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Book Reviews

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Practical impartiality to litigants is obtained where the jury is not cognizant of the judicial effect of its answers. North Carolina has gone far toward achieving this end by limiting the judge and jury to their respective spheres—the judge to the law and the jury to the facts.[15] To characterize a verdict inconsistent which only finds a fact unnecessary to the final disposition of the litigation, would seem to defeat the objective of this progressive procedure. For then the attention of the jury is called to the legal effect of their findings by the re-instruction, leaving the stage set for prejudice and partiality.

ERNEST W. EWBANK, JR.

BOOK REVIEWS

Patent Rights for Scientific Discoveries, by C. J. Hamson. Bobbs-Merrill Co., Indianapolis, 1930. $5.00.

Charles C. Linthicum, patent counsel for the United States Steel Corporation, died in 1916. In his honor, friends established at Northwestern University the Linthicum Foundation, the income to be applicable to "cultivating research, study and instruction in the fields of law of patents, trademarks, copyright, or other topics of the law involving the development of trade, industry and commerce".

In 1927, the Foundation Committee announced "Scientific Property" as the subject for 1929. Mr. Hamson's book is the monograph which won the award and, although its title is "Patent Rights for Scientific Discoveries," it is an exposition on the subject which, under the name "Scientific Property", for ten years or more has been widely discussed in Europe, but which until very recently has received little attention in the United States. It is a very able and interesting piece of work.

Scientific property briefly is this. It is a new variety of intellectual property, not now recognized by the laws of any country, which aims to compensate scientific men who discover new facts or principles by requiring those who make industrial uses of these facts or principles to pay a royalty to the scientist who discovered them,—who furnished, if I may use the term, the intellectual raw material from which industrial property may afterwards be developed.

When stated in general terms, this proposal sounds attractive and it is one of those metaphysical things which it is almost impossible to resist the temptation to debate. Its purposes are of course admirable. Everyone desires scientific men to be adequately compensated.

[15] Green, *A New Development in Jury Trials* (1927) 13 A. B. A. J. 715.

The proponents of scientific property offer it as the means by which compensation is to be paid, and much controversy has developed over the question.

There is no doubt that scientific discoveries are valuable, and are useful to industry. It is, therefore, proposed to protect by law this valuable thing which now receives no protection. Mr. Hamson states the proposal thus:

"The object of scientific property is to protect it by giving the scientist some rights over the idea, the corpus of his discovery. It is *not* suggested that he should have the sole right of reproduction, as in the case of copyright, nor that he should obtain a monopoly, as in the case of patent: both such rights would be either impossible or entirely undesirable. It *is* suggested that he should have a *legal right to demand remuneration* from such persons as, or more exactly from a certain class of those persons who, make use and profit of his discovery."

There can be no dispute that scientific property is worthy of protection and that, in theory at least, it should be protected if scientists desire it, but always the question arises how it is to be accomplished. There is no more natural impossibility in scientific property than in the protection given to inventions by patents: a discovery is as definite a thing as an invention, and does not differ essentially from it; it is general, whereas an invention is particular. A discovery states the existence of a fact or truth; an invention, according to the conventional conception consists of the particular adaptation of a fact or truth for a definite object.

It is commonly said that a discovery is the finding of something already in existence but theretofore unknown—to use Mr. Justice Buckley's phrase, a lifting of the veil disclosing something which before had been unseen or dimly seen. An invention on the other hand is said to be the creation of some thing which did not previously exist. I prefer to leave to the psychologists the discussion of the soundness of this distinction. Perhaps discussion will get nowhere; maybe it will be as useless as an effort to determine which came first, the chicken or the egg; but as the English have a way of saying, "merely as another bone for the pot", what *is* the essential difference between the discovery of a principle or fact of science, hitherto unknown or only suspected to exist, and the discovery—or invention, if you please—of a machine, the well known elements of which may be found to act in a certain way under certain condi-

tions to produce a hitherto unknown result. The elements under the same conditions always would have acted in that way and produced the same result. The thing—whether invention or discovery—was always there, just as America existed in 1491 as well as in 1492. It is all pretty esoteric.

There are no logical objections to scientific property. There are practical difficulties, of course, but so there are with respect to every legal right. The objections which have been made to the legal recognition of scientific property are many, only one of which merits serious consideration, and that is the difficulty of devising a workable scheme.

Most of the objections which have been made are from persons suffering from Neophobia. Every proposal to enlarge the field of intellectual or industrial property rights has been met with precisely the same objections that are now urged against this.

When literary property was being discussed, Lord Camden spoke as follows:

"Glory is the reward of science, and those who deserve it, scorn all meaner views: I speak not of the scribblers for bread, who teaze the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of a letter press. When the bookseller offered Milton five pound for his Paradise Lost, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it. Some authors are as careless about profit as others are rapacious of it, and what a situation would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition. All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are." Cobbett's Parliamentary History of England, Vol. 17, p. 953. Feb. 4, 1774.

Of course, this sort of thing is shocking to modern ears and could only be appropriately characterized in terms which would be even more shocking.

When it was first proposed to protect trade marks, Lord Hardwicke thought the idea was nonsense, saying:

"Every particular trader has some particular mark or stamp; but I do not know of any instance of granting an injunction here to restrain one trader from using the same mark with another, and I think it would be of mischievous consequence to do it." (Blanchard v. Hill, 2 Atk. 484. December 18, 1742.)

And when what is now an almost commonplace form of unfair trading which the courts now invariably stop, came before Mr. Justice Bradley, he said to permit such a suit "would open a Pandora's box of vexatious litigation" (New York & R. Cement Co. v. Coplay Cement Co., 44 Fed. 277-8).

So the objection that the notion is new is not impressive, but the practicality of the plans proposed raise questions of great difficulty. There is a grasp of the problem, a clarity and vigor of thought, and much ingenuity in the solution Mr. Hamson proposes. It is based on English law and is embodied in a draft statute for the United Kingdom. It has the great merit of being concrete and hence capable of being discussed with the realities in mind, and as far as I can see there is no reason to suppose that it will not work.

In England, where there is no limit on the power of Parliament to legislate, the enactment of such a statute, if enough public sentiment should be aroused to demand it, would furnish proof of the pudding.

This leads to a few suggestions concerning the possibility of protecting scientific property in the United States under the constitutional limitations on the power of Congress. Congress is given 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."

If it is thought desirable to extend the protection of intellectual property in this direction, it seems as if immediate progress could be made in this country toward the protection of scientific property if Congress should exhaust the grant of power conferred by the Constitutional provision dealing with discoveries as it did twenty years ago with respect to the writings of authors. The Copyright Act, following the language of the Constitution, embraces in its scope all the writings of an author. The Patent Act, on the contrary, does not protect all the discoveries of an author or inventor as the

Constitution permits, but limits the subject matter of patents to the much-restricted field of new and useful arts, machines and compositions of matter, and certain kinds of plants. A few slight amendments to the existing patent acts to make them coextensive with the Constitutional grant would exhaust the Congressional power to legislate. It would then be possible to test the question concretely and find out what can be done, and if the cases which say that discovery means only invention are any longer law.

If it should be thought inadvisable to confer the right of exclusion upon discoverers of new facts or principles, a right to remuneration could be substituted or compulsory license similar to the provisions of the Copyright Act dealing with the mechanical reproduction of copyright music.

It is time, I should think, to revise somewhat our ideas on the subject of authorship and invention. Authorship is not limited to literature; neither is it restricted to the creation of things never known before. It does not exclude a portrait painter, a sculptor or a photographer.

The purpose of the Constitutional provision is stated to be "to promote the progress of science and useful arts". The purpose should keep pace with progress. If the telegraph or air mail can be held to be a post road, and a photographic portrait a writing, I see no difficulty in considering a discovery in pure science an invention, or a writing promoting the progress of science and useful arts, and its discoverer, if not an inventor, at least an author. This may seem heresy to a practitioner of patent law, but it does not shock anyone used to considering authorship.

I am unable to find anything in the Constitution requiring novelty in the sense of creation of something never before existing. This notion is the result of the language of the patent statutes and decisions interpreting them, both of which may be changed without inviting destruction, and it may be suggested that when the Constitution was adopted the words "discovery" and "invention" were very nearly, if not entirely, synonymous.

If discoveries of new facts or principles are not embraced in the Constitutional grant of power to Congress to protect authors and inventors, then, short of Constitutional amendment, speculation as to the method of protection is idle. The treaty making power has remote possibilities, but the obvious source of the right of Congress to legislate is elsewhere. The simple procedure is to amend the Patent Act

to exhaust the Constitutional power and see how far, as a matter of construction, the courts are willing to go. If the demand for protection of scientific property is insufficient to warrant this step which would raise no Constitutional doubts, then manifestly it is not strong enough to justify legislation dealing separately with scientific property as a new and different right.

If the American advocates of scientific property are interested in practical results, here perhaps is a way of getting a very considerable measure of protection for rights which now are unprotected without undue delay and without head-on collision with the Constitution. If, on the other hand, they prefer metaphysics and leisurely consideration of the occult, the present interesting discussions furnish an unequaled opportunity.

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Suretyship, by Herschel W. Arant. St. Paul, Minn.: West Publishing Co., 1931. Pp. XII, 471. $5.00.

This book merits mild praise and faint damns. To say that it is the best of the several short precis on the subject is probably true but scant encomium. One feels it should be better than that to justify its existence.

In a foreword the author expresses an understandable dissatisfaction with the decisions which make the surety's defenses depend upon the technical question of whether his right of subrogation has been impaired. As a substitute he suggests that so long as the creditor's "relations with the principal debtor accord with ordinary business practices," the surety should be bound. He adds that, if no investigation or proof discloses what such "ordinary business practice" is, the court or writer is free to speculate on the matter. If the author really means what he says such a frank avowal of armchair realism is refreshing but astonishing. It seems an obvious paradox to talk of an "ordinary business practice" which can not be discovered either through investigation by a writer or proof in court. It might be added that even on this expressed test it should be the "ordinary business practice" of a creditor who has a surety. However, the truth seems to be that the author didn't mean what he said but rather that a surety is entitled only to have a creditor act with ordinary business prudence—quite a different thing and one which is a legitimate subject for speculation. Of course, if an "ordinary business prac-

tice" can be shown and the creditor's conduct is in accord with it, ordinarily that would be living up to the criterion (e.g., page 199). On the other hand, even though no "ordinary business practice" can be established and, further, although it cannot be assumed reasonably that the surety contemplated that the creditor would do the particular act he did, if that act satisfies the standard the surety should not be discharged (e.g., section 54). Aside from its vagueness (and the author has a pretty good answer to such an objection, page 192) there is little to quarrel with in such an approach. And with most of the author's judgments in particular cases one can agree or at least admit that they do not deviate far from one's own ideas of good sense. Furthermore, in his discussion of the surety's defenses, the author, before advancing his own solutions, states fairly what the cases actually hold and the various rationales of them that have been advanced.

In the first chapter the distinctions between suretyship, guaranty, warranty, indorsement, indemnity, primary and secondary obligation, etc., are well defined. When lawyers, courts and writers alike use these various terms without any nice discrimination, often interchangeably, it is probably hopeless to expect the author's neat labels to win general adoption. And between suretyship and guaranty, at least, it is for the most part, unnecessary to distinguish. Nevertheless it is very desirable to have the quite distinct factual and, sometimes, legal situations to which the various terms are indiscriminately applied clearly differentiated. The author does a careful job of this.

The author's treatment of the Statute of Frauds is probably the best chapter in the book. His general thesis, which is, that no matter what test they may avow, what the courts actually require is corroboration of the creditor's story, succeeds in bringing some order out of the most chaotic portions of the law. Even though a few of the cases have to be reconciled upon reasoning which seems more ingenious than convincing, one feels that the fault lies not in the author's tenets but rather in aberrations on the part of some judges.

Although no thorough check was made, references to periodical literature seemed quite complete. The book is well printed and bound.

The most explosive of the damns is caused by an exasperatingly persistent use of a Literary Digest, shears and pastepot method of compiling large portions of the book. Surely, by a little extra labor, the diverging views of courts could have been set forth more tersely and lucidly than by constantly culling excerpts from opinions of

judges, many of whom had never learned the art of condensation. A few milder damns are evoked by the good many lapses in simple logic (e.g., at random, the complete non-sequitur on page 158 and the reasoning in footnote 12, page 323); by the inclusion of rudimentary contract law in no way peculiar to suretyship in chapters 2 and 3; and by the rather inadequate treatment of the right of subrogation, a treatment which fails to disclose any penetrating insight into its basis. One scarcely hopes to find the illumination of literary charm in a Hornbook so there is no need to comment morosely on its absence.

The insertion of twenty-five pages of forms in so short a book might be questioned, but they do emphasize the heterogeneous collection of transactions to the solution of which the courts have attempted to apply an integrated and symmetrical system of rules worked out with the non-commercial, obliging-friend surety as the type.

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Strike Injunctions in the New South, by Duane McCracken. University of North Carolina Press. Chapel Hill, N. C., 200 pages. $3.00.

The problem of labor and the law is one which of late has been much in the public eye. In the last few years, the South has been the scene of several grave labor disputes in which the injunctive process has been invoked by the employers. Dr. McCracken, who is a professor of economics at Guilford College, N. C., became interested in the question of this weapon of the economic war, both as to its legal basis, immediate effect, and social consequences. In a sound scholarly way, he set to work to gather the available factual material for a dispassionate presentation of the problem. This present volume represents the fruit of his enterprise.

In almost every strike, a stage is quickly reached at which employers believe that there is imminent danger that those who are striking against them will resort to acts of force, violence and intimidation which will cause "irreparable injury" to the firm affected. Thereupon the employers seek injunction, not to obtain redress for an injury already committed, but to prevent the commission of threatened harmful and illegal acts. In the view of many, the process acts promptly, "reaches everybody who may be involved, and it particu-

larly reaches those persons who stand behind the scenes and direct the activities which result in the criminal acts."

The management of a business affected by a strike usually seeks to continue its operation by replacing those who have quit work with others anxious and willing to work. Owners and managers deem themselves the owners of the particular tools of production in their establishment, and feel it their right to hire workers to use those tools. If certain workers thus hired refuse longer to work under existing terms, the owners feel that they have the thorough right to fill these men's places with others willing to labor upon these terms.

But the strikers approach the matter from a different standpoint. They may not deny in so much words their employer's right to employ whom he pleases, but they unmistakably feel that they have a right to their jobs, even if they are unwilling to perform their tasks, and that no one else has a right to come in and replace them. Accordingly, it is the customary technique of the strike for those engaged in it to seek to prevent the enterprise operating by other labor. Hence strikers establish picket lines, and, in theory, seek peaceably to persuade strike-breakers to abandon their jobs, keep the mill shut down, and thus, because of its inability to secure any other labor than that which the strikers could provide, force it to come to terms.

This phrase "peaceable picketing" is a pretty one, but it is the general conclusion of strike observers that there is no such thing. The process of "persuasion" almost always advances from peaceable discussions to the employment of threats, intimidations, and often physical violence. Thus the technique of picketing seems inevitably to lead to aggression. When these overt acts occur, or where they seem about to occur, the management frequently seeks protection from the court, by application for a restraining order.

These injunction applications are *ex parte* statements of fact, but, even so, temporary injunctions are almost immediately issued, restraining strikers from the commission of types of acts complained of. Date for hearing on the facts, to determine whether the injunction shall be set aside, modified, or made permanent, is also set. In the meanwhile, however, the temporary injunction is in effect, and often its terms are so broad as to be all-inclusive. For example, the injunction at Elizabethton prohibited the strikers from "entering upon the premises of the rayon mills, assembling in groups around gates, or fences, or property lines, molesting or damaging complainant's property; threatening complainant's plants, officers, employees, or those

seeking employment, and picketing of all kind. The temporary injunction also enjoined the defendants "from unlawfully in any way interfering with complainants, their employees, or those seeking employment, in the proper operation of their business, or the use and enjoyment of its plants, property and business, and all rights, benefits and privileges arising therefrom, incident thereto, etc."

Labor's basic objection to these injunctions is that they are issued on *ex parte* presentation, that they are so broad in their terms that almost any type of peaceable activity in behalf of the strikers can be construed as being prohibited, and that violations of them are punishable through the contempt of court process, involving trial by judge rather than by jury. Of course, the basic labor objection is because injunctions are believed to be an effective employers' weapon in winning strikes.

Dr. McCracken's book describes these variant attitudes faithfully and effectively, and is a valuable contribution to our knowledge of the subject. So far as methods of writing are concerned, it is strictly objective in its approach. Its most interesting feature is the author's analyses of five specific labor injunctions in Southern States. In each case, he has presented a background of the origin of the strike, the story of the alleged grievances for which the injunctive remedy was sought, a description of the form of the injunction, and its effect. The cases cited grew out of two North Carolina printers' strikes and the more famous textile disputes at Marion, N. C., Elizabethtown, Tenn., and Danville, Va. In each instance, Dr. McCracken made investigations on the spot. His interest being that of the economist rather than the lawyer, he gave special attention to the effects of the injunction, both upon the strike itself and upon the general public consciousness.

His conclusion is that the injunctions had little effect in settling the strike controversies one way or another. In four of the five cases studied, he reported a general agreement among persons interviewed, representing both sides of the controversy, that the injunctions had had practically no effect in aiding the management to break the strike. In each of the cases, the issuance of the injunction seemed to have produced not respect but disrespect of and contempt for the general legal system on the part of those who were being enjoined. From Dr. McCracken's study, one gains the distinct impression that, whatever may be the legal propriety of the injunction as a remedy, its