the District of Columbia courts for release.[33] *Ahrens v. Clark* standing alone would have deprived these petitioners of effective habeas corpus relief.[34]

The restrictions on the "freedom writ" introduced by *Ahrens v. Clark* can best be overcome by statute. For the protection of Americans imprisoned abroad by American military personnel, an act has been proposed which stipulates that the Chief Justice of the Supreme Court shall assign to designated district courts the duty of passing on the merits of habeas corpus petitions presented by citizens who are not within the territorial jurisdiction of any federal district court.[35] The Attorney General is to be named respondent in all such proceedings. A similar statute, providing that district courts shall have the power to issue writs if the jailer is subject to process,[36] would seem necessary for effective preservation of one of the most "precious safeguard[s] of personal liberty."[37] One year after the passage of the statute which the *Ahrens* decision has construed restrictively, the Supreme Court said: "[T]he general spirit and genius of our institutions have tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States."[38] The reversal of this trend is not a desirable tendency.

MUTUAL AGREEMENT NOT TO COMPETE AS PRECLUDING RELIEF FOR PATENT INFRINGEMENT

The Kammerer Corporation, holder of a pipe-cutter patent, and its exclusive licensee, Baash-Ross Tool Co., sought damages and an accounting from the defendant, McCullough, for infringement. After the patent was found to be valid and infringed,[1] the defendant raised the defense that the licensing agreement

[33] Burns v. Welch, 159 F. 2d 29 (App. D.C., 1947); Sanders v. Allen, 100 F. 2d 717 (App. D.C., 1938).

[34] In McAffee v. Clemmer (App. D.C., Oct. 18, 1948), the court of appeals relied on Ahrens v. Clark to hold that the District Court of the District of Columbia was without jurisdiction to grant a writ of habeas corpus to a petitioner who had been sentenced by that court and confined in the District of Columbia Reformatory at Lorton, Virginia. The court noted that this decision overruled previous precedents in the same court to the contrary, but made no mention of the section in the new judicial code, 28 U.S.C. § 2255 (1948), which permits the prisoner to make a motion to the court of his conviction at any time "to vacate, set aside or correct the sentence." Another circuit, confronted with the same problem, held that a prisoner, who was sentenced by a federal district court in North Carolina and confined in Georgia, might not seek a writ of habeas corpus in the North Carolina district court. Crowe v. United States, 169 F. 2d 1022 (C.C.A. 4th, 1948).

[35] Wolfson, Americans Abroad and Habeas Corpus, 9 Fed. Bar J. 142 (1948).

[36] Of course, the statute ought to be phrased permissively so that the courts could deny jurisdiction by invoking the doctrine of forum non conveniens. See Rutledge, J., dissenting in Ahrens v. Clark, 335 U.S. 188, 207 (1948).

[37] Bowen v. Johnston, 306 U.S. 19, 26 (1939).

[38] Ex parte Yerges, 8 Wall. (U.S.) 85, 101 (1868).

[1] Kammerer Corp. v. McCullough, 39 F. Supp. 213 (Calif., 1941), aff'd 138 F. 2d 482 (C.C.A. 9th, 1943), cert. den. 322 U.S. 739 (1944), rehearing granted 322 U.S. 766 (1944), writ dismissed and case remanded 323 U.S. 327 (1945).

between the plaintiffs went beyond the patent monopoly and restrained competition. The licensor had covenanted not to do business either with the devices covered by the agreement or with competing devices. The licensee had agreed not to deal with competing devices. The majority opinion held that this covenant extended the patent monopoly and harmed the public by preventing competition with other patents which might otherwise be marketed by the plaintiffs. Enforcement of the infringement decree was refused. The dissent denied any issue of public interest and claimed that the evidence entirely failed to establish any way in which the patentee's business practices stifled competitive forces. *McCullough v. Kammerer Corp.*[2]

The issues and decision in this case mark another step in spelling out one of the most important and controversial aspects of patent law: What constitutes an extension of the patent monopoly, and, if one is found, how should the patentee be punished or his rights restrained?

The Supreme Court in an early case decided that the object of the patent laws was not primarily the creation of private fortunes but the promotion of progress of science and the useful arts.[3] It is true that the Court has repeatedly sustained the doctrine that the patentee may make no use of his patent if he so pleases,[4] whether such non-use is reasonable or not.[5] But it has increasingly restricted the commercial marketing techniques of the patentee to practices compatible with the Court's notions of competitive policy. This policy has reflected changing contract and property concepts[6] and has shown especially the impact of more recent economic thinking—the recoil from economic concentration and restraint of competition—which has been influenced in great part by the passage of the anti-trust laws.[7]

[2] 166 F. 2d 759 (C.C.A. 9th, 1948).

[3] Pennock v. Dialogue, 2 Pet. (U.S.) 1, 19 (1829); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 511 (1917).

[4] Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405 (1908); Special Equipment Co. v. Coe, 324 U.S. 370 (1945). Noteworthy is the dissent of Douglas, J., in which he exclaimed that it was time to overrule the Paper Bag case and rid the law of a rule that "is inconsistent with the Constitution and the patent legislation which Congress has enacted." Ibid., at 381.

[5] The Court in Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405 (1908), rejected the lower court's distinction between "simple non-use" and "unreasonable non-use," saying that the suppression for the maintenance of old and less efficient machines was probably reasonable.

[6] See Hamilton, Patents and Free Enterprise 51–85 (U.S. TNEC Monograph 31, 1941).

[7] The effect of the anti-trust statutes upon patent law is illustrated by many cases: Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917), and the United Shoe cases, United States v. United Shoe Mach. Corp., 247 U.S. 32 (1918), and United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922). Consider also the problem of whether there is a conflict in policy between the patent and the anti-trust laws. For a view holding that there is no conflict, see Wood, Patents and Antitrust Law (1942), and Barnett, Patent Property and the Anti-monopoly Laws (1943). Contra: see the dissent of Rutledge, J., in Hartford-Empire Co. v. United States, 323 U.S. 386, 452 (1946). In general, see Oppenheim, Cases on Federal Anti-trust Laws 482 (1948).

Control and punishment of the patentee has come, of course, through government suit under the anti-trust laws.[8] Of perhaps equal importance has been the refusal of the courts to enforce the patentee's rights of equitable relief against direct or contributory infringers if the patentee has used his exclusive powers under the patent laws to extend his patent monopoly over some normally competitive aspect of the market. The *McCullough* case raises the question of what practices the courts consider sufficiently nefarious to warrant a denial of equitable relief. Any attempt to answer this question must also consider the anti-trust cases as an indication of the trend of the courts' thinking.

In denying relief against infringers, the Supreme Court has indicated two lines of defense against the patentee. The defense most often invoked relies on a showing that there has been a misuse of the patent such as to give the patentee a limited monopoly over some other patented or unpatented article not within the patent grant. This line, which has been developed principally where there has been a tie-in arrangement between the patented article and something else, clearly does not require proof of a violation of the anti-trust laws. Then, in *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*,[9] the Court first indicated that the anti-trust laws and not the patent law might be used to decide whether the patentee's conduct constituted a complete defense for the infringer.

It is in interpreting these approaches that the *McCullough* court split. The majority opinion contended that the covenant involved was an extension of the patent monopoly sufficient to justify a denial of relief. The dissent represents the position that before the patentee may be denied relief it must be shown that his actual practices—in effect measured by the standards of the anti-trust laws—illegally affected competition.

The misuse doctrine has been given broad application by the Supreme Court within the last three decades. In 1912 the Court's decision in *Henry v. A. B. Dick Co.*[10] reaffirmed the theory that marked the high-tide of patent control: Since the patentee might withhold his patent altogether from public use, he might also impose any condition he chose upon the use of the patented article. In the *Dick* case the Court upheld the patentee's right to condition his sale of the patented article upon the purchaser's agreement to buy accessory materials exclusively from the patentee. But after the Clayton Act had specifically outlawed the use of contracts tying together the lease or sale of the patented article and patented or unpatented supplies, the Supreme Court overruled the *Dick* case. In *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*[11] the Court carefully pointed out that such contracts were unlawful independent of the Act as an extension of the patent monopoly. The decisions of the Court following the *Motion Picture* case have consistently refused to aid patentees where

[8] Sherman Anti-trust Act, 26 Stat. 209 (1890) as amended, 15 U.S.C.A. §§ 1–7 (1941); Clayton Anti-trust Act, 38 Stat. 730 (1914), 15 U.S.C.A. § 12 et seq. (1941); Federal Trade Commission Act, 38 Stat. 717 (1914) as amended, 15 U.S.C.A. § 41 et seq. (1941).

[9] 320 U.S. 680 (1944). [10] 224 U.S. 1 (1912). [11] 243 U.S. 502 (1917).

there was an attempt to tie in the patented article with something outside of the patent grant.[12]

The majority in the *McCullough* case used this concept of illegal extension of patent monopoly to condemn the licensing agreement between the patentee and the sole licensee. By the terms of the agreement the patentee agreed not to "manufacture, sell, rent, license, use or in any way do business with the device or devices covered by this agreement or with devices which will come or be in competition with the device or devices covered by this agreement."[13] The licensee agreed "not to manufacture or use or rent any device which will be in competition with the device or devices covered by this license agreement."[14] Although such a covenant does not at first glance seem to constitute the same type of patent extension as a tie-in between the patented article and some tangible and existing device, article, or supply, the majority thought it came within the same principles.[15] The covenant here, instead of requiring the use of some other product supplied by the patentee or prohibiting the use of some other product if supplied by a competitor, sweepingly prohibits the use of all other devices in competition with the Kammerer patent, in what might loosely be termed a negative or reverse tie-in. In considering conventional tie-in arrangements the Supreme Court has repeated the broad statement, perhaps applicable here, that "[i]n construing and applying the patent laws as to give effect to the public policy which limits the granted monopoly strictly to the terms of the statutory grant . . . the particular form or method by which the monopoly is sought to be extended is immaterial."[16]

The federal courts have in earlier cases condemned similar restrictions upon the freedom to compete. In *Blount Manufacturing Co. v. Yale & Towne Manufacturing Co.* the Massachusetts Circuit Court announced that "a contract whereby the manufacturers of two independent patented inventions agree not to compete in the same commercial field deprives the public of the benefits of

[12] Carbice Corp. v. American Patents Development Corp., 283 U.S. 27 (1931); International Business Machines Corp. v. United States, 298 U.S. 131 (1936); Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938); United States v. Univis Lens Co., 316 U.S. 241 (1942); Morton Salt Co. v. Suppiger, 314 U.S. 488 (1942); B. B. Chemical Co. v. Ellis, 314 U.S. 495 (1942); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944). But see Transparent-Wrap Mach. Corp. v. Stokes & Smith Co., 329 U.S. 637 (1947). In general, see James, Use of Patents to Control Unpatented Material, 28 J. Pat. Off. Soc. 427 (1946); Bateman, Should Anti-trust Law Penalties or Unenforceability of the Patent Monopoly Be Invoked for Misuse of the Patent Grant? 29 J. Pat. Off. Soc. 16 (1947).

[13] McCullough v. Kammerer Corp., 166 F. 2d 759, 760 (C.C.A. 9th, 1948).

[14] Ibid.

[15] The court said: "We agree with [the circuit deciding the Lockwasher case] that there is no difference in principle between extending the monopoly of the patent by suppressing the manufacture or use of competitive devices, patented or unpatented, and the extension of the monopoly by prohibiting the use in making the patented article of unpatented articles competing with those made by the licensor's subsidiary, held against the public interest in Morton Salt Co. v. Suppiger Co., 314 U.S. 488, 493 . . . ." Ibid., at 761.

[16] United States v. Univis Lens Co., 316 U.S. 241, 251–52 (1942).

competition, and creates a restraint of trade. . . ."[17] And in *Pope Manufacturing Co. v. Gormully*,[18] long before the *Motion Picture Patents* case, the Supreme Court declared a contract unenforceable at equity, even though not void as to public policy, where the licensee had agreed not to import, manufacture, or sell devices covered by other of the plaintiff's patents.

The case principally relied upon by the majority in the *McCullough* decision was *National Lockwasher Co. v. G. K. Garrett Co.*,[19] which presented a very similar fact situation. There five licensees agreed, in exchange for the right to manufacture a certain patented spring washer, not to manufacture any competing spring washers. On the basis of the same general policy decisions relied on by the *McCullough* majority concerning extension of patent monopoly as expressed by the Supreme Court, the circuit court held that

> . . . the instant case . . . falls within the principle of the cases cited to the extent that the patentee is using the lawful monopoly granted by the patent as a means of suppressing the manufacture and sale of competing unpatented articles. It is not creating for itself a monopoly for unpatented goods, as in some of the cases cited. But it is attempting by means other than that of free competition to extend the bounds of its lawful monopoly to make, use and vend the patented device to the extent where such device would be the only one available to a user of such an article. This monopoly is obviously not covered by the patent. A patentee's right does not extend to the use of the patent to purge the market of competing non-patented goods except, of course, through the process of fair competition.[20]

In the *Lockwasher* case it appears that all five manufacturers gave up the production of other washers upon entering the agreement.[21] In the *McCullough* case two employees of the licensee Baash had devised the patented pipe cutter as an improvement upon one already patented and used by Kammerer. To avoid a conflict of patent rights and to make manufacture possible, Kammerer and the two Baash employees formed the Kammerer Corporation to hold the new patent. The Baash Company was given the exclusive license rights under the agreement already set forth. Between the time of the contract, 1923, and the bringing of the instant suit, the plaintiffs established a monopoly of the pipe-cutting business in the United States and did business in foreign countries as well.

The majority claimed restraint of competition at three points. The first, an issue not raised by the *Lockwasher* case, was that the officers and employees of the licensor, Kammerer Corporation, were restrained from creating new devices

[17] 166 Fed. 555, 557 (C.C. Mass., 1909); cf. Jones Cold Store Door Co. v. Jones, 108 Md. 43, 70 Atl. 88 (1908), where a contract restraining the assignor of a patent from dealing with similar devices for a period of five years was held void; National Harrow Co. v. Hench, 76 Fed. 667 (C.C. Pa., 1896), where a combination requiring manufacturers to assign their patents to the corporation set up for that purpose and to take back a license for the manufacture of their patented harrow, all parties being bound to sell at a uniform price, was held in restraint of trade.

[18] 144 U.S. 224 (1892).

[19] 137 F. 2d 255 (C.C.A. 3d, 1943).

[20] Ibid., at 256.

[21] See note 31 infra.

to compete with the plaintiffs' present patent. There seems little doubt that under the covenant the licensee could prevent the licensor from making or from licensing others to make a pipe-cutting device employing an entirely new invention. But with respect to improvement patents, the majority's contention does not seem accurate. The first paragraph of the covenant provided that the license right was to extend to patents "now granted or which may hereafter be granted on any applications now pending or any patents hereafter obtained on improvements . . . said license to continue for the full term of any Letters Patent granted for said inventions or improvements thereon."[22]

More important are the conclusions of the *McCullough* majority opinion that the covenant restrained competition at two other points: It served to "extend the monopoly of the patent by preventing competition with the patent of any other pipe cutter, patented or unpatented, manufactured, used or sold by the licensee, theretofore engaged in making pipe cutting tools,"[23] and it prevented the licensor from dealing either with the patented article or with any competing device.

Considering the position of the licensor first, the dissent argued that the Kammerer Corporation was a " 'paper corporation' expressly created for the one and only purpose of holding the Kammerer patent or patents . . . ; it was not, and never was, a manufacturing and/or selling company."[24] It had "never competed, or attempted to compete with any one."[25] While this may be true, the license restriction would seem to come within the doctrine of *Blount Manufacturing Co. v. Yale & Towne Manufacturing Co.*,[26] where it was held improper for a patentee to put into the hands of another the power to restrain the patentee from developing his own patents. And even if the circuit in which the court here sat did not expressly adopt the *Blount* view, it seems obvious, as the majority points out, that the covenant restriction did aim at the prevention of such competition, looking forward to the day when the so-called "paper corporation" might itself desire to manufacture a third party's device or license others to do so. This restriction upon the licensor, not present in the *Lockwasher* situation, adds to the dissenting judge's difficulty in distinguishing the result of that case.

It is with respect to the restriction upon the licensee, however, that the break between the majority and dissent becomes more pronounced. Dissenting Judge Bone read the *Lockwasher* decision as clearly demonstrating a combination of six manufacturers "all coldly bent upon the creation of a stifling monopoly in an entire field which (under facts disclosed at trial) *was deliberately fashioned and designed to purge the entire market of competition*,"[27] while no design was

[22] Appellant's supplemental brief at 7.

[23] McCullough v. Kammerer Corp., 166 F. 2d 759, 760 (C.C.A. 9th, 1948).

[24] Ibid., at 768.

[25] Ibid.

[26] 166 Fed. 555 (C.C. Mass., 1909).

[27] McCullough v. Kammerer Corp., 166 F. 2d 759, 771 (C.C.A. 9th, 1948).

shown in the instant case to eliminate all or any competition. The report of the *Lockwasher* case does not disclose the nature of the schemes indulged in by the patentee, partly because the court did not get a full report from the master below.[28] The decision rests upon the master's finding that the plaintiff had a restrictive licensing policy in operation and upon certain uncontroverted evidence not disclosed in the opinion. Apparently, then, the contract policy of refusing to allow the licensees to manufacture competing devices really lay at the roots of the decision. After stating the form of the covenant, the court concluded:

> We think this is enough; enough to show that the plaintiff was using its patent to suppress competition with it by non-patented articles. To the extent that the policy was successful the supply of competing non-patented washers would, of course, disappear.[29]

To the same extent the supply of competing pipe cutters would disappear from the market in the *McCullough* situation, and the record permits the inference that this was in fact the result. The contract was entered into in 1923. From that time on the plaintiffs experienced great success. In the course of years prior to the instant suit, the device had gained a monopoly of the pipe-cutting business, "all other cutters being supplanted by the cutter of which [the patentee] had the patent monopoly."[30] With the licensor and licensee both bound by a covenant that aimed at control of the market, it is doubtful that all of the success emanated from the superiority of the cutter.

One fact does appear, however, that brings the *McCullough* decision squarely within the *Lockwasher* holding. In both cases existing manufacturers[31] gave up the production of competitive articles to obtain licenses under the restrictive covenants. To the extent that this withdrew competition from the market, it may be said that the covenants were an illegal extension of the patent monopoly. And though there is no showing in the *Lockwasher* case of the extent to which the plaintiff and licensees controlled the market,[32] the amount of control exercised by the plaintiffs in the instant case underscores the probable effect of the

[28] The court said: "[W]e are confronted with a record which is not complete in detail. The special master made one specific finding on the matter of the defendant's contractual policy. The District Judge regarded the point under discussion as outside the reference to the master. However that may be, it is not outside the scope of relevancy for us if we have the necessary facts on which a conclusion may be based." National Lockwasher Co. v. G. K. Garrett Co., 137 F. 2d 255, 257 (C.C.A. 3d, 1943).

[29] Ibid., at 257.

[30] McCullough v. Kammerer Corp., 166 F. 2d 759, 761 (C.C.A. 9th, 1948).

[31] The McCullough court states definitely that the licensee was an existing manufacturer; the Lockwasher court speaks of "[t]he patentee issu[ing] licenses to various manufacturers of metal washers under a standard form of license agreement. . . . That contract contains a clause that '(g) Licensee agrees that, while this agreement is in force, it will make and sell no form of non-entangling spring washers except such as are covered by said patent, and that it will not, either directly or indirectly, make or sell spring washers of the kind specifically excluded from this license under the provisions of Paragraph-First (a) hereof.'" National Lockwasher Co. v. G. K. Garrett Co., 137 F. 2d 255, 256–57 (C.C.A. 3d, 1943).

[32] The court said, "It is not disputed that there are other forms of unpatented nontangling spring washers than those involved in the Loutrel patent." Ibid., at 256.

contractual withdrawal of the licensee from the production of more than the one type of pipe cutter. The fact that there was only one licensee in the instant case and five in the *Lockwasher* case is hardly a distinguishing factor when the monopoly position of the single licensee in the *McCullough* case is taken into consideration.

But the problem of the *McCullough* case is not confined to the misuse doctrine. So far as the instant case fails to point out specifically how actual business practice stifled competition with other devices, it must be taken to stand for the additional proposition that the agreement not to compete was itself an illegal extension of the patent monopoly sufficient to justify the refusal of relief. A number of recent Supreme Court cases support the view that any extension of the patent monopoly, whether within the anti-trust laws or not, is a sufficient defense for an infringer.

In *Morton Salt Co. v. Suppiger*[33] the circuit court had reversed the trial court upon the ground that the defendant-infringer had failed to show that the plaintiff-patentee's leases substantially lessened competition or tended to create a monopoly within the meaning of Section 3 of the Clayton Act. The tie-in contract involved an inconsequential amount of the total volume of all salt business. The Supreme Court overruled the circuit court, holding that a finding under the Clayton Act need not be made and concluding that the practice shown was a sufficient extension of the patent monopoly for Equity to "rightly withhold its assistance."[34] This result was reached despite the fact that the defendant was a direct infringer and had been in no way harmed by the tie-in-contract policy of the plaintiff. From this decision it is clear that the controlling criterion is not the actual amount of competition restrained but the fact that the patentee was engaging in a practice which restricted commerce and was not within his patent grant. "The Court . . . rejects altogether the idea of measuring the reasonableness of the restraint imposed."[35] Once it is conceded that there is no real difference in intent between the tie-in cases and agreements not to deal in competing devices, the *McCullough* case comes squarely within the *Morton Salt* decision.

More recently, in *International Salt Co., Inc. v. United States*,[36] the Supreme Court condemned tying restrictions similar to those in the *Morton Salt* case, holding that under the admitted facts no real issue remained under either the Sherman or the Clayton Act. "Not only is price fixing unreasonable, *per se*, . . . but also it is unreasonable, *per se*, to foreclose competitors from any substantial market. . . ."[37] The tie-in contract in the *International Salt* case covered and

[33] 314 U.S. 488 (1942).

[34] Ibid., at 493.

[35] Wood, Patents and Antitrust Law 86 (1942).

[36] 332 U.S. 392 (1947).

[37] Ibid., at 396. It is interesting to note that the Supreme Court in United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948), cited the International Salt case as supporting the proposition that "where a complaint charges that the defendants . . . have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*." See Tying Restrictions: Changing Standards of Legality, 48 Col. L. Rev. 733 (1948).

protected a "substantial market" just as the agreement not to compete covered and protected the monopolistic market of the plaintiffs in the *McCullough* case.

Finally, the challenging statement of Justice Douglas in *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*[38] that "[t]he legality of any attempt to bring unpatented goods within the protection of the patent is measured by the anti-trust laws and not by the patent law"[39] should be mentioned. While it will take a proper case to determine whether this view will ultimately be carried to the point where all extensions of the patent monopoly are illegal per se under the anti-trust laws, the language employed at least suggests that the Supreme Court has developed strict notions of the treatment to be accorded any attempt at extending the patent monopoly. Certainly it is hard to doubt that such an obvious attempt to restrain competition as the covenant in the *McCullough* case would escape the policy clearly expressed in the *Morton Salt* and other recent cases.

The *McCullough* decision must be regarded as a desirable and positive step toward protection of competition. If the court had required the infringer to build a defense showing actual violations of the anti-trust laws arising from the twenty-five-year old restrictive agreement, the prohibitive nature of the task would almost certainly have precluded the denial of equitable relief to the patentee. The court is justified in saying, "We won't inquire into actual practices." To this extent the court is protecting competitive society from the operation of these covenants.

It is true that the plaintiffs are left free to practice the usual patent safeguards of buying up and shelving competitive patents, of shelving improvement patents of their own, and of requiring in the licensing agreement the assignment of all improvement patents.[40] But legally, at least, both the licensor and licensee may now deal with inventors of better pipe cutters, thus giving the public the benefit of new products offered by the largest producers in the market.

There were available to the licensor and licensee in the *McCullough* case contractual arrangements which would not seriously threaten competition.[41] Once changes were made so as to "purge" the parties of the charge of patent misuse, the patentee would be free to punish the infringer McCullough or any other infringers.[42] The total effect of these changes upon the patentee would not be to

[38] 320 U.S. 680 (1944). [39] Ibid., at 684.

[40] Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637 (1947).

[41] The covenant against competition would have to be dropped. The patentee could require the assignment of improvement patents. Covenants giving the licensee an exclusive license for the life of the patent and improvement patents, together with a covenant by the patentee and licensee to share any profits made from dealing with a competing device, would give the parties some mutual protection. Or an agreement containing elements of mutual undertaking and responsibility and loss such as to make the agreement a true joint venture—which was not found here—might eliminate entirely the need for such agreements against competitive devices.

[42] It is well settled that once the patentee has shown a change in practices satisfactory to the court the patentee will be allowed to proceed against the infringer. B. B. Chemical Co. v. Ellis,

damage his competitive position in the market—if, as the dissent claimed, his monopolistic position came from the superiority of the device. But that part of the patentee's advantageous market position which is traceable to the covenant has been removed and competition restored.

DISQUALIFICATION OF FEDERAL JUDGES FOR PERSONAL BIAS

Following an appearance before the House Committee on Un-American Activities, Lester Cole, a motion picture script writer, was suspended by his employer, Loew's, Incorporated, on the ground that his conduct before the committee had violated his contract of employment. He brought a suit to restrain the suspension and to obtain damages. Invoking the disqualification provisions of Section 21 of the Federal Judicial Code,[1] the defendants filed an application to transfer the cause supported by an affidavit that the district judge assigned to the case, Leon R. Yankwich, had a personal bias against them and in favor of the plaintiff. The affidavit stated that during a discussion at the home of friends about the hearings before the House committee Judge Yankwich had said "in substance and effect that in his opinion there was no legal justification for the suspension or discharge of any of the persons whose conduct before the committee resulted in their indictment; that he hoped that none of the cases arising out of such suspensions or discharges came before him, but if they did, he would have no alternative but to render judgment for the plaintiffs in such actions and that if he were the attorney for such plaintiffs he could recover judgment in their favor for millions of dollars."[2] The names of persons present, the place, the occasion, and approximate date of the remarks were included. Treating the affidavit as true, Judge Yankwich found the facts stated insufficient to show the personal bias he considered necessary to disqualify him under Section 21. The section provides: "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice against him or in favor of any opposite party to the suit, such judge shall proceed no further therein. . . . Every such affidavit shall state the facts and reasons for the belief that such bias or prejudice exists."[3] The application for transfer was denied. *Cole v. Loew's, Inc.*[4]

---

314 U.S. 495 (1942). There is some dispute as to what the character of the change and the length of time have to be. In the Ellis case the court stated that both the method of restraint of competition must be abandoned and the consequences of the practices fully dissipated. In general, see Bateman, op. cit. supra note 12, at 61.

[1] 36 Stat. 1090 (1911), 28 U.S.C.A. § 25 (1927).

[2] Cole v. Loew's, Inc., 76 F. Supp. 872, 875 (Cal., 1948).

[3] 36 Stat. 1090 (1911), 28 U.S.C.A. § 25 (1927).

[4] 76 F. Supp. 872 (Cal., 1948).