ship between bank and depositor as one involving reciprocal duties,[16] which would require the enactment of loss-splitting legislation similar to that passed in a few jurisdictions to govern the imposition of liability in the more typical negligence action.[17]

One hears few proposals for change, however, from any of the parties involved —bank, depositor, or insurance company. In fact a singular contentment with the present state of affairs seems to exist in all quarters. The undoubted explanation lies in the comparatively slight losses resulting from forgeries, recent publicity to the contrary notwithstanding.[18] Figures from two prominent Chicago banks reveal yearly losses ranging from $600 to zero during 1945 and 1946. Furthermore, according to the best available information, national losses are probably greatly overrated; the bankers' annual toll is estimated at approximately $500,000 to $800,000, nearly all of which is covered by forgery insurance.[19] Thus the insurance company is revealed as the risk-shifting vehicle, usually in the role of the bank's insurer. However, forgery claims seem to be sufficiently small in amount to provide no impetus for insurance companies in this competitive field to demand of the banks higher standards of operation. Under these circumstances there is little hope for the reduction of losses through forgery unless and until they become a substantial burden on any one of the classes involved. Thus, despite the clumsiness and conceptualism sometimes indulged in by the judiciary in allocating forgery costs the needs of the business community appear to be adequately served by the present state of the law.

Patents—Revocation of Executory Price-fixing Agreement Held To Relate Back so as To Permit Retroactive Enforcement of Patent—[Federal].—The patentee of a feather-picking apparatus made a manufacturer his exclusive licensee with power to sublicense, the patentee to receive a 5 per cent royalty. The exclusive licensee entered into a sub-licensing agreement, in which the patentee joined, which provided that the exclusive licensee was to specify the

[16] Duty of Depositor to Notify Bank of Checks Forged in His Name, 18 Va. L. Rev. 774, 779 (1927).

[17] Compare the proposals set out in Gregory, Legislative Loss Distribution in Negligence Actions 154 (1936).

[18] The most spectacular recent forgery is that involving the Mergenthaler Linotype Corporation. N.Y. Times, § 1, p. 1, col. 2 (Nov. 3, 1946). See also Stearns, Embezzlement—the Easiest Crime, 48 Reader's Digest, No. 285, at 73 (Jan., 1946).

[19] The statistics were contained in a letter of February 1, 1947, from Mr. James E. Baum of the Insurance and Protective Committee, American Bankers Association. It is to be noted that the total of national losses includes those from forgeries on non-negotiabile instruments as well as on negotiable instruments. Comparison of the figures with the number of banks in operation further substantiates the view that the losses are slight. The average loss per bank equals $52.10 when $800,000 is divided by 14,586—the number of banking offices in the United States on December 31, 1946. 33 Federal Reserve Bulletin, No. 3, at 330 (Mar., 1947). In addition, evidence that banks themselves consider forgery losses insignificant is to be found in the widespread use of excess forgery insurance policies which covers losses only over a certain amount, often $100,000. Below the amount established the banks are, in effect, self-insured.

minimum prices at which the sub-licensee could sell. In a patent infringement suit brought by the patentee and his exclusive licensee, the defendants claimed that the licensing agreements entered into by the plaintiffs created a price-fixing arrangement in violation of the Sherman Act and that the court should therefore withhold its aid in the patent. Toward the end of the trial stage the plaintiffs canceled the price-fixing provision. The district court found that eight claims were valid and infringed, and rendered judgment for the plaintiffs. On appeal to the circuit court of appeals, *held*, judgment affirmed except as to two claims. Although a court withholds enforcement of patent rights where there is price-fixing, this suit was not dismissible on that ground, because the agreement had never been enforced,[1] and had been canceled. *Campbell v. Mueller.*[2]

Involved in the case is the novel question of whether a patentee or exclusive licensee who has illegally contracted to fix prices but has never actually done so may, by cancelling the agreement, recover damages for infringements which occurred prior to the cancellation.

The Supreme Court has condemned attempts by a patentee to secure a monopoly not granted by the patent law by tying in unpatented articles with the licensing of a patented product.[3] Price fixing by a patentee has also been considered an abuse of the patent privilege,[4] although an indefinite area exists in which price fixing has been permitted.[5] In *Morton Salt Co. v. Suppiger*

[1] The court's treatment of the price-fixing provision is ambiguous. The provision did more than give to the exclusive licensee the power to fix prixes; it actually set a minimum price of $250 under which the patented apparatus might not be sold. The court states that "there is no evidence that the price fixing clause was ever invoked" and relies upon a general finding of the district court that there was no abuse of the patent and upon a statement in the repudiating agreement that the provision had not been enforced nor relied upon. Campbell v. Mueller, 159 F. 2d 803, 807 (C.C.A. 6th, 1947). But in the face of a definite determination of a minimum price it would appear that something more should be required before it can be said that the agreement was not put into effect.

[2] 159 F. 2d 803 (C.C.A. 6th, 1947).

[3] Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944); Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942); Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938); Carbice Corp. v. American Patents Corp., 283 U.S. 27 (1931).

[4] United States v. Univis Lens Co., 316 U.S. 241 (1942); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940). Where patent privileges are abused by the patentee, the courts are apparently free to choose as a rationale for forfeiture of patent rights the equitable doctrine of unclean hands, refusing enforcement where there has been a misuse. Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942); Barber-Colman Co. v. National Tool Co., 136 F. 2d 339 (C.C.A. 6th, 1943); Novadel-Agene v. Penn, 119 F.2d 764 (C.C.A. 5th, 1941). Or since Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944), the grounds for non-enforcement may be a violation by the patentee of the anti-trust laws. Landis v. Chaso, 141 F. 2d. 800 (C.C.A. 6th, 1944). For a suggestion that the lower courts have shown a reluctance to follow the Mercoid case in this respect, see Batemen, Should Anti-trust Law Penalties Be Invoked for Misuse of the Patent Grant? 29 J. Pat. Off. Soc. 16, 60 (1947). The defendant in the instant case claimed the court should withhold its aid to the patentee because the arrangement violated the Sherman Act, but the court discussed only the misuse doctrine as propounded in the Morton Salt case.

[5] United States v. General Electric Co., 272 U.S. 476 (1926), narrowly construed, held that where the patentee is also a manufacturer of the patented product he may stipulate that a

Co.,[6] the effect of such a misuse by the patentee was made clear. The Court stated that the patentee loses his right to prevent infringements "at least until it is made to appear that the improper practice has been abandoned and that the consequences of the misuse of the patent have been dissipated."[7] As to what actions are sufficient to dissipate the consequences, the courts have not been in agreement.[8] Similarly, there is disagreement as to whether renunciation of the misuse will immediately render the patent enforcible or whether a *purging period* is required.[9]

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licensee-manufacturer may make and vend at prices set by the patentee, provided the restrictions are "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." Ibid., at 490. The General Electric case is now being attacked on many fronts. The doctrine was reiterated in United States v. Line Material Co., 64 F. Supp. 970 (Wis., 1946), probable jurisdiction noted, 67 Sup. Ct. 113 (1947), noted in 13 Univ. Chi. L. Rev. 504 (1946).

The possibility that the price-fixing agreement in the instant case falls within the protection of the General Electric case was not discussed. The court stated broadly that "if there is price-fixing, the court simply withholds enforcement." Campbell v. Mueller, 159 F. 2d 803, 806 (C.C.A. 6th, 1947). But the case involved a patentee who received 5 per cent royalty from an exclusive licensee who had power to sub-license. The latter entered into a licensing agreement with another manufacturer and retained the right to establish prices in order to prevent being undersold. The similarity between the horizontal price maintenance in the two cases is apparent. For a discussion of horizontal and vertical (re-sale) price-fixing by patentees see Meyers and Lewis, The Patent "Franchise" and the Antitrust Laws, Part I, 30 Geo. L. J. 117, 134 (1941). The courts have tended to construe the General Electric decision narrowly. United States v. Paramount Pictures, 66 F. Supp. 323 (N.Y., 1946); United States v. Vehicular Parking Ltd., 54 F. Supp. 828, 838 (Del., 1944). It is probable that an exclusive licensee with authority to sub-license who had entered into a price-fixing sub-licensing agreement, would be distinguished from an assignee of the patent, or the patentee himself as in the General Electric case, although the patentee has the same interest in the sale price of the manufactured article.

[6] 314 U.S. 488 (1942).

[7] Ibid., at 493.

[8] In B. B. Chemical Co. v. Ellis, 314 U.S. 495 (1942), the patentee, guilty of tie-in practices, offered to "purge" itself of the misuse of its patent privilege by granting unconditional licenses on a royalty basis but was instructed that the court would consider its right to relief only when the patentee has shown that it had fully abandoned the restraint of competition and dissipated the consequences. In Barber v. La Fera Grecco, 116 F. 2d 211 (C.C.A. 3d, 1940), the court held that the alternative licensing plan offered by the patentee would still secure him a limited monopoly in unpatented products and was therefore not sufficient to avoid the misuse doctrine. See also, cases collected in Batemen, Should Anti-trust Law Penalties Be Invoked for Misuse of the Patent Grant?, 29 J. Pat. Off. Soc. 16, 39 (1947).

[9] In Universal Sewer Pipe Corp. v. General Const. Co., 42 F. Supp. 132 (Ohio, 1941), the patent was found valid and infringed but misused by allowing an implied licensee to use the process accompanying the sale of unpatented materials. The court relied on a showing made by the plaintiff during the pendency of the suit to the effect that it was no longer misusing its patent and granted an injunction against infringement. No period was required to purge the evils of the misuse. But in Novadel-Agene v. Penn, 119 F. 2d. 764 (C.C.A. 5th, 1941) the plaintiffs' proof of purging was not accepted and the case was remanded to the district court for a determination of whether the monopolistic practices had been discontinued. In United States v. Vehicular Parking, Ltd., 61 F. Supp. 656 (Del., 1945) the patentees appeared in court a year after the entrance of a judgment against them for violation of the antitrust laws and requested modification of the decree so as to permit them to enforce their patents. The court refused to so modify the decree until an unspecified additional period of time elapsed.

The court in the principal case at one point states that there was never in fact a misuse of the patent.[10] It seems to assume, however, that an executory price-fixing agreement is a sufficient abuse of a patent to prevent enforceability but that the act of rescission without more restores to the patentee the right to prevent infringement. The reliance by the court on the *Morton Salt* case to support this position is open to doubt. In that case the Supreme Court did not determine that restoration of patent rights would immediately follow a proof of purging by the patentee but merely that the patentee's unclean hands prevented present enforcement.

In the instant case the patentee asked not only the prevention of future infringement but also damages for infringement during the period before the rescission.[11] Had the price-fixing agreement actually been put into effect the patentee would clearly not have been entitled to damages. By permitting damages in the instant case, the court, if it assumes that the price-fixing provision is illegal, is taking the position that the purifying act of rescission relates back to encompass infringements which occurred before the objectionable agreement was cancelled. As was emphasized in *Mercoid Corp. v. Mid-Continent Investment Co.*,[12] an attempt by a patentee to extend his legalized monopoly will subject him to general laws, including the antitrust laws, just as though the patent element were not involved.[13] Outside of the patent field, executory price-fixing agreements are unlawful per se.[14] And in *Chicago Metallic Mfg. Co. v. Katzinger Co.*[15] the Supreme Court assumed without question that if a price-fixing provision in a patent license is unlawful, it is so whether executed or not. If in the instant case, the price-fixing agreement is unlawful, the award of damages seems clearly inconsistent with the effect of illegal conduct generally. And particularly, it is not in accord with the patent antitrust cases where the decrees rendered enjoin the patentee who has violated antitrust laws from instituting or proceeding with infringement suits for past infringements.[16] Illegal conduct, whether tortious or criminal, may create a disability which can be removed pro-

[10] Campbell v. Mueller, 159 F. 2d 803, 807 (C.C.A. 6th, 1947).

[11] Where the plaintiff's misuse of its patent for packaging food products to secure a monopoly in unpatented sausage casings was proved and the plaintiff later showed to the satisfaction of the court that it was no longer attempting to so monopolize, plaintiff was granted an injunction and damages for infringement *from the date when its purge was complete.* Sylvania Industrial Corp. v. Visking Corp., 132 F. 2d 947 (C.C.A. 4th, 1943).

[12] 320 U.S. 661 (1944).

[13] Ibid., at 666.

[14] American Tobacco Co. v. United States, 328 U.S. 781 (1947); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[15] 329 U.S. 394, 397 n. 3 (1947).

[16] Hartford-Empire Co. v. United States, 323 U.S. 386 (1945); United States v. Vehicular Parking Ltd., 54 F. Supp. 828 (Del., 1944).

spectively by corrective action. But it is almost never possible for the wrongdoer to take steps which will relate back to the wrongful act and render it legal.[17]

Torts—Conversion—Directed Verdict for Broker Innocently Consummating Sale of Fraudulently Acquired Goods Reversed—[Iowa].—The plaintiff, a livestock dealer, transferred fifteen cattle to a buyer who fraudulently misrepresented his identity in a face to face transaction and gave a worthless check in payment. The fraudulent buyer immediately shipped the cattle to the defendant, a commission broker operating under the Packers and Stockyards Act of 1921.[1] Before the plaintiff had taken any action, the defendant sold the cattle to a third party and paid the proceeds of the sale, less expenses and commission, to the fraudulent buyer. After the check was returned unpaid, the plaintiff instituted this action for damages against the defendant broker for conversion of the cattle. The trial court directed a verdict for the defendant. On appeal to the Iowa Supreme Court, *held*, the directed verdict is reversed and the case remanded, four justices dissenting. A subsequent petition for rehearing was denied. *Birmingham v. Rice Bros.*[2]

The stringent rule that a person who, however innocently, exercises dominion over another's property is absolutely liable for conversion[3] has been mitigated for bona fide purchasers in many instances, ostensibly in the interests of an unhampered flow of commerce. Thus, purchasers for value of stolen or fraudulently acquired negotiable instruments who take without notice acquire good title.[4] Purchasers of chattels and non-negotiable instruments are protected where the seller obtained his title by fraud[5] or was clothed by the owner with apparent authority to sell.[6] In the instánt case, had the defendant broker purchased and resold the cattle rather than acted as agent, he would not have been

[17] There are exceptions. For example, contracts void because made by a corporation which has not complied with a statute prohibiting foreign corporations from maintaining suits until certified, may be validated by a later compliance with the statutory requirements. M. S. Cohn Gravel Co. v. Terry, 135 Okla. 275, 275 Pac. 1048 (1928).

[1] 42 Stat. 159 (1921), 7 U.S.C.A. § 181 (1921).

[2] 26 N.W. 2d 39 (Iowa, 1947).

[3] Pease v. Smith, 61 N.Y. 477 (1875); Rest., Torts § 229 (1934); Harper, Torts § 30 (1933).

[4] Negotiable Instruments Law, § 16; note 10 infra.

[5] Williston, Sales § 348 (2d ed. 1924).

[6] Uniform Sales Act § 23; Williston, Sales § 312 (2d ed. 1924). Goods sold in London's market overt cannot be reclaimed from a buyer for value without notice. Case of Market-Overt, 5 Coke 83b, 3 Fraser's Notes 167 (1583–1608); Hill v. Smith, 4 Taunt. 520 (1812). The continental systems are even more indulgent in favor of purchasers; title may in many cases be passed by one in possession without other claim to ownership. Schuster, Principles of the German Civil Law, 390–99 (1907).