

A NEW PATENT ACT.

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A Bill has been introduced into the Dominion Parliament entitled "An Act to amend and consolidate the Acts relating to Patents of Invention," which, if it becomes law, will be, in effect, a new Patent Act containing many provisions radically different from those of the old Act. The principal changes have to do with the conditions which an applicant must fulfil in order to obtain a patent, and those which he must comply with in order to maintain his patent in force. The prohibition against importation of the patented invention after one year from the date of the patent is removed, and new manufacturing and license provisions introduced.

The present Patent Act in its main provisions, has remained substantially unchanged since 1869, when it was drafted with the United States Act of 1836 as a model. Since that date the only material change that has been made has been the introduction in 1903 of the Compulsory License System, as a substitute for working, with respect to certain classes of inventions.

From time to time there has been a suggestion that the Canadian Patent Act should be amended in order to permit Canada to become a member, and so secure the advantages, of the International Convention for the Protection of Industrial Property (Signed at Paris, March 30, 1883; Revised at Washington June 2, 1911). The principal advantage to be obtained by the Convention would be that contained in Article IV thereof which provides:

"Any person who has duly applied for a patent, industrial design or model, or trade-mark in one of the Contracting States shall enjoy, as regards registration in the other States, and reserving the rights of third parties, a right of priority during the periods hereinafter stated."

The period stated with respect to patents is one year. Canada by its present Act gives the same protection as the Convention does to all foreign applicants, but receives nothing in return. The principal bar to Canada becoming a member of the Convention has been that contained in Section 38 of The Patent Act which prohibits importation after one year, this being contrary to Article V of the Convention which provides:

“The introduction by the patentee into the country where the patent has been granted of objects manufactured in any of the States of the Union shall not entail forfeiture.

“Nevertheless, the patentee shall remain bound to work his patent in conformity with the laws of the country into which he introduces the patented objects.”

The revision of the working requirements proposed in the Bill would enable Canada to become a member of the Convention, with the result that inventions made by Canadian inventors would be protected during a period of one year in all countries of the International Union, these countries including at the present time: Austria, Belgium, Brazil, Cuba, Denmark, Dominica, France, Germany, Great Britain (with Australia, Ceylon, New Zealand, Trinidad, and Tobago), Holland, Hungary, Italy, Japan, Mexico, Norway, Portugal, Servia, Spain, Sweden, Switzerland, Tunis and United States.

The conditions which an applicant for a patent under the present Patent Act (R. S. C. 1906 Chap. 69) must meet are set forth in Section 7 thereof which reads:

“7. Any person who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement in any art, machine, manufacture or composition of matter, which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale

with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent therefor in Canada, may, on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property in such invention.

“(2) No patent shall issue for an invention which has an illicit object in view, or for any mere scientific principles or ‘abstract theorem.’”

It is proposed in the present Bill to replace these provisions by the following:

“7. (1) Any person who has invented any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvements thereof, not known or used by others in Canada before his invention thereof and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application and not in public use or on sale in this country for more than two years prior to his application may, on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property in such invention.

“(2) No patent shall issue for an invention which has an illicit object in view, or for any mere scientific principle or abstract theorem.”

The Section proposed to be substituted follows textually the provisions set forth in United States statutes (Section 4886 Revised Statutes 1878; as amended by Act of March 3, 1897).

The principal changes introduced are:

(a) With regard to prior knowledge in other countries than Canada;

(b) With regard to prior publication; and

(c) With regard to public use or sale prior to application.

Under the present Act, the requirements which an applicant for a patent must fulfil with regard to prior knowledge are more rigorous than in any other country in the world. To be entitled to a patent in Canada, the applicant must be the first inventor throughout the world, and not merely in Canada. (*Smith v. Goldie* (1883), 9 S. C. R. 46). This makes a Canadian patent liable to attack by proving that, prior to the date of the alleged invention, it was as a matter of fact known in some way to some other person in some other part of the world. The phraseology of the present Act is particularly comprehensive in requiring that the invention should not be "known or used by *any other person* before his invention thereof." The new Bill substitutes "not known or used by others in Canada before the invention thereof." By the new Act not only is knowledge restricted to Canada, but it is required to be knowledge "by others" not "by any other person." This phraseology has been construed in the United States Courts to exclude secret knowledge such as an unpublished drawing or prior model.

The present Act contains no reference to the effect of prior publication. Section 17, sub-section (d) authorizes the Commissioner to object to grant a patent:—

"(d) When it appears to him that the invention has been described in a book or other printed publication before the date of the application, or is otherwise in the possession of the public."

This Section was copied into our Patent Act from Section 17 of the American Act of 1836, but there is no corresponding provision in Section 7 of our Patent Act which makes publication for two years, or for any period, a bar to a patent. There is no doubt that, if an invention is described in a book or publication before the date of invention, such book or publication would constitute a proper bar because the invention would then not be new, but Section 17, as it at present stands, refers to publication before the date of appli-

cation, thus authorizing the Commissioner to object to the grant of a patent for reasons which are inconsistent with the rest of the Act. The Bill will overcome this difficulty by making publication for more than two years in Canada, or any foreign country, a bar to the application.

The present Act makes public use *with the consent or allowance* of the inventor for more than one year previous to the application for a patent in Canada, a bar. It has been decided that the "public use" referred to is public use in any country, and not merely in Canada. (*Barnett-McQueen Co. v. The Canadian Stewart Co.* (1910), 13 Ex. C. R. 186); *Lombard v. Alex. Dunbar & Sons Co.* (1910), 8 E. L. R. 261). The Bill substitutes for this a prohibition against public use or sale in Canada for more than two years, and makes no reference to whether or not the public use or sale was with the consent or allowance of the inventor or not. In this way, a patent in Canada could be defeated by public use of which the inventor had no knowledge; presumably upon the theory that, if the inventor allowed public use to continue in Canada for a period of two years before application for the patent is made, he must be taken to have abandoned his invention. In some instances, an applicant for an United States patent is delayed many years in obtaining his patent by interferences or other contests in the Patent Office. In such cases, it would be necessary for him, if his invention is likely to become in public use or go on sale in Canada, to make application within the two-year period. One result which will follow from the adoption of the new provisions is that the Canadian courts will have the benefit of such jurisprudence as has been established in the United States.

Section 8 of the Bill extends the time within which application may be made on an invention for which a foreign patent has been taken out until one year from the date of application for the foreign patent, as compared with one year from the date of issue in the

present Act. The corresponding Section in the United States permits application within one year from the date of application in a foreign country for which protection is afforded by the International Convention.

Section 16 contains new law and follows exactly the terms of Section 11 of the British Patents and Designs Act, 1919 (9-10 George V.). It provides in brief that, in the case of patents on chemical processes, no claims shall be made for the substance itself except when prepared by the special process described, and, further, that in the case of inventions intended for the preparation or production of foods or medicines, the Commissioner may grant a license to any person applying for the same upon such terms and conditions as may be settled by him, having regard to the desirability of making the food or medicine available to the public at the lowest price consistent with giving to the inventor due reward for the research leading to the invention. The enactment of this law in Great Britain has been too recent to enable any opinion to be formed as to its effect.

Section 21 of the Bill refers conflicting applications for a patent to the Exchequer Court instead of to arbitration. This overcomes the objection to boards of arbitration occasioned by the varying procedure followed by the different boards, and frequently by the lack of technical or legal training on the part of the members composing the board. In the case of conflicting applications, the only question to be decided is one of fact, and it would seem that a court having established rules of procedure and accustomed to weighing evidence is more likely to reach a correct decision than a board whose members may for the first time be sitting upon a judicial tribunal. In its essence, the question to be decided is not one which can be arbitrated, but one which must be decided as a matter of fact. If a board of arbitrators should decide a question of priority incorrectly, their decision would not have the effect of making the patent, issued as a

result of **their decision, a valid one** if attacked by a third party in a position to establish before the courts that the patentee was not, as a matter of fact, the first inventor.

Section 23 introduces new law with regard to inventions made by persons in the public service, and is a restriction upon the rights of such persons. At present the only restriction upon the rights of a person in the public service of Canada are those contained in Section 61 which provides:

“No officer or employee of the Patent Office shall buy, sell or acquire or traffic in any invention or patent, or in any right to a patent. . . .”

The right of the Government of Canada with regard to a patent invention is covered by Section 52 which reads:

“The Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof.”

Section 23 of the Bill proposes that the royalty payable to a patentee, who is in the public service, with respect to his invention should be divided equally between the Government of Canada and the patentee, the terms upon which a license may be granted for use of the invention to be determined by the Commissioner.

Section 24 of the Act with respect to the re-issue of patents has been amended by limiting the time within which application for re-issue should be made to four years from the date of the patent. The present law permits re-issue at any time during the life of the original patent. In the United States, under a similar provision, the courts have adopted what is termed a two-year rule for preventing a broadened re-issue after two years from the date of the patent. This rule is drawn by analogy from the conditions attached to the grant of a patent which

make public use for more than two years prior to the application a bar to the grant of a patent. (*Toppliff v. Toppliff* (1892), 145 U.S. 171; *Woollen-sack v. Reiher* (1884), 115 U.S. 101). The effect of the amendment will be to limit definitely the time within which any re-issue may be applied for to four years.

The principal change, from a standpoint of policy, which the new Bill proposes is that governing the manufacturing or working conditions. The present conditions are contained in Sections 38 and 44 of The Patent Act, which read:

38. Every patent shall, unless otherwise ordered by the Commissioner as hereinafter provided, be subject, and expressed to be subject, to the following conditions:

“(a) Such patent and all the rights and privileges thereby granted shall cease and determine, and the patent shall be null and void at the end of two years from the date thereof, unless the patentee or his legal representatives, within that period or an authorized extension thereof, commence, and after such commencement, continuously carry on in Canada, the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada;

“(b) If, after the expiration of twelve months from the granting of a patent, or an authorized extension of such period, the patentee or patentees, or any of them, or his or their or any of their legal representatives, for the whole or a part of his or their or any of their interest in the patent, import or cause to be imported into Canada, the invention for which the patent is granted, such patent shall be void as to the interest of the person or persons so importing or causing to be imported.”

44. On the application of the applicant for a patent, previous to the issue thereof, or on the appli-

cation within six months after the issue of a patent of the patentee or his legal representatives, the Commissioner, having regard to the nature of the invention, may order that such patent, instead of being subject to the condition with respect to the construction and manufacture of the patented invention hereinbefore provided, shall be subject to the following conditions, that is to say:—

“(a) Any person at any time while the patent continues in force, may apply to the Commissioner by petition for a license to make, construct, use and sell the patented invention, and the Commissioner shall, subject to general rules which may be made for carrying out this section, hear the person applying and the owner of the patent, and, if he is satisfied that the reasonable requirements of the public in reference to the invention have not been satisfied by reason of the neglect or refusal of the patentee or his legal representatives to make, construct, use or sell the invention, or to grant licenses to others on reasonable terms to make, construct, use or sell the same, may make an order under his hand and the seal of the Patent Office requiring the owner of the patent to grant a license to the person applying therefor, in such form, and upon such terms as the duration of the license, the amount of the royalties, security for payment, and otherwise, as the Commissioner, having regard to the nature of the invention and the circumstances of the case, deems just;

“(b) The Commissioner may, if he thinks fit, and shall on the request of either of the parties to the proceedings, call in the aid of an assessor, specially qualified, and hear the case wholly or partially with his assistance;

“(c) The existence of one or more licenses shall not be a bar to an order by the Commissioner for, or to the granting of a license on any application, under this section; and,

“(d) The patent and all rights and privileges thereby granted shall cease and determine, and

the patent shall be null and void, if the Commissioner makes an order requiring the owner of the patent to grant any license, and the owner of the patent refuses or neglects to comply with such order within three calendar months next after a copy of it is addressed to him or his duly authorized agent.

By the new Bill, the absolute prohibition against importation is removed, and the following conditions substituted:

“40. (1) Every patent, except those governed by section twenty-three, shall be subject to the following conditions:—

(a) Every patentee shall satisfy the reasonable requirements of the public with reference to his patent and to that end shall adequately manufacture the patented article or carry on the patented process within Canada;

“(b) Any person interested may present a petition to the Commissioner alleging that the reasonable requirements of the public with respect to a patented invention have not been satisfied and praying that the patentee be ordered to supply the patented article at a reasonable price or grant licenses for the use of the invention on reasonable terms;

“(c) The Commissioner shall then consider the petition and, if the parties do not come to an arrangement between themselves, the Commissioner, if satisfied that a *prima facie* case has been made out, shall refer the petition to the Exchequer Court, and, if the Commissioner is not so satisfied, he may dismiss the petition,

“(d) Where any such petition is referred by the Commissioner to the Exchequer Court, such Court shall have jurisdiction to hear and determine the matter, and, if it is proved to the satisfaction of the Court that the reasonable requirements of the public with respect to the patented invention have not been satisfied, the patentee may be ordered by the Court to supply the patented article within reasonable limits at such price as

may be fixed by the Court and in accordance with the custom of the trade to which the invention relates as to payment and delivery, or to grant licenses for the use of the patented invention on such terms as may be fixed by the Court, in either case within and after such time as may be fixed by the Court and on pain of forfeiture of the patent:

“(e) For the purposes of this section the reasonable requirements of the public shall not be deemed to have been satisfied,—

“(i) if by reason of the default of the patentee to manufacture to an adequate extent and supply on reasonable terms the patented article, or any parts thereof which are necessary for its efficient working, or to carry on the patented process to an adequate extent or to grant licenses on reasonable terms, any existing trade or industry, or the establishment of any new trade or industry, in the Dominion of Canada is unfairly prejudiced, or the demand for the patented article or the article produced by the patented process is not reasonably met; or,

“(ii) if any trade or industry in the Dominion of Canada is unfairly prejudiced by the conditions attached by the patentee before or after the passing of this Act to the purchase, hire, or use of the patented article or to the using of or working of the patented process.”

“41. (1) At any time not less than three years after the date of a patent and not less than one year after the passing of this Act, any person may apply to the Commissioner for the revocation of the patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside Canada, to supply the Canadian market with the invention covered by the patent.

“(2) The Commissioner shall consider the application, and, if after enquiry he is satisfied that the allegations contained therein are correct, then, subject to the provisions of this section, and unless the patentee proves that the patented articles or process is manufactured or carried on

to an adequate extent in Canada, or gives satisfactory reasons why the article or process is not so manufactured or carried on, the Commissioner may make an order revoking the patent either,—

“(a) forthwith; or,

“(b) after such reasonable interval as may be specified in the order, unless in the meantime it is shewn to his satisfaction that the patented article or process is manufactured or carried on within Canada to an adequate extent;

“Provided that no such order shall be made which is at variance with any treaty, convention, arrangement or engagement with any foreign country.

“(3) If within the time limited in the order the patented article or process is not manufactured or carried on within Canada to an adequate extent, but the patentee gives satisfactory reasons why it is not so manufactured or carried on, the Commissioner may extend the period mentioned in the previous order for such period not exceeding twelve months as may be specified in the subsequent order.

“(4) Any decision of the Commissioner under this section shall be subject to appeal to the Exchequer Court.”

These sections in their phraseology follow the sections which were introduced into the British Act of 1907, (Edward VII., c. 29) and modified in 1919 (9-10 George V. c. 80).

Some objection has been taken to the present Act by reason of the stringency of its terms. The earlier decisions under the sections corresponding to Section 38 of The Patent Act gave a somewhat lenient interpretation to its provisions; thus in *Barter v. Smith* (1877), 2 Ex. C. R. 455, p. 481, Deputy-Minister Taché, the officer charged with the administration of the Section, said:

“The legislature has, certainly not without intention, provided for a kind of paternal tribunal, formed by the Commissioner of Patents,

the natural protector of patentees, which intention can be no other than that every case should be adjudicated upon in a liberal manner."

The Supreme Court of Canada, however, in 1902, in *Power v. Griffin*, 33 S. C. R. 39, rudely shattered prevailing views as to the interpretation of this section of the Act, and held that the statute must be taken to mean what it said, and that actual manufacture in Canada was necessary. Since that time, it has been necessary for a patentee in suing upon a patent to show that actual manufacture had been commenced within the two-year period, or any extension thereof. Some relief was afforded with respect to certain classes of invention by the provision of Section 44, which was enacted in 1903 as an amendment to The Patent Act.

Up to the present time, the Commissioner has never had to grant formally a compulsory license. A number of cases have been before him, but usually a settlement has been arrived at between the parties which has avoided the necessity for any decision by the Commissioner.

Some open questions still remain with regard to Section 38 of The Patent Act, such as, whether or not it applies to a process patent, and whether the Act is complied with by the assembling in Canada of parts which have themselves been manufactured abroad. In *Alsop Process Co. v. Friesen* (1917), 16 Ex. C. R. 507; 57 S. C. R. 606, it was held that the importation of an apparatus to carry out a patented process had no effect on the patent for the process. In the *Dominion Chain Co. v. McKinnon Chain Co.* (17 Ex. C. R. 255; 58 S. C. R. 121), it was held that the patent had been invalidated by the importation into Canada of the parts of the tire chains ready to be assembled here. The invention, in this instance, was the well-known Weed Tire chain. The chain had been cut to length in the United States, and shipped over to Canada ready to be hooked together here. Under these circumstances, the Supreme Court held that the patented

invention had been imported. The Court, however, did not specifically overrule the earlier cases, such as *Anderson Tire Co. v. American Dunlop Tire Co.* (5 Ex. C. R. 82), which had held that the parts of an invention might be imported and assembled in Canada. The reasoning of Mr. Justice Anglin on the subject in the case referred to, was expressed as follows:

“In *United Telephone Company v. Dale*, 25 Ch. D. 778, Pearson, J., is reported, at page 782, to have said: ‘If there was a patent for a knife of a particular construction, and an injunction was granted restraining a defendant from selling knives made according to the patent, and he was to sell the component parts so that any school boy could put them together and construct the knife, surely that sale would be a breach of the injunction.’

“In *Dunlop Pneumatic Tire Co. v. Mosely*, 21 R. P. C. 472, at p. 280, Vaughan-Williams, L.J., approves of this statement of the law, adding:

‘If you are in substance selling the whole of the patented machine, I do not think that you save yourself from infringement because you sell it in parts which are so manufactured as to be adapted to be put together.’

“In *E. M. Bowden’s Patents Syndicate v. Wilson*, 20 R. P. C. 644, a sale of all the component parts of a patented brake was held to be a violation of an injunction protecting the patented invention. I find the observation of Pearson, J., in the *Dale* case cited with approval in *Frost on Patents*, Vol. 1, at page 377, and *Fletcher-Moulton on Patents* at page 161.

“The importation of *all* the component parts of the patented invention ready to be put together by some very simple process would, in my opinion, constitute an infringement of the patent quite as much as would the sale of the same parts. The importation of them by the holder of the patent would entail its avoidance under clause (b) of s. 38 of The Patent Act. See also *Fisher and Smart on Patents*, pp. 148 *et seq.* But with-

out condemning it, I wish especially to guard myself against being committed to an endorsement of the first paragraph on page 152, expressing the personal view of the authors of the work last cited as to the effect of the importation of 'anything on which labour has been done to particularly adapt it to use in the invention.' The decision of Burbidge, J., in *Anderson v. American Dunlop Tire Co.*, 5 Ex. C. R. 82, is an authority against this view.

"But we are dealing not with the case of the importation of one or more of the component parts of the patented article, but with the importation of all the component parts 'together in such a form that they can easily be made into the combination.'

"I have not overlooked the cases of *Sykes v. Howarth*, 12 Ch. D. 826, and *Townsend v. Howarth*, *ibid.* 831. The *Townsend* case was not a case such as this is, of supplying all the component parts of the invention—parts especially manufactured according to specifications in sizes and lengths and with appropriate fittings, the whole as manufactured being suitable and suitable only for the making of the patented invention. The *Sykes* case is merely authority for the general proposition that 'selling articles to persons to be used for the purpose of infringing a patent is not an infringement of the part.' Here, according to evidence, the side chains with hooks attached and the cross chains with hooks attached, all made to order and of particular sizes 'manufactured to the proper lengths'—being the component parts of the plaintiff's chain tire grip—were imported 'adapted to be put together' by a simple process which 'any school boy' if endowed with sufficient strength, could apply."

While, therefore, the construction of some parts of the present sections with regard to manufacture and importation is unsettled, it may be questioned whether or not the new provisions suffice to clear the atmosphere of doubt.

The condition of Section 40 of the Bill is, that a compulsory license may be granted after three years if the patentee does not satisfy "the reasonable requirements of the public" and "adequately manufacture the patented invention." The "reasonable requirements of the public" are stated to require manufacture "to an adequate extent" and under such conditions that the establishment of any new trade or industry is not "unfairly prejudiced," and that the demand for the article should be reasonably met and that no trade or industry should be unfairly prejudiced by the conditions attached by the patentee for the use or working of the invention. It is evident that there is room for wide difference of opinion in the interpretation of such elastic terms as the foregoing.

It may also be observed that Sub-section (d) of Section 40 enables the Court to order the patentee to supply the patented article within reasonable limits "at such price as may be fixed by the Court." Under some conditions a patentee could much better afford to surrender his patent than be subject to the condition forcing him to supply the article at a fixed price.

Section 41 of the Bill, giving the terms under which a patent may be revoked, also leaves considerable to the discretion of the Court. It provides that after three years the patent may be revoked if the patented article is manufactured or carried on "exclusively or mainly outside Canada, to supply the Canadian market with the invention covered by the patent." On an application to revoke, the patentee may save his patent if he "gives satisfactory reasons."

There has been some interpretation of the corresponding section of the British Act, and some jurisprudence established. (See cases reported in Vol. 36 of *Cutler's Reports of Patent Cases*, pages 5, 21, 114, 161, 163, 209, 300, 383, 447, 449, 666 and 830). The decision in each case has involved a detailed examination of much evidence on questions of fact, together

with the exercise of considerable discretion by the trial Judge.

Section 47 of the Bill gives wide powers to the Commissioner for the restoration and revival of patents which have lapsed through failure to pay fees, or failure to construct or manufacture, or by reason of importation of the patented invention. The only remedy heretofore for a patent which had become void by reason of such facts, has been a special Act of Parliament. The present section would have the effect of transferring to the Commissioner those powers which have been heretofore exercised by Parliament itself, and make it much easier for a patentee whose patent had lapsed, to effect restoration thereof. By Sub-section (5) of Section 47 the rights of any person who has commenced manufacture, use or sale of the invention while the patent was void, is saved, and the right reserved to such a person to continue the manufacture, use and sale in as full and ample a manner as if the patent had not been restored or revived.

Section 57 is a new provision authorizing the Patent Office to keep a register of attorneys on which shall be entered the names of all persons entitled to represent applicants in the prosecution of applications before the Patent Office. Entry on such register is to be made in accordance with regulations made by the Commissioner and approved by the Governor in Council. Section 58 empowers the Commissioner for gross misconduct, or any other sufficient cause, to refuse to recognize any person as a patent attorney, either generally or in any particular case. In this connection it may be said that it is desirable that only those who have some legal or technical training should be authorized to hold themselves out, or practice, as patent attorneys or agents.

Section 67 of the Bill provides that all patents granted under The Patent Act shall be subject to the provisions of the Bill, which has the effect of making the Bill retroactive and altering the conditions under

which patents at present in force were granted. Wide questions of policy always arise with respect to any retroactive legislation, and a discussion of such questions would be beyond the scope of this article, which is intended only as a survey of the changes which would, as a matter of fact, be effected if the present Bill becomes law.

* * * There are two publications whose bow to the legal profession in the New World synchronized with that of the REVIEW. They are the *New York Law Review* and the *Texas Law Review*. The latter is the joint enterprise of the Law School of the University of Texas and the Bar of the State of Texas; while the New York Law Review Corporation is responsible for the former. Mention of our contemporaries at this place is due to the exigencies of printing, and in no wise suggests they are not of first rate importance in the field of legal literature. We wish them every success.