

## ARTICLE XI.

## MONOPOLY BY PATENTS.

BY Z. SWIFT HOLBROOK.

IN the excellent work by Professor John Bascom, of Williams College, on "Social Theory," just published by Crowell and Company, the subject of patents receives a brief treatment of two and one-half pages. Professor Bascom has not assumed to treat the subject exhaustively. He makes only two points: (1) patent laws allow unreasonable profits, which go not to the inventor, but to the capitalist or entrepreneur; and (2) that injustice is caused by delay in issuing patents. The second point, without doubt, is wisely urged, but it is of small importance comparatively. Professor Bascom assumes that inventors, as a rule, are defrauded of their rights by receiving an unjust proportion of profits, made upon the manufacture or sale of devices under their patents, because, in some instances, inventions prove valuable and enrich, not the inventor, but others. It is an inference not at all warranted from the premises, and even more remote from the facts in the world of invention.

It is undoubtedly true of many of the most successful inventions that enormous profits accrue to others than to the inventors; but these are exceptions to the general rule, for the great majority of patents are not worth the final fee, and, but for the hope of gain, stimulated by the more successful ones, would never be taken out of the Patent Office. The instances often cited, where inventors have been defrauded—such as the Colt revolver or the McCormick reaper—do not bear investigation. Such public reports oftentimes have their

origin in envy or prejudice or in the vainglorying of the inventor. It certainly has not been true of Howe, Pullman, Edison, Bell, McKay, and hosts of others, that the inventor is not properly rewarded. Professor Bascom says: "Patent laws are now at fault in allowing them to accrue to the benefit of those who have appropriated, not rendered the service rewarded by them. It is said that the gimlet-pointed screw has been worth to the manufacturer \$10,000,000" (p. 415).

Now the question is not, What have the inventors of certain successful devices received for their inventions? but, Do inventors on the whole, and as a rule, receive a fair reward for their services? It is generally assumed that they do not. If such were the case, however, to attempt to remedy it by law would be a most chimerical undertaking, not to say a clear invasion of the right of private contract, on the part of the State that assumes to guarantee and protect that very right. It would be an attempt on the part of the State to make good bargains for inventors who are poor business men, and would involve an interference with private rights that no class of men would resent more strenuously than inventors themselves. And yet social critics imagine that the patent laws could, and should, protect inventors from making such poor bargains. Just how it is to be done, of course, no one has explained.

The broad question is one of patents in general as a form of investment; of the kind of ability required to invent; what its reward should be, and what that reward really is; whether patent laws can be enacted and enforced to help inventors in making good bargains or to prevent them from making bad ones when they are enlisting the aid of executive ability and capital to market their ideas; whether inventors themselves really desire the enactment of such laws for their protection as assume that as a class they are, commercially speaking, *non compos mentis*, and need legal guardianship; and whether, beyond the mere issuing of a patent with an assignable title

in the one who swears the invention to be his own, and beyond the establishing of courts to protect from infringements and to enforce contracts, there is anything practically that the State can do.

Inventive ability in mechanics is not of the highest order. The exceptions prove the rule. It may be inventive genius or inventive talent. Genius is creative and propulsive, while talent is more intellectual and purposeful. Genius works by spasms, and talent from principle. The former is a child of the imagination, and not so much of the reason. It dwells in the realm of fancy, and not of fact. The mind of an inventive genius is full of imagery and of quaint conceits. It is seldom a mind that works by rote or rule. It imagines, it dreams, it fancies, it pictures. But such a mind, as has been well said, has a kind of insanity that is scarcely amenable to ordinary laws. It is, in a measure, spasmodic, erratic, and untrustworthy. Paul Morphy was a most creative genius in chess, but a lawyer of inferior ability. Talmage, the pulpit actor and orator, whom so many esteem, to speak charitably, as *sui generis*, will read out of the Scriptures what the inspired writers never dreamed of.

The greatest inventions, those that have been of the highest service to mankind and the most profitable, from a commercial standpoint, have been the work of geniuses. The ordinary mind dreads too close a practical contact with genius. We prefer to view it from a point of delightful perspective. It has its uses, but, as Jane Carlyle learned, it is difficult to live with. The best appreciation of it comes on tombstones and in biographical dictionaries. The mildew and dust of at least a century make the most picturesque setting, for it hides defects, and leaves the character like a lonely mountain in bold relief against the sky. The defects and disagreeable details are thus lost sight of in the grandeur of a single view.

Now, in the marts of trade, the practical, hard-headed business man too often considers the inventive genius a crank

and a visionary. Commercial interests are founded upon the safe and conservative basis. A genius is seldom that. Inventive ability is usually a two-edged sword that can devise improvements upon devices which it has sold, and it can invent a way to-morrow to defeat the success of what it conceived and sold to-day. Nothing, in the mind of an investor, presents so formidable an obstacle to the safety of an investment as the very fertility of an inventor and his ability to outwit his own inventions. Let Mr. Edison's career in this light testify. Inventors, as a rule, have no perspective in matters of value, and will demand as much for a poor invention as for a good one. They are hopeful natures that see millions in every child of their brain. They sell inventions readily because of their sanguine expectations from the new and wonderful lines of thought that they have stumbled upon since breakfast.

Their commercial instincts are not so fine that they can be relied upon to develop and perfect an art till it is an actual business success, unless tied by iron-clad agreements and pressed by necessity. A celebrated inventor is known to have sold five-fourths of a well-known invention to different parties for a good figure, and in another case to have improved upon his own devices for a competing firm.

An inventor has the choice of disposing of his ability in one of the following ways: He may sell his time as an expert by the month or year, in which case he is introduced to an industry and to the state of an art by his employer, who takes his inventions for better or for worse. It is usual to pay a sum, additional to a salary, for each patent granted by the government, as a stimulus to invention. If out of a hundred patents issued, in such cases, one proves valuable, the public quickly hears of that one and of the inventor's poor compensation for it, but they never hear of the ninety and nine that went astray. An inventor may prefer to take out patents at his own expense and risk, and in such cases he

may dispose of them by actual sale, by exclusive license on royalty, by license not exclusive, or by territorial license.

It is not the simplest matter to interest capital in the manufacture of patented devices, especially in a new art; and it is well-nigh impossible to do so except by absolute sale or exclusive license, and the latter is preferable to retain the continuous interest of the inventor. The Patent Office is full of valuable inventions to-day waiting for capital and executive ability to market them. Hence an "exploiter" or "promoter" has come to be a necessary agent in launching a new industry dependent for protection upon patents.

Social critics overlook the fact that inventions are like mining in one sense, not an attractive form of investment for conservative investors; while the investment of trust funds in either of these directions would be little short of criminal. No college would dare depend upon such investments to pay the salaries of its professors, for the element of risk far outweighs the hope of gain; but if a college should do so foolish an act and it should prove highly profitable, what right would its own economic professors then have to decry the unusual acquisition and claim it was at the expense of some poor inventor? So established has become this line of reasoning, that the law of *caveat emptor* applies in the case of patents, and will be strictly enforced by the courts. An investor who tampers with safety and negotiability for the sake of increasing his rate of interest must not seek the protection of the courts if, in the effort to increase his gain, he loses his principal.

More money is squandered on devices that prove impracticable, or the patents upon which break down, than has ever been made by investors upon patented devices. The successful patents, like the profitable mines, attract wide notice and stimulate others to losses and gains, while the unsuccessful are never heard of.

The conditions which must attend an absolutely successful patent may be briefly stated as follows:—

1. The art in which the patent issues, should be new.
2. The device should be labor saving.
3. It should be of simple mechanical construction.
4. The device should be protected by a patent with broad claims.
5. These claims should be adjudicated.

When all of these conditions exist, a patent may be as valuable as government bonds; but few patents conform to these requirements, and none can have the fifth requirement until after years of prosecution of the rights granted under the patent and after expensive litigation. After the folding bed had been manufactured for five years, the precise device was discovered among the old English patents under the head of *lounges*, and the examiner in the Patent Office had overlooked it for that very reason. The inventor had received thousands of dollars of royalty, the investment was at least a hundred thousand dollars, and yet one glance at the picture of the English device nullified the entire patent.

The prosecution of an industry protected by patents is not all smooth sailing. The natural opposition of the industry it seeks to displace, or the competition of those whom it would undersell; the hatred of the toilers whose services it dispenses with; the uncertainty of sustaining the patent if it be infringed, which is inevitable if it prove valuable; expensive litigation to prosecute infringers or to adjudicate the patent; improvements that inevitably follow and that may render machinery, patterns, models, stock on hand, and even the very plant itself, valueless, are among the contingencies. The patent itself expires in seventeen years, and its diminishing value, all other considerations aside, is therefore six per cent a year. When our social critics, therefore, attack patents as a source of evil, in the unequal distribution of property, and assume to speak authoritatively, it would be well to go most carefully into the details and discover the real ground for the justice of such an indictment.

It is undoubtedly true that our patent laws need revision, but that revision should be in ways to make the field more attractive to investors no less than to inventors, and we suggest the following:—

1. Broad claims should be granted with even greater freedom than now, but they should be limited to the definite art described in the patent. An English judge said that a spoon could not be patented to feed a child and again patented to feed a cat. This is not our contention. But a broad claim on a curved spoon-handle should not prevent the constructing of a curved handle on a spade. Edison's electric pen was found to have been anticipated by a device for pricking holes in paper known as a cooky-roller device, from its resemblance to the cooky-rollers which the New England housewife used. No patent could issue to him which would not have to pay tribute to the cooky-roller. After diligent search the cooky-roller patent was found in the possession of an old man in the country, who placed no value upon it, and sold it for a mere song. Our point is, that a broad claim on a cooky-roller should have been limited to cooky-rollers, if granted at all, and never have been permitted to arrogate to itself a right of way and to dictate terms to a new industry like manifold printing through punctures made with an electric pen. A most valuable invention to prevent fires arising from rubbish receptacles has been refused a patent because a woolen-cloth machine had been given a broad claim on dampening cloth automatically to prevent it from singeing. That broad claim will cover any device that releases water automatically, from a fire engine to a spray bath. It stands in the way of innumerable valuable inventions, and defeats the very end for which patents are granted. Meanwhile the woolen-cloth machine is not in use, and never was for any length of time.

2. A patent should revert to the government in case it is not exercised within a specified time,—say within three years from the time of its issue. It should then be made possible

for any one to secure a license under it by the payment of a reasonable royalty to the government. This would prevent putting experts upon certain arts, and securing patents for the express purpose of injuring competitors and stifling growing industries.

3. It should be made possible to condemn a patent for the public good, the same as in the case of land, but it should be done by the government and only by the payment of its appraised value. Suppose that Bell had refused to market the telephone, saying: "The patent is mine, I abhor money-making, I refuse to let the public use it." Under our present laws no remedy could be found whereby the public could have secured the benefits of the telephone until his patent had expired.

4. A private person should be able, by legal procedure, to condemn a patent for specific uses remote from the purposes for which it was granted. Jay Gould was the first to attempt this with a patent controlled by the Western Union Telegraph Company. He gave up the contest because he secured it in another way, by the purchase of the stock.

By none of these laws would invention be discouraged, but the rather encouraged, for they would remove obstacles that now, in many ways, block the way of valuable inventions.

These are suggestions, merely, and not an exhaustive consideration of the most important subject of monopoly by patents. Professor Bascom's work is the ablest book thus far published on the subject of Social Theory, or Sociology, and no indiscriminate criticism is intended by these suggestions. It is a question, however, if the best book on sociology will not need to be written, as Winsor's "Critical and Narrative History" was, by a symposium of writers each one of whom is an authority upon the subject he assumes to treat. The subject is too vast for any one writer, and a text-book by one man on such a widely diversified range of subjects must necessarily have some weak points.