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THE PATENT SYSTEM.

A current newspaper paragraph credits Edison, the inventor, with saying that he would have been better off pecuniarily if he had never taken out a patent on any of his inventions. Whether it be true or no that he did make this exact statement, the fact is well known that there is large complaint of the workings of our patent system. This complaint runs along three lines: First, that there is little reliance to be placed on the patent itself; second, that the time which it takes to carry on a suit to enforce any patent rights is great; and third, that the expense of such litigation is enormous. The result is, it is said, that parties invest in patent rights reluctantly, and with much hesitation, and that the real inventor seldom reaps the proper reward for his invention. It must be conceded that there is some foundation for these complaints, and that some injustice is wrought out under the present patent system, though probably not nearly so much as is pictured.

What shall be done under the circumstances? One drastic remedy suggested is to repeal the whole patent law, reserving only the rights which are now actually vested. This would place the situation in line with the statement credited to the inventor, Edison, and would, as he claims, secure greater pecuniary compensation to the inventor. It would also do away with any monopoly in this respect created by law, and leave only that monopoly created in fact by the superior business energy and skill of the individual. This remedy is urged by some as a mere matter of temporary relief, claiming that the patent law should be like the bankrupt law, in force for a while and then repealed. It is

doubtless true that if the patent law was repealed either temporarily or permanently, it would relieve the courts of much litigation, and quite a number of our profession of their employment. In one aspect of the case it would put an end to all complaints, because there would be no system to complain of. There are, however, many weighty reasons why no such drastic remedy should be pursued. It ignores the spirit of the Constitution which, giving to Congress the power to thus promote the progress of science and useful arts, carries with it the implied declaration of the whole body of the people that Congress ought to secure to inventors for a limited time such an exclusive right in their discoveries. Such exclusive right for a limited time creates no monopoly in any odious sense, and only aims to secure to the inventor a fair compensation for the benefit which his invention has done to the general public. It invites the inventor to disclose his secret for the public benefit, by the promise of an exclusive control of it for a limited time. The prospect of gain from such exclusive control stimulates the spirit of invention and encourages the efforts of all having anything of inventive genius.

The marvelous extent to which invention has been carried, and the wonderful variety of machines devised for doing all kinds of work (some of them so intricate, and moving so deftly as almost to seem possessed of intelligence) are among the wonders of the age, and suggest the not irrational fear of the laborer that ere long the machine will wholly take the place of the man in all the departments of production and manufacture. Unless this advancement in mechanical achievements be an injury to the race, and no man is bold enough to assert that, then a system which has tended to bring about this wonderful mechanical development should not be swept out of existence, but should, on the other hand, be preserved and improved.

A second suggestion is to limit the monopoly by reducing the term of the patent, and I notice that in the present House of Representatives a bill has been introduced to make the life of a patent only ten years. But it seems to me that a man who has made a true invention, the product of whose genius is something which substantially tends to bettering the condition of the race, and to make our daily lives sweeter and more full of comfort, is not extravagantly compensated when the sole profits of its manufacture, sale, or use, are secured to him for the term of seventeen years.

But if neither the abolition of the patent laws, nor the reduction of the term of a patent, is to be desired, what can be done looking

to an improvement of the system? One thing which arrests attention is that so few patents bear the test of judicial investigation. I think I am within bounds in saying that in the last dozen years not one out of ten of the patents brought before the Supreme Court was sustained. There seems to be a want of harmony between the Patent Office and the Courts, and the latter are busy declaring grants of exclusive privileges which have been approved by the former to be void either because there was no invention, or no sufficient description of the invention.

On the 6th of March of the present year the number of the last original patent was 516,173, and of the last reissue, 11,404. Does any one suppose that there have been so many really substantial inventions? Are not these figures persuasive that a vast multitude of these patents are for matters which may have the element of novelty, but do not disclose the skill of the inventor? Take that well-known article of domestic use, a washboard. All are familiar with its corrugated surface, upon which clothes are rubbed up and down in the process of washing. That corrugated surface seems a very simple thing, and yet there are thirty-six patents for different forms of such surface. Does any one believe that the genius of invention is displayed in each and all of these forms? And yet no hasty condemnation of the Patent Office is just. It must not be assumed that a patent can be obtained for anything that has the element of novelty. On the contrary, there always has been a great sifting of applications. Thus in the year 1891, 39,418 applications were filed, but only 22,328 patents were issued. And the effort of the Patent Office—effort strongly supported by the present Commissioner of Patents—is to make this sifting more thorough, so that hereafter the possession of a patent shall be more satisfactory evidence of the existence of invention. Yet the fact that notwithstanding the commendable efforts to make the examinations thorough and critical, so many worthless patents have been issued, suggests that perhaps the machinery now in use may not be the one adapted to work out the best results.

By the present system an application when presented is referred to an examiner for examination. Such examiner in that examination is in a qualified sense a judge passing upon an *ex parte* application; and no one appreciates more fully than a judge that an *ex parte* application, with all the sifting after truth and all the effort to reach justice which the judge may make, is apt to be erroneous in its results. Nothing more certainly tends to bring out the truth than a contest by opposing interests before an impartial tribunal.

Again, the examiner is generally confronted with the fact that the application presents a matter which is novel. Be it a tool, machine, a process, or a product, the thing presented to him is new. Whether that new thing thus put before him is something which only the genius of the inventor could have devised, or could be expected from any ordinary mechanical skill, is a question often of the utmost difficulty. No satisfactory definition has yet been made of the term "invention" as found in patent law. Mr. Justice Matthews, in Hollister *v.* Benedict Manufacturing Co., 113 U. S. 59, referred to the matter in these words:

"The idea of detaching that portion of the stamp * * * seems to us not to spring from that intuitive faculty of the mind put forth in the search for new results, or new methods, creating what had not before existed, or bringing to light what lay hidden from vision; but, on the other hand, to be the suggestion of that common experience, which arose spontaneously and by a necessity of human reasoning, in the minds of those who had become acquainted with the circumstances with which they had to deal. * * * As soon as the mischief became apparent, and the remedy was seriously and systematically studied by those competent to deal with the subject, the present regulation was promptly suggested and adopted, just as a skilled mechanic, witnessing the performance of a machine, inadequate, by reason of some defect, to accomplish the object for which it had been designed, by the application of his common knowledge and experience, perceives the reason of the failure, and supplies what is obviously wanting. It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice; and is in no sense the creative work of that inventive faculty which it is the purpose of the Constitution and the patent laws to encourage and reward."

Mr. Justice Brown, in McClain *v.* Ortmayer, 141 U. S. 419, thus discusses the question:

"What shall be construed as invention within the meaning of the patent laws has been made the subject of a great amount of discussion in the authorities, and a large number of cases, particularly in the more recent volumes of reports, turn solely upon the question of novelty. By some, invention is described as the contriving or constructing of that which had not before existed; and by another, giving a construction to the patent law, as 'the finding out, contriving, devising or creating something new and useful, which did not exist before, by an operation of the intellect.' To say that the act of invention is the production of something new and useful does not solve the difficulty of giving an accurate definition, since the question of what is new as distinguished from that which is a colorable variation of what is old, is usually the very question in issue. To say that it involves an operation of the intellect, is a product of intuition, or of something akin to genius, as distinguished from mere mechanical skill, draws one somewhat nearer to an appreciation of the true distinction, but it does not adequately express the idea. The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not. In a

given case we may be able to say that there is present invention of a very high order. In another we can see that there is lacking that impalpable something which distinguishes invention from simple mechanical skill. Courts, adopting fixed principles as a guide, have by a process of exclusion determined that certain variations in old devices do or do not involve invention; but whether the variation relied upon in a particular case is anything more than ordinary mechanical skill is a question which cannot be answered by applying the test of any general definition."

When invention is so difficult, if not incapable, of accurate and satisfactory definition, it is not to be wondered at that an examiner finding that presented in the application which has the merit of novelty, and in doubt whether it also displays the genius of the inventor, rather than the skill of the mechanic, gives to the applicant the benefit of the doubt, leaving the final determination of the matter to inquiry in the courts.

Another matter: There are certain fees prescribed for all action taken in the Patent Office in respect to the applications for and issue of patents. These fees have more than paid the expenses of that office, and, as I am advised, "there was at the close of business on December 31, 1893, in the Treasury of the United States a surplus fund, amounting to $4,281,743.45, to the credit of the Patent Office, over and above all expenses incurred on behalf of the office." Now, it has been urged that these fees, and the profit which the Patent Office has been to the Government, have prompted the officials of that Department to encourage applications by favorable responses in the way of patents to such applications as well as by general effort through the country. To obviate this, two suggestions are made. First, that no fees be charged for any service to be rendered to individuals in the Patent Office; but obviously there would be great injustice in that. Surely, if any special services are rendered by any officers of the Government to a private individual, it would be unjust to require the public at large to pay for such services, and it would be in conflict with the practice of the Government in all other Departments. Second, it has also been suggested that an increase be made in the charges for the filing and examination of applications, with a provision that if the application be sustained and the patent granted, those charged be refunded, on the ground that by the decision it is shown that the patentee has done something for the public welfare in the invention which he has made, and should not be taxed in his efforts to secure the full benefit of his invention; while, on the other hand, the rejection of the application is evidence that the time and labor of the officials have been unnecessarily occupied, and the person who has thus unnecessarily taken

such time should be compelled to pay liberally therefor. Undoubtedly it is against all public policy that the personal fees of an officer should be affected by the manner in which he decides a question submitted to him, profiting pecuniarily if he decides one way, and losing if he decides the other; but that result is not involved in this suggestion. The salary of the examiner is something fixed, and does not vary with the results of his examinations. I am not sure but that the general results of such a change would be beneficial. It might discourage applications. If it had no effect upon the examiner to restrain from the issue of doubtful patents, it would at least do away with the thought of increasing the business of the Patent Office with a view of enlarging the amount of the fund to its credit.

But this, whichever may be the better way, is a comparatively trivial matter. The main thing is that there should be something beyond an *ex parte* hearing. The government should be represented by a corps of attorneys, to resist the granting of patents. No judgment is rendered against the government until after its defense has been made and urged by counsel. A patent, if wrongfully issued, is in derogation of the rights of the public, for whose benefit the government exists, and no patent should be issued purporting to create a monopoly of right until the public has been heard to contest by one of its attorneys the right to such monopoly. Instead of forcing the individual to defend himself against the attempted monopoly, the Government, as the representative of the public, should, in the first instance, defend against the claim of monopoly and, so far as possible, prevent any improper grant thereof. The rule in the construction of grants of corporate franchises is that such grants are construed in favor of the Government and against the grantee. While it is often said that a different rule obtains in respect to patents, and that they are to be construed liberally in favor of the patentee, yet when an application is made for a patent, which is the grant of a monopoly, abridging, if wrongfully issued, the rights of the individual, why should not doubts as to the matter of invention be resolved against the applicant, and in favor of the public? How can this contest be brought about? By the appointment of counsel, whose duty it shall be to contest every application for a patent. Whenever an examiner has passed upon an application, and ruled that the applicant is entitled to a patent, let it be required that the chief counsel appeal from that decision to a court composed of such number of judges as may be deemed proper, unless he is able to place upon the award of the examiner a certificate that there is

no reasonable doubt of the facts of novelty and inventive skill; and, on such appeal, let the defense be carried on by some one of these Government counsel, with the same scope of inquiry as in an ordinary suit in equity upon a patent. But these provisions are matters of detail; the important matter is that the Government should be charged with the same duty of resisting an application for a patent as it is of resisting a suit against it for money, so that when a patent shall issue it will not be as the result of a mere *ex parte* investigation, but of a vigorous and active litigation.

The issue of a patent is not the end but the beginning of trouble. If it is really for a meritorious invention, infringement commences, and then come the delay and expense of suits to restrain and recover for infringement. So burdensome and wearisome is this that almost invariably the inventor, if a poor man, has to give up the fight and let the public get the benefit of his invention, or sell to some wealthy manufacturer, and generally for a song, that out of which he really ought to have large compensation. Not only does the inventor thus lose largely the profits of his invention, but also on the other hand, patents really without merit are bolstered up and sustained because, passing into the possession of wealthy manufacturers, others find it cheaper and less annoying to pay an exacted royalty than to contest their validity. So it happens both that the deserving inventor makes nothing out of his invention, and that the unworthy patent is the means of creating a monopoly and charging an unjust burden upon the public.

Is there any remedy for this? The first thing I suggest is to prohibit all expert testimony in patent cases. The patent expert is the great stumbling block in the way of speedy and inexpensive litigation—and I intend by this no disrespect to those gentlemen who are so often called as experts in patent cases, many of whom are of the highest character, and possessed of the most complete scientific knowledge. They are expensive. Every one knows this who has had anything to do with patent litigation. Their testimony supports the party who calls them. Mr. Justice Miller is credited with having said to counsel arguing a patent case before him, "You don't expect me to pay much attention to the testimony of witnesses who swear for either side at $50 a day?" It would be injustice to impugn the integrity of these witnesses, but no party calls a witness as an expert until he has ascertained that such witness looks at the questions in issue in a manner favorable to himself. Every lawyer interviews, as he ought, his witnesses, and he may have to interview many before he finds a gentleman

with the skill of an expert who looks upon the relations of things in a light favorable to his case. And so you read the testimony of the patent expert on one side that there is patentability and infringement, of the one on the other side that there is neither. And after all, the information they furnish and the reasons they give should be a part of the argument of counsel. If his counsel is not sufficiently informed let the client pay for all needed instruction, and not tax the cost of that instruction to the opposing party. Generally speaking, the counsel need no such instruction, and the gentlemen who come to the Supreme Court to argue the important patent cases are sufficiently versed in mechanics and science to explain fully to any judge or court all the intricate questions in relation thereto that may arise in any patent case. It is, I submit, simply an outrage and one working unnecessary delay to put the information they possess, or ought to possess, on paper in the form of testimony from the lips of a patent expert, which testimony is charged up at large figures in the costs of the case. A poor man could carry on a suit if all the expenses of expert testimony were eliminated.

Again, I would make more emphatic the reliance on model and copy. With every bill or complaint charging infringement, in which it was practicable, I would require an accompanying model or copy of the tool, machine, or product, claimed to be within the protection of the patent, and of the tool, machine, or product, charged to be an infringement thereof. Let the defendant be required either to deny the manufacture, sale, or use, of anything similar to that presented by the plaintiff, or else to furnish with his answer a model or copy of that which he does manufacture, sell, or use, and a failure so to do be taken as an admission that he manufactures, sells, or uses that which is filed as his by the plaintiff. Let the litigation proceed, as far as possible, whether in preliminary application for injunction or on final hearing, as a study in object lessons. I do not mean to be understood as claiming that all of patent litigation can be reduced to a mere comparison of models and forms, but I do insist that justice will be more speedily and satisfactorily obtained if the burden of the suit is a comparison of models and not an examination of testimony, written or oral.

Finally, I urge that the patent law be changed so as to render a one-half interest in the patent incapable of alienation. In other words, in order to secure to the inventor and his heirs a reasonable share of the benefit from his invention, and to prevent its being all monopolized by some wealthy purchaser, I would have one-

half the interest preserved to the patentee and his heirs beyond the possibility of alienation. Such a provision would reduce largely all mere speculation in patents, would diminish the amount of litigation, and would certainly tend to secure to the inventor a larger share than he now receives of the pecuniary benefits that flow from his invention.

I submit these suggestions, not claiming that in them I have certainly hewn out a new and better path, but with the strong conviction that unless some radical changes are made in the patent system as it exists to-day it will not be many years before the people rise in their wrath and abolish it altogether. Something must be done to make the litigation more speedy and less expensive, and the system such that the real inventor shall be the party who gets at least a reasonable portion of the profits from his invention.

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