1891

Property Rights in Patents

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T H E S I S

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by

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I n t r o d u c t i o n.

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Patents are so called by abbreviation for letters patent. In respect to inventions, a patent is a grant by the United States, of the exclusive privilege of making, using and vending, and authorizing others to make, use and vend, an invention. Patents are a monopoly, but they are not an odious monopoly. The whole community has an interest in this so called monopoly, since the greater perfection to which they are brought, the greater will be the amount of necessaries, conveniences, comforts, luxuries and amusements, within reach of every one, at the same expense. A general who has achieved a great victory, is entitled to a reward. He is considered a benefactor to his country, and as such

is entitled to a reward. So is the inventor a benefactor to his country and he is equally entitled to a reward. But this reward is not of the kind that makes the inventor feel as if he were receiving alms from the people. It has very truly recently been said, that a United States patent is a contract. The parties to it are the inventor on the one side and the people on the other. A patent therefore does not flow from the community, as might a pension or a medal. It belongs to the inventor by right. To be sure, this is not a natural right, for the inventor has not independently of positive laws, any exclusive property in his invention, any longer than he keeps it secret. Thos. Jefferson remarks upon the subject of patent rights : "It has been pretended by some (and in England especially) that inventors have a

natural and exclusive right to their inventions ; and not merely for their own lives, but inheritable to their heirs; and while it is a moot question, whether the origin of any kind of property is derived from nature at all, it would be singular to admit a natural and even an hereditary right to inventions. Stable ownership is the gift of social law, and is given late in the progress of society; it would be curious then if an idea, the fugitive fermentation of an individual brain, could of natural right be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea; which an individual may exclusively possess as long as he keeps it to himself, but the moment it is divulged, it forces itself

into the possession of every one, and the receiver cannot dispossess himself of it. He who receives an idea from me receives instruction himself without lessening mine ; as he who lights his taper at mine receives light without darkening me. That ideas should freely spread from one to another over the globe for the moral and mutual instruction of man and improvement of his conditions, seems to have been designed by nature when she made them, like fire expansible over all space without lessening their density in any point ; and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then, cannot in nature be a subject of property." Thus we see that property rights which an inventor has in his patent are not natural rights, but such rights as society

has given him for a stipulated time, in consideration of the benefits he has conferred on society. No inventor has any special right to his invention at common law. (Brown v. Duchesne, 19 Howard 183.) The patent laws are authorized by that article in the Constitution of the United States which provides that 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 writings and discoveries. The power thus granted is confined within the limits of the United States.

The right of property which an inventor has in his invention, and his right to its exclusive use, is derived altogether from these statutory provisions. Congress passed in 1790 the first federal statute on the subject of patents, (1 Statutes at Large, Ch. 7, p. 109.)

and provided therein that the exclusive right should be secured to the respective inventors by means of a written grant from the United States, called letters patent.

The patent laws of the United States, although resting solely on the provision in the Constitution giving power to Congress to enact patent laws, are undoubtedly traceable to the English law as the origin of the patent law. Before the Statute of Monopolies which was passed during the reign of James I, in the year 1624, the Crown could grant monopolies to any of its subjects for the purpose of exclusively trading in certain articles, making or using the same ; but by this Statute of Monopolies, all past monopolies were abolished, and the power to grant them in the future was denied the Crown, except in cases where such grants had been or should be made to the

inventors of new manufactures, conferring upon them the exclusive privilege of practicing such inventions for a limited period of time.

During the colonial period of our country, we find that patents were granted to the colonists by the crown for inventions, and also after the colonies in America became States, we find the States granting patents to the subjects. Therefore, the framers of the Constitution acted on the light of experience when they put the clause in the Constitution relating to patents. Thus we have had a short glimpse here and there at the early stages relating to patents.

It is not my purpose to give a history of the law of patents, but to more particularly look into the property rights which are secured to the inventor by his contract with the government, called letters patent.

Rights secured by Patents are Property.

Inventions secured by letters patent are property in the holder of the patent, and as such, are as much entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or the exclusive right is granted. (Seymour v. Osborn, 11 Wall. 533.) A patent for an invention is as much property as a patent for land. The right rests on the same foundation, and is surrounded and protected by the same sanctions. Neither an individual nor the public can trench upon or appropriate that property in an invention which belongs to the patentee. (94 U. S. 96 Consolidated Fruit Jar Co. v.Wight ; Cammeger v. Newton, 94 U. S. 226 ; James v. Campbell, 104 U. S. 357.)

By the above cited cases we see that the privileges granted by letters patent are property of some kind ;

now what kind of property ? Williams on Personal Property says that "the priviliges granted by letters patent are therefore plainly an instance of an incorporal kind of personal property, different in its nature from a mere chose in action , which never has been assignable at law." Property in a patented invention has a dual nature ; first as applied to the property in the invention itself. A man has an absolute right to make his invention, sell and use the same, no matter whether he has it patented or not ; provided he does not infringe on the rights of some previous inventor. The second kind of property secured by letters patent is what some writers call the monopoly ; or the power given by the contract with the government to the inventor to prevent others from making, using and vending without the invent-

or's permission, the invention. Hence in every patented invention there are two objects capable of alienation,-- the invention or the right to make use and vend the patented instrument, machine, art. etc., and the right to prohibit others from practicing the invention, and to obtain redress for the forbidden making, use and sale of the invention.

The grant of letters patent creates a legal estate of a peculiar nature ; it has many of the incidents of other legal estates, and among these are equitable estates or interests which may arise either by contract or by operation of law. By the act of Congress passed in the year 1870, (See Statutes at Large, p 198,) entitled "An act to revise, consolidate and amend the statutes relating to patents and copyrights," it is enacted by the

twenty-fourth section, that " any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvement thereof, not known or used by others in this country, and not patented, or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may upon payment of the duty required by law, and other due proceedings had, obtain a patent." The rights secured by the inventor are exclusive as to individuals and the government. (Cammeger v. Newton, 94 U. S., 234.) He has the sole power to make, use and vend the same within the United States for a term of seventeen years.

The alienation of the rights to make, use or sell the invention may be made either separately or together. The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee. (Adams v. Burke, 17 Wall. 456.) He may transfer them before or after the patent is granted, for the sale of the patented device and the right to use it, do not convey the right to prohibit others from using, making, etc. ; that right is given the inventor by the letters patent, and before he obtains the letters patent he has only a right in the invention and not in the monopoly. This monopoly can also be transferred by the patentee, but it is subject to the statutory rules of law. Thus it is indivisible, except as to the territorial area over which it

may be exercised. But as the inventor has an inchoate right to the exclusive use of his invention before letters patent are granted, he may transfer this right even before letters patent are issued, but not until the patent issues is his a perfect and absolute right.

Now, the monopoly granted to the patentee is for one entire thing ; it is the exclusive right of making, using, and vending to others to be used, the invention. The monopoly did not exist at common law; it is created by the acts of Congress; and it is provided by those acts, that the patentee may assign his whole interest, or an undivided part thereof. Courts hold that anything short of this is not an assignment. "For it was obviously not the intention of the legislature to permit several monopolies to be made out of one, and divided

among different persons within the same limits. Such a division would lead to fraudulent impositions upon persons who desired to purchase the use of the improvement; and would subject a party who, under a mistake as to his rights, used the invention without authority, to be harassed by a multiplicity of suits instead of one, and to successive recoveries of damages by different persons holding different portions of the patent right in the same place." (Gayler v. Wilder 10 How. at p.468). It may be vested in one owner as to one section of the country and in a different owner as to another, but wherever it exists it must be as a whole. This power of assignment has been so construed by the courts as to confine it to the transfer of an entire patent, an undivided part thereof or the entire interest of the

patentee or undivided part thereof within and throughout a certain specified portion of the United States. (Littlefield v. Perry 2 Wall 219.)

C l a s s i f i c a t i o n.

Mr. Walker in his work on patents Chap. XI. says, "titles to patent rights are capable of two independent classifications. One relates to the nature of title ; and the other relates to the methods by which title may be acquired. In the first of these aspects, titles are divisible into those which are purely legal, those which are purely equitable, and those which are both legal and equitable. In the second aspect, they are divisible into these : 1. By occupancy. 2. By assignment. 3. By grant. 4. By creditor's bill. 5. By bankruptcy. 6. By death. Titles which are both legal

and equitable may be acquired in either of these methods. Titles which are purely equitable may be acquired by either except the first ; and those which are purely legal may be transferred by either, except the first, fourth and fifth." Mr. Robinson in his work in his chapter on the transfer of patents while calling attention to the classes into which Walker divides titles to patents, makes two classes : first, assignment and grant; and second, license. The first class transfers both the invention and the monopoly. We prefer Mr. Walker's classification for it relates to all methods by which titles in patents may be acquired, while Mr. Robinson's classification deals only with rights acquired from the patentee by his free consent.

Title by Occupancy.

To take the classes up in the order given, we have first, title by occupancy. Title by occupancy is that title to a patent, which a person may acquire by inventing any new process, machine, manufacture or composition of matter. The inventor has before he obtains his patent, the right to make use of and sell his invention, he has an inchoate right to the exclusive use, which he may perfect and make absolute. (Gayler v. Gilder, 10 How. 493 ; Hendrie v. Sayles, 98 U. S. 551.) An assignment may be made of this inchoate right to the monopoly and the property created by his inventive act, and this before the patent issues. If it is an assignment of the whole interest of the inventor the patent will issue in the name of the assignee, and this conveyance transfers

to the assignee both the legal and equitable title to the patented invention. A legal title does not exist in any one until the patent issues. (Pontiac Co. v. Merino Shoe Co., 31 Fed. Rep., 286.) It is necessary to have the assignment recorded in the Patent Office as prescribed by statutes as well as all assignments made after the issuing of the patent.

Title by Assignment.

An assignment is an instrument in writing, conveying the whole interest in the entire patent, or an undivided part thereof. Or perhaps a better definition is the one given by Mr. Robinson, "An assignment is a transfer of the entire interest in a patented invention, or an undivided portion of such interest, as to every section of the United States." An assignment must convey to the

assignee all, or an undivided part of all, the rights which were before vested in the assignor, or as is more often the case, in the original patentee. The assignment puts the assignee in the same position as the patentee held before assignment, if it is an assignment of the whole interest, but if it is only an undivided part of the whole interest, the assignee is placed upon equal footing with the assignor ; it makes them joint owners of the patent. No particular form of assignment is necessary, but by section 4898 of the Revised Statutes of United States it is provided that," every patent or any interest therein shall be assignable in law, by an instrument in writing ; and the patentee or his assigns or legal representatives may, in like manner, grant and convey an exclusive right under the patent to the whole or any specified part of the United States. An assign-

ment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof." The instrument must be signed by the assignors, otherwise it will not convey the legal title. It must also contain words indicating an intention to assign both the invention and the monopoly or an interest therein. It is well decided by great weight of authority that an equitable interest or title may be assigned by parol agreement. The section of the Revised Statutes above quoted applies only to the legal title ; any contract may confer a beneficial interest in a patent right, as between the parties to the contract, where the rights of innocent purchasers do not arise. (Burr v. De La Vergne 102 N. Y. 422; Whitney v. Burr, 115 Ill. 289.) The

legal and equitable titles may vest in different owners; thus a very frequent case is where an inventor assigns his invention before he obtains his letters patent, and the patent for some reason issues in his own name, the legal title vests in the inventor and the equitable title in the assignee ; in this case the courts of equity hold the holder of the legal title as trustee for the owner of the equitable title, and will compel him to do whatever is required to protect the interest of the owner of the equitable title.

As we have seen, the law requires that all patents that are assigned must have such assignment recorded in the Patent Office within three months after the date of execution. This is required for the protection of subsequent purchasers. In order to guard against an out-

standing title of over three months duration, the purchaser need only look to the records of the Patent Office; within that time an unrecorded prior assignment would prevail, hence he must protect himself the best he can. It is not necessary to render an assignment valid as between the assignor and those claiming under him that the assignment must be recorded, also as between assignees and subsequent purchasers with notice it is not necessary that the assignment be recorded. The whole object of the law as regards the recording of assignments is to protect bona fide purchasers without notice of the prior assignments of the rights under the patents. (Tainbull v. Weir Plow Co., Myers Fed. Dec. Vol. 26, and cases cited in note.)

An assignment can be made by any one owning an in-

terest both in the invention and in the monopoly; at first this rests in the patentee; upon his death the interest passes to his executor or administrator for his heirs or devisees. An assignee of a patent has full power to assign all his rights, title and interest in the patent. It is well settled that married women and infants may assign their respective interests in patents. If an infant wishes to assign his patent it must be done by guardian. The laws of Congress give a right to any person to obtain a patent, whether sui juris or under disability, and to the assigns of the inventor, (Rev. St. 4886, 4895.), and provide that the interests are assignable by an instrument in writing. In the case of Tetter v. Newhall, 17 Fed. Rep., Judge Wheeler says: "A married woman, an infant, or a person under guardian-

ship, might be an inventor, or the assignee of an inventor, of a patented invention. It would seem that, when such, the right to the patent would vest in them ; and that, when vested in them as patentees or assignees, all that Congress has required is that, if they would assign, the assignment must be in writing, so as to be recorded ; but that the ability to make the instrument, or the aids to the disability, must be found in the laws of the States where all such rights are regulated." An assignment by an administrator is a valid assignment. (Bradley v. Dull, 19 Fed. Rep. 913.)

Owing to the peculiar wording of the Statutes there is no way provided for the assignment of the patent save by the voluntary act of its real owner. The ownership of a patented invention cannot be seized and sold on execution by a sheriff like a personal chattel. These

incorporal rights do not exist in any particular State or district ; they are co-extensive with the United States. There is nothing in these rights to give them locality, and as the acts of Congress do not subject them to the process of courts having jurisdiction limited by the boundaries of States and districts ; it is impossible to levy on such rights. (Stevens v. Gladding, 17 How. 604 ; Carver v. Peck, 131 Mass. 291.) Neither can a court of equity or any other court, transfer the title vested by a patent unless it gets the consent of the owner ; but a court of equity may compel an owner to transfer the title by treating the equitable rights as vesting in the creditors. As assignment creates an implied warranty of title, it is important to look closely at the language of the assignment ; an assignment of "all

rights" in the patented invention warrants a perfect title. If the title is not perfect when the words"all rights" are used the assignee has a right of action against the assignor on the implied warranty, or the transfer may be treated void. Whereas, if the words in the assignment are "all my rights" , this implies no warranty of title, but merely transfers to the assignee the same rights which the assignor had in the invention. Where a man assigns all the rights which were conveyed to him by letters patent, the meaning is that the assignment takes with it everything that the patent conveyed. It is certainly different from an assignment which declares merely that he assigns all the interest which he, at the time he makes the assignment, has in the letters patent. (Tainbull v. Weir, Plow Co. Myers Fed. Dec. Vol. 25.) There is no implied warranty in an assign-

ment that the patent is a valid one, but this warranty may be put in the assignment by express words or words which the courts have construed to be a warranty of validity. An agreement to protect the sales of a vendee from suits for infringements on other patents is a warranty that the invention does not infringe other inventions. (Croninger v. Paige 48 Wis. 229.)

W a r r a n t i e s.

Warranties are either expressed or implied; expressed warranties are those which are put in the instrument of assignment in expressed terms ; warranties are implied from the assignment of the invention for a valuable consideration as to the title to the patented invention and the right to assign the same according to the terms of the assignment. An assignment of the entire interest

of the assignee revokes all his rights and also all licenses which can possibly be revoked. An assignment of an undivided interest, makes the assignee and assignor joint-owners, or tenants in common. There seemed to be a doubt in the mind of the text writers and the judges as to whether such mutual ownership in the patent constitutes tenancy in common or joint tenancy. But it seems that it is now settled that joint ownership in patents is tenancy in common. Judge Boardman in the case of DeWitt v. The Elmira Nobles Manufacturing Co., 5 Hun. 301, speaking of joint-owners in a patent, says: "Beyond doubt they are tenants in common, each owning the undivided half. Each as an incident of his ownership has the right of use of the patent, or to manufacture under it." This case was affirmed by the N. Y.

Ct. of Appeals, see 66 N. Y. 459 ; also the case of Dunham v. Indianapolis & St. Louis R. Co. 7 Bissell ; Myers Fed. Dec. Vol. 25, p. 438. After a person has assigned his patented invention he is not allowed to deny the validity of the patents assigned, or his own title to the interests which he has transferred ; and further a patentee cannot sell his rights to another and then buy or obtain control of an older patent, and through such older patent dispossess his assign of the full benefit of what he purchased. (20 Fed. Rep. 835; 21 Fed. Rep. 573.) An assignee is estopped from denying the validity of the patent and of the title conferred upon him by the assignor, if he has received profits under it. Even in the case of fraud on the part of the assignor as in the case of Shaw v. Soule, 20 Fed. Rep. 790, the assignee is liable for royalties and cannot set up the invalidity of the

patent. In that case an inventor wishing to assign and receive royalties upon a patent, mentioned certain features in the patent, without saying that a third party had a patent covering the same. The assignment was made and the assignee made profits out of the patent ; it was held he was bound to pay the royalties.

Assignments may be made upon condition and if so made this will leave in the assignor a reversionary interest ; also it may be made for a term of years less than the time for which the patent runs ; also in this case there is an interest to result to the assignor. So long as the conditions of a conditional assignment are not fulfilled the assignor has a reversionary interest. And these interests he can protect either in equity or in law according to the facts of the case. (Otis Bros.

Mfg. Co. v. Crane Bros. Mfg. Co. 27 Fed. Rep. 550.) In case the assignee of a patent fails to carry out the purpose for which it has been assigned, and the contract provides for a reverting of the patent to the assignor on failure to comply with the terms for which the patent was assigned, it will revert to the assignor. (Buckley v. Sawyer,7 Fed. Rep. 358.)

Title by Grant.

A grant is an instrument in writing which gives to the grantee, the exclusive right under the patent, to make and use, and to grant to others to make and use the thing patented, within and throughout some specified portion of the United States. Grants are easily distinguished from assignments, in that an assignment covers the whole territory of the United States while a grant

only " within and throughout any specified portion of the United States." In pointing out the distinctions between assignee, grantee, and licensee, we can do no better than to quote, Ingersoll, J. in Potter v. Holland reported in Myers Fed. Dec. Vol. 25. p. 283. He says, "there are three classes of persons in whom the patentee can invest an interest of some kind in the patent. They are an assignee, a grantee of an exclusive sectional right, and a licensee. An assignee is one who has had transferred to him in writing the whole interest of the original patent, or any undivided part of such whole interest, in every portion of the United States ; and no one, unless he has had such an interest transferred to him, is an assignee. A grantee is one who has had transferred to him, in writing, the exclusive right under

the patent, to make and use and to grant to others to make and use, the thing patented, within and throughout some specified part or portion of the United States. Such right must be an exclusive sectional right, excluding the patentee therefrom. A licensee is one who has had transferred to him, in writing or orally, a less or different interest than either the interest in the whole patent, or an undivided part of such whole interest, or an exclusive sectional interest." A grant is practically a territorial assignment; a grant must convey the same rights as an assignment as to the specified territory, otherwise the conveyance is merely a license. The rules which relate to assignments also govern in cases of grants. The grant must be an instrument in writing, signed by the grantor and it must be recorded in the

Patent Office in the same manner as an assignment. (R. S. of U. S. 4898.) It carries with it a warranty of title and in fact there is very little difference between the rules which govern in cases of assignment and those of grants.

Title by Creditor's Bill.

As has already been stated property in a patented invention cannot be seized and sold on execution by any methods known to the common law. But as the rights secured by letters patent are property, the courts of equity apply the principle that all property of the debtor should be liable for his debts, hence they hold that property in a patented invention should come under this rule. But as the property can be transferred only by the patentee or the owner of the patent no ordinary

method of appropriation for the benefit of creditors can be made. It is now decided that a court of equity has power to compel the owner of a patent to sell the same to satisfy the claims of his creditors. As Mr.Walker puts it, "A creditor's bill may operate to transfer a complete title or an equitable title, to a patent right, whenever a judgment is obtained against its owner, and an execution issued on that judgment, is returned nulla bona ; and the court in which the creditor's bill is filed may appoint a trustee to execute a proper assignment". The direct point in the case of Ayer v. Murray 105 U. S. 126, was, whether a patent-right may be ordered by a court of equity to be sold and the proceeds applied to the payment of a judgment debt of the patentee; and it was there held that this could be done. A suit

of this nature does not come within the patent laws of United States; therefore it is not necessary to bring such actions in the Federal Courts, except where the parties to the suit are citizens of different States. In the case of Gillette v. Bate, 86 N. Y. 87, it was decided that while the right of a patentee of a patented invention may be reached by creditors and applied to the payment of his debts, unpatented inventions are not property in such a sense as they can be reached for the payments. We have seen though, for some purposes these rights are considered property in that they may be transferred by assignment. (Pacific Bank v. Robinson, 40 Am. Reps. 120 ; Murray v. Ogel, Myers Fed. Dec. Vol. 25, p. 633.)

Title by Bankruptcy.

By the bankrupt laws of 1867, U. S. R. S. 5046, all patent rights of the bankrupt were subjected to this law, but as that law was repealed in 1878 it is of very little importance to us, except perhaps in showing that at that time it was the intention of Congress to subject patents to be transferred from the bankrupt to his creditors.

Title by Death.

We come now to the last method by which title to patents may be acquired, namely, by death. By virtue of the Statutes of the United States, upon the death of the owner of a patent title vests in his executors or administrators. The exact words in the statute are,

" a grant to the patentee, his heirs and assigns." It was at first contended that the title should pass directly to the heirs, without the intervention of an executor or an administrator. But as the property secured by letters patent had always before been considered personal property and had gone to the executor or administrator for the next of kin, the courts decided that although the words in the statutes, R. S. 4884, did not expressly state executor or administrator, it meant as much. The statutes prior to the one above quoted contained the words"heirs, administrators, executors or assigns." Those maintaining that the property secured by the letters patent should go directly to the heirs, claimed that in as much as Congress had left out the words executors, and administrators, they intended that it should descend

to the heirs, but on the other hand, the Courts held that the acts of Congress had not been drawn with technical accuracy in this particular, and that it was undoubtedly the intention of Congress to consider the property rights secured by patents as personal property and not real. (Shaw Relief Valve Co., v. City of New Bedford, 19 Fed. Rep. 753. It is now well settled that the property is personal and goes to the administrators or executors as the legal representatives. The title which vests in the administrators is derived from the laws of Congress. The interest of the patentee on his death, passes to his legal representatives and remains in them until assigned; and until it is assigned all suits in reference to the patent must be brought in the name of the legal representatives. It is not necessary to make the next of kin

parties to the suit. The nature of the property of an executor or administrator is peculiar. While he holds in the nature of a trustee, he is not strictly a trustee. "Administrators of an estate are not, properly speaking, trustees in whom is vested the legal title. The law clothes them with certain powers, by which they are enabled to transmit the legal title of property. They are mere instruments of the law, and the effect is given to their acts upon the same principle that the title of property is transferred by the official act of a sheriff or marshal." (Wintermate v. Pedington, 1 Fisher, 239.) The property is not liable to the claims of creditors of the deceased. If the death of the inventor occurs before he has procured his letters patent, his administrator may apply and procure the same, or if application has been made and the patent has not yet issued, he may

have the patent issued in his name. Death of the owner of a patent already in existence, causes the transfer of whatever interest the patentee had, to the legal representatives ; and his legal representatives may assign, grant, license, and in fact they are to all appearances the true owners of the patent. (Shaw CO. v. City of New Bedford, 19 Fed. 753 ; Bradley v. Dull, 19 Fed. 913; Donehue v. Hubbard, 27 Fed. 742.)

L i c e n s e s.

Before concluding our subject it is very important that we should give some attention to licenses as they relate to patents. Licenses are easily distinguishable from assignments and grants in that licenses do not transfer the monopoly secured by the patent, but only the invention. Any conveyance of an interest which cannot

operate as an assignment or a grant is a license. (Potter v. Holland, ante.) Licenses are governed by State laws like other agreements, and are not subject to the Patent Laws. (St. of Mo. v. Bell, 23 Fed. Rep. 539.) The license may be either expressed or implied; it may be oral or in writing. Expressed licenses may cover either one or more of the rights embraced in the invention. Those rights are the rights to make, to use, and to sell ; these are independent rights and therefore may be transferred separately either to one or different persons. Thus, if the right to make a patented machine was transferred, this would not give the licensee the right to sell or the right to use the thing made. But such licenses are construed in favor of the licensee, and the courts decide in such cases that where a license

is given to make, and the licensee would in no way be benefited by merely making the invention he has a right to the use ;-- or, take another case, if a party engaged exclusively in the construction of machines of various kinds, for sale to others, were to receive a license to manufacture a patented machine, a construction which would deny him to sell the machine when manufactured would not be just, and the courts would hold that the licensee should be allowed to derive a benefit from the license, and therefore allow him to sell. An express license to use a patented article will not be construed to carry with it a right to make or to sell. A license to use may be confined to a certain specified territory, and if so confined, the licensee cannot use the invention outside of that territory. And a purchaser of a machine

from one who has the right to use, and to sell to others to be used, only in a certain territory, has no right to use the machine elsewhere. (Burke v. Partridge 58 N. H . 349.) The right to make and sell includes the right to use. (Tainbull v. Plow Co. 14 Fed. Rep. 108.) Any owner of a patent may issue licenses ; these express licenses may contain any stipulations the parties care to insert, but as we have shown the courts construe the license so as to give the licensee a benefit under the license. A license may be given for any length of time, but unless clearly stipulated the license expires when the original term of the patent is at an end, and does not continue to exist if the original patent should be extended beyond the usual term. (Mitchell v. Hawley 16 Wall. 544 ; Union Paper Bag Co. v. Nixon, 105 U. S. 766)

A license unlike an assignment or a grant is not required to be recorded ; the licensee must protect himself the best he can. License may become forfeited by various acts; if there are express stipulations in the license that the license shall be void upon the breach of those conditions, this will forfeit the license ; but it is held that where there are express stipulations, upon the breach of them the license does not ipso facto become void, but are in force until declared rescinded by a court of equity. (White v. Lee 3 Fed. Rep. 222 ; Hartwell v. Tilghman 99 U. S. 547; Adams v. Negrose 7 Fed. Rep. 208)

The most frequent case where the law implies a license is where the patented article is sold in open markets and the sale is unconditional; in this case the pur-

chaser has an implied license to use the patented article and also a right to sell or dispose of the invention in any manner. The unconditional sale of the patented article confers the whole title to it upon the vendee. (Porter Needle Co. v. National Needle Co., 17 Fed. Rep. 536 : Adams v. Burke, 17 Wall. 453.) The implied license to use which is vested in the vendee and also the implied license to sell the invention, upon an unconditional sale, does not give the purchaser the right to manufacture the invention either for his own use or to sell to others. For instance, if the invention is a machine, the vendee cannot make other machines which would infringe the patented article, but he may repair parts of the machine which have become useless by wear and tear. He can also add to the machine, but he cannot when the thing

itself has become absolutely useless build another machine of the same description. The law implies licenses sometimes in the case of partnership relations ; where one partner makes an invention, and has used the firm's funds in perfecting his invention and permits the firm to use it, an implied license is raised which exists after the partnership is at an end. (Wade v. Metcalf 16 Fed. Rep. 130 ; Montross v. Mabie, 30 Fed. Rep. 234.) Also in the case of employer and employee there is sometimes an implied license raised; As where a man is employed especially for his inventive skill and there has been a prior contract to that effect. As a rule, though an employer has no interest or right in the inventions of his workman. (Hapgood v. Hewitt, 11 Fed. Rep. 400 ; 14 Fed. Rep. 40.)