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Article 9

Patent Rights: Injunction in Patent Cases

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It seems that the extraordinary economic emergency, that existed when the law was passed, is not used by the court as a justification of its decision; the cases of *Wilson* v. *New,* (fixing of wages and hours of railroad employees during a national emergency sustained) 243 U.S. 332, 37 Sup. Ct. 298, 61 L.Ed. 755 (1917); *Block* v. *Hirsh,* (fixing of rents during emergency in housing facilities sustained) 256 U.S. 135, 41 Sup. Ct. 458, 65 L.Ed. 865 (1921); and *Marcus Brown Holding Co.* v. *Feldman,* (same as *Block* case) 256 U.S. 170, 41 Sup. Ct. 465, 65 L.Ed. 877 (1921) are not even cited in the opinion.

The court goes back to the majority opinion in *Munn* v. *Illinois,* supra; in that case defendants enjoyed a virtual monopoly, but neither the enjoyment of a monopoly nor of a franchise is held to be "the touchstone of public interest" which justifies the regulation in the instant case. 78 L.Ed. 563, 575; cf. *Brass* v. *North Dakota,* 153 U.S. 391, 14 Sup. Ct. 857, 38 L.Ed. 757 (1894) where price regulation for grain elevators was sustained even though it was established that the business was highly competitive. In rediscovering *Munn* v. *Illinois,* supra, the court renounces the *laissez-faire* philosophy of the cases which had given so narrow a construction to the phrase, "affected with a public interest." As the law now stands, a business is affected with a public interest, so as to be subject to the exercise of the police power, when the legislature reasonably determines that regulation is for the best interests of the people as a whole. And such regulation will not be considered as denying due process unless it is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt * * * " A definite tendency is indicated to hold all legislation, which is passed in the interests of public welfare, valid unless the party assailing such legislation can show it to be unreasonable and arbitrary. See Notes, 82 U. of Pa. Law Rev. 619 (1934). Such a construction in effect adopts the economic philosophy and the approach to the due process clause of Mr. Justice Brandeis, as evidenced in his dissenting opinions in *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 52 Sup. Ct. 371, 76 L.Ed. 747 (1932); and *Liggett Co.* v. *Lee,* 288 U.S. 517, 53 Sup. Ct. 481, 77 L.Ed. 929 (1933).

RICHARD F. MOONEY.

PATENT RIGHTS—INJUNCTION IN PATENT CASES.—The city appeals from a decree holding the appellee's patents covering processes and mechanisms appropriate for their practice, in purification of sewage valid and infringed by the operation of the city's large sewage disposal plant. The decree granted an accounting and also an injunction restraining the city from operating its plant. The patents had not as yet expired. *Held,* the decree is affirmed except as to the injunction and as to it the decree is reversed. *The City of Milwaukee* v. *Activated Sludge, Inc.,* Fed. (C.C. A. 7th, 1934).

The right (franchise) which the patent grants to the inventor and his assigns is the right to exclude everyone from making, using or vending the invention patented. *Bloomer* v. *McQuewan, et al,* 14 How. 539, 549, 14 L.Ed. 532 (1852); U. S. Const. Art. 1, § 8, cl. 8; Pomeroy's Eq. Rem. 2nd Ed. § 565 (1919). The inventor does not get from the law a right to a use he did not have before but he gets the right to an exclusive use. *United States* v. *United Shoe Machine Co.,* 247 U.S. 32, 58, 62 L.Ed. 968 (1917). When the right has been legally established, the obvious means of protecting it is by an injunction. If no other remedy could be given than an action at law for damages, the inventor would be ruined by the necessity of perpetual litigation. Story's Eq. Jur. § 931 (1877); *Allington & Curtis Mfg. Co., et al* v. *Booth,* 78 Fed. 878 (C.C.A., 2d, 1897); §

4921 R.S., U.S. Code Title 35 § 70. The remedy provided by an injunction exists even if the infringer of the right has already been held liable in an action at law for damages, provided the term of the right has not expired. *Suffolk Co.* v. *Hayden,* 3 Wall. 315, 18 L.Ed. 76 (1865). The remedy at law is inadequate not only because of the necessity of perpetual litigation but because money damages are not adequate. To illustrate, an inventor was granted an injunction to restrain the infringement of a patent which he did not use himself or had not licensed others to use. *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.,* 210 U.S. 405, 28 Sup. Ct. 748, 52 L.Ed. 1122 (1908). The language used in the case is strong: "It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by prevention of its violation. Anything but prevention takes away the privilege which the law confers upon the patentee." *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.,* 210 U.S. 405, 430, supra.

In the instant case the court appears to rely on the rule that injunctive relief should be denied when it is not absolutely essential to preserve the rights of the patentee, and would cause the infringer irreparable damage. This is mere lip service to an established equity rule, the applicability of which to patent infringement cases is doubtful. The real ground for the decision is public policy. "If, however, the injunction ordered by the trial court is made permanent in this case, it would close the sewage plant, leaving the entire community without any means for disposal of raw sewage other than running it into Lake Michigan, thereby polluting its waters and endangering the health and lives of that and other communities." *The City of Milwaukee* v. *Activated Sludge, Inc.,* supra.

Legally, the nature of the patent grant is such that its complete protection lies in injunctive relief. But practically the grant is used as a source of profit to the holder. He may seek money damages from infringers or he may attempt to increase his own pecuniary returns by restricting competition. Sometimes he may do both. An injunction besides its operating value in limiting competition is also used as a lever to provide the holder with substantial and beneficial settlements. Congress acting upon the authority granted by the Constitution has prescribed that such a procedure is the best means of promoting the Progress of Science and Useful Arts. But, as indicated by the instant decision, the patentee cannot, in his attempt to enrich himself, endanger the public health. "The right was not granted for the inventor's exclusive profit and advantage, the benefit to the public or community at large was another and doubtless the primary object in granting and securing that right." *Kendall* v. *Windsor,* 21 How. 322, 328, 16 L.Ed. 165 (1858). The right has been limited in its application. For instance, it cannot be expanded by placing limitations as to materials and supplies necessary to the operation of the invention. *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.,* 243 U.S. 502, 37 Sup. Ct. 416, 61 L.Ed. 871 (1916). Nor can it be used as a basis for abridging obligations as a public utility. *Missouri ex rel. Baltimore & Ohio Tel Co.* v. *Bell Tel. Co.,* 23 Fed. 539 (C.C. E.D. Mo. 1885); appeal dismissed, 127 U.S. 780 (1887). Its use to restrain commerce was condemned under the Sherman Anti-Trust Law. *Standard Sanitary Mfg. Co.* v. *Nnited States,* 226 U.S. 20, 33 Sup. Ct. 9, 57 L.Ed. 107 (1912). However, the effect of these limitations is not to cut down the exclusive nature of the right but merely to keep it within its originally predetermined scope. In England and to some extent in Germany the exploitation of a patent may be directed by administrative order. The purpose is to protect the public from obnoxious restraint of the beneficial use of the patent. To accomplish this end the administrative order may extend even to revocation of the right. Freund Administrative Powers

Over Persons and Property, § 205 (1928). The effect is to make the exclusive nature of the right conditional. It is time that, in the United States, the public as a whole be given an *immediate right* to share in the benefits to be derived from the advance of science. To compel them to await the expiration of the term of the grant or to subject themselves to a course of litigation in which they face the risk that courts will adhere to the strict letter of the law and enjoin the use rather than decide on the basis of the public interest (as the court did in the instant case) is plainly unsocial.

GERRIT D. FOSTER.

TORTS—NEGLIGENCE—MANUFACTURER'S LIABILITY.—The defendant manufactured and sold a ladder to plaintiff's employer. A defective rung broke, causing the plaintiff to fall thirty feet. The defect in the rung was not ascertainable by ordinary inspection. The defendant made some tests of the wood and of the finished ladders. Experts testified that the defendant could have made tests which might have led more readily to a discovery of the defect in the ladder. The defendant's witnesses showed that no such tests were applied in the ordinary manufacturing plant like that of the defendant. The trial court permitted the jury to find that the defendant in the exercise of due care, should have applied the tests suggested by the experts. A judgment was enterd on a verdict for the plaintiff. *Held,* judgment affirmed, *Kalash* v. *Los Angeles Ladder Co.,* (Cal. 1933) 28 P. (2d) 29.

The instant case is in conformity with the trend of modern decisions extending the manufacturer's responsibility to others than the original purchaser. See *MacPherson* v. *Buick Motor Car Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916). It is frequently said that the general rule is that a manufacturer is not responsible to persons other than the immediate purchasers, because there is no contractual relationship between them. *Kerwin* v. *Chippewa Shoe Mfg. Co.,* 163 Wis. 428, 157 N.W. 1101 (1916), *Beznor* v. *Howell,* 203 Wis. 1, 233 N.W. 758 (1932). But the liability is held to extend to others than immediate purchasers when the defect is such as to render the article itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence. *Bright* v. *The Barnett and Record Co.,* 88 Wis. 299, 60 N.W. 418 (1894). Although this holding was ignored in *Zieman* v. *Kieckhefer Elev. Mfg. Co.,* 90 Wis. 97, 63 N.W. 1021 (1895), and in *Miller* v. *Mead-Morrision Co.,* 166 Wis. 536, 166 N.W. 315 (1918). Later Wisconsin cases have extended the responsibility by holding a manufacturer liable for injuries caused by negligent construction of articles which could not be regarded as *inherently* dangerous even when negligently constructed. *Coakley* v. *Prentiss Wabers Stove Co.,* 196 Wis. 196, 218 N.W. 855 (1928).

The more recent Wisconsin cases demand a higher degree of care than the older cases. Recklessness and bad faith, or knowledge that the defective construction would result in the particular injury, was once necessary to recover where there was no contractual relation. *Zieman* v. *Kieckhefer Elev. Mfg. Co.,* supra. The defendants were held to the standard of care required of other manufacturers in similar businesses and circumstances. *Guinard* v. *Knapp-Stout & Co.,* 95 Wis. 482, 70 N.W. 671 (1897). Now the degree of care is much higher. In *Marsh Wood Products Co.* v. *Babcock & Wilcox Co.,* 207 Wis. 209, 240 N.W. 392 (1932), the jury found the defendant negligent in not inspecting steel and steel tubes by miscroscopic examinations. No other manufacturer required such an examination of steel which was to be used in the manufacture of boiler tubes. In cases like the instant case it is often difficult for the plaintiff to secure evi-