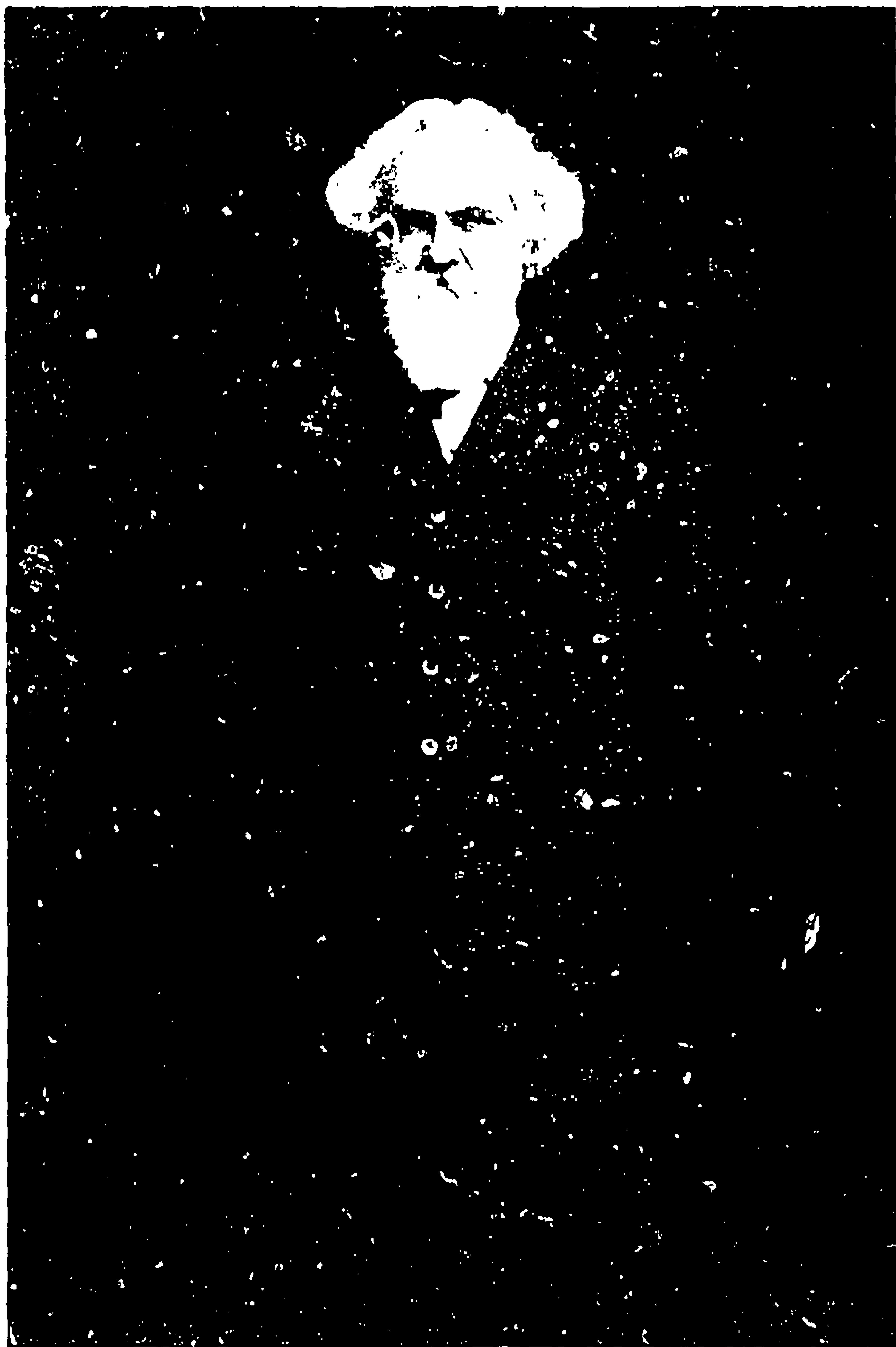

Albert H. Walker

TEXT-BOOK

OF

THE LAW OF PATENTS

FOR INVENTIONS

BY

ALBERT H. WALKER

OF THE NEW YORK BAR

FIFTH EDITION

BY

JOHN H. HILLIARD AND EUGENE EBLÉ

OF THE NEW YORK BAR

YALE LAW LIBRARY.

NEW YORK

BAKER, VOORHIS AND COMPANY

1917

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PREFACE TO THE FIFTH EDITION

IN presenting the Fifth Edition of WALKER ON PATENTS, the editors have felt a deep responsibility toward the imperishable talent and gift of analysis of the late author, Albert H. Walker, which have made the preceding editions of this work a most valued text-book on the subject of Patent Law. It would be impossible conscientiously to undertake an augmentation of Mr. Walker's splendid treatise, approved through many years past by the highest tribunals of the United States without a profound sense of duty to the author, who was inspired in all his works by a self-imposed sense of duty which he felt he owed to his brethren of the profession to guide them in the science of this particular and intricate branch of the law.

In the succeeding pages it has been the effort of the editors to cite all the cases involving questions of law pertaining to patents and to treat in the text such of the cases as required special consideration, either because they established new doctrines or modified or enlarged old doctrines.

The present work takes up Federal decisions where the Fourth Edition concluded. Approximately 3,000 reported cases have been examined and from these all were selected which were deemed essential to bring the work to a state of completeness. New rulings, per-

taining to the law of recovery of damages and profits, the rights of owners of patents in the light of the Sherman Anti-Trust Law, procedure under the present Equity Rules, design patents, the enforcement of contracts for assignments of patent rights, etc., have received especial attention.

The editors trust that they have succeeded in contributing to prior treatises on the subject, something which may prove of value to those who may be interested in this branch of the law either professionally or as students.

JOHN H. HILLIARD.
EUGENE EBLÉ.

NEW YORK,
February 1, 1917.

PREFACE TO THE FIRST EDITION

THE Constitution and the statutes of the United States, together with twelve hundred and forty-six Federal and State judicial decisions, are the principal sources from which the materials for this text-book were drawn. The most extensive treatise heretofore published on the same subject, was published in 1873; but it cited only two hundred and eighty American cases, together with one hundred and sixty-one English adjudications. The inadequacy, to the needs of the profession, of a treatise so limited in scope, was clearly impressed upon me when I entered, in 1877, upon a somewhat extended practice in patent litigation. During the next four years, I was called upon to argue several patent cases in the Supreme Court, and many others in many of the Circuit Courts of the United States; and in preparing those arguments, I was forced to make many laborious researches, from which a complete text-book would have largely relieved me. Under these circumstances, I resolved, early in 1881, to undertake the production of a treatise so much needed by the profession. I began writing on the first day of May of that year, and soon became so much interested in the work, that I largely suspended my active practice of the law, in order to give the book the freshest of my efforts, and thus the greatest degree of merit consistent with my abilities. The resulting treatise covers the entire field

of the patent laws of the United States, as those laws were enacted in the statutes and developed in the decisions, from the foundation of the national government in 1789, down to the first day of September, 1883. How accurately and well it covers that field, is a question which belongs to the bar and to the bench; and to the generous judgment of the bench and of the bar, I commit the result of my long and interesting labor.

A. H. W.

HARTFORD, CONNECTICUT,
September 26, 1883.

PREFACE TO THE SECOND EDITION

THE patent laws of the United States, as those laws exist at this beginning of the second century of the national government, are stated and explained in this edition of this book. The differences between it and the first edition, consist in omitting eleven whole sections which have become obsolete since 1883, together with parts of many other sections for the same reason; and in inserting three new sections, and many new points in many other sections, which have been enacted in the statutes or developed in the decisions since that year; and in so changing or qualifying the statements of law in many other places as to make them conform to those relevant and often radical decisions of the courts which have been rendered since the first edition of the book was published. The work of making these changes began as soon after the publication of the first edition as new decisions were published, and has continued from that time to this, and has involved my careful study and analysis of the more than six hundred new decisions which are incorporated with the more than twelve hundred old ones in the table of cited cases. The generous judgment which has been passed upon the first edition of the work, has been made known through numerous citations of the book in the decisions of the courts, and through numerous letters received by me from my professional brethren. Sincere

thanks for the exceeding generosity of that judgment are now returned; and I am thereby encouraged to propose a third edition of the book in 1895, and a fourth edition at the beginning of the twentieth century.

A. H. W.

HARTFORD, CONNECTICUT,
April 30, 1889.

PREFACE TO THE THIRD EDITION

THE Supreme Court of the United States has lately decided the last of the patent cases, which were taken to that tribunal before the judiciary act of 1891 put a practical period to nearly the whole of its patent law jurisdiction. At this distinguished stage of legal evolution, the existing patent statutes, together with the thousands of patent decisions which have been made by the Supreme Court, and by the lower Federal courts under its guidance, contain materials for a nearly complete and a beautifully symmetrical science of the subject. To the study of the laws thus embodied and developed, I have devoted enthusiastic efforts for twenty years; and during the last eighteen of those years, I have practiced in those laws, in fifteen of the United States. This edition of my book is a result of that experience, and of my careful revision and enlargement of the second edition, into accurate conformity with the present law. The differences between this edition and the second, are far more numerous and important than those between the second and the first. No book so old as the second edition, nor even one a year younger, can be a reliable guide through the patent laws of to-day; but it is not probable that any development of those laws during any six years of the future, until Congress enacts a new system of patent statutes, will be nearly so extensive or important, as that of the six

years which have passed since 1889. Except in the event of such an enactment, a necessity for another edition of this book, cannot now be foreseen; and therefore I present this edition to the bench and to the bar, as probably my final contribution to the literature of the patent law.

A. H. W.

HARTFORD, CONNECTICUT,
November 16, 1895.

PREFACE TO THE FOURTH EDITION

CONGRESS has enacted six statutes amending the patent laws, and the courts have decided two thousand patent cases, since the third edition of this book was published in 1895. Two-thirds of those decisions were confined to questions of fact, the judicial answers to which contain no new material for a law book. But nearly seven hundred of those cases were found, upon careful examination by me, to contain contributions to the patent law. Those contributions, together with the amendments made by the six statutes, have been collected by me, and have been written by my own hand, into this text-book, in their proper places. I have now conducted one side or the other of nearly three hundred patent litigations in most of the States of the Union, and I have delivered many courses of lectures on the patent laws, in Cornell University, and in the University of Michigan. These labors, and the writing, during twenty-three years, of four editions of this text-book, and the studies incident to the litigations, the lectures and the authorship, have made me well acquainted with the patent laws of the United States. The analysis and arrangement of those laws, in the first edition of my book, have proved to be suitable, and will probably prove to be permanent; but the second and third editions were much enriched in detail, by hundreds of new points collected from the

sources of the law; and the fourth edition contains more than six hundred new and material differences from the third. Future years will bring still further evolution of the patent laws; and I hope that future editions of this book, written by my hand, or by the hands of others, will formulate that evolution from period to period.

A. H. W.

PARK ROW BUILDING,
MANHATTAN, N. Y.,
February 1, 1904.

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APP. D. C.: The first forty-four volumes of the reports of the Court of Appeals of the District of Columbia, from the beginning of that Court in 1893, until 1916.

BALDWIN: One volume of reports of decisions in Circuit Courts of the United States, in the third circuit, from 1827 to 1833.

BANN. & ARD.: Five volumes of patent cases, decided by the Circuit Courts of the United States, from 1874 to 1880, and collected by Hubert A. Banning and Henry Arden.

BISSELL: Nine volumes of reports of decisions in District Courts and Circuit Courts of the United States, in the seventh circuit, from 1851 to 1880.

BLACK: The reports of the Supreme Court of the United States, in two volumes, from 1861 to 1862.

BLATCH.: The reports in eighteen volumes, by Samuel Blatchford, of the Circuit Courts of the United States, in the second circuit, from 1845 to 1881.

BOND: Two volumes of reports of decisions in District Courts and Circuit Courts of the United States, in the sixth circuit, from 1856 to 1871.

BROCK.: Two volumes of reports of decisions of Chief Justice Marshall, in Circuit Courts of the United States, in the fourth circuit, from 1802 to 1836.

C. C. A.: The first one hundred and forty-six volumes of Circuit Courts of Appeals reports, from 1891 to 1916, published by the Lawyers' Co-operative Publishing Association. All the cases contained in these volumes are also contained in the "Federal Reporter," and are cited from the "Federal Reporter" in this book, and not from the "C. C. A."; because the "Federal Reporter" is more numerously and widely distributed, and is always cited by the courts, even in the exceptional cases wherein C. C. A. is also cited.

CHASE: One volume of reports of decisions of Chief Justice Chase, in Circuit Courts of the United States, in the fourth circuit, from 1865 to 1869.

CLIFF.: Four volumes of reports of decisions of Justice Clifford, in the Circuit Courts of the United States, in the first circuit, from 1858 to 1878.

COURT OF CLAIMS: The first fifty volumes of the decisions of the Court of Claims of the United States, from 1863 to 1915.

CRANCH: The reports of the Supreme Court of the United States, in nine volumes, from 1801 to 1815.

CRANCH'S C. C. REPORTS: Five volumes of reports by Judge Cranch, of decisions in the United States Circuit Court of the District of Columbia, from 1801 to 1840. These volumes are sometimes cited as 1, 2, 3, 4, 5 D. C. R.

CURTIS: Two volumes of reports, by Justice Curtis, of decisions in the Circuit Courts of the United States, in the first circuit, from 1851 to 1856.

D. C. R.: Volumes 6 and 7 of reports of decisions in the Supreme Court of the District of Columbia, from 1863 to 1873; and volume 21 of reports of decisions in the same court, from 1892 to 1893.

DEADY: One volume of reports by Judge Deady, of decisions in Circuit Courts of the United States, in the ninth circuit, from 1861 to 1869.

DILLON: Five volumes of reports by Judge Dillon, of decisions in sundry Circuit Courts of the United States, in the eighth circuit, from 1870 to 1879.

F. C.: Thirty volumes of "Federal Cases," being a series of secondary reports of decisions in the United States District Courts and the United States Circuit Courts, rendered prior to the time of the "Federal Reporter." All the important patent cases in the "Federal Cases" were previously reported in other reports specified in this table; and they are cited in this book from those other reports, and not from the "Federal Cases."

FISHER: Six volumes of patent cases, decided by the Circuit Courts of the United States, from 1848 to the end of 1873, and collected by S. S. Fisher, from periodicals and manuscripts and other authentic sources.

FISHER'S REPORTS: One volume of patent cases, from 1821 to 1851, collected by W. H. Fisher, from official reports specified in this

table. Those cases are cited in this book from the official reports, and not from this collection of W. H. Fisher.

FLIPPIN: One volume of reports of decisions in Circuit Courts of the United States, in the sixth circuit, from 1859 to 1877.

F. R.: The first two hundred and thirty-five volumes of the Federal Reporter, containing all the decisions of the District Courts of the United States, and of the Circuit Courts of the United States, and of the Circuit Courts of Appeals of the United States, from 1879 to 1916.

GALLISON: Two volumes of reports of decisions in the Circuit Courts of the United States, in the first circuit, from 1812 to 1815.

GILPIN: One volume of reports of decisions in the United States District Court for the Eastern District of Pennsylvania, from 1828 to 1836.

HEMPSTEAD: One volume of reports of decisions in the United States District Court, and the United States Circuit Court, for the District of Arkansas, from 1836 to 1855.

HEYWOOD & HAZLETON: Two volumes of reports of decisions in the Circuit Court of the District of Columbia, from 1840 to 1863.

HOLMES: One volume of reports, by Oliver Wendell Holmes, Jr., of decisions in the Circuit Courts of the United States, in the first circuit, from 1870 to 1875.

HOWARD: The reports of the Supreme Court of the United States, in twenty-four volumes, from 1843 to 1860.

HUGHES: Three volumes of reports by Judge Hughes, of decisions in District Courts and Circuit Courts of the United States, in the fourth circuit, from 1870 to 1879.

LOWELL: Two volumes of reports by Judge John Lowell, of decisions in the United States District Court, for the District of Massachusetts, from 1865 to 1877.

MACKEY: The reports of the Supreme Court of the District of Columbia, in nine volumes, from 1880 to 1892. These volumes are sometimes cited as 12, 13, 14, 15, 16, 17, 18, 19, 20 D. C. R.

MASON: The reports in five volumes, of the United States Circuit Courts, in the first circuit, from 1816 to 1830.

McALLISTER: One volume of reports of decisions in Circuit Courts of the United States, in the ninth circuit, from 1855 to 1859.

McARTHUR: The reports of the Supreme Court of the District of Columbia, in three volumes, from 1873 to 1879. These volumes are sometimes cited as 8, 9, 10 D. C. R.

McArthur & Mackey: The reports of the Supreme Court of the District of Columbia, in one volume, from 1879 to 1880. This volume is sometimes cited as 11 D. C. R.

McArthur's Patent Cases: One volume of reports of patent cases, decided in the Circuit Court of the District of Columbia, from 1840 to 1859, on appeal from the Commissioner of Patents; reported by Frank MacArthur, Examiner of Interferences.

McCrary: Two volumes of reports by Judge McCrary, of decisions in Circuit Courts of the United States, in the eighth circuit, from 1877 to 1881.

McLean: Six volumes of reports, by Justice McLean, of decisions in sundry United States Circuit Courts, from 1829 to 1855.

O. G.: The first two hundred and thirty-four volumes of the Official Gazette of the Patent Office, from 1872 to 1916.

Olcott: One volume of reports of admiralty cases, decided in the United States District Courts in New York, from 1843 to 1847.

Paine: Two volumes of reports of decisions in Circuit Courts of the United States, in the second circuit, from 1810 to 1840.

Peters: The reports of the Supreme Court of the United States, in sixteen volumes, from 1828 to 1842.

Peters' C. C. Reports: One volume of reports of decisions in Circuit Courts of the United States, in the third circuit, from 1803 to 1818.

Robb: Two volumes of patent cases, decided prior to 1850, and collected from official reports specified in this table. Those cases are cited in this book from the official reports, and not from Robb's collection.

Sawyer: The reports in seven volumes, by Judge Sawyer, of decisions in Circuit Courts of the United States, in the ninth circuit, from 1870 to 1882.

Story: Three volumes of reports, by Justice Story, of decisions in the Circuit Courts of the United States, in the first circuit, from 1839 to 1845.

Sumner: Three volumes of reports, by Charles Sumner, of decisions in Circuit Courts of the United States, in the first circuit, from 1829 to 1839.

Taney: One volume of reports of decisions of Chief Justice Taney, in Circuit Courts of the United States, in the fourth circuit, from 1836 to 1861.

U. S.: The reports of the Supreme Court of the United States, in one

hundred and fifty volumes, from 1875 to 1916, beginning with 91 U. S. and ending with 240 U. S.

U. S. APP.: Sixty-three volumes of United States Circuit Courts of Appeals reports, from 1891 to 1899. All the cases contained in this series are also contained in the "Federal Reporter," and are cited from the "Federal Reporter" in this book, rather than from "U. S. App.," because the "Federal Reporter" is more widely and numerously distributed, and is always cited by the courts; and because U. S. App. covers only a few years of the work of the Circuit Courts of Appeals.

WALLACE: The reports of the Supreme Court of the United States, in twenty-three volumes, from 1863 to 1874.

WALLACE, JR.: Three volumes of reports of decisions in Circuit Courts of the United States, in the third circuit, from 1842 to 1862.

WASHINGTON: Four volumes of reports of decisions of Justice Washington, in Circuit Courts of the United States, in the third circuit, from 1803 to 1827.

WHEATON: The reports of the Supreme Court of the United States, in twelve volumes, from 1816 to 1827.

WHITMAN: Two volumes of patent cases collected by C. S. Whitman from the official reports of the Supreme Court of the United States, from 1810 to 1874. This collection contains all of the patent cases decided by the Supreme Court, prior to 21 Wallace; but they are cited in this book from the Supreme Court reports, and not from Whitman's collection.

WOODBURY & MINOT: Three volumes of reports in the Circuit Courts of the United States, in the first circuit, from 1845 to 1847.

WOODS: Three volumes of reports by Justice William B. Woods, of decisions in Circuit Courts of the United States, in the fifth circuit, from 1870 to 1879.

WOOLWORTH: One volume of reports of decisions of Justice Miller, in Circuit Courts of the United States, in the eighth circuit, from 1863 to 1869.

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THE LAW OF PATENTS FOR INVENTIONS

CHAPTER I

THE SUBJECT-MATTER OF PATENTS

1. Constitutional and statutory foundation of the patent laws.
2. Patent law meaning of the word "discovery."
3. Patent law meaning of the word "art."
7. Difference between a "process" and a "principle" inquired into.
8. Illustrated by the case of McClurg *v.* Kingsland.
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16. Machines, and improvements of machines.
17. Manufactures.
18. Compositions of matter.
19. Distinction between machines, manufactures, and compositions of matter.
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21. Design patents, under statutes earlier than 1873.
22. Ornament and utility.

§ 1. CONGRESS has power to promote the progress of science and useful arts, by securing for limited times to inventors the exclusive right to their respective discoveries.[1] This constitutional law is the foundation of all the patent laws of the United States. In accordance with

[1] Constitution of the United States of America, Article I, Section 8.

the power it confers, and in pursuance of the object it mentions, Congress has, from time to time, enacted certain statutes. The principal enactment, in force at this writing, is Section 4886 of the Revised Statutes of the United States, as amended March 3, 1897. Subject to certain conditions and limitations, hereafter to be explained in this book, that section provides that any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor. Statute law, identical with this, has been in force in the United States ever since April 10, 1790; except that the conditions and limitations attending it have varied somewhat from time to time; and except that compositions of matter were not mentioned in the statute prior to that of February 21, 1793, though they were doubtless covered by the word "manufacture," which the earlier statute contained.

§ 2. The word "discovery" does not have, either in the Constitution or the statute, its broadest signification. It means invention in those documents, and in them it means nothing else.[2] The "discoveries" of inventors are inventions. The same man may invent a machine and may discover an island or a law of nature. For doing the first of these things the patent laws may reward him, because he is an inventor in doing it; but those laws cannot reward him for doing either of the others, because he is not an inventor in doing either.[3] The statute provides that patents may be granted for four classes of things. These are arts, machines, manufactures, and composi-

[2] *In re* Kemper, 1 McArthur's Patent Cases, 4, 1841; Haffcke *v.* Clark, 46 F. R. 772, 1891.

[3] Wall *v.* Leck, 66 F. R. 557, 1895; Thomson-Houston Electric Co. *v.* Nassau Electric R. Co., 107 F. R. 280, 1901.

See Chapter II.

tions of matter. None of these things can be originally made known by discovery, as our continent was. They are not found, but created. They are results of original thought. They are inventions. Laws of nature, on the other hand, can never be invented by man, though they may be discovered by him. They exist as facts at all times whether known or unknown to human knowledge. When discovered, they may be utilized by means of an art, a machine, a manufacture, or a composition of matter. It is the invention of one or more of these, for the purpose of utilizing a law of nature, and not the discovery of that law, that may be rewarded with a patent.[4]

§ 3. The word "art" also has a narrower meaning in the patent laws than it has in the dictionaries. In the dictionaries its significance is "the use of means to produce a result." In the patent laws it covers only a limited meaning of the word process. The generic definition of process is "an operation performed by rule to produce a result." Operations performed by rule may be classified as: 1, operations which consist partly or wholly in the employment of heat, light, electricity, magnetism, chemical action, pneumatics, hydraulics, or some other force producing chemical change; 2, operations which consist entirely of mechanical transactions, and which are only the peculiar functions of the respective machines which are constructed to perform them; 3, operations which consist entirely of mechanical transactions, but which may be performed by hand or by any of several different mechanisms or machines. It is settled that all processes which belong to the first class are subjects of patents;[5]

[4] O'Reilly v. Morse, 15 Howard, 112, 1853; Morton v. Infirmary, 5 Blatch. 116, 1862.

[5] Cochrane v. Deener, 94 U. S. 780, 1876; Tilghman v. Proctor, 102 U. S. 728, 1880; Eames v. Andrews, 122 U. S. 40, 1887; Fermentation Co. v. Maus, 122 U. S.

and that all processes wh'^h belong to the second class are unpatentable in the United States.[6] It was formerly debatable whether processes which belong to the third class are subjects of patents or not, but the question has finally been definitely settled in the affirmative.[7] Not only need the process not involve any chemical change or change of substance, but it is enough, it is said, if a new thing is created merely by mechanical readjustments or new juxtaposition of parts.[7a]

It has been held, whenever the question has come before the courts, and may now be considered settled law that a "system" or method of transacting business is neither an "art" nor does it come within any other designation of patentable subject-matter;[8] *e. g.*, a system of

427, 1887; Telephone Cases, 126 U. S. 533, 1888; Westinghouse Electric & Mfg. Co. *v.* Catskill Co., 94 F. R. 868, 1899; Kirchberger *v.* Am. Acetylene Co., 124 F. R. 764, 1903.

[6] Corning *v.* Burden, 15 Howard, 267, 1853; Busch *v.* Jones, 184 U. S. 607, 1902: Carnegie Steel Co. *v.* Cambria Iron Works, 185 U. S. 425, 1902; MacKay *v.* Jackman, 12 F. R. 615, 1882; New *v.* Warren, 22 O. G. 587, 1882; Brainard *v.* Cramme, 12 F. R. 621, 1882; Goss *v.* Cameron, 14 F. R. 576, 1882; Hatch *v.* Moffitt, 15 F. R. 253, 1883; Reay *v.* Raynor, 19 F. R. 310, 1884; Moulton *v.* Commissioner of Patents, 61 O. G. 1480, 1892; Bonsack Machine Co. *v.* Elliot, 63 F. R. 837, 1894; Gindorff *v.* Deering, 81 F. R. 952, 1897; Conroy *v.* Penn Electrical & Mfg. Co., 155 F. R. 421, 1907; American Lava Co. *v.* Steward, 155 F. R. 731, 1907; Denning Wire & Fence Co. *v.* Am. Steel & Wire Co., 169 F. R. 793, 1909; U. S. Consolidated Seeded Raisin Co. *v.* Selma Fruit Co., 195 F. R. 264, 1912; Ball *v.* Coker, 210 F. R., 278, 1913.

[7] Kahn *v.* Starrels, 135 F. R. 532, 1905; General Subconstruction Co. *v.* Netcher, 174 F. R. 236, 1909; Expanded Metal Co. *v.* Bradford, 214 U. S. 366, 1909.

[7a] David E. Kennedy, Inc., *v.* Beaver Tile & Specialty Co., 232 F. R. 477, 1916.

[8] United States Credit System Co. *v.* American Indemnity Co., 51 F. R. 721; United States Credit System Co. *v.* American Credit Indemnity Co., 53 F. R. 818; Hocke *v.* N. Y. Central &

cash registering and checking for hotels apart from the physical means of conducting the system is not the subject of a patent. As to whether or not the means of carrying out the system are patentable, there seems to be no objection in principle or authority.[9] It may be remarked, however, that as a rule such patents have not met with notable success in the courts.[10]

§ 7. It was shown in Section 2 that the discovery of a law of nature is not patentable. That which was so denominated in that section is often spoken of as a "principle," and at other times as a "scientific principle," and again as a "scientific fact," and still again as a "law of nature." By whatever name it is called it is certain that the thing referred to is not a material substance. It is not to be apprehended by the sense of touch, but when discovered finds a lodgment in the mind as a mental conception only. So also, a process is not a substance which can be handled. It is seen only by noting its constituent acts as they are being performed. Principles and processes are therefore alike in that they are intangible, and being so, they have sometimes been mistaken for each other.

Whether a given patent is one for a process or one for a

H. R. R. Co., 122 F. R. 467; Hotel Security Checking Co. *v.* Lorraine Co., 160 F. R. 467, 1908, and cases cited therein; Berardini *v.* Tocci, 190 F. R. 329, 1911.

[9] Rand, McNally & Co. *v.* Exchange Scrip-Book Co., 187 F. R. 984, 1911; Cincinnati Traction Co. *v.* Pope, 210 F. R. 443, 1913.

[10] Hotel Security Checking Co. *v.* Lorraine Co., 160 F. R. 467, 1908, and cases cited; Time Saver Co. *v.* Stamford Trust Co., 176 F. R. 358, 1910; Exchange Scrip-Book Co. *v.* Rand, McNally & Co., 194 F. R. 444, 1912; Exchange Scrip-Book Co. *v.* Rand, McNally & Co., 203 F. R. 278, 1913.

See Mitchell *v.* International Tailoring Co., 170 F. R. 91, 1909, and Section 17, *post.*

principle, is a question upon which its validity may wholly depend. It is therefore important to ascertain what rule governs the decisions of such questions; to ascertain precisely wherein consists the difference between a principle and a process. Any search for that distinction made during the first half of the nineteenth century was necessarily a speculative one, for lack of authoritative adjudged cases from which to reason. Now, however, when engaged in an investigation of the point, we have recourse to five very instructive Supreme Court decisions. The proper method of conducting the inquiry seems to be, to first set down the important relevant points of each of those cases, and then to ascertain what doctrine is consistent with them all. Such hypothetical rules as are found to be inconsistent with either of the cases may safely be rejected as not true rules; but if some one proposition is found to logically underlie all five decisions, it is safe to believe that the Supreme Court will never depart from it.

§ 8. In McClurg *v.* Kingsland [11] it appears that some method was long sought, by means of which rollers or cylinders could be so cast that the metal, when introduced into the moulds, would be given a rotary motion, to the end of throwing the flog or dross into the centre instead of the circumference of the casting. The fact that rotary motion would so result was an understood law of nature, an understood operation of centrifugal force. The problem was to produce such a motion more conveniently and more uniformly than by stirring the liquid metal with a circular movement of an implement inserted therein. That problem was solved in 1834 by James Harley, a workman in a foundry in Pittsburg, Pennsylvania. He discovered that the rotary motion desired, could be imparted to melted metal by injecting that metal into a

[11] McClurg *v.* Kingsland, 1 Howard, 202, 1843.

mould tangentially. A patent was granted to him in 1835, for "an improvement in the mode of casting chilled rollers and other metallic cylinders and cones." Litigation arose on the patent, and coming before the Supreme Court it was held to be a patent for a process.

§ 9. In O'Reilly *v.* Morse[12] it appears that Samuel F. B. Morse was not the discoverer of either of the laws of nature which he utilized in his telegraph. He did, however, invent a machine by means of which those laws could be made to carry information to a distant place. That machine was dependent for success on several laws of nature, and lacking any one of them it would have failed of its result. The chief of these was the electric current discovered by Gray. The one next in importance was that discovered by Œrsted and Arago, and known as electro-magnetism. The eighth claim of Morse's patent was construed, by the Supreme Court, to be a claim for the use of an electric current, for marking intelligible signs at any distance. The Supreme Court held that claim to be void.

§ 10. In Mowry *v.* Whitney,[13] the following matters are set forth. It had long been known that sudden cooling of very hot cast-iron makes it hard, but brittle. On the other hand, the slow cooling of very hot cast-iron was known to make it soft, but tough. This is annealing. Cast-iron car-wheels require hardened peripheries and annealed hubs and plates, because the first have to endure friction and the last two have to endure strain. The early attempts to subject car-wheels to both hardening and annealing produced a weak and worthless article, resulting from the law of the expansion and contraction of metals. The peripheries of the wheels were hardened by

[12] O'Reilly *v.* Morse, 15 Howard, 112, 1853.

[13] Mowry *v.* Whitney, 14 Wallace, 620, 1871.

chilling them, this chilling consisting in surrounding the moulds in which the wheels were cast with a circle of iron, and with only a thin film of sand between it and the peripheries of the wheels. This iron band, being a rapid conductor of heat, caused the peripheries of the wheels to suddenly cool, and thus be hardened, while the plates and hubs, being enclosed in a thick mass of sand, cooled very slowly, and were thus annealed. The sudden cooling of the rims of the wheels, however, materially contracted their circumference, and that contraction forced the still hot plates to contract their diameter. Afterward, when the plates came to cool down, they themselves contracted still more, and thus tended to break away from the rims, which, having entirely cooled some time before, had no more contracting to do. Wheels so made were therefore weak.

In this condition of affairs, Asa Whitney, of Philadelphia, discovered in 1848, that hardness once given to iron will not be destroyed or seriously impaired by the immediate reheating of the iron, and its subsequent very slow cooling; and he also conceived a process by means of which that law of nature could be utilized to obviate the evil explained in the last paragraph. That process consisted in taking the wheels from the moulds, very soon after their rims were chilled, and in putting them immediately into a chamber or furnace which had previously been heated about as hot as the then heat of the wheels, and in thereupon gradually raising the temperature of all parts of the interior of the chamber or furnace and its contents, to an equally high point, and finally in causing all parts of the wheels to cool with equal slowness. In accordance with the law of nature discovered by Whitney, it turned out that the third stage of this process did not destroy or seriously impair the hardness of the peripheries of the wheels which were subjected to it. It did, however,

cause the peripheries of the wheels to re-expand in circumference, and in so doing to stretch the still hot and ductile plates back to nearly the same diameter as that they had before the rims were contracted by the chill. The fourth stage of the process then served to contract all parts of the wheels harmoniously, and the result of the whole process was to remedy the evil at which it was aimed. Mr. Whitney obtained a patent for his invention, and the Supreme Court held it to be a patent for a process, and held it to be valid.

§ 11. The case of Tilghman *v.* Proctor[14] discloses the following facts: The celebrated French chemist, Chevreul, discovered in 1813 that fat is a regular chemical compound, consisting of glycerine and three kinds of fat acids. He also discovered that fat can be separated into those, its constituent elements, by causing them to severally unite with an atomic equivalent of water. In 1853 Richard A. Tilghman, a Philadelphia chemist, discovered that those elements of fat can be caused so to unite with an atomic equivalent of water, by mixing the fat with water, and by thereupon subjecting the mixture to a high degree of heat, and to such a degree of pressure as will prevent the conversion of the water into steam. In 1854 Mr. Tilghman obtained a patent, in the specification of which he announced his discovery, and described a suitable apparatus in which to utilize that discovery in connection with the discoveries of Chevreul, and claimed "the manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure." The Supreme Court held that patent to be a patent for a process and to be valid.

§ 11*a*. The Telephone Cases[15] set forth the following

[14] Tilghman *v.* Proctor, 102 U. S. 707, 1880.

[15] Telephone Cases, 126 U. S. 531, 1888.

fundamental facts. It has been known for centuries, that articulate sounds can be reproduced at a distance from the place where they are originally uttered, by means of two thin diaphragms, made of metal or membrane, and attached at their centres to the respective ends of a tightly drawn cord or wire; and that when a person speaks near and toward one of those diaphragms, the sound vibrations which are produced by his voice cause that diaphragm to vibrate correspondingly; and that those corresponding vibrations are transmitted along the cord or wire to the other diaphragm, and cause it also to vibrate correspondingly; and that the second diaphragm thus vibrating, causes corresponding vibrations in the air adjacent thereto; and that when those vibrations strike upon the drum of the ear of a listener, they cause him to hear what was spoken toward the first diaphragm. Instruments like this are called string telephones, and they utilize that law of nature which causes such diaphragms as those employed therein, to copy and to transmit the vibrations of air which occur adjacent thereto. It has been known ever since 1831, when it was discovered by Faraday, that when an armature is moved in front of an electro-magnet, which is being magnetized by an electric current passing through its coil, the motion modifies the current, and that those modifications correspond to the movements of the armature in duration, in direction, and in strength. And it has long been known that the electric current thus modified, will cause correspondingly modified movements in the armature of another electro-magnet, through the coil of which the electric current thus modified is also passing. At this stage of knowledge of the relevant laws of nature, Alexander Graham Bell invented his telephone. That invention consisted in mounting two such diaphragms as those of the string telephone,

upon two armatures arranged, combined and movable as above described, and thus enabling one of those armatures to transmit, and the other one to receive, such minute and exceedingly variant vibrations as those caused in the air by the human voice; and it also consisted in the process of transmitting sounds, by causing electrical undulations, similar in form to the vibrations of the air caused by the sounds, to occur upon the conducting wire. Mr. Bell obtained a patent for that invention in 1876, and the Supreme Court held it to be a patent for a process, as well as for an apparatus, and held the process claim to be valid.

§ 12. The last five sections present five cases, covering five subject-matters of claim, four of which the Supreme Court held to be patentable processes, and one of which that tribunal held to be an unpatentable principle, or law of nature. To learn the controlling distinction between a claim for a process and a claim for a principle, it is therefore sufficient to ascertain precisely wherein consists the controlling difference between the eighth claim of Morse, on the one hand, and the claims of Harley, Whitney, Tilghman, and Bell on the other.

That difference does not consist in the fact that Harley, Whitney, Tilghman, and Bell each discovered one of the laws of nature which he utilized, while the laws which Morse utilized were discovered by others; because the Supreme Court did not rest its decision in the Morse case on the ground that he was not the discoverer of the electric current, but on the ground that, being a power in nature, it was not patentable to any person. Neither does that difference consist in anything outside of the use of laws of nature, because all five claims extended to accomplishing results by means of such law or laws, regardless of the particular apparatus used in the respective processes. The fact that tangential injection of melted metal into a

cylindrical mould will give that metal a rotary motion; the fact that moderate reheating of a car wheel will not destroy its chill; the fact that very hot water will separate the elements of fat; the fact that mechanical motion may cause electrical undulations—every one of these is just as truly a law of nature, just as truly a "principle," as is the fact of the electric current. Nor was the apparatus described by Harley, Whitney, Tilghman, and Bell, respectively, for the purpose of utilizing the first four of these laws, respectively, claimed as their sole respective inventions, any more than the particular telegraph described by Morse was made essential to his eighth claim.

§ 13. There is apparently but one radical distinction between the claims of the four patents of Harley, Whitney, Tilghman, and Bell, on the one hand, and the eighth claim of Morse on the other. That distinction is as follows: Harley, Whitney, Tilghman, and Bell each produced a process which utilized several laws of nature, and each of them claimed the entire process he produced, including the use of all those laws, in the order and method described. Morse also made an invention which utilized several laws of nature, but instead of claiming his combined and methodical use of all those laws, his eighth claim was construed as confined to one of them alone. This difference, taken in connection with the fact that the Supreme Court sustained the patents of Harley, Whitney, Tilghman, and Bell, and overthrew the eighth claim of Morse, and taken in connection with the fact that no other relevant and important difference can be detected, points to the soundness of the doctrine stated in the next section, and illustrated in the section following that.

§ 14. A patent for a process is a patent for the described combined use of all the laws of nature utilized by that process. A patent for a principle is a patent for one only of

the laws of nature used in a process. If a patent for a principle were granted and sustained, it would be much broader than a patent for a process, because it would cover all processes which aim at the same result, and which use the particular law of nature covered by the patent for a principle, no matter in what combination with other laws. A patent for a process, on the other hand, covers only its own method of using all of the laws of nature which it utilizes. To grant and sustain a patent for a principle, would induce an inventor to guess which of the laws of nature used in his process, will always be found indispensable, and guessing rightly, would enable him, by claiming that particular law, to suppress all subsequent processes using it, and thus to suppress all subsequent invention in the same field, until such time as his patent might expire. A patent for a process, on the contrary, leaves the field open to ingenious men to invent and to use other processes using part of the laws used by the patented process, or using all of them in other combinations and methods.[16]

§ 15. An illustration of the doctrines of the last section exists in the matter of the eighth claim of Morse, when considered in connection with other telegraphs than his. The subject of that claim was construed to be the use of electric current for marking signs at any distance. Electric current is one fact, and electro-magnetism is another. The first was discovered by Gray, in 1729, but the existence of the latter was not known until ninety years later. Morse used both in his telegraph, but his eighth claim was construed to cover the use of electric current with or with-

[16] Westinghouse Electric & Mfg. Co. *v.* Beacon Lamp Co., 95 F. R. 464, 1899; American Bell Telephone Co. *v.* National Telephone Mfg. Co., 109 F. R. 996, 1901; Manhattan General Const. Co. *v.* Helios-Upton Co., 135 F. R. 785, 1905.

out the other. But without electro-magnetism Morse's telegraph would not work. After Morse came Bain, who invented a telegraph which used electric current, but did not use electro-magnetism. Its recording apparatus operated electro-chemically, and not electro-magnetically like that of Morse. Bain's telegraph could work with a much feebler current than could that of Morse, and therefore the relay batteries of the latter were not needed by Bain. The two telegraphs had nothing in common except that both used electric current. If the eighth claim of Morse had been sustained as construed, it would have covered Bain's and every other electric telegraph, capable of marking signs at a distance. On the other hand, had that claim been so drawn as to cover the combined use of all the laws of nature utilized by the telegraph of Morse, when used as he used them, then it would have been a claim for a process, and not being obnoxious to either of the weighty objections which are set forth in the opinion of the Supreme Court, it would doubtless have been sustained by that tribunal. In that case, however, it would not have been infringed by the telegraph of Bain, nor by any other which, like his, dispensed with one or more of the laws of nature necessary to the process of Morse.

§ 16. Machines, and improvements of machines constitute the subjects of a majority of the American patents heretofore granted. A machine is a combination of heterogeneous mechanical parts, adapted to receive energy, and to apply it to the production of some energetic result or results. All the parts of a machine may be old, while the machine as a whole, and also the sub-combinations which are contained therein, are proper subjects of patents.[17] An improvement of a machine may consist of an addition thereto, or in a subtraction therefrom, or in sub-

[17] Cantrell v. Wallick, 117 U. S. 694, 1886.

stituting for one or more of its parts something different, or in so rearranging its parts as to make it work better than before. Whether or not a given improvement is a patentable one will always depend upon several considerations. In order to be so it must, first of all, be an invented improvement,[18] as distinguished from one otherwise produced. This point of law is explained at large in the next chapter. So also it is explained in the chapter on infringement, what improvements can be used, and what improvements cannot be used, without infringing the patents for the machines improved upon, if the latter are patented. It is enough to say in this chapter, that patents are not void merely because they cover processes or things which include old inventions,[19] and that an improvement may or may not be an invention, and in either case may or may not be an infringement of a patent covering the machine improved.

§ 17. The word "manufacture" has a much narrower signification in the American patent laws than it has in those of England. In the latter it includes not only everything made by the hand of man, but also includes processes of manufacture. According to the former, processes are patentable because they are arts, while some of the things made by the hand of man are patentable as machines, and some others are patentable as compositions of matter, and some others are patentable as designs. Whatever is made by the hand of man, and is neither of these, is a manufacture, in the sense in which that word is used in the American patent laws.[20] In spite of the *dictum* of Justice Grier

[18] Cochrane *v.* Waterman, 1 McArthur's Patent Cases, 53, 1844.

[19] Cantrell *v.* Wallick, 117 U. S. 694, 1886.

[20] Johnson *v.* Johnston, 60 F. R. 620, 1894; Cincinnati Traction Co. *v.* Pope, 210 F. R. 443, 1913; International Mausoleum Co. *v.* Sievert, 213 F. R. 225, 1914.

in the jail case,[21] this term has lately been held to include building structures.[22] The question has not, however, been directly passed upon by the Supreme Court and so of course cannot be regarded as judicially settled.

§ 18. The phrase "composition of matter," as used in the statutes, covers all compositions of two or more substances. It includes, therefore, all composite articles, whether they be results of chemical union, or of mechanical mixture, or whether they be gases, fluids, powders or solids. To be a proper subject of a patent, a composition of matter must, like a process, a machine, or a manufacture, be able to endure the relevant tests of invention, novelty, and utility, which are stated in the next three chapters of this book.

§ 19. The distinction between a machine and a manufacture cannot be so stated that its application to every case would be clear and satisfactory to every mind. The same remark is true of the distinction between manufactures and compositions of matter. In most instances, however, when something is invented by the mind and constructed by the hand of man, its classification under some one of these heads is sufficiently obvious. If an inventor is certain that his invention belongs to one or another of the three classes of things, but is uncertain as to which, no evil need result from the doubt. No inventor needs

[21] Jacobs *v.* Baker, 7 Wallace, 297, 1868.

[22] Crier *v.* Innes, 170 F. R. 324, 1909, in which case, however, it was expressly held that the sarcophagus covered by the patent was not a species of architecture; Riter-Conley Mfg. Co. *v.* Aiken (roof structure for sheds), 203 F. R. 699, 1913; Aiken *v.* Riter-Conley Mfg. Co., 205 F. R. 531, 1912; International Mausoleum Co. *v.* Sievert, 213 F. R. 225, 1914.

See Turner *v.* Quincy Market Cold Storage & Warehouse Co., 225 F. R. 41, 1915. *Contra* American Disappearing Bed Co. *v.* Arnælsteen, 182 F. R. 324, 1910, reviewing the subject.

to state or to know whether the thing he has produced is a machine, a manufacture, or a composition of matter, provided he knows that it is one or the other of these. A seventeen-year patent may be lawfully granted for a thing which falls under either designation, but it never becomes vitally important to determine to which one of the three classes a particular thing really belongs.[22a]

§ 20. Designs are patentable under Section 4929 of the Revised Statutes; as amended May 9, 1902. That section provides that any person who has invented any new, original, and ornamental design for an article of manufacture may, subject to certain conditions and limitations stated in the statute, obtain a patent therefor.[23] The original Section 4929, provided that any person who, by his own industry, genius, efforts, and expense, had invented and produced any new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief, any new and original design for the printing of woollen, silk, cotton, or other fabrics, any new and original impression, ornament, patent, print, or picture to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture, or any new, useful, and original shape or configuration of any article of manufacture, might, subject to certain conditions and limitations stated in that statute, obtain a patent therefor. That original section was almost a literal transcript of Section 71 of the Consolidated Patent Act of 1870,[24] except that in the latter the word "pattern" is found in the connection in which the word "patent" is printed in Section 4929. The change from "pattern" to "patent" was doubtless an error of the printers of the

[22a] See 1 Hopkins on Patents, Section 32.

[23] 32 Statutes at Large, Pt. 1, Ch. 783, p. 193.

[24] 16 Statutes at Large, Ch. 230, p. 209.

Revised Statutes. Those statutes were enacted as printed, and not as is the custom with shorter edicts, as engrossed in writing. The word "patent" is meaningless in that connection, and patterns, though not mentioned in the section, were doubtless covered by its other provisions.

§ 21. In like manner as Section 4929 of the Revised Statutes was enacted to take the place of Section 71 of the Patent Act of 1870, the latter was passed to take the place of Section 11 of the Patent Act of 1861.[25] The Act of 1870 differed from its predecessor mainly in conferring upon any person, the rights to design patents which the Act of 1861 gave only to citizens and to aliens who, having resided one year in the United States, had taken an oath of intention to become citizens. Section 11 of the Act of 1861 was a modification of Section 3 of the Patent Act of 1842,[26] which latter was the first American statute authorizing patents for designs.

§ 22. The amended Section 4929 of the Revised Statutes,[26a] differs from the original section, in using the word "ornamental" to specify one characteristic which every design must have, and in omitting the word "useful," from its former place among the charactersitics which some designs were required to have, by the original Section 4929. But the word "useful" in the original section, did not have the meaning of the word "utilitarian." The presence of utility in a design, did not impart patentability thereto; and the absence of utility therefrom, did not deprive it of that privilege.[27]

[25] 12 Statutes at Large, Ch. 88, p. 248.

[26] 5 Statutes at Large, Ch. 263, p. 543.

[26a] Act of May 9, 1902, 32 Stat. 193, Ch. 783.

[27] Smith v. Whitman Saddle Co., 148 U. S. 678, 1893; Theberath v. Trimming Co., 15 F. R. 250, 1883; Westinghouse Electric Mfg. Co. v. Triumph Electric Co., 97 F. R. 102, 1899; Pelouze Scale & Mfg.

Consequently an article which is ordinarily not visible in its ordinary use is not proper subject-matter for a design patent.[28] Nor is an article patentable as a design, the essential element of which is a mechanical construction which causes the article to assume an ornamental shape.[29] The design patent may, however, be made to cover the ornamental shape, as it is of course no objection that it is at the same time useful.[30] It is questionable, however, whether an article to which ornamentation would give no value is proper subject-matter of a design patent, as for example, a horseshoe calk,[31] a pickaxe, a plough or other articles coming within such a category.[32]

Co. v. American Cutlery Co., 102 F. R. 918, 1900; Rowe v. Blodgett & Clapp Co., 112 F. R. 61, 1901; Marvel Co. v. Pearl, 114 F. R. 946, 1902; Eaton v. Lewis, 115 F. R. 635, 1902.

[28] Rowe v. Blodgett & Clapp Co., 112 F. R. 61, 1901; Bradley v. Eccles, 126 F. R. 945, 1903; Williams Calk Co. v. Kemmerer, 145 F. R. 928, 1906; Williams v. Syracuse & S. R. Co., 161 F. R. 571, 1908.

[29] Royal Metal Mfg. Co. v. Art Metal Works, 130 F. R. 778, 1904.

[30] Weisgerber v. Clowney, 131 F. R. 477, 1904.

[31] Williams Calk Co. v. Kemmerer, 145 F. R. 928, 1906.

[32] Theodore W. Foster & Bro. v. Tilden-Thurber Co., 200 F. R. 54, 1912.

CHAPTER II

INVENTION

23. Invention necessary to patentability.
24. Many negative rules, but no affirmative rule, for determining the presence or absence of invention.
25. Mere skill is not invention.
26. Circumstances indicating difference between invention and skill.
27. Excellence of workmanship is not invention.
28. Substitution of materials is not invention.
29. Exceptions to the last rule.
30. Enlargement is not invention.
31. Change of degree is not invention.
31*a*. Exception to the last rule.
32. Aggregation is not invention.
33. Simultaneousness of action is not necessary to invention.
34. Duplication is not generally invention.
35. Omission is not generally invention.
36. Substitution of equivalents is not generally invention.
37. New combination without new mode of operation, is not invention.
38. Using old thing for new and analogous purpose is not invention.
39. Cases to which the last rule does not apply.
40. Doubts relevant to invention, when otherwise insoluble, are solved by ascertaining comparative utility.
41. Form.
41*a*. Proportion.
42. Questions of invention are questions of fact.
43. Questions of invention are investigated in the light of the state of the prior art.
44. Joint and sole inventions.
45. How made.
46. How distinguished.
47. Suggestions to an inventor.
48. Information sought by an inventor.
49. Mechanical skill not necessary to invention.
50. Sole patent to one joint inventor is void.
51. Joint patent to sole inventor and another is void.

§ 23. It has been shown that the word "discovered," in Section 4886 of the Revised Statutes, has the meaning

of the word "invented."[1] It follows that patents are grantable for things invented, and not for things otherwise produced,[2] even where the production required ability of a high order.[3] Novelty and utility must indeed characterize the subject of a patent, but they alone are not enough to make anything patentable; for the statute provides that things to be patented must be invented things, as well as new and useful things.[4] And except in the few cases where definite rules of law have been laid down for the determination of the question, invention is a question of fact.[5] The courts have therefore declared that not all improvement is invention, and entitled to protection as such, but that to be thus entitled, a thing must be the product of some exercise of the inventive faculties.[6] And the law stated in this section applies not only to processes, machines, manufactures, and compositions of matter, but also to designs.[7] But a patent may be sus-

[1] Section 2 of this book.

[2] *In re* Snyder, 10 App. D. C. 144, 1897; Lamb Knit Goods Co. *v.* Lamb Glove & Mitten Co., 120 F. R. 272, 1902.

[3] Fowler *v.* City of New York, 121 F. R. 749, 1903.

[4] Thompson *v.* Boisselier, 114 U. S. 11, 1884; Gardner *v.* Herz, 118 U. S. 191, 1885; Klein *v.* City of Seattle, 77 F. R. 204, 1896; Tiemann *v.* Kraatz, 85 F. R. 439, 1898; Goss Printing-Press Co. *v.* Scott, 103 F. R. 657, 1900.

[5] Proudfit Loose Leaf Co. *v.* Kalamazoo Loose Leaf Binder Co., 230 F. R. 120, 1915.

See Section 42.

[6] Pearce *v.* Mulford, 102 U. S. 112, 1880; Atlantic Works *v.* Brady, 107 U. S. 199, 1882; Slawson *v.* Railroad Co., 107 U. S. 649, 1882; Morris *v.* McMillin, 112 U. S. 247, 1884; Hollister *v.* Benedict Mfg. Co., 113 U. S. 59, 1885; Stephenson *v.* Railroad Co., 114 U. S. 149, 1885; Munson *v.* New York City, 124 U. S. 601, 1888; Pattee Plow Co. *v.* Kingman & Co., 129 U. S. 294, 1889; Watson *v.* Railway Co., 132 U. S. 161, 1889; Hill *v.* Wooster, 132 U. S. 700, 1890; Burt *v.* Evory, 133 U. S. 349, 1890; Magin *v.* Karle, 150 U. S. 391, 1893; Risdon Locomotive Works *v.* Medart, 158 U. S. 81, 1895.

[7] Smith *v.* Saddle Co., 148 U. S.

tained for an invention which resided in a theory, without a reduction to actual practice, at the time the patent was granted, if that theory afterward proves to be correct,[8] and also where the correctness of the theory is self-evident.[9] Not only the first and the last, but every intermediate step of advance, which rises to the dignity of invention, in a particular art, is entitled to the protection of a patent.[10] And invention may result from long consideration, or from a flash of thought.[11]

§ 24. The abstract rule stated in the last section is as certainly true as it is universally just, but its application to particular cases cannot be made without the guidance of more concrete propositions. In delivering an opinion of the Supreme Court, in January, 1885, Justice MATTHEWS used some language which may be thought to establish an affirmative rule by which to determine the

679, 1893; Western Electric Mfg. Co. *v.* Odell, 18 F. R. 322, 1883; Osborn *v.* Judd, 29 F. R. 96, 1886; Meers *v.* Kelly, 31 F. R. 153, 1887; Untermeyer *v.* Freund, 37 F. R. 343, 1889; Redway *v.* Stove Co., 38 F. R. 583, 1889; Dukes *v.* Bauerle, 41 F. R. 783, 1890; Foster *v.* Crossin, 44 F. R. 63, 1890; Eclipse Mfg. Co. *v.* Adkins, 44 F. R. 282, 1890; Cahoone Mfg. Co. *v.* Harness Co., 45 F. R. 585, 1891; Anderson *v.* Saint, 46 F. R. 760, 1891; Eagle Pencil Co. *v.* American Pencil Co., 53 F. R. 388, 1892; Cary Mfg. Co. *v.* Neal, 98 F. R. 617, 1899; General Gaslight Co. *v.* Matchless Mfg. Co., 129 F. R. 137, 1904; Ashley *v.* Samuel C. Tatum Co., 189 F. R. 357, 1911; Mygatt *v.* M. Schaufferflaum Co., 191 F. R. 836, 1911; Charles Boldt Co. *v.* Nivison-Weiskoff Co., 194 F. R. 871, 1912; Charles Boldt Co. *v.* Turner Bros. Co., 199 F. R. 139, 1912.

[8] Telephone Cases, 126 U. S. 535, 1888.

[9] Heath *v.* Hildreth, 1 McArthur's Patent Cases, 19, 1841; Screw Co. *v.* Sloan, 1 McArthur's Patent Cases, 210, 1853; *In re* Seely, 1 McArthur's Patent Cases, 249, 1853; Chandler *v.* Ladd, 1 McArthur's Patent Cases, 493, 1857.

[10] National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 F. R. 698, 1901.

[11] Snyder *v.* Fisher, 78 O. G. 486, 1897.

presence or absence of invention in every case. Speaking of a simple device which the court held not to be an invention, he said that it "seems to us not to spring from that intuitive faculty of the mind put forth in search for new results or new methods, creating what had not before existed, or bringing to light what lay hidden from vision; but, on the other hand, to be the suggestion of that common experience which arose spontaneously, and by a necessity of human reasoning, in the minds of those who became acquainted with the circumstances with which they had to deal."[12] This language may be thought to mean that whatever new and useful process, machine, manufacture, composition of matter, or design is produced by intuition is an invention, and that whatever such thing is produced by reason is not an invention. But such an interpretation of the language would not be right. Intuition may sometimes reach to a single brilliant result; but intuition can never conceive or correlate the mazes of movements and mechanisms which constitute a modern automatic machine. To enforce such a rule as that hypothetically implied in the language of Justice MATTHEWS would be to deny invention to those marvelous combinations of numerous metallic devices which compose American automatic machinery, and which work with such complexity and yet with such precision that they seem themselves to be endowed with reason. But fortunately the supposed interpretation of that language is evidently not the meaning of the court. The court does not deny invention to all the products of pure reason in the useful arts. It merely finds want of invention in those things which are conceived "spontaneously and by a necessity of human reasoning" in the minds of those who have their attention directed to the subject.

[12] Hollister *v.* Benedict Mfg. Co., 113 U. S. 72, 1885.

In a later case the Supreme Court, speaking by Justice BROWN of the meaning of the word "invention," said: "The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not. In a given case we may be able to say that there is present invention of a very high order. In another we can see that there is lacking that impalpable something which distinguishes invention from simple mechanical skill. Courts, adopting fixed principles as a guide, have by a process of exclusion determined that certain variations in old devices do or do not involve invention; but whether the variation relied upon in a particular case is anything more than ordinary mechanical skill is a question which cannot be answered by applying the test of any general definition."[13] Thus it has been settled by the Supreme Court that the ideal line which separates things invented from things otherwise produced can never be concisely defined; and that there is no affirmative rule by which to determine the presence or absence of invention in every case; and that such questions are to be determined by means of several negative rules which operate by a process of exclusion. Each of those rules applies to a large class of cases, and all of them are entirely authoritative and sufficiently clear. To formulate those rules, and to state their qualifications and exceptions, and to classify and cite the adjudged cases from which those rules, qualifications, and exceptions are deducible, is the scope of several sections which immediately follow.

§ 25. It is not invention to produce a process, machine, manufacture, composition of matter or design which any skillful mechanic, electrician, chemist, or other expert

[13] McClain v. Ortmayer, 141 U. S. 427, 1891.

would produce whenever required to effectuate a given result.

In holding a patent to be void the Supreme Court, speaking by Justice BRADLEY, delivered a paragraph of very instructive argument in support of the rule of this section: a paragraph so valuable as to call for its verbatim quotation in this text.

"The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in principle and injurious in its consequences. The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It is never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the arts. It

embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."[14]

This opinion of Justice BRADLEY is now a classic. Many federal judges, during twenty years, have administered it as law; and some have paraphrased it in sound and suggestive language of their own. For example, Judge PHILLIPS has said that: "In this day of increasing demand for new and enlarged mechanical appliances, the first natural result is the production of a large class of skilled and experienced mechanics and artisans, and, second, a more studious and constant development in applied mechanics. And, as such advance plainly points out, to the attentive and assiduous workman, the natural, larger, practical adaptation of existing, known mechanical devices; to invest each one of these developments with the immunity of a monopolizing patent, would not only be a perversion of the term "invention," but would utterly extinguish the doctrine of mechanical equivalents."[15] And Judge COXE has said that a chemical patent is addressed to accomplished chemists; and "That which seems, to the ordinary layman, to involve the exercise of extraordinary mental power, is to these men nothing but the everyday work of laboratory routine."[16] And Judge TOWNSEND has said that an electrical patent should be stripped of the dazzling halo which conventionally adorns appliances designed to deal with that mysterious agent, electricity; when a court is called on to decide the question of the presence or absence of invention, in an electrical patent.[17]

[14] Atlantic Works v. Brady, 107 U. S. 199, 1882.

[15] Tiemann v. Kraatz, 85 F. R. 439, 1898.

[16] Badische Anilin & Soda Fabrik v. Kalle, 94 F. R. 173, 1899.

[17] Perkins Electric Switch Mfg.

Nearly a hundred other cases, involving the rule of this section, have now been adjudicated and reported. The question whether a particular process, machine, manufacture, composition of matter or design, evinces invention, or only shows skill, may sometimes be decided by reasoning by analogy from some of those cases; and therefore those of them which were decided by the Supreme Court are cited on this page in a note.[18]

The absence of invention may be established in some cases, by evidence that a considerable number of persons who were not inventors, acting independently of each other, and without receiving any information from the patentee or his patent, did in fact contrive the improvement claimed therein, not long after he produced it.[19] And where that does not happen to be the case, want of invention can be proved by teaching a mechanic or other person the whole or a part of the prior art, and by proving that, without exercising any invention, he promptly pro-

Co. *v.* Gibbs Electric Mfg. Co., 87 F. R. 923, 1898.

[18] The Corn-Planter Patent, 23 Wallace, 232, 1874; Vinton *v.* Hamilton, 104 U. S. 491, 1881; Tack Co. *v.* Mfg. Co., 109 U. S. 119, 1883; Morris *v.* McMillin, 112 U. S. 244, 1884; Hollister *v.* Benedict Mfg. Co., 113 U. S. 72, 1885; Yale Lock Co. *v.* Greenleaf, 117 U. S. 554, 1886; Pomace Holder Co. *v.* Ferguson, 119 U. S. 335, 1886; Weir *v.* Morden, 125 U. S. 98, 1888; Brown *v.* District of Columbia, 130 U. S. 87, 1889; Day *v.* Railroad Co., 132 U. S. 102, 1889; Butler *v.* Steckel, 137 U. S. 29, 1890; Shenfield *v.* Nashawannuck Mfg. Co., 137 U. S. 59. 1890; Consolidated Roller Mill Co. *v.* Walker, 138 U. S. 132, 1891; Cluett *v.* Claflin, 140 U. S. 180, 1891; Magowan *v.* Belting Co., 141 U. S. 343, 1891; Pope Mfg. Co. *v.* Gormully Mfg. Co., 144 U. S. 259, 1892; Ryan *v.* Hard, 145 U. S. 246, 1892; Duer *v.* Lock Co., 149 U. S. 222, 1893; Leggett *v.* Standard Oil Co., 149 U. S. 295, 1893; Sargent *v.* Covert, 152 U. S. 516, 1894; Palmer *v.* Corning, 156 U. S. 342, 1895.

[19] Bromley Bros. Carpet Co. *v.* Stewart, 51 F. R. 915, 1892; Haslem *v.* Pittsburgh Plate Glass Co., 71 O. G. 1770, 1894.

duced the patented improvement, without any knowledge on the subject except what he had thus learned.[20] But it does not tend to prove want of invention, to show that a skillful mechanic who had seen the patented thing, can reconstruct some older thing so as to make it similar to that covered by the patent.[21]

§ 26. But if a particular result was long desired and sometimes sought, but never attained, want of invention cannot be predicated of a device or process which first reached that result, on the ground that the simplicity of the means is so marked that many believe they could readily have produced it if required.[22] That is the opinion of many relevant to some real inventions, because solved problems often seem easy to persons who could never have solved them, and true inventions sometimes seem obvious to persons who could never have produced them.[23] This doctrine does not contradict that of the last section. It only teaches us that the fact upon which the doctrine of the last section is founded cannot be proved by subsequent opinion, when that opinion is inconsistent with prior attempts and failures.

In The Loom Co. *v.* Higgins,[24] Justice BRADLEY remarked that: "It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is

[20] National Co. *v.* Belcher, 68 F. R. 668, 1895.

[21] Beach *v.* Box-Machine Co., 63 F. R. 601, 1894; National Co. *v.* Belcher, 71 F. R. 879, 1896.

[22] The Barbed Wire Patent, 143 U. S. 283, 1892; Gandy *v.* Belting Co., 143 U. S. 594, 1892; Krementz *v.* Cottle Co., 148 U. S. 560, 1893; Potts *v.* Creager, 155 U. S. 609, 1895; Du Bois *v.* Kirk, 158 U. S. 63, 1895; Hanifen *v.* Armitage, 117 F. R. 849, 1902.

See Section 42.

[23] Railroad Supply Co. *v.* Hart Steel Co., 222 F. R. 261, 1915.

[24] Loom Co. *v.* Higgins, 105 U. S. 591, 1881.

evidence of invention." The exception to this rule, which Justice BRADLEY contemplated, doubtless refers to cases, the result wherein was never before attained only because it was never before desired. In the circuit court cases which support the doctrine of this section, the proviso that the thing or process which the patentee was the first to produce, had been previously sought for by others in vain, is never overlooked, but, on the contrary, is always treated as a material element in the proposition.[25] So also, the statement of Justice BRADLEY would still have been correct, if it had omitted the words which it contains to designate novelty of result; for where a new organization of old elements produces a new mode of operation, and a beneficial result, there may be a patentable invention,[26] whether that result is new or is old.

A qualification of the rule of this section consists in the subordinate point, that where several improvements have mutually contributed to introduce an unused invention into public favor, and where it does not appear that either of those improvements alone would have produced that

[25] Terry Clock Co. v. New Haven Clock Co., 4 Bann. & Ard. 121, 1879; Wallace v. Noyes, 13 F. R. 180, 1882; Ward v. Plow Co., 14 F. R. 696, 1883; Davis v. Fredericks, 19 F. R. 99, 1884; Patterson v. Duff, 20 F. R. 641, 1884; Brown Mfg. Co. v. Deere, 21 F. R. 713, 1884; McFarland v. Spencer, 23 F. R. 151, 1885; Celluloid Mfg. Co. v. Chrolithion Collar & Cuff Co., 23 F. R. 397, 1885; Sewing Machine Co. v. Frame, 24 F. R. 596, 1884; Asmus v. Alden, 27 F. R. 687, 1886; Adee v. Peck, 42 F. R. 499, 1890; American Cable Ry. Co. v. New York, 56 F. R. 150, 1893; Stohlmann v. Parker, 53 F. R. 925, 1893; Westinghouse v. Air-Brake Co., 59 F. R. 581, 1893; Electric Ry. Co. v. Jamaica R. R. Co., 61 F. R. 670, 1894; Brill v. North Jersey St. Ry. Co., 124 F. R. 778, 1903.

[26] Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 118 F. R. 139, 1902; St. Louis Street, etc., Co. v. Am. Street, etc., Co., 156 F. R. 574, 1907; Steiner & Voegtly Hardware Co. v. Tabor Sash Co., 178 F. R. 831, 1910.

See Section 37.

result, no presumption in favor of either of those improvements being an invention, arises out of the commercial success of the invention thus improved.[27] And another qualification resides in holding that the rule of the section does not apply where the prior attempts were unsuccessful because they were unskillful,[28] or because those who made them, did not know and understand the prior art.[29]

§ 27. It is not invention to produce an article which differs from some older thing only in excellence of workmanship.[30]

The distinction between this rule, and the rule of Section 25, resides in the fact that mechanical skill is treated as ability to plan improvement; while excellence of workmanship is contemplated as ability to execute improvement already planned, but not well executed by him who planned it. This subject does not require an elaborate explanation; because it is evident that invention does not reside in taking an article so irregular or rough, that it never could have found a sale in the market, and exercising upon that article such superiority of workmanship as to make it commercial.[31]

§ 28. It is not invention to substitute superior for inferior materials, in making one or more or all of the parts of a machine or manufacture.

[27] Corbin Lock Co. *v.* Eagle Lock Co., 37 F. R. 338, 1889.

See Section 40.

[28] Butler *v.* Steckel, 137 U. S. 29, 1890; American Feather Duster Co. *v.* Levy, 43 F. R. 383, 1890; Mahon *v.* McGuire Mfg. Co., 51 F. R. 684, 1892; Johnson Co. *v.* Steel Co., 67 F. R. 942, 1895.

[29] Mast Foos & Co. *v.* Stover Mfg. Co., 177 U. S. 493, 1900; New Departure Bell Co. *v.* Bevin Bros. Mfg. Co., 73 F. R. 475, 1896.

[30] Edison *v.* American Mutoscope Co., 114 F. R. 935, 1902.

[31] Risdon Locomotive Works *v.* Medart, 158 U. S. 81, 1895; Buzzell *v.* Fifield, 7 F. R. 467, 1881; Hatch *v.* Moffitt, 15 F. R. 252, 1883; Lee *v.* Upson Hart Co., 42 F. R. 531, 1890.

In most of the cases which embody this rule, the substitution of materials was both new and useful; and in some of those cases, the increase of utility due to the substitution, was decidedly high. But the courts held the respective improvements to be the result of judgment and skill in the selection and the adaptation of materials, and not the product of the inventive faculties of those who made them.[32]

There being no invention in substituting superior for inferior materials, there is certainly none in selecting from a number of materials recommended by a prior patentee, that one which is best adapted to the purpose in view;[33] and none in substituting one well-known form of a particular material, for another well-known form of the same material.[34]

§ 29. Important exceptions have, however, been estab-

[32] Hotchkiss *v.* Greenwood, 11 Howard, 248, 1850; Hicks *v.* Kelsey, 18 Wallace, 670, 1873; Terhune *v.* Phillips, 99 U. S. 593, 1878; Gardner *v.* Herz, 118 U. S. 192, 1885; Brown *v.* District of Columbia, 130 U. S. 87, 1889; Florsheim *v.* Schilling, 137 U. S. 76, 1890; Hoff *v.* Iron Clad Mfg. Co., 139 U. S. 329, 1891; Ryan *v.* Hard, 145 U. S. 245, 1892; *In re* Maynard, 1 McArthur's Patent Cases, 536, 1857; Post *v.* Hardware Co., 26 F. R. 616, 1886; Forschner *v.* Baumgarten, 26 F. R. 858, 1886; J. L. Mott Iron Works *v.* Cassidy, 31 F. R. 47, 1887; National Roofing Co. *v.* Garwood, 35 F. R. 658, 1888; Kilbourne *v.* Bingham Co., 47 F. R. 57, 1891; Vulcanized Fiber Co. *v.* Taylor, 49 F. R. 744, 1891; Thomson-Houston Electric Co. *v.* Lorain Steel Co., 117 F. R. 254, 1902; National Tooth Crown Co. *v.* Macdonald, 117 F. R. 617, 1902; Drake Castle Pressed Steel Lug Co. *v.* Brownell & Co., 123 F. R. 87, 1903; Lafferty Mfg. Co. *v.* Acme, etc., Co., 138 F. R. 729, 1905; New York Belting Co. *v.* Sierer, 149 F. R. 756, 1906; Cover *v.* American Thermo-Ware Co., 188 F. R. 670, 1911.

[33] Welling *v.* Crane, 14 F. R. 571, 1882.

[34] Brush Electric Co. *v.* Julien Electric Co., 41 F. R. 693, 1890; Brush Electric Co. *v.* Accumulator Co., 47 F. R. 50, 1891.