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The JOURNAL takes great pleasure in announcing the appointment to the Editorial Board of the following men from the Class of 1910 L.: Howard Francis Bishop, '07 Yale, Chicago, Ill.; William Ernest Collins, '07 Yale, Livingston, N. J.; Clarence Russell Hall, '07 Yale, Woodstock, Conn.; Charles Edwin Hart, Jr., '07 Yale, New Britain, Conn.; Charles Kenneth Wynne, New Haven, Conn.

The American Bar Association at its meeting in Seattle in August took advanced position on some important matters relating to legal education and admissions to the bar. In the report which Dean Rogers submitted as Chairman of the Association's Committee on Legal Education and Admissions to the Bar at the meeting at Portland, Maine, in 1907, a number of important recommendations were made. The report was not acted upon in 1907 as it had not been printed in full prior to the meeting. It was, therefore, laid over to be considered at the Seattle meeting this year. It accordingly came up for final consideration at Seattle in August last and the recommendations were adopted with the exception of that relating to a uniform law on the subject of law degrees. That particular recommendation Dean Rogers declined to call up this year inas-

much as the minority member of the Committee who had dissented on that particular recommendation, was unable to be present at the meeting.

Among the recommendations thus adopted, attention is called to the following:

That a candidate for admission to the Bar should have an education equivalent at least to that required for graduation from a high school within the state in which the application is made; that the Association is not to be understood as holding the opinion that a high school education is fully adequate to the needs of those who are to practice law, but on the contrary, entertains the opinion that the interests of the profession and of the state will be promoted if all candidates for admission are required to have an education equivalent at least to two years of a college course; that the Association approves a rule requiring candidates for admission to the Bar to study law for three years if graduates of law schools, and for four years if not; that the Association approves a four years' course in case of night law schools; that the Association disproves conferring a law degree by correspondence schools.

DEVELOPMENT OF THE DOCTRINE OF UNFAIR COMPETITION.

Growth is the test of vitality in every living organism and that there should be a gradual development of the principles of law and the powers of the courts is undeniable, but in the case of *Samuel W. Rushmore v. Manhattan Screw and Stamping Works*, decided by the United States Circuit Court of Appeals, July 27, 1908, where the decision was rendered on the authority of previous rulings, we have what seems to be a rather wide extension of the law of development and even a misinterpretation of the cases cited to substantiate the decision.

The complainant, S. W. Rushmore, secured an injunction against the Manhattan Screw and Stamping Works on the grounds of unfair competition in the production and sale of an automobile lamp. He had widely advertised a lamp "Flare Front," insisting particularly upon the advantages of its peculiar shell-shaped construction. The defendant's lamp "Phoebus" having practically the same design, it was the complainant's charge that the defendant was profiting by his advertising and pawning off on the public its lamp as the "Flare Front." The design of the "Flare Front" was not patented by the complainant; the word

"Phoebus," together with the name of its manufacturer, was legibly and clearly stamped upon the lamp of the defendant; and sufficient proof was not advanced to establish that the defendant had ever represented its lamp as that of the complainant. Nevertheless an injunction was granted against the manufacture or sale of defendant's lamp. The judge of the Circuit Court, whose opinion is sustained by the Circuit Court of Appeals, gives the following reason for issuing the injunction: "Assuming that at the present time the defendant is not using the word 'flare-front,' is not selling its product as Rushmore lamps, and is not using in any way either of these words or phrases, the question is whether plaintiff is entitled to be protected from unnecessary imitation of non-functional parts of his well-known lamp. It seems to me that under the cases of *Enterprise Manufacturing Co. v. Landers*, 131 Fed. 240, and *Marvel Co. v. Pearl*, 133 Fed. 160, he is so entitled." A close examination of the authorities cited discloses in the present case a very remarkable development of the doctrine of unfair trade. The following extract from the opinion of the court in *Enterprise Manufacturing Co. v. Landers*, *supra*, shows the wrong done complainant to be much more aggravated than in the present case. "Here on the contrary, they have not only conformed their goods to complainants' in size and general shape, which was to be expected, but also in all minor details of structure—every line and curve being reproduced, and superfluous metal put into the driving wheels to produce a strikingly characteristic effect, while the goods are so dressed with decorations reproduced or closely simulated, with style of lettering and details of ornamentation, that except for the fact that on the one mill is found the complainant's name and on the other the defendants', it would be very difficult to tell them apart. Defendants admitted using parts of mills sold by complainants as patterns wherever it was convenient or profitable to do so." Evidently there is in question here a far closer imitation than was found to exist in the case of the "Phoebus."

In the case of *Marvel Co. v. Pearl*, *supra*, the injunction asked for was denied, the court saying: "In the absence of protection by patent, no person can monopolize or appropriate to the exclusion of others elements of mechanical construction which are essential to the successful practical operation of a manufacture, or which primarily serve to promote its efficiency for the purpose to which it is devoted. Unfair competition is not established by proof of similarity in form, dimensions or general appearance

alone." It does not seem to be questioned that the flaring front design has, in an automobile lamp, decided utility and this is the feature of the "Phoebus" to which censure is primarily attached. Thus the cases cited apparently are not authority for the present ruling.

Independent of these two cases from which an argument in favor of an injunction can be drawn only with difficulty others may be cited which hold positively against the ruling; as for example in the case of *Brown v. Seidel*, 153 Pa. St. 60, the court said: "It is only where there is a manifest intent on the part of one manufacturer to sell his goods as and for the goods of another manufacturer that the aid of equity has been successfully invoked." No such intention was proven on the part of the Manhattan Screw and Stamping Works. While in order to prove fraudulent intent it is not necessary to show that any purchaser was in fact misled, *Von Mumm v. Frash*, 56 Fed. 830, still the absence of evidence to show that any one has been deceived is a circumstance tending to show that no one is likely to be deceived, *Heinz v. Lutz*, 146 Pa. St. 592. This is especially true where the article is expensive.

Automobile lamps are as a rule sold among persons of more than ordinary intelligence and being an expensive article we might naturally expect that care would be used in their selection. The fact that these circumstances must be considered, is clearly demonstrated by the case of *Fischer v. Blank*, 138 N. Y. 244, in which the court said: "The true test, we think, is whether the resemblance is such that it is calculated to deceive, and does in fact, deceive the ordinary buyer making his purchases under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates."

THE EFFECT OF NONUSE ON A PATENTEE'S REMEDY AGAINST
INFRINGEMENT.

Our liberal theory as to patent right is in harmonious accord with the broad spirit of our constitutions and our courts encouraging private enterprise in general. Commerce, manufacture and production have been left as free as possible from governmental surveillance. For in a new country, the chief ambition is growth and the strongest incentive to advance is private property. Not only should the volume of business be improved, but also the methods of operation should constantly be changed for the

better by the adoption of new ingenious devices. To foster invention and discovery to the very limit of the law was the far-sighted aim of the framers of the Constitution, Article I, Sec. 8, which reads: "The Congress shall have power 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." So explicit a grant to patentees could not well be construed, observing the recognized rule that constitutional provisions are to be read according to their obvious intentment, as giving, during the time prescribed, a narrower right than that which inheres in the absolute owners of property in general. That this right is not lost by a failure to use a patent is affirmed in the recent case of *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 28 Sup. Ct., Rep. 748.

Upon this idea of property right, the early decisions and the best modern opinions stand strong. The Supreme Court declared in 1846: "The law has enabled the patentee to hold and deal with his patent the same as in the case of any other description of property belonging to him, and on his death it passes, with the rest of his personal estate to his legal representatives and becomes part of the assets." *Wilson v. Rousseau*, 4 How. 646. See also *Jordan v. Overseers*, 4 O. 295. Since he is in no sense indebted for this right to the law; *Jordan v. Overseers*, *supra*; he consequently may deal with it as he sees fit during his period of monopoly and also afterwards, the sole difference being that in the one case he is protected by the law. In return for this he incurs one single contractual obligation, which is to describe and deliver his secret to the public at the expiration of his period of monopoly. Showing that the public has no right to the benefit of any patent right until then, the United States Supreme Court said in 1896: "That the grant is made upon the reasonable expectation that he will either put his invention to practical use or permit others to avail themselves of it upon reasonable terms is doubtless true. This expectation is based alone on the supposition that the patentee's interest will induce him to use, or let others use his invention. The public has received no other security to enforce such expectation. A suppression can endure but for the life of the patent and the disclosure he has made will enable all to enjoy the fruits of his genius." *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 47 U. S. App. 146.

However clear it may be that this interest of the public is

utterly abstract and without legal significance, considerable error has arisen by imposing on the patentee a legal duty to use his patent, thus making him a quasi-trustee for the public. The influence of this view has been subtle. Peculiar cases have been presented, where the patentee has closeted his patented device, another person of enterprise has applied it to vastly cheapening and improving a certain production with great service to the public so that the contrast has elicited favorable consideration for one who is actually an unmistakable infringer. So strong is public opinion in demanding, above all, public service that the courts frown upon a non-user and uphold one apparently more enterprising who has violated an express law. Thus the court in *Sullivan v. Redfield*, Fed. Cas., No. 13,597, intimated that a certain rule "applies with peculiar force to a case where a patentee has slept upon a naked patent right for a great length of time without carrying it into effect." The same reasoning was used in the decision of a case where a prior patented, but unused invention had been interfered with by a subsequent patent on an exactly similar machine: "The Stonemetz press, though covered by a patent, seems to me a mere disembodied idea, which, whatever its merit, is not here entitled to equitable aid, nor within the spirit of the patent system, which requires diligence in giving to the public the benefit of his invention." *Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co.*, 86 Fed. 331. The most conspicuous case and one in which the fact of non-use constituted the main ground for denying remedy against infringement is *Hoe v. Knap*, 27 Fed. 204: "The question therefore arises whether a court will grant an injunction in favor of an owner of a patent who has not after a reasonable time put it into use, against another who is using it. I think, under a patent which gives a patentee a monopoly, he is bound either to use the patent himself or allow another to use it on reasonable or equitable terms."

None higher than a Circuit Court has ever taken this view. The best jurisdictions have insisted on clinging to the elementary, constitutional idea of absolute right in a patentee. For example: "A man may obtain a patent for an invention and let it lie in the Patent Office without use, and no one else would have the right to use such invention: because it is his property." *Pitts v. Wemple*, 2 Fischer, 10. The reasoning in *Hoe v. Knap*, *supra*, was directly attacked in *Button Fastener Co. v. Specialty Co.*, *supra*. See also: *Mount Morris Electric Light Co. v. Edison Electric Light Co.*, 20 U. S. App. 111.

The patentee should merit the benefit of the doubt in case of failure to use his invention, for there are many conceivable ways of explaining such conduct. Possibly he is waiting to perfect an improvement; may be occupied with another patent of more importance; or he may be without funds.

Whatever the particular circumstances may be, it is the duty of a court to apply clearly expressed rules. The unusual right of the patentee to protection is emphasized by his exceptional position under various acts. In selling his patent he is free from the restrictions of the Sherman Anti-Trust law and therefore may annex the most monopolistic conditions to his sale. *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424. Not even misuse of his patent in some way negatives the presumption that he will serve the public, for he is allowed wide freedom. *Fuller v. Berger*, 120 Fed. 274. Certainly nonuse ought not ever to induce a court to act in contravention of so marked a policy.

THE PRESUMPTION OF UNDUE INFLUENCE IN WILL CASES.

The case of *Lockwood v. Lockwood*, decided by the Supreme Court of Errors of Connecticut, in March, 1908 (80 Conn. 513, 69 Atlantic 8), contains an unusually lucid exposition of the law as to the burden of proof in will cases and the nature of the presumption of undue influence, and a sound and convincing limitation of that presumption.

The rule of the burden of proof in contests as to the probate of a will is complicated, first, by the especial importance given to the subscribing witnesses by the law of wills, secondly, by the normal presumption of sanity, and thirdly, by exceptional presumption of undue influence.

The issues in the ordinary will contest are three: did the testator execute the will in the manner required by law, was he of sound and disposing mind and memory, was he induced to make the will by any fraud, duress or undue influence?

It is evident that, as to the first two of these issues, the burden of proof is upon the proponent of the will; the will cannot be probated until it has been shown to the court that the testator was competent to make a will, and that he did make it in the legal manner. But, the presumption that every man is sane until proof is given to the contrary would relieve the proponent of the necessity of opening the question of mental competency (as the State is relieved of proving the prisoner's sanity in a criminal prosecu-

tion), were it not for the peculiar importance given to the testimony of the subscribing witnesses, who must be called by the proponent, and whose testimony must support the will. If they testify satisfactorily to the execution of the will, and to the testator's competency, the will is supported by the evidence peculiarly relied upon by the law in will matters, and the proponent of the will may rest upon his *prima facie* case. And this required testimony must show the testator's mental competency, as well as his actual execution of the alleged will.

If the subscribing witnesses should deny, or should refuse to affirm, either the due execution of the will, or the testator's soundness of mind, the proponent would have failed to make out the technical *prima facie* case recognized by law, or he would have overthrown the presumption of sanity by the doubt cast upon it by his own witnesses, and it would therefore be necessary for him to support his case, discredited by the hostile evidence of the witnesses especially relied upon by the law, by the testimony of other satisfactory witnesses, before he could safely rest his case.

Even if he has, by the testimony of the subscribing witnesses, made out the legal *prima facie* case, he has shifted to his adversary only the duty of going forward with other testimony; the burden of proof, in its proper sense, still rests upon the proponent of the will as to due execution and mental competency, and at the conclusion of the trial, the court or jury, to sustain the will, must find that a fair preponderance of the evidence is in favor of the will upon those points.

Crowninshield v. Crowninshield, 2 Gray 524, *Thayer's Cases on Evidence*, 100.

As to the issue of undue influence, the burden of proof is upon the opponents of the will; the allegation of undue influence is regarded as one in confession and avoidance, and it is no more necessary for the proponent of the will to offer affirmative evidence of the freedom of the testator from such influence than it would be for one who sought to prove a deed to add to the proof of execution affirmative proof of the absence of fraud or duress.

But here comes in a presumption peculiar to the law of wills, thus stated in the Lockwood case. "In certain cases: where the natural object of the testator's bounty is excluded from participation in his estate, where a stranger supplants children, and the will is in favor of the lawyer drawing and advising as to its provisions, or the guardian having charge of his person and estate,

or of the person occupying a clearly analogous position of trust, there is imposed upon the proponents of the will the obligation of disproving by a clear preponderance of evidence the actual exercise of undue influence by such beneficiaries of the will."

Such facts, therefore, appearing on the face of the will itself, or disclosed by the evidence of the subscribing witnesses, create a presumption of undue influence which the proponents of the will must remove before they can claim to have made a *prima facie* case.

The leading case as to this presumption is *Barry v. Butlin*, 2 *Moore P. C.*, 480, *Thayer's Cases*, 82; and it has often been followed and applied in the American courts.

In the Lockwood case, it appeared that the testatrix was the mother of nine adult children, and that she gave to two of these much more than to the others; it also appeared that one of the favored daughters had been accustomed to attend to business matters for her mother, and to advise her, and that she went with her to the lawyer's office where the will was drawn. Other evidences was given to support and to overthrow the claim of undue influence. The trial judge was asked to charge the jury, and did charge them, that the above facts raised a presumption of undue influence, and that the burden was upon the proponents of the will to remove it by a preponderance of the evidence.

This the Supreme Court held to be erroneous, saying: "There is a broad distinction between the effect of a confidential relation of a legatee to the testator, as suggestive of undue influence, when that legatee is a stranger and when he is a child. In the latter case, both the relation of confidence and some participation in the estate is natural. In *Dale's Appeal*, 57 Conn. 127, we say: 'It is the duty of a son to entitle himself to the confidence of his parents; it is his right to ask with earnestness, restrained within proper limits, for testamentary remembrance.' The language used in that case is applicable to the facts appearing in this."

The ruling in this case seems to be eminently sound. The jury are entitled in every case to have all the facts put before them as to the relations between the testator and the beneficiaries of the will; any evidence of undue influence, any abuse of confidence, they should give its full weight. But the spirit of the modern law of evidence does not favor and ought not to favor creating artificial rules as to the force of evidence, or confusing the minds of jurymen by instructing them to determine the preponderance

of the evidence in any other way than by the exercise of their best reason on all the facts of the case.

If a person of sound mind, in the presence of three witnesses, has executed according to law a will of his property, it ought not to be set aside by a jury unless all the facts have created a preponderant belief in their minds that the will was induced by fraud or undue influence; and any rule of law by which their judgment is to be controlled by a presumption defined by the court ought to be limited to cases clearly of a suspicious and reprehensible character.

E. P.

THE USE OF THE QUO WARRANTO.

The ordinary use of the information in the nature of quo warranto or its statutory substitute, for many of the states have statutes defining it, lies where a person has usurped an office, or franchise, or where once having held such office or franchise he has forfeited it by misuser or nonuser. *Leigh v. State*, 69 Ala., 261. This use of the writ is in every respect a survival of the common law functions which it performed.

In the month of July, 1908, the Supreme Court of Florida handed down an opinion in the suit of the *State of Florida ex rel, W. H. Ellis, Attorney General, v. Gustav Gerbing*, which is of very general interest, as involving the right of the public to take oysters in or on the shores of navigable waters below high water mark. Stated briefly it was a quo warranto proceeding in the Circuit Court by the Attorney General to ascertain by what warrant or authority the defendant had marked and staked off certain portions of the bed of a navigable river in a certain county in Florida, and claimed and usurped the exclusive right to the use, benefit and enjoyment of, natural or maternal oyster beds upon the designated land below high water mark and extending to the channel of said navigable river.

We venture to say that the use of quo warranto to try such a right is a peculiar if not doubtful procedure in this particular case. And it is more remarkable, upon consideration, that the court failed to challenge its use in this specific instance, and did not even allude to the point throughout its opinion.

We have learned that quo warranto lies to try the right to a franchise. In this case we believe it material to know the construction placed by courts upon the word "franchise." A very

clear idea of its meaning may be obtained from the words of Chief Justice Taney, in the case of *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 595, where he said: "For franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state." In *T. & T. Road Co. v. Campbell*, 44 Cal. 89, the court said: "It is a sovereign prerogative, and vests in an individual only by virtue of a legislative grant." So general is this conception of a franchise that it is needless to multiply citations.

We arrive now at what is the decisive question and upon which the propriety of the use of a quo warranto rests. Was the right questioned by the Attorney General a "franchise" within the definition given it by the courts? We think not. There was a statute in the state to which it might be well to refer. In order to develop resources and encourage industries, limited privileges are granted to individuals to plant oysters in the public waters of the state. The statute provides that such rights shall not obstruct or interfere with the navigation of any of the navigable waters of the state, and also provides that all the existing natural or maternal beds in the waters of the state are exempt from the provisions of the act, and that such natural or maternal oyster beds shall remain for the free use of the citizens of this state. *Gen. Stats. of Florida*, 646 to 651. The court has not lost sight of this statute for it refers to it by saying: "But this statute . . . expressly provides that natural or maternal oyster beds in the waters of the state shall remain for the use of the citizens of the state."

Here is a right open to all the citizens and not the subject of legislative grant. It is difficult to reconcile the attitude of the court toward the statute itself where the free use of the beds is expressly reserved to the citizens, and its failure to comment upon the method of proceeding—a procedure which tries the right to franchises. According to the construction placed upon the word "franchise," it is plain, that what is free to the people in general and not the subject of legislative grant, is not a franchise. If it were such, it would mean that no citizen had this right without grant, and the purpose of the statute reserving the free use to the people, would be defeated.

Even eliminating the statute, it is not easy to see that a franchise was involved. The defendant claimed the exclusive right to lands held in trust for the people by the state, so the court found. These lands could not be entirely alienated, but the state could grant limited privileges to him without at the same time giving him a franchise. As fishing rights are in the public, unless restricted by statute, the grant of a privilege to the defendant would not have been clothed with the attributes of a franchise. Even if the grant to him were exclusive, it would not be a franchise, for the right could be exercised "without the express permission of the sovereign power" and a franchise in its true sense is lacking.

It seems apparent then, that error was committed in permitting such an action for accomplishing the end desired. Other methods might have been employed and when that is true, the law says that quo warranto will not lie, for it is an extraordinary legal remedy, and where there is other plain and adequate remedy, that remedy must be used. *Tarbox v. Sughrue*, 36 Kan. 228.

The facts of the case show that the defendant was exceeding any legal rights he may have had, and it follows that another remedy must be found. Inasmuch as the necessary franchise was wanting, which would warrant the procedure adopted by the Attorney General, we believe the end could have been reached properly, by an action of trespass, a criminal information, or by an injunction from a court of equity.