

PATENT—THE NATURE AND SCOPE OF THE PATENT FRANCHISE.

M., the owner of a patent on a mold for making burial vaults, assigned the patent-right for a portion of Virginia to R., the plaintiff; also he assigned the patent for Maryland to H. Defendant purchased one of the molds in Maryland from H, and took it into plaintiff's territory, where he used it. Held there was no infringement of the patent. *Russell v. Tilghman* (1921, D. C. Va.) 275 Fed. 235.

The law thus declared is thoroughly settled. Indeed, since the leading case of *Adams v. Burks* (1873) 17 Wall 453 (which presents every feature of the case decided), patent owners have generally ceased to apportion the franchise territorially. *Adams v. Burks*, *supra*, was reaffirmed and followed in *Hobbie v. Jennison* (1893) 149 U. S. 355; *Keller v. Folding Bed Company* (1895) 157 U. S. 659; *Bauer v. O'Donnell* (1913) 229 U. S. 1; *Motion Picture Patents Company v. Film Co.* (1917) 243 U. S. 502.

But this result has been reached with much difficulty and always (except in *Hobbie v. Jennison*, *supra*) by a closely divided court. The question involved is a phase of a much larger one, which the courts have been unable to settle.

The larger question is this: What is the nature and scope of the patent-right? Does it *create* in the patent owner a right to make, use and sell the patented article, which right is sanctioned by the National Government? Or does it merely give him the right to exclude others from so doing by means of infringement suits in the Federal Courts? The question is of great importance. For, if the patent affirmatively confers upon the owner a right to make, use and sell, which right is sanctioned by the Federal Government, then such owner is not amenable to either Federal or State anti-monopoly statutes; he may make contracts, enter into trade combinations and conspiracies that would clearly violate such statutes except for the patent. This view of the patent-right is declared in *Dick v. Henry* (1912) 224 U. S. 1 (decided by a vote of 4 to 3 of the Justices).

The other view, namely that there is a clear distinction between "the rights which are given to the inventor by the patent law and which he may assert against all the world through an infringement proceeding, and rights which he may create for himself by private contract, which, however, are subject to the rules of general, as distinguished from those of the patent, law,"—is declared in the *Motion Picture Patents* case, *supra* (decided by a divided court) which expressly overrules *Dick v. Henry*. But in *United States v. United States Shoe Machinery Co.* (1918) 247 U. S. 32, the court by a division of 4 to 3, reinstated the principle of *Dick v. Henry*, and held that monopoly contracts affecting the use of patented machines do not come within the purview of the Sherman Act. In the present state of the law, it is impossible authoritatively to define the nature and scope of the patent-right. No doubt this difficulty is largely attributable to the incorporeal nature of the patent-right. Lawyers and

even judges are inclined to overlook this circumstance and to deal with a patented article, as though the article itself in some way embodies the incorporeal right. This difficulty was long ago recognized in *Hogg v. Emerson* (1846) 6 How. at 485, where the Court characterized the patent law as the "most metaphysical branch of modern law."

The opposing views of the nature of the patent-right have competed for supremacy at least since 1850. Congress has by the Clayton Act adopted the view set forth by the majority in the Motion Picture Patent Case, *supra*. The construction of this statute in the aspect noted is due to come before the court in January, 1922.