

able items by awarding to the king all treasure trove wherever found.¹⁹ Possibly today the true owner of really valuable chattels can always be discovered, and hence the law should develop rules solely for the disposition of small articles. But it is not beyond possibility, especially after the war, that the abandoned equipment of dissolved corporations may be subject to a true finding,²⁰ and at the time be a sizable windfall. Even if it is assumed that some incentive should be given for finding or reporting findings, it is not clear why a casual finder should be so generously rewarded.²¹ Despite his limited award the salvor of ships is often a professional.²² However, any law attempting to seize for the state all lost or mislaid articles²³ is apt to be unenforceable because the community can have no interest in prosecuting sporadic claims rarely exceeding a hundred dollars in value. Statutes attempting to give the government such rights have become dead letters probably for this reason, and hence have often been ignored when items of large value are found.

Sherman Antitrust Act—Patents—Legality of Cross-licensing Agreement between Owners of Complementary Patents Setting Prices at which Sub-licensees Sell Patented Articles—[Federal].—The two principal defendants, Line Material Company and Southern States Equipment Corporation, owners of complementary patents for dropout fuse cutouts, executed a cross-licensing agreement authorizing one of the patentees to sublicense other manufacturers under both patents on condition that the sublicensees would not sell the patent-

¹⁹ This doctrine still survives in England. *Attorney-General v. Trustees of the British Museum*, [1903] 2 Ch. 598; *Emden, The Law of Treasure-Trove, Past and Present*, 42 L.Q. Rev. 368 (1926). The American cases usually ignore the distinction between ordinary chattels and treasure trove, and award the latter to the finder. *Groover v. Tippins*, 51 Ga. App. 47, 179 S.E. 634 (1935); *Danielson v. Roberts*, 44 Ore. 108, 74 Pac. 913 (1904).

²⁰ It is not always possible to locate the stockholders of a dissolved corporation. See *In re Hull Copper Co.*, 46 Ariz. 270, 50 P. 2d 560 (1935), where, on liquidation, \$46,309.20 was left after all stockholders who could be located had been paid.

²¹ Seven of the American jurisdictions limit the finder by statute, some giving part of the find to the government. See *Mich. Stat. Ann. (Henderson, 1937) § 18.708* (town gets one-half); *Ore. Code Ann. (1941) § 70-704* (county gets one-half); *N.H. Rev. Laws (1942) c. 270, § 6* (town gets all).

²² *Robinson, Admiralty Law in the United States § 99 (1939)*. Some statutes take an admiralty analogy and allow the finder a lien against the true owner for more than the finder's expenses. *Iowa Code (1939) § 12211* (10 per cent of value); *Ala. Code Ann. (Michie, 1940) c. 47, § 157* ("reasonable" reward).

²³ American statutes dealing with the subject tend to emphasize the interest of the community. See provisions mentioned in note 21, *supra*. These provisions appear to be dead letters, and in any case none of them clarify the relationship of finders and owners of premises. See *Weeks v. Hackett*, 104 Me. 264, 71 Atl. 858 (1908), where the find was called "treasure trove" and thus removed from the statute. General ignorance of the statutory provisions means that there is no public cooperation. Statutes dealing with escheat have met with slightly greater success, but still encounter judicial hostility. See *Illinois Bell Telephone Co. v. Slattery*, 102 F. 2d 58 (C.C.A. 7th, 1939).

ed products at prices lower than those fixed by the patentees in sales to their own customers. Ten defendant sublicensees signed license agreements which, under an escrow agreement, became effective when three out of five named manufacturers in addition to the licensors and the General Electric Company also signed. Price schedules were drawn up by the joint efforts of eight of the twelve defendants and were subsequently adhered to by all the parties. In a civil action by the Government under the Sherman Act, *held*, that the agreement between the principal defendants is not in violation of the antitrust laws and therefore the case against the other defendants falls. *United States v. Line Material Co.*¹

The borderline between the scope of the patent statute² and the operation of the antitrust laws is uncertain.³ Nowhere has the conflict appeared more strikingly than in litigation concerning price-fixing. It is usually said that under the Sherman Act price-fixing is illegal per se.⁴ The courts have sought to define the degree of immunity to that prohibition which a patentee enjoys in a series of cases which began by giving broad protection to the patentee.⁵ But it has been established that a patentee may not control the resale price of a patented article;⁶ nor may he constitute his competitors "agents" for that purpose.⁷ The patentee may not fix resale prices of unpatented articles and services "tied-in" with the patented product⁸ nor of patented articles which the patentee does not manufacture.⁹ And a patentee who partially fabricates a patented product and sells it to his licensees to finish under the patent may not determine the selling price of the finished article.¹⁰ In one situation, however, the Supreme Court has

¹ 64 F. Supp. 970 (Wis., 1946).

² 46 Stat. 376 (1930), 35 U.S.C.A. § 40 (1941).

³ 50 Stat. 693 (1937), 15 U.S.C.A. § 1 (1941). See Wood, Patents and Antitrust Law (1942); Hamilton, Patents and Free Enterprise, T.N.E.C. Monograph No. 31 (1941); Petro, Patents: Judicial Developments and Legislative Proposals, 12 Univ. Chi. L. Rev. 80, 352 (1944); Kelleher, Price-fixing under Patent License Agreements, 3 Mont. L. Rev. 5 (1942).

⁴ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940), *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

⁵ *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288 (C.C.A. 6th, 1896); *Bement v. National Harrow Co.*, 186 U.S. 70 (1902); *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424 (C.C.A. 7th, 1903); *National Phonograph v. Schlegel*, 128 Fed. 733 (C.C.A. 8th, 1904).

⁶ *Boston Store v. American Gramophone Co.*, 246 U.S. 8 (1918); *Bauer & Cie. v. O'Donnell*, 229 U.S. 1 (1913). A limited exception to the rule was created in the case of trade-marked commodities by the Miller-Tydings Act, 50 Stat. 693 (1937), 15 U.S.C.A. §1 (1941).

⁷ *United States v. Masonite Corp.*, 316 U.S. 265 (1942).

⁸ *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661 (1944). Nor may the owner of a process patent fix, by license agreement, the price at which his licensee-manufacturer sells the unpatented product. *Barber-Colman Co. v. National Tool Co.*, 136 F. 2d 339 (C.C.A. 6th, 1943).

⁹ See *United States v. Vehicular Parking, Ltd.*, 54 F. Supp. 828, 838 (Del., 1944).

¹⁰ *United States v. Univis Lens Co.*, 316 U.S. 241 (1942).

given positive sanction to an agreement by which a patentee determined the selling price at which his licensee sold the patented articles. In *United States v. General Electric Co.*¹¹ the defendant had licensed the Westinghouse Company to make, use, and vend electric light bulbs under General Electric patents on condition that prices and terms to customers of Westinghouse would be those determined from time to time by General Electric in sales to its own customers. Mr. Chief Justice Taft said that the price restrictions were “. . . normally and reasonably adapted to secure pecuniary reward for the patentee’s monopoly”¹² and that the license agreement was not illegal under the Sherman Act. More recent decisions seem to have narrowed that principle,¹³ but the Supreme Court has refused expressly to overrule the *General Electric* decision.¹⁴ A vague area remains within which price fixing by a patentee may be legal. Thus, in the present case the court held that the *General Electric* case was controlling and that the agreements fixing prices were valid.

In several respects the holding in the present case is an extension of the doctrine of the *General Electric* case. That case and the case of *Bement v. National Harrow Co.*,¹⁵ upon which it was based, decide only that where A, a patentee who manufactures and vends to the public, licenses B to manufacture and vend on condition that B may not undersell him, the contract is not illegal.¹⁶ But

¹¹ 272 U. S. 476 (1926). There were two separate agreements involved in the case but the first one, dealing with del credere agencies, is not relevant here. Subsequent references to the General Electric case pertain only to the license agreements between General Electric and Westinghouse.

¹² *Ibid.*, at 490.

¹³ See *United States v. Vehicular Parking, Ltd.*, 54 F. Supp. 828, 838 n. 14 (Del., 1944).

¹⁴ In *United States v. Univis Lens Co.*, 316 U.S. 241 (1942) the defendants relied upon the General Electric decision to support a licensing arrangement under which the patentee sold unfinished lens blanks to wholesalers and retailers and set the prices at which the finished lenses were sold. The Government urged that the case called for an overruling of the General Electric decision. Although the Court held the licensing arrangements to violate the Sherman Act, it refused to overrule the General Electric decision. *Ibid.*, at 252.

¹⁵ 186 U.S. 70 (1902).

¹⁶ Actually both the Bement case and the General Electric case represented industry-wide price-fixing schemes but in neither case was that fact before the Court. In the former case the Court said, “The omission of the referee to find from the evidence that the contracts A and B were a continuation of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered into the same kind of contracts with plaintiff as those denominated A and B, and that there was a general combination among the dealers in patented harrows to regulate the sale and prices of such harrows, furnishes no ground for this court to assume such facts. The contracts A and B are to be judged by their contents alone and construed accordingly.” *Bement v. National Harrow Co.*, 186 U.S. 70, 85 (1902). The trial court in the General Electric case excluded consideration of agreements with other competitors of General Electric and Westinghouse. “[General Electric] . . . has also licensed some 13 other manufacturers . . . but as to these 13 no complaint is made, and their activities, as well as their relations to the General Electric Company, are not involved in this controversy.” *United States v. General Electric Co.*, 15 F. 2d 715, 716 (D.C. Ohio, 1925). As a matter of fact the agreement between Westinghouse and General Electric was a cross-licensing agreement by which Westinghouse agreed to license General Electric under any patents it then had or

the Sherman Act prohibits "combinations" and "conspiracies" as well as "contracts" in restraint of trade.¹⁷ In the present case there was not a single patentee but two competitors owning complementary patents. The court found that the principal defendants did not pool their licenses for the purpose of fixing prices and yet the first agreement entered into between the patentees made price-fixing provisions mandatory in all sublicenses. Here, also, the licensees were not a single manufacturer but ten competitors acting in undisguisable concert.¹⁸ Here minimum prices were not, as in the *General Electric* case, determined by the patentees, but were the fruit of "joint efforts of all defendants except Porcelain Pacific, Johnson and Royal."¹⁹ In the *General Electric* case the patentee determined the price at which his licensee might sell, but in the *Line* case the patentees have attempted to bind themselves not to sell below fixed prices.²⁰ The conclusion seems inescapable that the agreements and acts of the parties here go beyond the simple situation described by Mr. Chief Justice Taft in the *General Electric* case. It is true that in the present case the court emphasized the fact that the patentees held complementary, rather than competing, patents.²¹ The necessity of cross-licensing in this situation seems undeniable. But the

might in the future acquire. Record, *United States v. General Electric Co.*, No. 113 (U.S. October Term, 1926), 117. The Court, however, did not discuss the question. Thus both the *Bement* case and the *General Electric* case were concerned only with the narrow question of a license contract between two parties.

¹⁷ 50 Stat. 693 (1937), 15 U.S.C.A. §1 (1941).

¹⁸ A meeting was held in New York on June 1, 1939, attended by six of the then prospective licensees. At that time Southern was licensor for the patentees. The six participants at the meeting decided that they would prefer to be licensed by Line; their wish was conveyed to the patentees and complied with by the execution of a new agreement by which the patentees exchanged places and Line became licensor. *United States v. Line Material Co.*, 64 F. Supp. 970, 974 (Wis., 1946).

The court also mentions another meeting held in Chicago in October, 1938, attended by seven of the prospective licensees at which meeting the form of the proposed licenses was discussed. The opinion does not elucidate the means of communication used by eight of the twelve defendants in the "joint action" by which they drew up price schedules in the fall of 1940. But the brief for the principal defendants concedes that there was a meeting of the licensees on September 4, 1940, at which "classification" of the patented products was discussed. Brief on behalf of the defendants, *Line Material Company and Southern States Equipment Corporation*, Civil Action No. 1696 (D.C. Wis., 1946), 83-86.

¹⁹ *United States v. Line Material Co.*, 64 F. Supp. 970, 974 (Wis., 1946).

²⁰ It is true that in the *General Electric* case the Government argued that the patentee did bind itself to sell at fixed prices. Brief for the United States, *United States v. General Electric Co.*, No. 113 (U.S., October Term, 1926), 88. But the question was not discussed by the Court and the situation was treated as one in which the patentee had freedom to sell at any price it chose. One commentator has argued that price limitations binding the licensee are not justifiable as within the scope of the patent grant but are made necessary by economic considerations. See Wood, *op. cit. supra*, note 3, at 48 n. 51.

²¹ "Owners of competing patents do not need cross-licensing, but manufacturers of complementary patents must have cross-licensing if the public is to have the benefit of the cheaper device covered by the subservient patent." *United States v. Line Material Co.*, 64 F. Supp. 970, 975 (Wis., 1946).

proposition seems irrelevant to the question of price-fixing. Owners of complementary patents may cross-license one another with or without royalties. But there is no reason for the court's assumption that the existence of complementary patents justifies their going outside the orbit of the cross-license and sub-licensing so as to fix prices among their competitors.

The Government, while insisting that the *General Electric* doctrine is "plainly wrong in principle," was not willing to rest its argument upon the supposedly erroneous conclusion in that case.²² The Government asserted that the present case is within the doctrine of *United States v. Masonite Corp.*²³ Masonite, patentee of a product known as "hardboard," executed agreements with its principal competitors constituting them *del credere* agents for the sale of hardboard at prices fixed by Masonite in sales to its own customers. The Supreme Court held that the agreements violated the Sherman Act. In the present case the Government argued that the "sub-licensees" were like the "agents" in the *Masonite* case, and that the escrow device was used in both cases to achieve concert of action among competitors through supposedly independent agreements.²⁴ There is room for speculation as to exactly what the *Masonite* case did decide. The Court specifically assumed that ". . . the agreements constituted the appellees as *del credere* agents of Masonite."²⁵ If that premise is accepted the Court seems to have advanced the proposition that there are circumstances under which a patentee-manufacturer cannot legally fix the price of the *first* sale of his product. But there is reason to doubt that the Court took the so-called "agencies" seriously.²⁶ It cannot be said that the *Masonite* case overruled the *General Electric* doctrine since the Court expressly declined to pass on the

²² Because of its belief that the *General Electric* case was wrong in principle the Government was faced with a dilemma: if the Government based its case on the proposition that the *General Electric* decision should be overruled, it faced the danger that that decision would be reaffirmed by the Supreme Court; yet to argue solely on the basis of *United States v. Masonite Corp.*, 316 U.S. 265 (1942), would involve a risk that the present case might result in a decision favorable to the Government and yet leave the *General Electric* doctrine unimpaired.

²³ 316 U.S. 265 (1942).

²⁴ It is of interest to observe that the *Bement* case, upon which the *General Electric* decision was principally based, involved escrow agreements similar to those used in the present case. In that case the Court said, "It must, however, be conceded that the escrow agreement above set forth looks to the signing, by the parties mentioned therein, of contracts similar to those between the parties to this suit. . . . But there is no finding by the referee that such contracts were in fact entered into by those other parties. . . . If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination." *Bement v. National Harrow Co.*, 186 U.S. 70, 94 (1901).

²⁵ *United States v. Masonite Corp.* 316 U.S. 265, 277 (1942).

²⁶ It is perhaps significant that Mr. Justice Douglas, after acknowledging the validity of the *del credere* agencies, continues to refer to the "agents" in quotation marks. And he says, "So far as the Sherman Act is concerned the result must not turn on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade." *Ibid.*, at 280.

right of a patentee to set the price at which a manufacturer-licensee can sell.²⁷ But the *Masonite* principle—that in passing upon a program to fix prices among competitors by agreements under a patent grant the Court will not be influenced by the particular legal form which the scheme embraces—seems to have severely limited the *General Electric* doctrine and placed it in need of re-examination.

Should the *Line* case be appealed to the Supreme Court, the Court may do one of several things. It may affirm the lower court in which case it would appear that the doctrine of the *General Electric* case has been extended to permit price-fixing by competitors throughout an industry. It may reverse the lower court on the ground that the present situation is an extension of the *General Electric* case and illegal under the *Masonite* decision. It is arguable that this result would eliminate many of the evils of large scale price-fixing and still protect the small manufacturer who owns a valuable patent and is reluctant to license his large competitor for fear that his licensee, through greater resources and mass-production methods, will drive the patentee out of business by under-selling him.

The Court may overrule the *General Electric* case.²⁸ That decision will quite reasonably answer in the negative the question of whether there is a valid distinction between fixing the price at which patented goods are resold and fixing the price at which a licensee-manufacturer sells patented products.²⁹ By the first arrangement the patentee sells the patented product and thereby receives the entire remuneration to which his patent entitles him.³⁰ In the case of a license to manufacture and vend the patentee transfers an intangible right, i.e., the right to manufacture and vend, and his remuneration is in the payment of royalties by the licensee. Furthermore, the right to price-fix in the simple situation envisaged by Mr. Chief Justice Taft is of dubious applicability to modern industrial patent structures³¹ as, indeed, it was when the *Bement* and *General Electric* cases were decided.³² But as long as the *General Electric* doctrine re-

²⁷ "We do not have here any question as to the validity of a license to manufacture and sell, since none of the 'agents' exercised its option to acquire such a license from Masonite. Hence we need not reach the problem presented by *Bement v. National Harrow Co.*, 186 U.S. 70, and that part of the *General Electric* case which dealt with the license to Westinghouse." *Ibid.*, at 277.

²⁸ It is possible that if the patentee is prohibited from setting the price at which his licensee sells, problems will arise similar to those posed by the "single trader" cases; a patentee-manufacturer faced with the possibility that his licensee may undersell him will chose with care those whom he licenses. Cf. *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

²⁹ An interesting discussion of that question which seems to have anticipated the situation presented in this case appears in Dominick, *Recent Developments in the Law of Price Restrictions in Patent License Agreements*, 11 *Geo. Wash. L. Rev.* 302 (1943). For an expression of the opposing considerations see Wood, *op. cit. supra*, note 3, at 47.

³⁰ See note 6, *supra*.

³¹ See *Potts v. Coe*, 140 F. 2d 470 (App. D.C., 1944).

³² See note 16, *supra*.

mains undisturbed, it may induce a belief on the part of the business community that the scope of the patent grant justifies price protection among competitors.³³

Taxation—Income Tax—Depreciation of Mortgaged Property in Computing Gain or Loss—Basis of Mortgaged Property—[Federal].—The taxpayer was executrix as well as sole devisee and legatee under her husband's will. The husband died in 1932 leaving an apartment building and land, subject to a mortgage of \$262,042.50.¹ Valuation for Federal Estate Tax purposes was \$262,042.50, thus the taxpayer's equity was zero. She never was liable personally on the mortgage debt.² Full depreciation deductions for tax purposes were claimed and allowed on the property.³ In 1938, to avoid foreclosure, the taxpayer conveyed the property, subject to the mortgage⁴ and past due taxes, for \$3,000. Sales expenses were \$500. The taxpayer reported \$2,500 as a capital gain in 1938, including half that amount as taxable income.⁵ The Commissioner of Internal Revenue assessed a deficiency of \$1,932.99 contending that the taxpayer sustained a capital loss of \$528.85 upon sale of the land and an ordinary gain of \$24,031.45 on the apartment building. The taxpayer's position was sustained by the Tax Court of the United States.⁶ On appeal to the circuit

³³ Although the General Electric decision is clearly in need of re-examination, the present case is a difficult one in which to challenge the validity of the doctrine of that case. The presence of complementary patents suggests a superficial distinction between the principal case and the General Electric case with respect to price-fixing. On the other hand, the evidence of joint action by the licensees in the principal case suggests a combination going beyond the doctrine of the General Electric case. The validity of the General Electric decision will be raised squarely in a suit by the Government against the General Electric Company now being argued in the District Court for the District of New Jersey (Civil Actions, numbers 1364 and 2590). It appears improbable that that case will reach the Supreme Court before the Line Material case.

¹ The mortgage lien consisted of \$255,000 principal and \$7,042.50 accrued interest.

² In New York an heir or devisee does not assume personally a mortgage debt solely by inheriting title to mortgaged property. *Hauselt v. Patterson*, 124 N.Y. 349, 26 N.E. 937 (1891); *Levy v. Comfort*, 13 N.Y.S. 2d 845 (1939), *aff'd* 257 App. Div. 1037, 13 N.Y.S. 2d 847 (1939).

³ The taxpayer operated the property under an agreement with the mortgagee acting as executrix for the estate from 1932 through 1936 and in her individual capacity as titleholder in 1937 and 1938. The entire net income, after taxes and operating expenses, was applied on interest. Income tax returns for the estate from 1932 through 1936 included rentals as gross income; taxes, operating expenses, interest payment, and depreciation as deductions. Similar gross income and deductions were reported in the taxpayer's personal returns during 1937 and 1938. The net effect of the gross income report and deductions, other than depreciation, was zero. Taxes, operating expenses and interest paid were deductible in full. Revenue Act of 1938, § 23(a)(1), (b), (c), 52 Stat. 460 (1938), 26 U.S.C.A. § 23(a)(1), (b), (c) (1940). Thus, except for the amount claimed for depreciations, no increase or reduction in taxes or taxable income resulted. For a discussion of the depreciation deduction, see notes 13 and 33, *infra*.

⁴ The purchaser assumed a mortgage principal of \$255,000, interest due of \$15,857.71, and taxes of undetermined amount assessed for the second half of 1938.

⁵ Revenue Act of 1938, § 117(b), 52 Stat. 501 (1938), 26 U.S.C.A. § 117(b) (1940).

⁶ *Beulah B. Crane*, 3 T.C. 585 (1944). The Tax Court of the United States determined that gain realized on the sale of the building was ordinary, not capital, gain. Capital gain was re-