The Patent Bar of Pittsburgh

Read before the Patent Law Association of Pittsburgh, May 26, 1939, in the Harvard-Yale-Princeton Club.

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Printed for the Patent Law Association of Pittsburgh by and with the compliments of Pittsburgh Printing Company, 530-534 Fernando Street.

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When Mr. Stebbins asked me to prepare an historical paper, on the Patent Bar of Pittsburgh, my first thought was that compliance should be easy. Remembering Dr. Johnson's famous understatement, and realizing that I should not be under oath, it seemed that it would be a simple matter in well-rounded phrases to satisfy general expectations. But immediately came the further thought, that such papers are commonly dull; and, after thinking the matter over, it seemed that, if I were to write individually, of things that now are known to me perhaps better than to another, dullness might be sharpened away, and something might be said that others could bring to a larger and more satisfactory completion. It is something of this sort that I have here attempted.

My father was admitted to the Bar in May, 1866, and purposed to practice patent law. In later years he was wont to say that his choice of this speciality was induced by the knowledge that there was at the time but one patent lawyer in Pittsburgh, and by the realization that there were two sides to every case. But he added ruefully that this canniness was in vain, for within a month he had entered partnership with that first lawyer, and the other side of the case was left still to go begging.

William Bakewell, English born and English bred, had then been practicing in Pittsburgh for about ten years. Beginning in the general field, he had come gradually to the smaller area of patent law. Others in New York and in Philadelphia—Seward and Gifford and Harding—had done the like; others in the inland cities—Stanton and Chase—had taken occasional patent cases; but Mr. Bakewell was the first patent lawyer, properly so

called, to arise to the west of the mountains. Of him my father wrote,—

My relations with him were, perhaps, too intimate for me to judge him impartially; but I can certainly say that he was a first-class all-round lawyer, a careful pains-taking practitioner, a Christian gentleman, and an honest man. He had that genuine liking for the active work of the profession, which made him very careless in the matter of fees. But for the attention of others, his professional income would have been small. Even so, he was not adequately paid for much of his best and hardest work. He was as perfectly at home in real estate law, in corporation law, in commercial law, and in the law of inheritance and descent, as in patent law. For whatever success I have myself attained in the profession, I am largely indebted to his wise and patient tutelage.

Under the first act for the appointment of Circuit judges, one in each circuit, during the first administration of President Grant, Mr. Bakewell's friends made a vigorous effort to secure his appointment for the Third Circuit; but eventually it appeared that some marriage tie or relationship existed between the McKennan and the Grant families; and, as President Grant was never known to go back on his friends, Judge McKennan got (and worthily filled) the office.

Plans were also laid, to secure for Mr. Bakewell the seat on the Supreme Bench ultimately filled by Mr. Justice Bradley, but the appointment was made before the plans on Mr. Bakewell's behalf could be properly matured.

Without under-estimating the merits and abilities of these eminent jurists, I have no hesitancy in saying that Mr. Bakewell was the legal peer of either of them. As a judge he would have made for himself a much higher reputation than he was able to attain to as an advocate—that is to say, outside the circle of those who knew him well.

Shifting thought for the moment to later years, Mr. Bakewell was still active when I myself entered my father's office. His attitude toward me was patronizing, in a kindly, grandfatherly way. I have the pleasantest memory of his personality; but of his professional ability, I have it by hearsay and by mediation, to the extent that in his son and grandson he has lived again.

My father, after graduation from Western Reserve, came to Pittsburgh and worked in turn as journalist, clerk in the Post Office, and teacher of mathematics in the University. In spare hours he read law. A year and a half of military service followed, and it was not until he was in his thirtieth year that he was admitted to the bar. But he should tell his own story—

Returning to Pittsburgh in the fall of 1865 [he writes], nearly twenty-nine years old, with no profession, I felt that I must buckle down to hard work. [He was engaged to be married.] I did so, and in May '66 passed examination and was admitted to the bar . . . and I hung out my shingle.

One day early in June a client of Mr. Bakewell's, Zoheth S. Durfee, whom I had met occasionally, asked me, "Why don't you get into partnership with Bakewell? I know he wants a partner." I replied that I would be glad to, but that I could not ask Mr. Bakewell for it, as I had no business to bring to a firm, and I could not ask him to give me outright an interest in his business. He then said that if I wished he would see Bakewell for me. I assented, with thanks for his kindness. "I will go and see him now," said he, and off he went. In half an hour he came back and said that Mr. Bakewell would like to see me the next morning. I knew Mr. Bakewell fairly well, as he was one of the leading trustees of the University, where I had been teaching. I called on him the next morning. In an hour we had agreed verbally on the terms of a partnership, which I was to put in writing and bring in the morning following. With a few verbal changes the papers were signed. "When can you move in?" he asked. "This afternoon," I replied. "All right," he said. I had nothing to move, more than an office table and chair, an armful of books, and a few papers. It did not take long. The partnership began the next day, June 15, 1866, and it continued for eight years, greatly to my profit and satisfaction. And if he ever had occasion to regret it, he was too polite to tell me.

From the first day I had my hands full. The business was new to me. Mr. Bakewell was absent a good deal, on account of ill health. His clients were accustomed to receive prompt and correct advice. His business then included, besides patents, real-estate law, life insurance, and insanity (for he was attorney for the Dixmont hospital). I had to get right down to the hardest kind of work, and for the first three years I had to put in from fourteen to sixteen hours a day of regular hard work. By that time I had mastered fundamental principles and the chief details, so that I quit professional work at night, except in emergency.

In 1874 George Westinghouse, having some important litigation on hand, desired us to prosecute it with the utmost speed, regardless of all other interests. I told him that we could not neglect other clients. He then proposed that I should leave the firm, and go into the employ of the Air-brake company After some negotiations, my patners Bakewell and Kerr consenting, I agreed. I became the vice-president of the company and, Mr. Westinghouse going to England, I was for the next year or more the active head of that concern. [It will be understood, of course, that the Westinghouse Air Brake Company in 1874 was not the large organization that in the course of years it became.]

After carrying through the litigation that then was pressing (the Gardner and Ranson case), as the details of manufacturing and business office management were not to my taste, I resigned and resumed the practice of patent law, solitary and alone. I have followed it without interruption, and have never had occasion to regret the choice that I made.

My father, as some of you know, was a vigorous and forceful individual. It suffices to add to what he has said of himself that, remembering the truth that most cases are won and lost on the floor, my father's virtue as an ad-

vocate lay in seizing upon the essential points and driving them home. It was his common saying that the horns and hooves go with the hide. It pleased him to repeat the remark of a lawyer in defeat—'the damned broad equities were too much for me.'

He was rather given to proverbial speaking. 'A man may be forgiven,' he would say, 'for a mistake; but he is a fool who makes the same mistake twice.' As preceptor he would say to me, 'When you have a question to decide, decide it. You may be wrong; even so, you probably will have opportunity to make correction; but, if you never decide, you never will be right.' And he could be savage too, as when he exclaimed over a particularly vexing opinion of a particular judge, 'If he would but toss a coin, he would be right half the time.'

Concluding his memoir, my father noted the fact that, but for a single instance of minor importance, he had held no public office, and remarked, 'If I have not done much good in the world in a public way, I am clear of having done much harm'; and then, with a Mark-Twainesque turn that was quite characteristic, he added, 'Even negative virtues, persistently held to, are worth something.'

Prior to the erection, in 1891, of the Circuit Courts of Appeal, appeal lay, as a matter of right, from the trial court to the Supreme Court in Washington. The volume of litigation was, in comparison with that of later years, small, and the dispensation of law was then facilitated by the practice on the part of the justices of the Supreme Court of sitting with the trial judges in their several circuits. Appeals were less frequent. In the thirty years or more, from the beginning of Mr. Bakewell's practice to the erection of the appellate courts, I find that Mr. Bakewell or my father appeared in the Su-

preme Court fourteen times: Mr. Bakewell in nine cases; my father in six; and in one case they appeared together. Of the fourteen, seven went up from this district, two from the eastern district of Pennsylvania, two from the northern district of Ohio, and one each from Connecticut, Iowa, and California. Nowadays we are accustomed to think that, on the average, it is about one case in three that is reversed on appeal. Of these fourteen cases of earlier years, eight were reversed and six affirmed.

That these men had significant part in the shaping of the body of the law, may be indicated by allusion to a few of these cases of theirs. The earliest, Jones v. Morehead, 1 Wall. 155, involves a question of pleading, and the effect of admission. Defendants in their Answer had admitted that they had made locks for doors, as described in the patent in suit. When the proofs were in it appeared that all that was common to defendants' locks and the lock of the patent was old, and of public right. The court (Miller) held that, while defendants were bound to their admission of having made *locks* of the patent, the language of the admission was satisfied by assuming that the smallest number of locks were made, consistent with the use of that word in the plural. The injunction was modified and an award of $13,000 was reduced to $1.00.

My father's earliest case was Gould v. Rees, 15 Wall. 187. It has to do with the law concerning the infringement of a combination claim. In this case the trial court had instructed the jury that the omission of one of the elements of the claim and the substitution of another mechanical device to perform the same function will not avoid infringement. This item of the trial court's instructions the Supreme Court (Clifford) held to be wrong. There is a further question to be asked. The sub-

stituted element—was it at the date of the patent known to be a proper substitute for the omitted element? If not, there is no infringement.

My father, successful in this early case, was twenty-six years later to have that principle applied to his discomfiture in the case of Westinghouse v. Boyden (170 U. S. 537), with its famous phrase—"We have repeatedly held that a charge of infringement is sometimes made out, though the letter of the claims be avoided. The converse is equally true."

The bar of 1898 regarded the Boyden decision as unsound innovation. Mr. Frederick P. Fish, I remember, would not allow me to use it in a brief that a few years later I was writing for him. To understand, however, Mr. Fish's dissent, one must understand something of Mr. Fish's philosophy of the Law; and that is another story. But the law of Westinghouse v. Boyden was no innovation. It is logically sequent upon what was old.

An anecdote in my father's memoir is worthy of repetition here.

> Mr. Justice Harlan was something of a joker, [my father writes, and continues]. The Westinghouse-Boyden case was argued three times. On the morning of the third argument I met Mr. Hill, leading counsel for Boyden, in the clerk's office, and while we were chatting who should come in but Justice Harlan? With his usual gigantic stride he walked across the room to where we were standing, shook hands, and, after passing the compliments of the day, said, 'So Westinghouse and Boyden is up again! That reminds me of a drummer who was caught over Sunday in an unfamiliar, out-of-the-way village; and, being devoutly inclined, he went in the morning to the church most highly recommended, and there heard a sermon from the text, "Peter's wife's mother lay sick of a fever." Not profoundly impressed, he went in the afternoon to another church. There he found that the pastor had exchanged pulpits with the man he had heard in the morning; and he was constrained to hear again the sermon on Peter's wife's mother who lay sick of a fever. In the evening he struck out for a mission chapel in the rural district, and there to his dismay once more the same preacher entered the pulpit, and preached his sermon on "Peter's wife's mother lay sick of a fever." As he walked out at the end of the service he was heard to mutter a hope that the damned woman would die before another Sunday should come round.'
>
> Before Hill or I could make any response, the judge added, 'You may divide that story between you,' and turned on his heel and walked off.

Returning from a long digression to the case of Gould v. Rees, decided in 1872, the opinion of the Supreme Court contains this dictum: Where the defendant omits entirely one of the ingredients of the plaintiff's combination without substituting any other, he does not infringe. The dictum became *res adjudicata* in Pittsburgh Meter Co. v. Pittsburgh Supply Co. 109 F.R. 644, which was my first case, in that I examined the witnesses. (I guess my father knew it didn't matter much what they might say.)

In Powder Co. v. Powder Works, 98 U. S. 126, the question whether a patent for a product may be reissued as a patent for a process (or the reverse) was considered, and was held not to be susceptible to an academic and categorical answer. There is an underlying question. Do the claims of the original and of the reissue define one and the same inventive act? If so, the form is unimportant—whether process or product; if not, the reissue is bad.

In Freeman v. Asmus, 145 U. S. 226, it was held that a reissue was invalid because it laid claim to a field that was wider than that originally specified as the field of invention.

'The same invention' declares the court in another case (Hoffheins v. Russell, 107 U. S. 132) 'involves correspondence both in means and in result.'

A second patent granted on a duplicate disclosure with the first is invalid if its claims be directed to the same subject-matter with the first. Miller v. Eagle Mfg. Co., 151 U. S. 186.

The fact is that these men in these important years were, on the one hand, sharing in the formulation of the law, and on the other guiding the policy in patent matters of the rapidly growing industry of Pittsburgh.

From Mr. Bakewell's office may be derived the professional careers of many men: of my father, of Thomas B. Kerr (whose firm in New York continues in the name, Cooper, Kerr, and Dunham) James K. Bakewell, Thomas W. Bakewell, James I. Kay, Clarence P. Byrnes, and the business that continues in the hands of Stebbins, Blenko, and Parmelee. Mr. Bakewell's office manager for many years was a certain Mrs. Fitler—a lady in the proper sense of the word. She was an aunt of Mr. Kay's and her daughter, still living, became the wife of James K. Bakewell. Mr. Kay's firm continued in a business still conducted by Mr. Archworth Martin.

Thomas W. Bakewell became, as we know, a leader of the Bar. Of him Mr. Fish said to me one day, not long before his death, that, though late in coming, he then stood in the front rank. Of his career Mr. Kay wrote:—

Thomas W. Bakewell, William Bakewell's younger son, was admitted to the bar about 1884. His was a brilliant career. He took up the main work of the firm when Mr. Kerr went to New York, and there proved his ability. He carried the burden of the large litigation, and his clear, clean-cut presentation of cases won him such prominence that he extended the firm's practice throughout the country. He succeeded Mr. Bennett as the patent attorney for the United States Steel Corporation about 1905, and moved to New York where he became employed in much important litigation. In the summer of 1909 he was taken suddenly ill while engaged in the argument of a case here in Pittsburgh, and died in the court building.

To this I would add a note of his court-room manner —modest, quiet, earnest. He spoke conversationally; his manner was the very antithesis to pomposity. It was sincere, it was intelligent, and it was winning.

It is necessary to curtail, and I pass over such matters of interest as the discovery of carborundum and the building up of the allied industries of that substance, and of aluminum, but I note two ultimate Supreme Court cases in one of which Mr. Thomas Bakewell was engaged and in the other both Mr. Bakewell and my father.

One of the most famous, and yet one of the most insignificant, of cases arising in this district and reaching the Supreme Court was that of Carnegie Steel Co. vs. Cambria Iron Co. (185 U. S. 403) on the Jones patent for a process of mixing the molten metal from different blast-furnaces before charging it into the Bessemer converter. The case is famous because of the industrial importance of the parties; and because of the array of counsel—for the patent were Thomas W. Bakewell, Thomas B. Kerr, P. C. Knox, and in the Supreme Court, Thomas B. Reed; and against the patent were Francis T. Chambers, James I. Kay, and Philip T. Dodge. The case is insignificant because it might be expunged from the record without changing one iota the body of patent law, or diminishing by one ounce the prestige of the Supreme Court.

I was present at the argument in the Supreme Court, in the fall of 1901; and I remember Mr. Kerr's little joke (for he had a sprightly wit.) 'When the case is called,' he said, 'and Tom Reed and Tom Bakewell and Tom Kerr stand up for the petitioners, I'm afraid the court is going to shout, *Scat!*' Mr. Reed's argument, let me say in passing, was the lightest and, as I suspect, the costliest of all the arguments I have listened to.

The patent had a remarkable history. The application squirmed through the Patent Office by repeated revision of the statement of utility; it dodged through the courts by shiftings of base and cancellation through disclaimer of significant passages in the specification.

The three judges of the court of appeals were unanimous in reversal of the trial court and in declaring the patent invalid. No more adequate reason for the intervention of the Supreme Court appears than the circumstance that Andrew Carnegie had testified as a witness

for plaintiff. Yet the decision of the court of appeals was set aside and the decree of the trial court was re-instated on a five to four split. The patent was sustained, despite the fact that the number of judges who had held unfavorably exceeded those who held favorably. And, if it be thought that the holding of Brown and Gray must merit acceptance, what shall we say when we find on the other side Dallas and Acheson, White and Fuller?

My father at the time deemed the patent legally unsound, but of his judgment it might be said that it was not free, since he represented a rival steel company.

It all is dead and done-for, but I think that anyone who will take the trouble to read the Supreme Court reporter will find that the dissenting opinion relentlessly exposes the casuistry of the opinion of the majority; and the reader will close the book with a disquieting thought, questioning the Ivory-tower isolation of the Supreme Court justices. The irony of Peter Dunn seems pertinent—

> "D'ye think, Martin, that Andy Carnegie is a happy man?"
> "He ought t'be, Hennesey, he ought t'be. He's rich, and he's famous, and he's a little hard of hearing."

One Supreme Court case more deserves mention, Expanded Metal Co. v. Bradford, 214 U. S. 366. Both my father and Tom Bakewell were for the patent; though before the case had reached the Supreme Court my father because of infirmity had given place to Frederick P. Fish, and before the summer was done both Mr. Bakewell and my father were gone. The case is important because it deals adequately with one of those illogical generalizations that impede the operation of the Patent Law—indeed, of law at large—: the generalization, namely, that the function of a machine is not patentable.

My own earliest memory pertinent to my subject tonight is of a dim foggy street that I now know to have been Sixth Avenue, and of a flight of snowy steps leading to my father's office. But memories much more frequent and distinct attach themselves to a suite of three rooms on the ground floor of a building on what then was called Diamond Alley. That was for me a rallying point, where my father and his friendly associates were to be found; the point whence there were exciting excursions to circus, exposition, and to incredible eating-houses. There, on a day I remember well, there was consternation and dismay even of the faces of the grown folks, when the sudden flying news came that the President had been shot.

It was a primitive office, no typewriter, no stenographer, no telephone; there was much writing, the letter press much in evidence, and the red tape. The draftsman ground his ink from a black stick. Clients came and went without the intervention of an office boy, and if conferences were then as now not always easy, certainly access was free. A gas lamp post stood at the street corner.

One day Mr. Westinghouse came, irate and storming. What was the matter? It was a patent—a patent just granted him—and he waived it wildly. Well, what of the patent? was the specification wrong? No. The claims, were they unsatisfactory? No. What then? It was the drawings. The assinine draftsman had shown the wheels of the car to be flanged on the outside of the rails, making him the laughing-stock of the industry.

I am reminded of the Burlington Tests of 1888: tests set up by the Master Car Builders' Association, to determine what type of brake was best for a freight train of fifty cars—a train more than half a mile long. The air brake won. There was a competing brake, operated by electricity. In the operation of this brake all the

brakes moved at once, throughout the length of the train, and necessarily should move gradually to effective positions. In this Burlington test there was lacking the gradation in application essential to success. The brakes went on suddenly and hard; the wheels stopped, but the superstructures of the car went right on. Some one remarked that it was a grand way to stop a train, but a hell of a way to unload it.

A few moments ago I spoke of the guiding of industry in matters of patent law. It is well to observe that no disquietude had yet arisen about using patents to stifle competition. The policy of the Air-brake company was deemed exemplary, of procuring and purchasing (so far as possible) *all* of the patents in its field.

Sometime late in the eighties my father moved to the fifth floor of the building at the corner of Grant Street, and Tom Patterson raised the question, 'Mr. Christy, don't you think it a mistake to take an office so high that you are dependent on elevator service?' 'I don't think so,' said my father. 'I recently had occasion to take testimony in New York in an office on the *eighth* floor [it was in the old Equitable Building, 120 Broadway] and, so far as I could see, it was the best office in the building.'

From Mr. Christy's office are similarly to be derived our friend Charles M. Clarke, J. Snowden Bell, Thomas J. Hogan, Darwin S. Wolcott, and, in later years Paul N. Critchlow, and my partner now is William Wharton, William Bakewell's grandson. Mr. Paul Synnestvedt, now of Philadelphia, should be named here. His approach to the profession was as an expert witness in air-brake matters.

Mr. Kay began, as has been said, under the tutelage of William Bakewell. In due time he set out on an inde-

pendent course and, associating with himself his brother-in-law, Robert D. Totten, he developed and held a valuable business. Mr. Kay was worthy of his preceptor in diligence, in carefulness of preparation and presentation. Another might say, 'The hooves and the horns go with the hide.' He would take no chance, but name hooves and horns and hairs too. And his carefulness had its reward. Of Robert Totten some of us remain who hold happy memories of a good practitioner, a courteous adversary, and a delightful companion.

From the Kay and Totten office came, first, James Negley Cooke; and, after a few years, Frederick W. Winter, who had been trained in the Patent Office. Both of these men, setting out for themselves, fell when in full career, and of Mr. Winter, particularly, it should be added that he was at the time of his fall but entering upon a larger success. His office continues in the name, Brown, Critchlow, and Flick.

William L. Pierce, a long, loose-jointed yankee, came, on graduation from Dartmouth, and became the headmaster of an academy in Sewickley.

I am reminded of a story. Once in the early days of the Federal government John Randolph of Roanoke, senator from Virginia, and Uriah Tracy of Norwich, senator from Connecticut (with whom my people had some connection), were standing at a window in Washington when a drove of mules passed through the muddy street. Turning to his colleague, John Randolph sweetly said, 'There go some of your constituents.' 'Yes,' answered Uriah, 'they're going to Virginia, to teach school.'

New England sent, not incompetents, but droves of virile and creative minds far and wide to teach school; and so William Pierce came westward, and for a few of

my boyhood years he was overseer of my purblind education. It may be that out of that early relationship an unshakable kindliness sprang. The fact remains that I liked him. And clients liked him. He was open, cordial—enthusiastic, even—in manner; self-possessed. One might say of him that he was rather well assured. He was mentally alert, quick of comprehension. It remains to say that, even in his volatility of mind lay evidence, as now we see, of the disorder that at length overshadowed him and brought eclipse.

His associate and successor was Floyd N. Barber and in his office too our friends Edward A. Lawrence and Karl Fenning had their professional beginnings. Mr. Lawrence tells me tonight that he had read law in Mr. Kerr's office, in New York, and returned to Pittsburgh on Mr. Bakewell's advice.

Many of us carry happy memories of John R. Roney, of Joseph M. Nesbit, of Francis W. H. Clay (who became an assistant Commissioner), of George H. Parmelee, and of Earl Parmelee, his son, of Wesley G. Carr, and of James C. Bradley, whose passing but a few months ago has saddened us.

Of my brother it is not so easy to speak. There was in him an element of bashfulness that he covered with a cloak of haste and intensity of speech. But for that—or, conceding that—he was among the first. I knew his mind as I have known no other, and, perhaps because I knew it best, it seems to me the best mind I have known. I know how diligently he studied, and how carefully he gave advice. I know the sureness and the skill with which he analysed invention; I know that in consultation it was commonly his theory of the case that was adopted. You knew the accuracy of his briefs. You recall his punctiliousness, that the court should find his presentation sound. And on occasion, when a client had (as clients will) given him something less than the whole truth, he would be brought to the bursting point with indignation—not so much against the client, as because of the censuring thought that might arise in the mind of the court. The cloak for his bashfulness scarcely concealed a gentleness that was in him a saving grace.

Good specimens of his work may be found in the broad interpretation given by court to the Owens patent for the fire-finishing of the inner surfaces of glass nappies, Blair v. Jeannette-McKee Glass Works (161 F. R. 355); in the relaxing of the austerities of Interference adjudication, Joy v. Morgan (295 F. R. 931); in the careful limiting of the scope of a patent to its disclosure in Pittsburgh Plate Glass Co. v. American Window Glass Co. (276 F. R. 197—the Spinasse Cold-bait Patent); and in the sustaining of the Haynes and the Bearley patents on stainless steel, American Stainless Steel Co. v. Ludlum (16 F. (2d) 823).

These men all are gone, and have left to us the field: the ever-engrossing labor of bringing legal principle to bear upon the fruits of imagination—the inventions of chemist, of metallurgist, engineer, and mechanic; and in so doing holding in a close-knit whole the fabric of our social order. An hour of reflection upon the lives now completed of some we have known may perhaps cause us to take up with quickened zeal tomorrow's task.