duty created by contract is limited to parties privy to that contract. In these terms, the sender would not be able to rely on the contract between the railroad and the government, to which he is not a party, to raise a duty of care from the railroad to him. To adhere to the privity doctrine and thus obscure the patent duty arising from the possession in the railroad is one more example of the classic failure to recognize a distinct duty arising apart from the contract. See Labatt, Negligence in Relation to Privity in Contract, 16 L. Q. Rev. 168 (1900); *McPherson v. Buick*, 217 N.Y. 382, 111 N.E. 1050 (1916).

Trade Regulation—Anti-Trust Laws—Use of Patents and Copyrights in Restraint of Trade—[Federal].—In a suit for copyright infringement the defendant answered that the plaintiff had a virtual monopoly of popular music copyrights in violation of the Sherman Act. The license fee demanded of the defendant had been twice that paid by the defendant's competitor. The plaintiff moved to strike. *Held*, motion granted. *Buck v. Hillsgrove Country Club, Inc.*, 17 F. Supp. 643 (R. I. 1937).

Through cross-licensing agreements with other large manufacturers, the defendant controlled indispensable patents on communication equipment. The plaintiff brought a suit to enforce the issuance of a license to him alleging that the defendant's control was a violation of the Sherman Act. *Held*, suit dismissed. *Andrea v. Radio Corporation of America*, 14 F. Supp. 226 (1936), aff'd, 88 F. (2d) 474 (C.C.A. 3d 1937).

Courts have been slow to apply the principles of the anti-trust laws to combinations involving patents or copyrights. The patent law gives patentees and copyright owners the "exclusive right to make, use and vend . . . ." (16 Stat. 201 (1870); 35 U.S.C.A. § 40 (1929)) and it is clear that the anti-trust laws do not affect the right of the owner of a single patent or copyright to license whomever he chooses at whatever rate he pleases. *Rubber Tire Wheel Co. v. Milwaukee Rubber W. Co.*, 154 Fed. 358 (C.C.A. 7th 1907). In some of the early cases under the Sherman Act courts were so impressed by the "exclusive right" thus granted that they extended the individual patent monopoly privilege to patent pools. *Bement v. National Harrow Co.*, 186 U.S. 70 (1902); *United States Consolidated Seeded Raisin Co. v. Griffin & Skelley Co.*, 126 Fed. 364 (C.C.A. 9th 1903); see *Henry v. A. B. Dick Co.*, 224 U.S. 1 (1912) (overruled in *Motion Picture Patents Co. v. Universal Film Co.*, 243 U.S. 502 (1917)); *contra*, *National Harrow Co. v. Hench*, 83 Fed. 36 (C.C.A. 3d 1897). While nothing in the patent law expressly limits the manipulation of patents, succeeding cases have considerably lessened the powers originally thought to have been granted to patentees and copyright holders. The right to control resale prices has been denied. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); *Straus v. American Publishers Ass'n*, 231 U.S. 222 (1913); *Victor Talking Machine Co. v. Straus*, 243 U.S. 490 (1917); *Boston Store v. American Graphophone Co.*, 246 U.S. 8 (1918). The Court has invalidated so-called "tying contracts," whereby use of the patented product is granted only to those purchasing other products from the patentee. *Motion Picture Patents Co. v. Universal Film Co.*, 243 U.S. 502 (1917); *Carbice Corp. v. Am. Patents Development Corp.*, 283 U.S. 27 (1931); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936). The trade control in the principal cases, however, is less clearly affected by the Sherman Act since it was exercised by the patentee directly upon the marketing of the patented and copyrighted articles themselves. But there is some indication that application of the Sherman Act will not be affected in any case by the fact that the combination attacked is composed of a number of patents. *United States v. Motion Picture Patents Co.*, 225 Fed. 800 (D.C. Pa. 1915), appeal dismissed, 247 U.S. 524 (1918); see *Standard Oil Co. (Ind.) v. United States*, 283 U.S. 163, 174 (1931).

It is not clear that the facts of the instant cases would justify a holding of anti-trust law violation; nor is it clear that the two cases are alike in that respect. If violations did occur, however, the propriety of the instant decisions depends upon the adequacy of the other remedies provided in the Sherman and Clayton Acts. Apart from criminal penalties, the remedies under the anti-trust laws are: (1) triple damages (38 Stat. 731 (1914); 15 U.S.C.A. § 15 (1927)); (2) injunctive relief, either by the government or by an individual, against the specific abuses complained of. (36 Stat. 1167 (1911); 15 U.S.C.A. § 4 (1927); 38 Stat. 737 (1914), 15 U.S.C.A. § 26 (1927)). The remedy of triple damages, apparently an unjust enrichment of the plaintiff, has met with the hostility of courts and juries and is extremely difficult to obtain. The most common of the injunction suits, the suit for dissolution, has had fair success, but even it is not in favor with the courts, and seemingly irrelevant matters such as interests of innocent investors and other third persons have prevented dissolutions. *United States v. United Shoe Machinery Co.*, 247 U.S. 32, 46 (1918); see *United States v. Am. Tobacco Co.*, 221 U.S. 106, 185 (1911). Furthermore, especially if a government suit is relied upon, the delay may be enormous. These remedies appear even more unsatisfactory when applied to the instant cases. In the *Buck* case, while a suit for injunction might prevent future anti-trust violations, it would not protect the defendant from damages granted for his infringement of the plaintiff's copyright. To make himself whole, the defendant is forced to pay the damages, then bring a separate suit for three times that amount. Where the defense of anti-trust violation has been denied in suits for patent infringement, courts have emphasized the infringer's failure to show a causal connection between the anti-trust violation and the infringement. *Radio Corporation v. Majestic Distributors*, 53 F.(2d) 641 (D.C. Conn. 1931); *General Electric Co. v. Minneapolis Electric Lamp Co.*, 10 F.(2d) 851 (D.C. Minn. 1924). Here, since there was a choice of infringement, submission to discriminatory rates, or cessation of business, the causal relation is clear.

Allowing the defense would be a mere adaptation of form to function. It would exactly counteract the violation and prevent its recurrence, with a minimum of delay and expense. Although courts have stated that the remedies expressed in the anti-trust laws are exclusive, there seems no justification either in the words or in the spirit of the laws for not recognizing a violation as a defense to an infringement suit. The *Andrea* case is indistinguishable in respect to the relief sought, namely, the opportunity to use the licensor's product, and the ordinary anti-trust remedies are equally ineffective. Section 16 of the Clayton Act (38 Stat. 737 (1914); 15 U.S.C.A. § 26 (1927)), providing for "injunctive relief . . . . against threatened loss or damage . . . ." has been held to allow only injunctions for preventive relief. *Venner v. Pennsylvania Steel Co.*, 250 Fed. 292 (D.C.N.J. 1918). While such interpretation might seem to preclude a mandatory injunction, it certainly should permit an injunction restraining a suit for patent infringement, thereby forestalling damage to the potential licensee precisely as would a defense. Since allowing such a remedy would force the patentee to license the plaintiff, it would also be identical in result with a mandatory injunction. The latter, then, is really "preventive relief" and is a proper remedy under § 16 of the Clayton Act.