law School Cruise and Dance

The Law School Cruise and Dance will be held on the three-decker steamship "Steel Pier," which is to leave Foster's Wharf at 370 Atlantic Avenue on Saturday, August 9, at 9 p.m. Music will be furnished by the ship's band, while mixed drinks will be served at the bar. The dock is a five-minute walk from the South Station subway.

Business School Tennis Match

A tennis match between a law school team and a business school team is planned for Tuesday, August 12. Any law school student interested in trying out for the team should contact Bill Howland at the Legal Aid office or Charles Lord at the Record office immediately.

THE UNIVERSITY WORLD

Sunday Evening Club

All students are invited to attend a lecture on Religion and Politics by Dr. Seth Brooks of Washington, D. C. The lecture will begin promptly at 8 p.m., at Phillips Brooks House.

THE OUTER WORLD

L Street Beach

Boston's famed L Street Bathhouse and Beach, with separate beaches for men, women and children, is free to all. The standard bathing attire consists of a fig leaf which may be rented at the bathhouse for 10 cents. The beach is open daily from 6 a.m. to 8 p.m. To reach it take the subway from Harvard Square to Broadway Station, and transfer from there to a Bay View bus, which goes to the beach.

Summer Theatre

The Boston Summer Theatre: Arthur Treacher, stage and screen comedian, is currently featured in a mystery comedy, *The Ghost Train*, at the air-conditioned New England Mutual Hall.

Ilka Chase, actress and author, will perform in Lynn Riggs' new comedy, *Laughter From a Cloud*. The play begins a week's engagement on Monday, August 11.

The Cambridge Summer Theatre: Richard Arlen, screen star, is in the title role in H. M. Harwood's comedy, *The Man in Possession*, now playing at the Brattle Hall Theatre. The production will run through Saturday, August 9.

The Shubert Theatre: Lucille Ball, popular screen actress, is at present playing her first Boston stage engagement as the star of Elmer Rice's comedy, *Dream Girl*. A two-week engagement will end this Saturday, August 9.

Baseball

Major League Games in Boston: The schedule for the Braves and Red Sox is as follows:

August 7*—Braves vs. Brooklyn.
August 8*—9-10—Red Sox vs. New York.
August 11*—12-13*—Red Sox vs. Washington.

(* denotes night games.)

End of Patent Accumulation Seen

(Continued from page 1)

therefore denied him. It would seem to follow that if an accumulation of unworked patents is an abuse of the patent grant, then the right to bring an infringement suit could be denied the holder of such unworked patents. See H. H. Coburn, *Compulsory Licensing by the Courts* (1946) 28 Journal of the Patent Office Society 180, 192.

U. S. POSITION UNIQUE

If this result is reached, a long and bitter controversy will have been determined. The United States remains unique among industrial nations in having no legislative requirements for the working of patents. France requires that the patented invention must be worked in France within two years of issuance and working must not be discontinued for two successive years. The penalty is forfeiture of the patent. Great Britain has a three-year rule which requires a complaint to be brought against the patentee before action is taken. An order compelling the patentee to license may then issue. Germany had very strict provisions prior to the war.

Legislation to alter the American position has repeatedly been requested. On the one hand, TNEC Monograph #31, *Patents and Free Enterprise* (1941) maintained (p. 150) that: "If the patentee squats upon the public domain in the path of industrial progress, some public body should have power to compel a license." In answer, the patent bar asserted that "an invention for which a patent is granted is not something in the public domain; it is something which did not before exist and which adds value to that domain." A. W. Deller, *Test of Patentability* (1945) 27 Journal of the Patent Office Society 682.

Thus, the legal argument in favor of the patentee's right not to exploit is that he has discovered something which society would not have had but for him and therefore society loses nothing by his failure to commercialize. See *Continental Paper Bag Co. v. Eastern Paper Co.*, 210 U.S. 405, 28 Sup. Ct. 748 (1908). Having acquired a property right in this invention, it is the patentee's business what he does with it; "A patent owner is not in the position of a quasi-trustee for the public or under any obligation to see that the public acquires the free right to use the invention." *Hartford Empire Co. v. U.S.*, 323 U.S. 386, 432, 65 Sup. Ct. 373 (1945). These arguments have been criticized.

It is difficult to say that but for Edison and Ford, we would never have had electricity or gasoline motors. Many inventors, working independently, produce similar devices at nearly the same time. Furthermore, it can be argued that the patent right, which is the property right involved, is not inherent in the invention, but arises only after application to and issuance by the government.

1870 PATENT LAW

In dealing with any aspect of patent law, it is important to remember (and its legal weight has been significant) that our present patent law was last extensively recodified in 1870. In the absence of legislation, the courts have been forced to note that the patent right has necessarily altered in nature and scope since that time. In a technologically undeveloped society in which capital is not likely to be fluid, the inventor's position is precarious. Society, on the other hand, receives, at this particular stage, an important and much-needed impetus. The interchange, as it is lyrically described by one treatise-writer, may possibly be "the nearest approach to a perfect apportionment of recompense to services the law has ever known." Robinson, *Patents* 54 (1890). But when technological advance reaches the point where research, exploitation, and distribution can be conducted efficiently only upon a highly concentrated level, any significant use of the patent may be understood only through corporate considerations which were not present in 1870; over one-half of the patents obtained today are taken out by corporations and these undoubtedly include those most economically significant. Certainly the legal safeguards which protected the inventor 75 years ago can sound meaningless when applied to the salaried employee of a large company or research firm.

To the extent that the courts have come to recognize this, new approaches

and new distinctions have continually been advanced. Thus, in the technical matter of determining whether or not a patent measured up to the inventive standard, Judge Arnold felt "bound to take judicial notice that this process (co-operative research) is the normal process in great laboratories" and that the patented device was "the product not of inventive ability, but of financial resources and organizing ability of those who operate the laboratories." *Potts v. Coe, Comm'r. of Patents*, 140 F.2d 470, 474 (App. D.C. 1944). Furthermore, complete freedom in licensing has been gradually broken down. At one time, it was possible for a patentee to require that his licensee use only a certain make of unpatented material in connection with his use of the license. *Henry v. A. B. Dick Co.*, 224 U.S. 1, 32 Sup. Ct. 364 (1912). But this case was subsequently overruled when the implications were realized of patent control to extend its reach over an entire field in which both basic machinery and ultimate distribution were controlled by a few cross-licensing companies. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 37 Sup. Ct. 416 (1917). Finally, in dealing with restrictions attached to patent licenses in general, the courts have applied a standard which, perhaps consciously, gives some leeway in approaching new situations. It has been stated that the patentee may not "by attaching a condition to his license . . . enlarge his monopoly and thus acquire some other which the statute and patent together did not give." *Ethyl Gas Co. v. U.S.*, 309 U.S. 436, 456, 60 Sup. Ct. 618 (1941). Any examination of decisions involving such "restrictive licensing" will show that the limits of the patent right, which must be determined in order to find whether an enlargement has taken place, have been drawn differently to accommodate new types of restriction.

RIGHT TO "SUPPRESS"

In the same way, the right to "suppress" one's patent has implications today which possibly were not realized in 1870, although the strongest judicial expression of the denial of such right occurred in *Hoe v. Knapp*, 27 Fed. 204 (C.C.E.D. Mo. 1886). Except for the necessity of maintaining his bargaining position, the individual inventor had no real incentive to suppress his patent. If he did, he controlled one area only and his ability to threaten litigation over a broad field of scientific endeavor was correspondingly limited. But in an area in which patents are built upon patents and a process or device can be invented, reach an economic apex, and become obsolete well within 17 years, this has had a serious monopolizing effect. Suppose, for example, that a corporation secures a revolutionary patent. As it exploits this first patent, with a 17-year right to exclude all competition, there will be an irresistible impetus toward acquiring other patents on improvements in its field. Whatever value may lie in free accessibility to the original patent is possessed by this corporation. Furthermore, an independent inventor who improves the process may prefer to deal with the leading distributor in the field.

The tendency in an aggressive company will be to bid high for any new patents in the field whether it plans to use them or not. The result of this accumulation will be to discourage competition in the field, for, unless the competitor has a completely new scientific approach, he will be faced by a large number of patent claims which may not actually overlap into his invention, but which threaten him with back-breaking litigation nonetheless. Patent litigation is a harsh threat; the courts are on uncertain ground in a field in which the lines which delimit patent claims and validity are obscure even to scientists. As Judge Hand once complained, "How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows." *Parke-Davis & Co. v. Mulford Co.*, 189 Fed. 95, 115 (C.C.S.D.N.Y. 1911). It is an acknowledged fact in patent law that there are strict courts and easy courts in the determination of a patent's validity, and that courts become less "charitable" as the case goes up on appeal. *Glascok and Stringham, Patent Law* 188-198 (1943).

The effect has been, as the District Court found in the *National Lead* case, that "the newcomer is confronted by a veritable jungle of patent claims through which only the very powerful and stout-hearted would venture, having a regard for the large initial investment which the business requires. These patents . . . have . . . been forged into instruments of domination of an entire industry. The net effect is that a business, originally founded upon patents which have long since expired is today less accessible to free enterprise than when it was first launched." *U.S. v. National Lead Co.*, 63 F. Supp. 513, 522 (D.C.S.D.N.Y. 1946).

LITIGATION VALUE

More pointedly, the record in the *Hartford-Empire* case reveals that the unveiled threat of infringement suit was one of the weapons by which the glass monopoly was defended; "... you are going to be sued and continue to be sued until you are out of business." *U.S. v. Hartford-Empire Co.*, 46 Fed Supp 541, 580 (D.C.N.D. Ohio 1942). As a further illustration, one company divided its patents (which numbered over 600) into three categories as set out in its Secretary's "Memorandum of Policy": "In taking out patents, we have three main purposes—(a) to cover the actual machines which we are putting out. . . (b) to block the development of machines which might be constructed by others for the same purpose as our machines using alternative means, (c) to secure patents on possible improvements of competing machines, so as to 'fence in' those and prevent their reaching an improved stage." Cited in W. H. Kenyon, *Current Problems in the Patent System* (1946) 28 Journal of the Patent Office Society 224, 230.

There are, of course, sound economic reasons why a company will "suppress" which have nothing to do with monopoly. The company may itself develop an invention which may improve a process sufficiently to increase a product's marketability, but which will require completely new types of machinery and thus jeopardize a huge overhead investment. It will be worthwhile for a company in the field to take the competing patent and simply not use it. Furthermore, one patent may be so efficient as to render many others useless and they are retired before their time. Therefore the contention is made that "suppression" is no real problem, but that it is just the normal operation of progress. But the answer to the first explanation is stated in an old case—"It is as important to the public that competition should not be repressed by worthless patents as that the patentee of a really valuable invention should be protected in his monopoly." *Pope Manufacturing Co. v. Gormally*, 144 U.S. 224, 12 Sup. Ct. 643 (1892). Patent Commissioner Ooms answered the second to some extent when he said, "If you agree with me that suppression is no real problem, you must also agree with me that any remedy designed to be invoked when suppression is clearly disclosed is harmless." Ooms, *Address*, 28 Journal of the Patent Office Society 15 (1946).

COURT SPLIT ANALYZED

It is possible that the split of the Court in both the *Hartford-Empire* and *National Lead* cases may reveal its general attitude to unworked patents. Certainly, Justice Roberts' language in the first case is misleading. "The owner of a patent is not in the position of a quasi-trustee for the public" (323 U.S. 432) sounds reassuring to the most demanding advocate of the right not to work a patent. However, his opinion and its later clarification (324 U.S. 570) clearly uphold compulsory licensing as a remedy under the Sherman Act. The split came

on the question as to whether the District Court could order a forfeiture of the patents. The majority overruled the forfeiture and assured a reasonable royalty to the defendants. Vigorous dissents by Justices Black and Rutledge pointed out that the defendants should not profit through royalties from patents so misused. However, the principle that the patentee can be deprived of the patent right because of organized suppression would not seem to be altered by the payment or non-payment of a reasonable royalty. Where the Court did deal directly, in the *Hartford-Empire* case, with the issue of non-use by an individual patentee, it was on an inconclusive point. The District Court had decreed that the defendants should be enjoined from taking out any patents in the future with the intention of not using them within four years, failure to use in that time to be *prima facie* proof of such intent. The Supreme Court overruled on this point, maintaining that this was "legislative rather than remedial." 323 U.S. 432. The dissent did not argue the issue, but endorsed the District Court holding, citing the *Morton Salt* case to the effect that abuse of the patent right should result in denial of its benefits. This division of the court, however, does not seem to go to the right of a patentee to bring an infringement suit on an unworked patent, but only to the question of how far a Sherman Act decree can go as a remedy.

If the division of the Court does become relevant, it is interesting to note that there was no clear majority in either case. The *Hartford-Empire* decision was 4-2 (Black and Rutledge dissenting and Murphy, Douglas, and Jackson not participating) and the *National Lead* decision was 4-3 (Murphy, Douglas, and Rutledge dissenting, Black and Jackson not participating). If the attitude of the court towards individual suppression is actually to be determined by this split as to royalties on patents involved in anti-trust action, then the issue is in the hands of Mr. Justice Jackson, and is not foreclosed by these decisions. Furthermore, the court in the *National Lead* case specifically left the possibility of forfeiture decrees open, inasmuch as the District Court, influenced by the *Hartford-Empire* case, framed its decree in terms of reasonable royalties. The dissenters felt that the *Hartford-Empire* case should be re-examined.

In determining the outcome, the language of the Constitution might be relevant; it gives Congress power to make patent laws "To promote the progress of science and the useful arts." To the extent that an unused patent may not only not promote, but may block progress, it is not in keeping with this provision, and the patent law cannot be construed to allow such a non-use. On the other hand, it is true that individual incentive, and therefore progress, may be stimulated by such a privilege. As always, a proper balance must be struck. Insofar as the courts are now applying the principle of compulsory licensing only in cases of proven abuse, and are on the point of requiring a certain amount of "good faith" in bringing infringement suits on unworked patents, such a balance may result.

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