

***E. BEMENT & SONS V. NATIONAL HARROW
COMPANY:***

**THE FIRST SKIRMISH BETWEEN PATENT LAW AND
THE SHERMAN ACT**

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INTRODUCTION

E. Bement & Sons v. National Harrow Company,¹ a practically forgotten 1902 Sherman Act case involving the Harrow Trust, tells the story of patent law’s uneasy transformation from a quaint and comfortable nineteenth century role of private protection for inventors to the nuanced picture of innovation, exclusion, and regulation that we experience today. In this first case considering a patent license under the Sherman Act,² the Court held that the licenses in suit did not violate the Sherman Act’s prohibition of restraints in trade, despite broad price restrictions, exclusive arrangements, and required grantbacks for patents and applications claiming improvements.³ The Court declared persuasively,

Notwithstanding these exceptions [for the police power of state], the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is

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1. 186 U.S. 70 (1902).

2. *Id.* at 83.

3. *Id.* at 95.

monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.⁴

In this sweeping statement, nine years before *Standard Oil Co. v. United States*⁵ established the rule of reason for antitrust liability,⁶ the *Bement* Court appeared to give antitrust immunity to patent license provisions integral to an early patent pool,⁷ setting an important foundation for a permissive antitrust approach to patent licensing in the early twentieth century.⁸ As the Court turned away from this permissive approach to a more skeptical one mid-century,⁹ *Bement* survived with little commentary from courts.¹⁰ In the modern era, *Bement* has fallen into relative obscurity.¹¹ In *FTC v. Actavis, Inc.*,¹² the Court's most recent antitrust case regarding settlement agreements between patent-owning pharmaceutical companies and generic companies in the shadow of federal drug regulation,¹³ the majority and the dissent both echoed portions of Justice Peckham's *Bement* decision with respect to limitations that antitrust law may place on a patent owner's right to exclude,¹⁴ yet the Court did not cite *Bement*.¹⁵

What accounts for the disappearance of *Bement* as a leading case?

4. *Id.* at 91.

5. 221 U.S. 1, 30 (1911).

6. *See id.* at 66; WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 256–57 (The University of Chicago ed., Greenwood Press 1980).

7. *Bement*, 186 U.S. at 94.

8. *Id.*

9. R. Hewitt Pate, Assistant Att'y. Gen., Antitrust Div., U.S. Dep't of Justice, Address to British Institute of International and Comparative Law Conference: Antitrust Law in the U.S. Supreme Court (May 11, 2004).

10. Citing references for *E. Bement & Sons v. Nat'l Harrow Co.*, LEXISNEXIS, <https://advance.lexis.com/shepards/shepardspreview/> (cited 247 times with only twenty-nine cases actually discussing the case).

11. *Id.* (only cited thirty-seven times since January 1, 1980).

12. 133 S. Ct. 2223 (2013).

13. *See id.*

14. *Id.* at 2231 (“[A] valid patent excludes all except its owner from the use of protected process of product.”) (quoting *United States v. Line Material Co.*, 333 U.S. 287, 308 (1948)); *Id.* at 2238 (Roberts, C.J., dissenting) (“The point of patent law is to grant limited monopolies as a way of encouraging innovation. Thus, a patent grants ‘the right to exclude others from profiting by the patented invention.’”) (quoting *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 215 (1980)).

15. *See Actavis*, 133 S. Ct. at 2232–33.

One explanation is merely procedural—the *Bement* Court limited its review to the contracts in evidence, not the entire horizontal cartelization scheme.¹⁶ The other is substantive—*Bement*, deciding whether the Sherman Act could regulate patent owner conduct, presents two competing viewpoints, which confused early courts.¹⁷ On the one hand, the *Bement* Court framed patents as mechanisms for gaining a legal monopoly, suggesting that the “absolute freedom” inherent in the patent owner’s right to exclude would apply broadly to the other licenses in the combination, individually or grouped into a pool.¹⁸ On the other hand, the Court also directly observed limitations to this absolute freedom, and emphasized that any immunity from antitrust scrutiny for patent owner conduct would be tied to reasonableness.¹⁹ But these principles—which inform the legality of reasonable restrictions within the scope of the patent grant—remain at the forefront of the patent and antitrust interface, even as the case itself has been marginalized.²⁰

This Article proceeds in three parts. Part I describes the growth of the Harrow Trust and the trust’s scheme for maintaining market share for spring tooth harrows through a national holding company, National Harrow Company (“National Harrow”). Part II explains how a dispute arose between National Harrow and one of its relatively influential licensees, E. Bement & Sons, and follows the litigation through to its final judgment from the United States Supreme Court. Finally, Part III describes the life and near death of *Bement* in the twentieth century and beyond, from early acceptance to later sidelining. In this Part, I observe that *Bement*’s conflict remains relevant today in cases examining patent owner conduct through the lens of antitrust.

I. THE HARROW TRUST

After the Civil War, the United States transformed into an economic and industrial powerhouse, with remarkably high levels of inventive activity and issued patents.²¹ As a result, by 1890, the United

16. *Bement v. Nat’l Harrow Co.*, 186 U.S. 70, 83 (1902).

17. *Id.* at 91. Although, to be fair, the Supreme Court in other Sherman Act cases had been less than clear about the reach of the statute beyond what the common law already regulated. *See Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 229 (1899); *United States v. Trans-Missouri Freight Ass’n.*, 166 U.S. 290, 320–22 (1897).

18. *Bement*, 186 U.S. at 91.

19. *Id.* at 92 (citing *Trans-Missouri Freight Ass’n*, 166 U.S. at 342).

20. *See FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2232–33 (2013).

21. SEAN DENNIS CASHMAN, *AMERICA IN THE GILDED AGE: FROM THE DEATH OF LINCOLN TO THE RISE OF THEODORE ROOSEVELT* 17 (2d ed. 1988); *see* A.B. LEVY, *PRIVATE*

States led the world in the value of its manufactured goods, many of which were patented articles.²² This explosion of production resulted in unbridled competition in many industries, which, in turn, led to industrial organization in the form of so-called “trusts.”²³

Not surprisingly, 1890 also marked the passage by Congress of the Sherman Act, which prohibited contracts and combinations in restraint of trade as well as monopolizing.²⁴ Senator John Sherman, speaking in support of the statute, described industrial combinations that controlled production, transportation, and sales of life’s necessities as holding the “power to prevent competition and to fix the price of any commodity.”²⁵ This proliferation of trusts governing manufactured goods important to everyday life ran up against the political, social, and judicial responses to them.²⁶ Nowhere was this more apparent than in the case of the Harrow Trust and National Harrow.

The story of the Harrow Trust begins with the invention in 1869 by David L. Garver of the spring tooth harrow,²⁷ one of three types of harrows generally used by farmers to cultivate land.²⁸ Garver’s invention, a flexible harrow tooth that glides over obstacles in soil, enjoyed little success until 1877 when Dewitt C. Reed invented an improved version that allowed for adjusting the tooth down or up to

CORPORATIONS AND THEIR CONTROL I, at 147 (Karl Mannheim ed., 1950).

22. CASHMAN, *supra* note 21, at 15.

23. See CASHMAN, *supra* note 21, at 52–59.

A trust is an equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in him, to apply or deal with the property for the benefit of some other person, or for the benefit of himself and another or others, according to such confidence.

McCreary v. Gewinner, 29 S.E. 960, 963 (Ga. 1898). Trusts, applied here, were used by manufacturers to create monopolies, a practice which was ultimately outlawed by the Sherman Antitrust Act of 1890. Standard Oil Co. v. United States, 221 U.S. 1, 27–28 (1911).

24. Sherman Antitrust Act, ch. 647 § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (2012)).

25. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman).

26. See James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 281–83 (1989).

27. U.S. Patent No. 95,458 (issued Oct. 5, 1869).

28. “A cultivating tool set with spikes, teeth, or disks and used primarily for breaking up and smoothing the soil.” *Harrow*, MERRIAM WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/harrow> (last visited Aug. 25, 2017); see ROBERT L. ARDREY, *AMERICAN AGRICULTURAL IMPLEMENTS: A REVIEW OF INVENTION AND DEVELOPMENT IN THE AGRICULTURAL IMPLEMENT INDUSTRY OF THE UNITED STATES* 21–22 (1894) (providing that a harrow breaks up ground, removes weeds, and covers seeds once planted). A harrow essentially moves over the surface as compared to a plow that renders deeper cuts into the cultivated land. William Strait, *Mr. Strait on Harrow Patents*, FARM IMPLEMENT NEWS, Dec. 29, 1892, at 16. Both are very common farm implements. *Id.*

create more or less depth in the soil.²⁹ Together, the Garver and Reed patents formed the foundation for almost all postbellum spring tooth harrow technology.³⁰ Other manufacturers entered the spring tooth harrow field in competition with these companies “in hostility to the same letters patent.”³¹ Some manufacturers obtained their own patents covering structural arrangements, the only features generally not believed to be controlled by Garver, Reed, and other prior art.³² By 1888, one source reported some twenty-five to thirty different harrows being manufactured under as many different patents.³³

Eventually, the Garver patent came to be owned by Reed,³⁴ who sued multiple companies for patent infringement, many of which allegedly settled for “considerable sums of money” at some time prior to September 1890.³⁵ After the Garver patent expired in 1886, the owners of the Reed patent (by then, Reed & Co. in the Midwest and Olin & Co. in the state of New York)³⁶ continued to claim “every one infringed their patents.”³⁷ Reed and Olin entered into licenses with the four largest harrow manufacturers to settle all of these litigations involving the Reed patents.³⁸

These six firms (referred to in the harrow trade as “the Big Six”),³⁹ who were related only as licensees and licensors at that point, organized the formation of National Harrow Company (“National Harrow”) in the fall of 1890.⁴⁰ The Big Six planned to assign all of the relevant patents

29. U.S. Patent No. 201,946 (issued Apr. 2, 1878). *See* Reed v. Smith, 40 F. 882, 884 (E.D. Mich. 1890) (finding the Reed patent limited to the clip and not covering an important longitudinal adjustment invented by John Paddock in 1872 with respect not to harrows but to rakes). U.S. Patent No. 125,216, cited as important prior art in *Reed*, had been purchased by Bement to defend against Reed’s infringement actions against its customers, including Smith. *See id.* at 883–84; U.S. Patent No. 125,216 (issued Apr. 2, 1872). Known as the Paddock patent, it apparently “cut quite a figure in the spring tooth harrow litigation.” Strait, *supra* note 28, at 16.

30. Strait, *supra* note 28, at 16.

31. *Bement v. Nat’l Harrow Co.*, 186 U.S. 70, 76 (1902).

32. Strait, *supra* note 28, at 16.

33. *Id.*

34. U.S. Patent No. 9,148 (issued Apr. 13, 1880).

35. *Bement*, 186 U.S. at 76–77.

36. Transcript of Record at 137, *Bement*, 186 U.S. 70 (No. 215).

37. Brief for Defendant at 11, *Bement*, 186 U.S. 70 (No. 215); Transcript of Record, *supra* note 36, at 138.

38. Transcript of Record, *supra* note 36, at 108, 138.

39. Transcript of Record, *supra* note 36, at 234. These firms included: Reed & Co.; Olin & Co.; Chase, Taylor & Co.; Lawrence, Chapin & Co.; J. M. Childs & Co.; and A. Stevens & Son of Auburn, New York. *Bement*, 186 U.S. at 76.

40. Transcript of Record, *supra* note 36, at 132. Large-scale factory production of farm implements emerged in the United States between the Civil War and the economic

in the spring harrow field to a newly organized corporation, National Harrow, and to accept licenses and capital stock in return.⁴¹ The firms hoped to reduce expenditures on patent infringement litigation and to stabilize prices (in fact, the company bragged about lowering prices despite this consolidation of competitors into one national firm).⁴² To this end, National Harrow's organizers also sought harrow firms outside of the Big Six to assign their patents to the company, including Bement and other manufacturers who had been heavily involved in patent infringement litigation over the Reed and Garver patents.⁴³ Most of these manufacturers entered into form agreements that assigned their respective patents and all of their existing rights under them to National Harrow in exchange for capital stock in an amount to be determined by an arbitrator and for the exclusive license to manufacture only those harrows that they had been making and selling prior to joining National Harrow.⁴⁴ Eventually, the number of firms who assigned their patents, licenses, and good will to National Harrow increased to twenty-six overall, including E. Bement & Sons ("Bement"), a harrow manufacturer brought in early in the fall of 1890 on the heels of its own litigation with the Big Six firms.⁴⁵

depression of the 1870s. Mary Beth Pudup, *From Farm to Factory: Structuring and Location of the U.S. Farm Machinery Industry*, 63 *ECON. GEOGRAPHY* 203, 216 (1987). As harrow production moved from local blacksmith shops to these large factories, harrow firms, like other farm implement manufacturers, engaged in forward integration that allowed them to control distribution, to allow for credit purchases, and not insignificantly, to best compete for sales to farmers. *Id.* at 217; see *The Harrow Trust in Court*, *N.Y. TIMES*, Feb. 20, 1891, at 4.

41. Transcript of Record, *supra* note 36, at 13–15, 146–47.

42. Transcript of Record, *supra* note 36, at 147. National markets for farm implements following the Civil War had resulted in "[f]renzied competition and price-cutting" in these sectors. Pudup, *supra* note 40, at 217. Notably, the price provision was critical for courts finding the licenses void as against public policy. See, e.g., *Strait v. Nat'l Harrow Co.*, 18 N.Y.S. 224, 233 (N.Y. Sup. Ct. 1891).

43. Transcript of Record, *supra* note 36, at 129.

44. See, e.g., *Bement v. Nat'l Harrow Co.*, 186 U.S. 70, 78 (1902). All of the assignment and license agreements were to be signed and placed into an escrow pending execution by all of the firms, at which point the agreements would become operative. *Id.* at 86 n.1. Bement never executed its first set. Transcript of Record, *supra* note 36, at 63. William Strait executed but successfully sued to cancel his agreements prior to them becoming operative. Transcript of Record, *supra* note 36, at 162. Later, some firms took licenses from National Harrow to manufacture and sell harrows without contributing patents to the pool. See Transcript of Record, *supra* note 36, at 146. These firms simply agreed to a price schedule and royalty scheme for specified harrow models. See Transcript of Record, *supra* note 36, at 146.

45. Transcript of Record, *supra* note 36, at 128. Bement entered into a preliminary agreement in September 1890, placed into escrow, which never became operative due to a condition failure sometime before May 1891. Transcript of Record, *supra* note 36, at 63.

Even after the patent assignments and license agreements were executed by and between National Harrow, the Big Six and others referred to as outsiders,⁴⁶ National Harrow continued to bring patent infringement suits against harrow manufacturers and dealers not in the trust,⁴⁷ as well as licensees and dealers who sold harrows in violation of the license restrictions.⁴⁸ In addition to this vast amount of litigation, National Harrow also waged a media campaign intending to funnel sales to the trust licensees with boasts about infringement suits and threats to bring more against dealers and farmers.⁴⁹ As a result of this exposure, challenges to the legality of the trust agreements commenced almost immediately by parties facing National Harrow in court.⁵⁰

In a very early case, William Strait (an inventor on several patents in his own right and proprietor of erstwhile National Harrow licensee, Clipper Chilled Plow Company (“Clipper”)),⁵¹ sued National Harrow to set aside its agreements, then in escrow awaiting the other firms to execute their agreements⁵², so that Strait could be free to set his own price for harrows.⁵³ The court, finding no breach or failure of condition by National Harrow, described the plaintiffs as “hav[ing] no cause of complaint, unless the contract made is an illegal contract, as hostile to the public good.”⁵⁴ The court observed that the spring tooth harrow monopolized the harrow market, that all of the manufacturers in the spring tooth harrow market in 1890 had entered into identical agreements with National Harrow, and that all of the manufacturers agreed to not make and sell spring tooth harrows for fifty years except as licensees and agents of National Harrow, and then only as to those

46. Transcript of Record, *supra* note 36, at 129.

47. See *infra* note 74 and accompanying text.

48. See *A.B. Farquhar Co. v. Nat’l Harrow Co.*, 99 F. 160, 161 (C.C.D.N.J.) *rev’d*, 102 F. 714 (3d Cir. 1900).

49. See *Nat’l Harrow Co. v. Quick*, 67 F. 130, 131 (C.C.D. Ind. 1895); *Adriance, Platt & Co. v. Nat’l Harrow Co.*, 121 F. 827, 829 (2d Cir. 1903). A strong feeling existed among some manufacturers that the trust used litigation solely “to frighten the dealers into their camp and oblige them to buy inferior harrows at any price that the combine may see fit to place upon them.” A.E. Cole, *Light on Spring Tooth Harrow Litigation*, FARM IMPLEMENT NEWS, Mar. 31, 1898, at 29.

50. See, e.g., *The Harrow Trust in Court*, *supra* note 40, at 4.

51. *The Harrow Trust in Court*, *supra* note 40, at 4.

52. *Strait v. Nat’l Harrow Co.*, 18 N.Y.S. 224, 229 (N.Y. Sup. Ct. 1891).

53. *Id.* at 231. Although newspapers reported that Strait and his company sought an adjustment of their share of profits from the trust, the lower court opinion does not mention anything other than the licensee’s desire to declare the contracts void. Compare *id.* (only discussing whether the contract is void), with Editorial, N.Y. TIMES, Mar. 4, 1891, at 4 (discussing adjustments between Strait and the Trust) (hereinafter Editorial, Mar. 4, 1891).

54. *Strait*, 18 N.Y.S. at 231–32.

styles of harrows each of them manufactured prior to entering into the National Harrow agreement.⁵⁵ Given this state of affairs, the court found that National Harrow intended to “engross the market, control prices, and prevent competition,” a practice condemned by the common law as an unlawful restraint of trade, if not the new Sherman Act.⁵⁶

After *Strait*, the press eagerly reported that a New York court had declared National Harrow “a Trust which has undertaken to control absolutely the manufacture and sale of harrows in the United States.”⁵⁷ *The New York Times* ran an editorial reminding its readers that “harmony again prevail[ed]” because these litigations were brought by the trust or by one of its members, not a member of the public seeking to break the combination.⁵⁸ Yet, after another suit brought against National Harrow highlighted similar exclusionary tactics, *The New York Times* opined, in reference to *Strait*, “[t]his ought to be enough to convince the [D]epartment [of Justice] and its agents that the so-called Anti-Trust law has been violated by this large and powerful combination.”⁵⁹

Other licensees also succeeded in defending contract claims brought by National Harrow.⁶⁰ National Harrow sued Hench & Dromgold (“Hench”), a harrow manufacturer in the trust, for selling harrows at prices below the specified prices in the license agreements.⁶¹ In defense, Hench claimed that the agreements were void as against public policy because the licenses represented unlawful restraints in trade under Pennsylvania common law.⁶² The court sided with Hench, declaring its licenses invalid and unenforceable.⁶³ The Third Circuit confirmed on appeal, explaining,

The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact. Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining

55. *Id.* at 232.

56. *Id.* at 233.

57. *The Harrow Trust in Court*, *supra* note 40, at 4.

58. Editorial, Mar. 4, 1891, *supra* note 53.

59. Editorial, *The Harrow Trust*, N.Y. TIMES, Jan. 11, 1892, at 4.

60. Nat'l Harrow Co. v. Hench, 76 F. 667, 670 (C.C.E.D. Pa. 1896), *aff'd*, 83 F. 36 (3d Cir. 1897).

61. *Id.* at 667.

62. *Id.* at 667–68.

63. *Id.* at 670.

competition and trade.⁶⁴

The *Strait* and *Hench* suits demonstrated that courts generally were willing to find the National Harrow license agreements unenforceable as a matter of contract law, but the nature of private adjudication left the remaining licenses valid and subject to enforcement by National Harrow in contract suits and in infringement suits against defecting licensees, dealers, and customers.⁶⁵ In infringement cases, National Harrow worked a numbers game by filing countless suits against dealers and customers, most of which did not make it to a hearing stage.⁶⁶ In the four infringement suits whose opinions can be found in reported cases, licensees made the allegedly infringing harrows under the patents that

64. *Hench*, 83 F. at 38.

65. This was particularly so after Congress reduced tariffs in 1894. Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894–1913*, 66 THE TAX LAW. 295, 306 (2013). The Tariff Act of 1890 had assigned a forty-five percent duty to imported harrows, insulating the domestic market from any foreign competition. See Editorial, *The Harrow Trust*, N.Y. TIMES, Mar. 26, 1895, at 4. In April 1893, the harrow manufacturers then controlling National Harrow claimed that the tariff would not impact the profits of the Standard Harrow Company, a newly incorporated company that organizers intended to acquire the stock of National Harrow (which did not come about after the panic of 1893). Editorial, *The Plaint of the Harrow Trust*, N.Y. TIMES, Jan. 12, 1894, at 4. Although a New York court in 1891 recognized the Harrow Trust as such, the Republican party sought to deny its existence, “just as they have denied the existence of almost every other similar combination devised by protected manufactures whose purpose was to take all possible advantage of consumers under the high tariff duties, which they have used . . . as ‘instruments of greed.’” *Id.* In support of his desire to lower tariffs to quell the rising tide of trusts, Senator Vest entered into the record an examination of one hundred trusts then existing in the United States. 23 CONG. REC. 5538–57 (1892). Senator Vest told Congress that no one knew about the Harrow Trust until the *Strait* case in New York, yet it was the “superiority” of the float spring-tooth harrow that had driven nearly any other kind out of the market. *Id.* at 5545. The manufacturers of harrows admitted that they were sold domestically at about ten percent more than the foreign trade. *Id.* Not coincidentally, Senator Vest, a Democrat from Missouri, had contributed to drafting and enacting the Sherman Act just two years earlier. See Barak Orbach, *Symposium: The Goals of Antitrust: How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2260 (2013). This concern with tariffs contributing to the trusts was front and center in the world of harrow manufacturing. See Editorial, N.Y. TIMES, Oct. 30, 1894, at 4. Once the Revenue Act of 1894 moved through Congress for enactment, the harrow manufacturers joined to oppose the bill, which they believed would leave domestic manufacturers with exposure to loss of sales to foreign corporations. *Id.* *The New York Times* reported that National Harrow had many suits pending during this time, presumably to continue to dominate the market for harrows using patent litigation rather than relying on a protective tariff. Editorial, *The Harrow Trust*, N.Y. TIMES, Mar. 26, 1895, at 4.

66. See E. Bement’s Sons, *Behold How Plain a Tale Shall Put Them Down*, FARM IMPLEMENT NEWS, July 14, 1898, at 20–21. In an advertisement listing in detail suits against its customers as well as suits against other manufacturers, Bement describes National Harrow’s warnings and threats of suit as “a malicious misrepresentation of facts, and was not intended as a warning in good faith to dealers, but simply as a bugaboo to terrify.” *Id.* at 20.

they assigned to National Harrow.⁶⁷ For example, National Harrow sued Hench after his licenses was declared void.⁶⁸ Moreover, Strait succeeded in invalidating the patent in suit,⁶⁹ whereas Hench won its suit when the court determined that the assignment of the patents to National Harrow must be declared void if the licenses given in consideration also were void.⁷⁰ National Harrow also sued a dealer of Strait's harrows, James Hanby, but the court found no infringement.⁷¹ Because the harrow field was "crowded when these patentees entered it," the patent claim at issue must be construed quite narrowly; as a result, "when so construed the defendant does not infringe."⁷² The only other reported case involving infringement found in favor of National Harrow over a dealer selling harrows made by Hench.⁷³

67. Nat'l Harrow Co. v. Wescott, 84 F. 670, 670 (C.C.N.D.N.Y. 1898); Nat'l Harrow Co. v. Hench, 84 F. 226, 226 (C.C.N.D.N.Y. 1898); Nat'l Harrow Co. v. Quick, 67 F. 130, 130 (C.C.D. Ind. 1895), *aff'd on other grounds*, 74 F. 236 (7th Cir. 1896); Nat'l Harrow Co. v. Hanby, 54 F. 493, 493 (C.C.N.D.N.Y. 1893).

68. *Hench*, 84 F. at 226–27.

69. U.S. Patent No. 388,306 (issued Aug. 21, 1888). Soon after the New York court declared the licenses void in January 1891, Strait sued National Harrow seeking to enjoin it from bringing an infringement suit. *Strait v. Nat'l Harrow Co.*, 51 F. 819, 819 (C.C.N.D.N.Y. 1892); *see Decisions Relating to Patents*, 68 SCI. AM. 178, 183 (1893). The court refused to deprive National Harrow of its legal right to bring suit for patent infringement, despite the previous decision that the licenses were unlawful restraints in trade. *Strait*, 51 F. at 820. Indeed, according to the court, it would be

impertinent [to inquire into the character of the combination] as one in respect to the moral character or antecedents of the plaintiff in an ordinary suit for trespass upon his property. Even a gambler, or the keeper of a brothel, cannot be deprived of his property because he is an obnoxious person or a criminal; and it is no defense to the trespass upon it, unless it was removed or destroyed in the suppression of a nuisance, that it was used in carrying on the unlawful occupation.

Id. at 820–21 (citing *Ely v. Bd. of Supervisors*, 36 N.Y. 297, 300 (1867)); *see The Principle Was Old*, FARM IMPLEMENT NEWS, Mar. 16, 1893, at 27 ("Clipper . . . have won in a skirmish with the National Harrow Company The court held that the principle involved was old at the date of application."). There are conflicting reports about Clipper Chilled being in or out of the trust during 1891 and 1892. The Chicago Tribune reported that the litigations had all been settled as of February 28, 1891. *In Control of the Harrow Business: The National Company Will Run Things Its Own Way*, CHI. TRIB., Feb. 28, 1891, at 1. Yet in December 1892, Strait wrote an opinion piece in Farm Implement News decrying the trust. Strait, *supra* note 28, at 16.

70. *Hench*, 84 F. at 227. The nullification of the licenses in Pennsylvania rendered the patent assignments unenforceable as well. As the court noted, "To place any other interpretation upon the [Pennsylvania] decision is to make it a mere brutum fulmen leading to results so illogical and inequitable as to border on the grotesque." *Id.*

71. *Hanby*, 54 F. at 494.

72. *Id.*

73. Nat'l Harrow Co. v. Westcott, 84 F. 673, 674 (C.C.N.D.N.Y. 1898) (finding the Davis patent valid and infringed). *But see* Nat'l Harrow Co. v. Westcott, 84 F. 670, 671 (C.C.N.D.N.Y. 1898) (finding West & Chase patents valid and not infringed); Nat'l Harrow Co. v. Westcott, 84 F. 671, 673 (C.C.N.D.N.Y. 1898) (finding Cobb patent invalid for lack

The remaining reported cases featured parties outside of the trust who found themselves losing customers or dealers due to the trust's threats.⁷⁴ Typically, National Harrow widely circulated letters announcing that National Harrow's patents had been sustained in the courts, that certain manufacturers (and, by extension, his customers and dealers) infringed certain patents, and that unless those dealers and customers ceased carrying the alleged infringer's harrows, National Harrow would bring suit.⁷⁵ The company warned that this would subject their customers or dealers to high costs because allegedly infringing manufacturers so often lacked financial responsibility.⁷⁶

When the trust sued Quick & Lindahl, a harrow dealer in Chesterton, Indiana, for patent infringement in 1895, the defendant countered that National Harrow should be declared illegal as a common law restraint in trade.⁷⁷ The district court agreed, stating carefully,

of invention). Hench rejoined the trust sometime in or around 1898. *The National Harrow Company*, FARM IMPLEMENT NEWS, Mar. 24, 1898, at 9. National Harrow used this 1898 victory against Westcott and Hench's harrows to threaten future suits against still more manufacturers, dealers, and even customers if they did not heed the trust's warnings about manufacturing and selling unlicensed harrows. *Id.* In an advertisement directed to dealers, National Harrow described the favorable resolution of the Hench matter and invited dealers to report on others selling unlicensed harrows. *Id.* National Harrow also called out specific Eureka Mower Company and Bement harrow models as unlicensed and infringing, warning, "[W]e shall continue in like manner to prosecute all infringers." *To Buyers and Users of Spring Tooth Harrows*, FARM IMPLEMENT NEWS, June 9, 1898, at 27. Another group of cases, unreported, claimed infringement by dealers of harrows made by licensee Eureka Mower Company (and its subsidiary Davison Harrow Company). *Id.*; see *Davison v. Nat'l Harrow Co.*, 103 F. 360, 362 (C.C.N.D.N.Y. 1900) (describing pending suits in New York as appropriate vehicles for determining whether National Harrow's infringement claims in advertisements were libelous or true); *A Patent Decision*, FARM IMPLEMENTS, Mar. 27, 1900, at 24. A test case brought in Michigan dismissed National Harrow's infringement claim against Davison that might impact pending "suits . . . reaching nearly the hundred mark" against Eureka and Davison's customers. *Id.*

74. *Davison*, 103 F. at 360; *A.B. Farquhar Co. v. Nat'l Harrow Co.*, 99 F. 160, 161 (C.C.D.N.J.) *rev'd*, 102 F. 714 (3d Cir. 1900).

75. *To Buyers and Users of Spring Tooth Harrows*, *supra* note 73.

76. *A.B. Farquhar Co.*, 99 F. at 161. For example, North Molitor sued National Harrow after it publicized its judgment against Bement, alleging damage from the accusations made by National Harrow that North Molitor's connections with Bement suggested it would be ruined by National Harrow's win. *The Spring-Tooth Harrow Warfare*, N.Y. TIMES, July 7, 1895, at 19.

77. *Nat'l Harrow Co. v. Quick*, 67 F. 130, 130 (C.C.D. Ind. 1895) *aff'd on other grounds*, 74 F. 236 (7th Cir. 1896); *An Important Decision*, N.Y. TIMES, Mar. 28, 1895, at 4. Referring to the Indiana court decision, the *New York Times* wrote, "[T]he purpose of the plaintiff corporation and combination had been to become the assignee of all the harrow patents held by manufacturers of harrows; to license these manufacturers on payment by them of a royalty; to take charge of all litigation, and to fix the price at which the harrows should be sold." *Id.*; see *Judge Baker on Trusts*, CHI. TRIB., Apr. 1, 1895, at 6 (discussing the *Quick* case).

The common law forbids the organization of such combinations, composed of numerous corporations and firms. They are dangerous to the peace and good order of society, and they arrogate to themselves the exercise of powers destructive of the right of free competition in the markets of the country, and, by their aggregate power and influence, imperil the free and pure administration of justice.⁷⁸

Although National Harrow claimed that a valid patent entitled it to protection from infringement by anyone, the court declined to “lend the countenance of the court to the creation of combinations, trusts, or monopolies.”⁷⁹ The Indiana court also held that the defendant’s harrow did not infringe the patent in suit; it practiced a different, non-infringing patent.⁸⁰ On appeal, a Seventh Circuit panel affirmed the decision on the grounds of non-infringement by way of invalidating the Reed patent, without considering whether the combination’s agreements ran afoul of the common law’s refusal.⁸¹

A. B. Farquhar (another affiliate of Hench & Dromgold) sued National Harrow and requested that the company be enjoined from

circulating among complainant’s customers and agents letters by which they are falsely and maliciously informed that the defendant’s patents have been sustained by the courts, that the complainant’s harrows are infringements thereon, and that, unless they desist from handling and selling the same, suits will be brought by defendant against them⁸²

The district court dismissed the case on demurrer—holding that any price controls or competition suppression would be “immaterial” to the question of patent infringement, if true.⁸³ The court described the patent owner as having every right to “us[e] all lawful means to protect his monopoly.”⁸⁴ The Third Circuit reversed the dismissal on demurrer,

78. *Quick*, 67 F. at 131 (citing *Strait v. Nat’l Harrow Co.*, 18 N.Y.S. 224, 233 (N.Y. Sup. Ct. 1891)).

79. *Id.* at 132 (“The common law does not prohibit the making of such combinations. It merely declines, after they have been made, to recognize their validity, by refusing to make any decree or order which will in any way give aid to the purposes of such combinations.”).

80. *Id.* at 134.

81. *Nat’l Harrow Co. v. Quick*, 74 F. 236, 240 (7th Cir. 1896) (“[W]e are clear that this patent is void of invention, and on that ground the decree below is affirmed.”). At this time, patents were invalidated on a circuit-by-circuit basis. Not until 1972 was issue preclusion held to apply to invalidate patents across all jurisdictions. *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971).

82. *A.B. Farquhar Co. v. Nat’l Harrow Co.*, 99 F. 160, 161 (C.C.D.N.J.) *rev’d*, 102 F. 714 (3d Cir. 1900).

83. *Id.*

84. *Id.*

and allowed the suit to proceed with the plaintiff's allegations.⁸⁵ The circuit court acknowledged that it agreed with the lower court's assessment of a patent as a monopoly, but also questioned whether the notices had been given in bad faith to destroy the business of another, in which case a court should not refuse to step in to protect against "property rights being fraudulently assailed."⁸⁶

When another infringement defendant, a dealer of harrows made by licensee Eureka Grower Company, sought a preliminary injunction against National Harrow to cease distributing inflammatory circulars, the court described the company's activity in less than flattering terms, accusing National Harrow of "barking" as well as "biting" such that its conduct was "fast reaching the point . . . where its conduct may be deemed unnecessarily harsh and oppressive."⁸⁷ Yet, the court did not issue an injunction (distinguishing the demurrer) and pushed the parties to calmly await the outcome of the infringement suit.⁸⁸

Similarly, *Adriance, Platt & Company*, a manufacturer not in the trust, brought suit against National Harrow for libel after an allegation of infringement.⁸⁹ When confronted by *Adriance*, who requested that it bring an infringement suit to settle the question, National Harrow

85. *A.B. Farquhar Co. v. Nat'l Harrow Co.*, 102 F. 714, 715 (3d Cir. 1900).

86. *Id.* (citing *Emack v. Kane*, 34 F. 46, 52 (C.C.N.D. Ill. 1888)).

87. *Davison v. Nat'l Harrow Co.*, 103 F. 360, 361 (C.C.N.D.N.Y. 1900). The court described National Harrow's activity in vivid terms:

On previous occasions they have shown some little familiarity with the art of advertising, but never before have they been so perniciously active as during the past few months. Not only have they kept up a well sustained system of 'barking,' but they have done some 'biting' as well, in the form of suits against 9 or 10 alleged infringers of one of the defendant's patents. The circulars and letters, which, at the time this action was commenced, were descending upon the farmers from a seemingly inexhaustible supply are all, substantially, of the same purport. They contain an assertion that the Davison harrow infringes the defendant's patents and particularly the patent granted to Reed and Clark. Dealers who purchase the Davison harrow are threatened with prosecution. A list of those against whom suits have been commenced is given and also a list of defendant's licensees with a statement that harrows can be bought of them which are free from any charge of infringement. One of the complainants' customers has received 13 of these warnings, and that substantial duplicates of the same notice have been sent again and again to the same persons is not disputed. Although it would seem that the defendant is fast reaching the point, if indeed it has not already reached it, where its conduct may be deemed unnecessarily harsh and oppressive, the court should hesitate to interfere by injunction so long as there remains a reasonable doubt as to the propriety of such a course. In these causes the court is embarking, with only a crude chart, upon a newly-discovered sea filled with rocks and dangerous shoals, and should, therefore, proceed with the utmost caution.

Id.

88. *Id.* at 362.

89. *Adriance, Platt & Co. v. Nat'l Harrow Co.*, 121 F. 827, 828 (2d Cir. 1903).

allegedly replied “that it proposed to prevent the complainant from building harrows in its own way.”⁹⁰ Although the lower court found that “the defendant was acting within its rights, and that the letters and circulars were legitimate notices to infringers of these rights,”⁹¹ the Second Circuit held that bad faith permeated the case—the purpose was to intimidate customers and coerce Adriance into taking a license—and enjoined National Harrow from harassing conduct.⁹²

In sum, as National Harrow used litigation and threats to protect its market share and combination,⁹³ these early wins of licensees and others suggested that the trust was not long for the world, especially given an inevitable showdown with the new Sherman Act. That changed in *Bement*.⁹⁴

II. E. BEMENT & SONS V. NATIONAL HARROW COMPANY

Bement, a well-known manufacturer of farm implements based in Lansing, Michigan, was no stranger to patent and contract litigation related to its harrow business.⁹⁵ Prior to National Harrow’s incorporation, Bement defended itself and its dealers in patent suits brought by Reed and others.⁹⁶ Bement also had been sued for unpaid

90. *See* *Adriance, Platt & Co. v. Nat’l Harrow Co.*, 111 F. 637, 638 (S.D.N.Y. 1901), *rev’d*, 121 F. 827, 829 (2d Cir. 1903). The circulars from National Harrow stated, “We have yet to find a harrow of recent and modern construction that does not embody one or more of our patents . . . [w]e regret that we are obliged to hold the dealers responsible, but this cannot be avoided, as in many cases the manufacturers would not be able to settle our claims.” *Id.* at 829.

91. *Id.*

92. *Id.* at 831. The publicity of Adriance’s suit caused National Harrow to bring several actions against the customers of Adriance; those suits were voluntarily dismissed. *Id.* at 830–31. The court remarked, “The inglorious conclusion of these suits may afford an explanation of the defendant’s reasons for preferring to attack the complainant by the circulars and letters rather than in a court of justice.” *Id.* at 831. Later, when the accounting awarded to Adriance in this litigation made Adriance National Harrow’s only creditor in bankruptcy, the parties settled by giving Adriance ownership of all of the company’s assets, including the patents and all claims for royalties. *Final Victory for A.P. & Co.*, *POUGHKEEPSIE DAILY EAGLE*, Mar. 12, 1910, at 5.

93. *Adriance, Platt & Co.*, 121 F. at 830 (“Until the present action was brought, the defendant contented itself with warnings and threats to the complainant’s customers, and made no attempt to prosecute an infringement suit.”).

94. *Compare id.* at 831 (“We conclude that complainant was entitled to an injunction and an accounting.”), *with* *Bement v. Nat’l Harrow Co.*, 186 U.S. 70, 95 (“[W]e hold that the agreements A and B actually entered into were not a violation of the act.”).

95. Transcript of Record, *supra* note 36, at 234.

96. Transcript of Record, *supra* note 36, at 234. At *Bement*’s trial, Arthur Bement testified that D.C. & H.C. Reed & Co. brought some “six to a dozen” patent infringement suits against Bement’s customers and dealers before September 12, 1890, and that Bement appeared on behalf of those customers in defense. *See* Transcript of Record, *supra* note 36,

royalties from a non-exclusive license from Garver in 1888, a case that Bement won.⁹⁷

When Bement agreed to join the recently incorporated National Harrow in September 1890, its portion of capital stock in the company was to be determined based on the value of its exclusive license of patents owned by Charles La Dow.⁹⁸ The La Dow license, signed in 1889, allowed Bement to manufacture and sell a type of harrow known in the trade as the “Steel King.”⁹⁹ During their negotiations, La Dow assured Arthur Bement that “if [Bement] took the license [they] would have this field entirely to themselves so far as the [claimed features of the Steel King harrow] . . . were concerned.”¹⁰⁰ But National Harrow’s attorneys were not so convinced—they sent a letter to Bement in December 1890 describing the La Dow patents as worthless.¹⁰¹

At the National Harrow inaugural annual meeting in June 1891, Bement finally executed the company’s form patent assignment and license agreements,¹⁰² but uncertainty about the value of the La Dow licenses became a point of contention for allocating capital stock.¹⁰³ National Harrow, believing the patents to be invalid, called upon Bement to rescind the La Dow license.¹⁰⁴ Bement insisted that the contracts were very valuable.¹⁰⁵ The arbitrator sided with Bement and

at 234. Following the decision in *Reed v. Smith* narrowing the Reed patent but enjoining the Bement harrow as infringing, Bement published a favorable portion of the decision in a trade circular and threatened infringement suits against Big Six customers in a two-to-one ratio for suits filed against Bement customers on the Reed patent. *See* 40 F. 882, 887 (E.D. Mich. 1890); Transcript of Record, *supra* note 36, at 234–35. Bement admitted that no suits had been brought against customers on the Paddock patent—only against one Big Six manufacturer, Olin & Co. Transcript of Record, *supra* note 36, at 235.

97. *See* *Garver v. Bement*, 37 N.W. 63, 65–66 (Mich. 1888). Bement won, in part, based on its position that a lawful termination of the agreement had enabled the company to switch to a non-infringing harrow tooth improvement invented by Arthur Bement. *See id.* at 66.

98. Transcript of Record, *supra* note 36, at 354.

99. *E. Bement & Sons v. La Dow*, 66 F. 185, 186 (1895).

100. *Id.* at 188.

101. *See id.* at 196.

102. Transcript of Record, *supra* note 36, at 354. By then, the agreements had all been revised to terminate upon the expiration of the patent to avoid the restraint in trade problems identified by the court in *Strait*. *See* *Strait v. Nat’l Harrow Co.*, 18 N.Y.S. 224, 233–34 (Sup. Ct. 1891).

103. *See La Dow*, 66 F. at 196. In its contracts with manufacturers, National Harrow agreed to issue paid-up stock in the corporation to them in exchange for their assignment of rights, to be agreed upon or settled by arbitration. *See also* Transcript of Record, *supra* note 36, at 47.

104. *See La Dow*, 66 F. at 196.

105. *See id.*

awarded it \$29,200 in National Harrow capital stock.¹⁰⁶ This was later adjusted upward to \$45,200, and the La Dow licenses were assumed by National Harrow.¹⁰⁷

When La Dow sued Bement for unpaid royalties in 1891, Bement raised a fraud defense based upon the allegedly false statements made by La Dow regarding the exclusivity of the field that Bement would enjoy.¹⁰⁸ However, because Bement had sold its harrow rights, including its contracts with La Dow, to National Harrow, the court held that Bement could not rescind the contract on the basis of fraud or misrepresentation.¹⁰⁹ After this suit, Bement assumed full responsibility back from National Harrow for the contracts with La Dow “to preserve peace and harmony.”¹¹⁰ Bement sued La Dow directly to rescind the licenses, again based on fraudulent misrepresentation.¹¹¹ In March 1895, the United States District Court for the Northern District of New York declared the licenses valid and held that Bement owed royalties to La Dow—having enjoyed the benefit of the licenses for five years and having full knowledge about the uncertainty regarding value of the La Dow patents, Bement had ratified the La Dow contracts.¹¹²

In the meantime, the harrow industry was moving from the standard float spring tooth harrows, upon which the teeth were fixed or adjustable at the harrow frame, to harrows with a lever attachment that allowed for adjustment simultaneously.¹¹³ National Harrow acquired the patent rights to the lever attachment in October 1891 and sued at least two licensees for infringement.¹¹⁴ By November 1892, National Harrow had voted to license lever harrows to all then existing licensees, on the same terms as their existing licenses, and had approved such models for licensing by each licensee.¹¹⁵ Bement and North Molitor never signed

106. *See id.* at 197.

107. *See id.*

108. *See id.*

109. *See La Dow*, 66 F. at 197.

110. *See id.*; Transcript of Record, *supra* note 36, at 354.

111. *See La Dow*, 66 F. at 197. It is clear that the La Dow agreements, which carried a royalty on every Steel King harrow sold, made the National Harrow price schedule more onerous to Bement than to manufacturers who were not paying additional royalties outside of the trust. *See id.* at 193 (describing the La Dow contracts as less valuable when Bement joined National Harrow).

112. *La Dow*, 66 F. at 198.

113. *See* Transcript of Record, *supra* note 36, at 248. The first lever attachment patent issued in 1890 and most of the licensees with National Harrow did not hear about it until the fall 1892 or spring 1893. *See id.* at 105, 248. From then on, about sixty to ninety percent of the harrows sold had levers. *See id.* at 175.

114. *Id.* at 105–06.

115. *See id.* at 105.

these new lever harrow licenses.¹¹⁶

Bement stopped paying royalties to National Harrow in September 1893 but continued to sell a number of harrows upon which it had previously reported royalties.¹¹⁷ The question of whether these harrows (with lever attachments) fell within the original license agreements executed in 1891 consumed much of the *Bement* trial after National Harrow sued Bement in New York state court in late 1894 seeking to recover contract damages based on allegations of price cutting on Steel King harrows and selling unlicensed harrows.¹¹⁸ A trade paper reported in March 1895 that “war [had] been declared between” Bement and National Harrow.¹¹⁹

After considering a great deal of evidence on prices, naming conventions of different types of harrows,¹²⁰ harrow technology in general, and the corporate organization of National Harrow, in June 1895, the referee sided with National Harrow in the contract case, awarding almost \$21,000 in damages to the company and ordering Bement to specifically perform its obligations under the agreements.¹²¹ The referee declared National Harrow not a trust and described its contracts with its licensees as valid and enforceable.¹²² Referring to the decision, *The New York Times* declared, “The life of the National Harrow [Co.], which now controls nearly every harrow factor in the country, depends upon this suit.”¹²³ An upstate New York newspaper

116. See Transcript of Record, *supra* note 36, at 105.

117. See *id.* at 254.

118. Nat’l Harrow Co. v. E. Bement & Sons, 47 N.Y.S. 462, 463 (N.Y. App. Div. 1897), *rev’d*, 57 N.E. 764 (N.Y. 1900), *aff’d*, 186 U.S. 70 (1902).

119. *Trade News*, FARM IMPLEMENT NEWS, Mar. 28, 1895, at 20. National Harrow had also sued dealers of North Molitor Manufacturing Co., “a branch of the Bement concern,” which caused North Molitor, in its own right, to sue National Harrow in 1895 to invalidate its contracts with National Harrow and to enjoin it from bringing further suits. *A Shot at the Harrow Trust*, DET. FREE PRESS, Mar. 24, 1895, at 2.

120. Bement’s main argument in the royalties case was that the harrows it sold did not fall within the existing license agreements for float spring tooth harrows, based upon a new round of license agreements, not signed by Bement, for lever spring tooth harrows. See Transcript of Record, *supra* note 36, at 153–54.

121. *Nat’l Harrow Co.*, 47 N.Y.S. at 463.

122. *Bement v. Nat’l Harrow Co.*, 186 U.S. 70, 85 (1902).

123. *National Harrow Company Not a Trust*, N.Y. TIMES, June 16, 1895, at 24. On July 6, 1895, Molitor sued National Harrow for damages arising from the libelous statements. *The Spring-Tooth Harrow Warfare*, *supra* note 76. Desperate to maintain its market domination, National Harrow again publicized the judgment and singled out the North Molitor Manufacturing Co., a company described as “connected with the Bement concern.” *To Buyers and Users of Spring Tooth Harrows*, *supra* note 73. Bement fought back with its own biting advertisement. *To Dealers in Spring-Tooth Harrows: Warning! Warning!*, FARM IMPLEMENT NEWS, Dec. 8, 1898, at 11 (cautioning dealers about infringement of Bement

explained, “[T]he National Harrow Company had several hundred suits pending against parties using unlicensed harrows, which will be seriously affected, if not absolutely determined, by the effect of this judgment.”¹²⁴

Bement appealed to the New York appellate division, which reversed the decision and granted a new trial to the parties.¹²⁵ After explaining how harrow manufacturers formed National Harrow in 1890 and outlining the provisions in the agreements between National Harrow and Bement, the appellate court declared the contract provisions that fixed the prices at which licensees could sell harrows and that limited manufacturers to selling only those harrows authorized in their individual contracts “void as against public policy.”¹²⁶ The court explained, “These provisions not only stifle competition between the plaintiff’s licensees, but effectually prevent them from attempting to make any improvement in harrows.”¹²⁷ Moreover, the court also considered the agreements under New York’s Stock Corporation law, which both prohibited and abolished “the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life.”¹²⁸ Harrows were an important and necessary farm implement—these agreements could not be enforceable, the court continued.¹²⁹

National Harrow, like it had in earlier cases, argued that patents enabled patent owners or their assignees to enter into agreements that restricted production or fixed the prices of patented articles sold without concern for running afoul of competition law.¹³⁰ In response, the Court recognized the property right of patents, which are “subject, as is all other property to the general law of the land,”¹³¹ but a patent license agreement, like all other contracts, must be “subject to the limitations

patents).

124. *The Harrow Suits*, DEMOCRAT & CHRON., June 7, 1895, at 1 (“[S]ettl[ing] the controversy” . . . [and] “dispos[ing] of the question of ‘public policy’ in favor of the [National Harrow Company].”).

125. *Nat’l Harrow Co.*, 47 N.Y.S. at 468.

126. *Id.* at 463–66.

127. *Id.* at 466.

128. *Id.* at 467 (quoting Law of May 7, 1897, ch. 384, § 7, 1897 N.Y. Laws 313). The court stated, “A harrow is an implement as important as generally used by farmers as a plow, and is quite necessary for the proper cultivation of land as any other agricultural implement, and is in use on every properly cultivated farm.” *Id.*

129. *Nat’l Harrow Co.*, 47 N.Y.S. at 467.

130. *Id.* at 467–68.

131. *Id.* at 468 (quoting *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 F. 288, 293 (6th Cir. 1896)).

imposed by definite principles of public policy.”¹³² Using this private law framework, the court found the contracts contrary to public policy precisely because they extended for the life of the patents, they controlled prices for a long period of time, and none of the licensees in the pool could capitalize on any improvements made during the license term.¹³³

National Harrow appealed to the New York Court of Appeals, which reversed again, not on the merits but on procedure.¹³⁴ The intermediate court’s opinion below had not made clear that it reversed on the facts, leaving the appellate court to assume that the reversal was made on an error of law.¹³⁵ The appellate court could not find an error of law stated in the lower court’s decision to reverse the referee.¹³⁶ As such, New York law prohibited the intermediate court from reversing the decision below.¹³⁷ The Court of Appeals’ refusal to consider the substantive question left the referee’s decision in favor of National Harrow in place.¹³⁸

Bement appealed to the United States Supreme Court on writ of error by the New York Court of Appeals.¹³⁹ Writing for the entire Court, Justice Peckham first noted the Court’s jurisdiction based upon new federal antitrust laws (a question raised by National Harrow).¹⁴⁰ One of the questions presented to the appellate court in New York was “[w]hether or not the [National Harrow] contracts . . . are valid under the [Sherman Act],” which was “the only Federal question raised and

132. *Id.* (quoting *Eureka Specialty Co.*, 77 F. at 293).

133. *Id.* at 468. The court referred to the *Hench*, *Quick*, and *Strait* cases decided against National Harrow as confirming this view. *Nat’l Harrow Co. v. Hench*, 76 F. 667, 669–70 (C.C.E.D. Pa. 1896); *Nat’l Harrow Co. v. Quick*, 67 F. 130, 131 (C.C.D. Ind. 1895); *Strait v. Nat’l Harrow Co.*, 18 N.Y.S. 224, 234 (N.Y. Sup. Ct. 1891).

134. *Nat’l Harrow Co. v. E. Bement & Sons*, 57 N.E. 764, 764 (N.Y. 1900).

135. *Id.* at 768.

136. *Id.*

137. *Id.* at 767–68.

138. *Id.* at 768; *but see Nat’l Harrow Co.*, 57 N.E. at 768 (Cullen, J., dissenting) (“In my opinion, the defendant conclusively proved by uncontroverted evidence that the two agreements declared on by the plaintiff were made in pursuance of the prior agreement referred to in the answer, and the written instruments, construed together, show an illegal combination. This was so held in [*Quick and Hench*]. In the views expressed in those cases I entirely concur, but it would be unprofitable to pursue the discussion in this respect, as the majority of the court hold that we cannot look into the record to see if the defendant has conclusively proved its defense, but are confined to the inquiry whether the facts found by the referee in his decision have the support of evidence, and, if there is evidence to sustain them, whether they authorize the judgment rendered. From this view of the practice and the power of the court I am constrained to dissent.”).

139. *See* Transcript of Record, *supra* note 36, at 1.

140. *Bement v. Nat’l Harrow Co.*, 186 U.S. 70, 83 (1902).

appearing in the record.”¹⁴¹ As such, the Supreme Court could decide that federal question, regardless of any action by the state courts below.¹⁴²

Next, the Court had to determine whether a contract defendant like *Bement* could raise the Sherman Act in defense to a state contract action in the first place (a question of first impression).¹⁴³ National Harrow contended that *Bement* could not bring suit against National Harrow for liability under the Sherman Act, which specifies by statute that only the Attorney General of the United States or a person injured in his business or property by the anticompetitive conduct in question can bring suits.¹⁴⁴ But as an entity sued upon the contract, the Court held, *Bement* could plead in defense that the contracts in question violate the statute, “and if found to be so, that fact will constitute a good defense to the action.”¹⁴⁵

Finally, the Court turned to that substantive question—did the contracts in question violate the prohibitions found in the statute?¹⁴⁶ That the agreements concern patents, the Court stated, is the “most material fact in considering this question.”¹⁴⁷ Previous decisions “impressed upon [the patent] all the qualities and characteristics of property . . . and has enabled him to hold and deal with it the same as in case of any other description of property belonging to him”¹⁴⁸ Although the patent grant is made on the “reasonable expectation that he will either put his invention to practical use or permit others to avail themselves of it upon reasonable terms,” the public has retained no

141. *Id.* at 82 (syllabus).

142. *Id.* at 83.

143. *Id.* at 87–88; see *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) (“There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.”).

144. *Bement*, 186 U.S. at 88. The relevant statute provided, “[I]t shall be the duty of the several United States attorneys . . . under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations” 15 U.S.C. § 4 (1890) (current version at 15 U.S.C. § 4 (2012)).

[W]hen the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case. . . .

Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned . . . and subpoenas to that end may be served in any district by the marshal thereof.

15 U.S.C. §§ 4–5 (1890) (current version at 15 U.S.C. §§ 4–5 (2012)).

145. *Bement*, 186 U.S. at 88.

146. *Id.*

147. *Id.*

148. *Id.* at 89 (quoting *Wilson v. Rousseau*, 45 U.S. 646, 674 (1846)).

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ability to enforce those expectations.¹⁴⁹ As a general matter, a patent owner has the “absolute freedom in the use or sale of rights under the patent laws of the United States,” subject to general public policy principles or the state police powers.¹⁵⁰ The Court concluded

that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.¹⁵¹

Having set out that such contracts were not presumptively illegal (yet also not presumptively legal), the *Bement* Court construed the statute to preclude its application to restraints that “may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor.”¹⁵² The Court acknowledged that this interpretation created some tension with previous cases holding that “the [Sherman Act] included any restraint of commerce, whether reasonable or unreasonable,” but Congress surely had not contemplated a construction that would prohibit agreements by patent owners to exploit their exclusive patent rights.¹⁵³

Reviewing the agreements in question between National Harrow and Bement through this lens, the Court failed to find any violations of the Sherman Act.¹⁵⁴ The Big Six had resolved a large amount of litigation by forming National Harrow, which the Court described as “a legitimate and desirable result in itself.”¹⁵⁵ The provision in the agreements keeping prices up in the licensed harrows merely “recognize[d] the nature of the property dealt in, and providing for its value so far as possible.”¹⁵⁶ The patent owner can charge whatever price he chooses when he sells a patented article—it followed that the patent owner can require, by agreement, a licensee or assignee to charge a

149. *Id.* at 90.

150. *Bement*, 186 U.S. at 91 (citing *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 F. 288, 293 (6th Cir. 1896)).

151. *Id.*

152. *Id.* at 92.

153. *Id.* at 92 (citing *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 345 (1897)).

154. *Id.* at 93.

155. *Bement*, 186 U.S. at 93. Importantly, the Court failed to recognize the immense amounts of litigation brought by the National Company, some of which has been recounted in Part I.

156. *Id.*

specified price.¹⁵⁷ With respect to the limitation on licensees manufacturing only those goods that it was making and selling prior to entering into the agreement with National Harrow, the Court found that these agreements did not stifle competition or prevent improvements in any manner more than the patents would have on their own.¹⁵⁸ The Court read the agreement to allow Bement and the other licensees explicitly to use any patents that they might obtain otherwise (provided they were not infringing the patents of others).¹⁵⁹ Closing, the Court found nothing in the provisions, taken together or separately in the agreements between National Harrow and Bement, that would render the contracts void under the Sherman Act.¹⁶⁰

Importantly, the Court did not consider any agreements between National Harrow and other harrow manufacturers apart from Bement.¹⁶¹ The referee, in the first instance, had not found from the evidence that the agreements identical to those with Bement had been found void in other jurisdictions, that other harrow manufacturers had entered into the same contracts, nor that “there was a general combination among the dealers in patented harrows to regulate the sale and prices of such harrows.”¹⁶² The Court could not assume facts not in evidence.¹⁶³ The referee concluded that the contracts between National Harrow and Bement were

legal, valid, and binding contracts, and such as might reasonably be made under the circumstances, and were founded upon a good, valuable, and adequate consideration, and were reasonable in their provisions, and that they embodied no illegal restraints, and were not repugnant to any rule of public policy as in restraint of trade, and were not intended to create a monopoly, trust, or illegal combination¹⁶⁴

No doubt, the referee’s opinion on this matter and its limited findings on the record below frustrated any desire the Court may have had to expand its opinion to take into account the conduct of National Harrow at any level other than just the agreements with Bement.¹⁶⁵

157. *Id.*

158. *Id.* at 94.

159. *Id.*

160. *Bement*, 186 U.S. at 94.

161. *Id.* at 85. The Court observed, “[W]e are brought back to the question whether these contracts or licenses, A and B, irrespective of any contracts found by the referee as in any way connected with, or forming a part thereof, are void as a violation of the act of Congress.” *Id.* at 87.

162. *Id.* at 85.

163. *Id.*

164. *Bement*, 186 U.S. at 85.

165. *Id.* at 95 (“If such similar agreements had been made, and if, when executed, they

The sweeping language of this relatively narrow contracts case influenced turn of the century patent and antitrust cases outside of the Harrow Trust context.¹⁶⁶ One contemporary author described the case as “strengthe[ning] the tendency to secure monopolistic control on the basis of patent right.”¹⁶⁷ The following Part describes *Bement’s* reception and modern doctrinal threads, the ways in which it has been forgotten, and the ways in which it may be useful to examine modern cases.

III. REVIVING *BEMENT* FOR THE MODERN AGE

The skirmish in *Bement*, with its rich facts and complex economics, ends with the patent owner victorious over a defecting licensee on a contract claim because the Court refused to consider the other identical assignments and licenses entered into by National Harrow, acting as a patent pool, in its attempt to obtain control over the entire harrow market.¹⁶⁸ By all lights, *Bement* should be a well circumscribed case in both fields of patent and antitrust law, given this contractual claim with a narrow federal defense joined with a limited record and publicly litigated facts ignored by the Court in its resolution. Curiously, then, courts in the early twentieth century looked upon *Bement* as establishing that patent agreements would be immune from antitrust scrutiny.¹⁶⁹ This early embrace of *Bement* far beyond the confines of its own facts could not be sustained.¹⁷⁰ As the mid-century Supreme Court strengthened its interventionist approach to horizontal agreements, a mere sliver of precedent remained of licensee price restrictions.¹⁷¹ In the modern age, *Bement’s* embrace of patent monopolies lends itself to rote recitation by advocates, but the case has otherwise been forgotten as important precedent in either patent or

would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination.”).

166. Although the trust organization prospered after the decision for a short time, the pendulum swing against the trusts came in 1911. *See* *Standard Oil Co. v. United States*, 221 U.S. 1, 72 (1911); *see also* *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 48 (1912).

167. MERLE RAYMOND THOMPSON, TRUST DISSOLUTION 39 (1919).

168. *See Bement*, 186 U.S. at 95.

169. *See, e.g.,* *U.S. Consol. Seeded Raisin Co. v. Griffin & Skelly Co.*, 126 F. 364, 368 (9th Cir. 1903).

170. *See* *Motion Pictures Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917).

171. *See, e.g.,* *United States v. Line Material Co.*, 333 U.S. 287, 314 (1948).

antitrust law.¹⁷²

A. Early Days: A Patent Pool Origins Story

Two cases from the early twentieth century capture how broadly courts interpreted *Bement* to approve of patent pooling agreements, including price and output restrictions, as per se legal instruments.¹⁷³ The Ninth Circuit, considering a very similar contracts case involving the Seeded Raisin Trust, held that contracts involving patents were “not void as against public policy, as tending to create a monopoly, or as obnoxious to the provisions of the Sherman anti-trust act.”¹⁷⁴ Arriving at this conclusion, the court recounted the facts of *Bement* in detail and held in favor of the patent owner on *Bement*’s principles alone.¹⁷⁵ The cases were identical in some respects—both involved patent pools formed to avoid injurious patent litigations—but the seeded raisin agreements did not fix prices for the licensees as was done in the harrow agreements.¹⁷⁶

Elsewhere, the Seventh Circuit, considering a contracts case involving the Rubber Tire Trust, acknowledged that *Bement* did not weigh in on the legality of pooling groups of patent licensees and setting price schedules, as done by National Harrow and others.¹⁷⁷ It carefully noted that it could only consider the facts in its record.¹⁷⁸ The Seventh Circuit conducted its own analysis of the arrangement in the Rubber Tire case and determined that it was lawful under the Sherman Act—“None of the provisions of the contract . . . touched any matter outside of the monopoly under the patent.”¹⁷⁹ Controlling price and output could not deprive the public of anything—these “internal agreements relating to royalties, proportioning the business, supervision, and penalties, did not affect or concern the public at all.”¹⁸⁰

172. See *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2232–33 (2013) (failing to cite *Bement* as a precedential decision).

173. See *Griffin & Skelley Co.*, 126 F. at 369; see also *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 F. 358, 362 (7th Cir. 1907).

174. *Griffin & Skelley Co.*, 126 F. at 369.

175. See *id.* at 368–69.

176. Compare *id.* at 368, with *Bement v. Nat’l Harrow Co.*, 186 U.S. 70, 92 (1902) (both involving patent pools formed to avoid injurious litigations).

177. *Rubber Tire Wheel Co.*, 154 F. at 362.

178. *Id.* at 363.

179. *Id.*; see *Ind. Mfg. v. J. I. Case Threshing Mach. Co.*, 154 F. 365, 370–71 (7th Cir. 1907). But see *Chadeloid Chem. Co. v. Charles McAdam Co.*, 298 F. 713, 715 (2d Cir. 1924) (“We remark, in passing, that the decision in [Indiana Manufacturing], has now become debatable . . .”).

180. *Rubber Tire Wheel Co.*, 154 F. at 364.

The Seventh Circuit dismissed any complex interaction between patent law and antitrust law:

The Sherman law contains no reference to the patent law. Each was passed under a separate and distinct constitutional grant of power . . . to advantage the public . . . the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states.¹⁸¹

Accordingly, an early impact of *Bement* was to fix courts on the idea of patent and antitrust law as separate spheres, where the new Sherman Act would not regulate any agreement that belonged exclusively to patent law (in other words, any agreement that did not exceed the boundaries of a patent owner's exclusive rights to use, make, and sell the invention).¹⁸² *Bement*, of course, did not go so far, but this view of patent immunity from antitrust liability persisted until at least 1912 in the Supreme Court.¹⁸³

B. The Progressive Antitrust Era

By 1912, public sentiment in the United States had come to a consensus that antitrust law needed to play some role in regulating the trusts that emerged in the late nineteenth century, including those involving patent licenses.¹⁸⁴ *Bement*, the Court's only precedent with regard to the latter, was featured in two prominent cases that year: *Henry v. A.B. Dick Co.*¹⁸⁵ and *United States v. Standard Sanitary Manufacturing Co.*¹⁸⁶ In the former, the Court used *Bement* to support its holding that a tying restriction placed upon a patented article could be enforceable as a matter of patent law.¹⁸⁷ In the latter, the Court

181. *Id.* at 362.

182. *See, e.g.*, *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 F. 555, 557 (C.C.D. Mass. 1909). There, the court stated, “[i]t seems self-evident that a contract which is only coextensive with the monopoly conferred by letters patent, and which creates no additional restraint of trade or monopoly, does not conflict with the Sherman act.” *Id.* In his exhaustive study of restrictions on goods, antitrust lawyer Frank Gladney quipped of this quote, “We cannot conceive of a more accurate abstract of the actual decision in the *Bement* case than that.” FRANK Y. GLADNEY, RESTRAINTS OF TRADE IN PATENTED ARTICLES 368 (1912). *Blount* took this premise further to hold that two manufacturers with independent patents who make an agreement to restrain trade do so through the agreement, not patent law. *Blount*, 166 F. at 557.

183. *See, e.g.*, *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 40 (1912).

184. *See* James May, *supra* note 26, at 281–83; Daniel A. Crane, *All I Really Need To Know About Antitrust I Learned In 1912*, 100 IOWA L. REV. 2025, 2027 (2015).

185. 224 U.S. 1 (1912).

186. 226 U.S. 20 (1912).

187. *Id.* at 47–48.

distinguished *Bement* to support its holding that a set of patent pool agreements were condemned by the Sherman Act because they “transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it.”¹⁸⁸ Although decided in the same term by the same justices, these cases illustrate the difficulty future courts had placing *Bement* into a neat category.¹⁸⁹

Henry involved a suit for patent infringement brought against a third party seller of supplies prohibited by a label license on a mimeograph machine for duplicating.¹⁹⁰ The Court quoted extensively from *Bement*, concluding,

If the stipulation in an agreement between patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition [according to the *Bement* Court], it must follow that any other reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as part of a sale of a patented machine, would be equally valid and enforceable.¹⁹¹

Logically, it should follow that tying restrictions fall into this category. The alleged infringer argued that a tying restriction would extend the patent owner’s monopoly into the unpatented supplies, but the Court rejected this proposition by explaining that the patent does not gain a monopoly in unpatented supplies because all users except the purchaser of the restricted devices would be free to use them.¹⁹² Essentially, *Bement* set the stage for finding no Sherman Act violation despite the tying arrangement.¹⁹³

The Court went in a different direction in *Standard Sanitary*.¹⁹⁴ There, the Department of Justice charged a group of sanitary enameled ironware manufacturers (makers of bathtubs, wash bowls, drinking fountains, etc.) with combining to restraint trade under the Sherman Act.¹⁹⁵ The enameled ironware industry featured one essential patent, owned by Standard Sanitary, which initially was unwilling “to confer its utility upon other companies.”¹⁹⁶ At some point, a promoter convinced the manufacturers of eighty-five percent of the trade to unite in

188. *Id.* at 45.

189. *See id.*; *see also Henry*, 224 U.S. at 48.

190. *Henry*, 224 U.S. at 11.

191. *Id.* at 31.

192. *Id.* at 31–32.

193. *See id.* at 29–31.

194. *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 48–49 (1912).

195. *Id.* at 34.

196. *Id.* at 37.

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The First Skirmish

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agreements restricting price and refusing to allow jobbers to purchase inventory unless they too agreed to the price restrictions.¹⁹⁷ Despite the defendants' argument that *Bement* established that the patent laws and the antitrust laws do not affect one another, the Court found the arrangement violated the Sherman Act:

The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. It had, therefore, a purpose and accomplished a result not shown in the *Bement* Case. There was a contention in that case that the contract of the National Harrow Company with *Bement & Sons* was part of a contract and combination with many other companies and constituted a violation of the Sherman law, but the fact was not established and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits.¹⁹⁸

In siding with the government, *Standard Sanitary* established that robust patent rights “do not give any more than other rights an universal [sic] license against positive prohibitions.”¹⁹⁹ As the Court noted, the Sherman Act allows for the restraint of rights “pushed to evil consequences.”²⁰⁰ The Court acknowledged that *Bement* was quite a narrow case, turning on only the agreements between the parties in the case and not the combination, which did not suggest complete immunity from any Sherman Act liability.²⁰¹

When *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*²⁰² overruled *Henry* in 1917, the death knell sounded for the strong view of *Bement* with respect to price or tying restraints.²⁰³ *Motion Picture Patents Co.* held unenforceable a label license on a film projector restricting its use to only films produced by the patent owner, allowing for the projector owner to supply any films that it liked.²⁰⁴ In 1913, the Court had declared in *Bauer & Cie v. O'Donnell* that price restraints placed directly onto patented articles were unenforceable as

197. *Id.* at 48.

198. *Id.*

199. *Standard Sanitary*, 226 U.S. at 49.

200. *Id.*

201. *Id.* at 48.

202. 243 U.S. 502, 518 (1917).

203. *See id.*

204. *See id.* at 519.

prohibited price fixing under the Sherman Act.²⁰⁵ *Motion Picture Patents Co.* similarly prohibited tying restrictions, despite having approved of them generally in *Henry* just five years before.²⁰⁶ The majority opinion did not cite *Bement*, but Justice Holmes's dissent argues for allowing such restrictions as the Court had done in *Henry* and *Bement*:

For fifteen years, at least since [*E. Bement & Sons v. National Harrow Co.*,] if not considerably earlier, the public has been encouraged by this court to believe that the law is as it was laid down in [*Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*] [cited favorably by *Bement* in support of a rule of general freedom in the use or sale of rights under the patent law] . . . and numerous other decisions of the lower courts.²⁰⁷

Yet even after *Standard Sanitary* and *Motion Picture Patents*, instead of fading into complete obscurity, *Bement* continued to carry some salience through *United States v. General Electric Co.*, which was decided in 1926.²⁰⁸ The government sought to enjoin General Electric and its licensee, Westinghouse Electric and Manufacturing Company, from violating the Sherman Act with license agreements covering the sale of electric lights with tungsten filaments—in the agreements, Westinghouse agreed to sell in accordance with General Electric's prices and terms of sale.²⁰⁹ Thinly distinguishing sales made to purchasers, as had been featured in the earlier cases and the agency of the licensee in this case, the Court allowed these price restrictions in licenses as outside of the Sherman Act prohibitions: A manufacturing licensee owns the material of the patented articles that he makes and can use those articles, but sales may infringe the patent owner's patent but for the license.²¹⁰

Sounding very much like Justice Peckham in *Bement*, the Court held that the patentee could place any conditions on the licensee's ability to sell the patented article, provided “[that they] are normally and

205. 229 U.S. 1, 18 (1913).

206. *Motion Picture Patents*, 243 U.S. at 519; see *Henry v. A.B. Dick Co.*, 224 U.S. 1, 49 (1912).

207. *Motion Picture Patents*, 243 U.S. at 520 (Holmes, J., dissenting).

208. 272 U.S. 476 (1926).

209. *Id.* at 479. The government previously had challenged General Electric, Westinghouse, and thirty-two other corporations as an illegal combination under the Sherman Act, but a consent decree dissolved the combination and the subsidiary corporations were absorbed into General Electric. *Id.* at 480. The owner of the patents was allowed, under the consent decree, to set provides for electric lights manufactured under the patents. *Id.* at 479–80.

210. *Id.* at 485.

reasonably adapted to secure pecuniary reward for the patentee's monopoly."²¹¹ The Court erroneously refers to *Bement* as a case about a "combination of manufacturers owning a patent . . . [whose restrictions to price and terms were] held to be a valid use of the patent rights of the owners of the patent."²¹² Where others argued that *Bement* had been overruled, the Court continued that *Motion Pictures Patents Co.*

did not carry with it the overruling of *Bement v. Harrow Company* The price at which a patented article sells is certainly a circumstance having a more direct relation, and is more germane to the rights of the patentee, than the unpatented material with which the patented article may be used.²¹³

Cases prohibiting label licenses restricting resale prices did not unravel the authority of *Bement* because a manufacturing licensee only takes the rights given to him by the patent owner, even if those rights are limited to specified prices or terms.²¹⁴

As the Court entered an era of patent skepticism, *Bement* became marginalized instead of clarified. In *Ethyl Gasoline Corp. v. United States* and *United States v. Masonite Corp.*, the Court disregarded or limited the reach of *General Electric Co.* (and, by extension, *Bement*).²¹⁵ In *Ethyl Gasoline Corp.*, the Court refused to enforce a license agreement between the patent owner and oil refiners that required them to sell ethyl gasoline to only jobbers holding a license from the patent owner.²¹⁶ In *Masonite Corp.*, the Court found illegal a scheme by the patent owner to engage with competitors as *del credere* agents to set price and terms of sale.²¹⁷ In both of these cases, the overall schemes to regulate trade overshadowed price restrictions ostensibly legal under *General Electric Co.* and *Bement*.²¹⁸

The Court did push back against *General Electric Co.* and *Bement* in both *United States v. U.S. Gypsum Co.*²¹⁹ and *United States v. Line Material Co.*,²²⁰ cases decided on the same day in 1948.²²¹ In both

211. *Gen. Elec. Co.*, 272 U.S. at 490.

212. *Id.* at 490–91.

213. *Id.* at 493. Interestingly, the Court felt differently when it came to prices placed on goods themselves, rather than in licenses. See *Bauer & Cie v. O'Donnell*, 229 U.S. 1, 17 (1913).

214. See *Gen. Elec. Co.*, 272 U.S. at 494.

215. See 309 U.S. 436, 456–57 (1940); 316 U.S. 265, 277 (1942).

216. 309 U.S. at 461.

217. 316 U.S. at 274 (citing *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927)).

218. See *id.* at 277; see also *Ethyl Gasoline Corp.*, 309 U.S. at 457–58.

219. 333 U.S. 364 (1948).

220. 333 U.S. 287 (1948).

cases, the Court struck down a horizontal price-fixing cartel where the patent owner licensed his competitors, much as National Harrow had done through a holding company controlled by the Big Six.²²² *Line Material* described *Bement* as establishing patents as an exception to the prohibitions of the Sherman Act, but price controls also loomed large as “no clearer evidence of restraint of trade.”²²³ Accordingly, “price limitations on patented devices beyond the limits of a patent monopoly violate the Sherman Act.”²²⁴ *General Electric* allowed for a patent owner to control the price his licensee may charge for the patented article under the license, but when two patent owners cross-license competitive patents and “fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for his licensees.”²²⁵ *Line Material*’s patent owners exchanged licenses for blocking patents, which the Court further found anticompetitive and prohibited, “as would the fixing of prices between producers of nonpatentable goods.”²²⁶

The Court presents *Bement*, in each of these cases, as establishing patents as an exception to the Sherman Act’s prohibitions of restraints in trade but then narrows that to one on one arrangements, not combinations.²²⁷ Any arrangement beyond a licensor fixing prices as to one licensee would be unlawful per se under the Sherman Act.²²⁸ As a result of these narrowing precedents, *General Electric* may be considered a dead letter today—“deemed an unreliable precedent by courts, government enforcers, and practitioners alike”²²⁹—but *Bement* need not be forgotten so easily. Instead of being relegated to history volumes, *Bement* and the curious case of the Harrow Trust could be helpful in understanding divided modern cases like *FTC v. Actavis, Inc.*

221. 333 U.S. at 287; 333 U.S. at 364.

222. *Line Material*, 333 U.S. at 315; *Gypsum*, 333 U.S. at 401.

223. *Line Material*, 333 U.S. at 309.

224. *Id.* at 310.

225. *Id.* at 311.

226. *Id.*

227. *Id.* at 309 (citing *Bement v. Nat’l Harrow Co.*, 186 U.S. 70, 92 (1902)); see *Gypsum*, 333 U.S. at 392–93 (citing *Bement*, 186 U.S. at 92).

228. *Line Material*, 333 U.S. at 311.

229. Stephen A. Stack, *Has The Supreme Court Resurrected Price Restrictions in Patent Licenses? The Implications of Leegin*, 38 AIPLA Q.J. 131, 169 (2010) (arguing that a patent owner’s price restrictions in multiple licenses to competitors will face antitrust risk despite the Supreme Court decision in *Leegin* to shift from a per se analysis to a rule of reason analysis).

C. Actavis's Rule of Reason

The most recent Supreme Court decision assessing the legality of patent owner conduct under antitrust law, *FTC v. Actavis, Inc.*, held that so-called “pay to delay” settlements between generic and brand name drug manufacturers are not immune from antitrust scrutiny.²³⁰ In his majority opinion, Justice Breyer reiterated the generally agreed-upon rule for determining antitrust immunity in patent licenses cases—is the agreement within the scope of the patent?²³¹ Justice Breyer reviewed the Court’s older cases involving price restraints and settlement agreements to define “scope of the patent,” coming to the conclusion that “patent and antitrust policies are both relevant in determining the ‘scope of the patent monopoly’—and consequently antitrust law immunity—that is conferred by a patent.”²³² Some litigants might settle their patent litigation to share monopoly profits and to keep prices high for consumers (which will generally be anticompetitive under our antitrust laws), or they might settle to avoid the time and expense of a patent litigation (which could be neutral or even pro-competitive).²³³ Determining whether the agreement in question falls within the scope of the patent cannot be the starting point, but a conclusion drawn only after assessing all of the circumstances using a rule of reason.²³⁴ Moreover, a district court should be able to figure out whether those circumstances run afoul of the Sherman Act without delving into specific questions of patent law like infringement or invalidity.²³⁵

230. 133 S. Ct. 2223, 2227 (2013). Pay-to-delay settlements, also known as reverse payment settlements, are settlements between a pharmaceutical patent owner and a generic manufacturer who seeks F.D.A. approval for a generic version of the patented drug. *Id.* at 2229. When filing an Abbreviated New Drug Application, the generic manufacturer must explain why it can enter the market despite patent protection, usually by declaring either that the generic believes that the patent is not infringed or invalid. *Id.* at 2228. When the patent owner sues the generic manufacturer for infringement, the parties sometimes settle the case to prevent an invalidity or non-infringement decision from rendering the patent unenforceable, with the patent owner paying the generic manufacturer instead of the other way around as would happen in a typical patent litigation. *Id.* at 2229. This payment preserves an exclusivity period for the generic and protects the enforceability of the patent, which suggests that it may be anti-competitive when the patent is of questionable validity. *Id.* at 2234.

231. *Actavis*, 133 S. Ct. at 2230 (citing *FTC v. Watson Pharm. Inc.*, 677 F.3d 1298, 1312 (8th Cir. 2012)). Justice Roberts seems weary of a worn concept: “This should go without saying, in part because we’ve said it so many times.” *Id.* at 2239 (Roberts, C. J., dissenting) (citing *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965)).

232. *Actavis*, 133 S. Ct. at 2231 (majority opinion) (citing *Watson*, 677 F.3d at 1312).

233. *Id.* at 2236.

234. *Id.* at 2230–31.

235. *Id.* at 2238.

In dissent, Chief Justice Roberts would define the scope of the patent as relating instead solely to patent law.²³⁶ In his view, the whole point of a patent—to confer a limited monopoly as an incentive to encourage invention and sharing of public information²³⁷—requires giving the patent holder permission to engage in conduct that otherwise would violate the antitrust laws.²³⁸ According to Chief Justice Roberts, “pay to delay” settlement, like all other types of patent litigation settlements, falls within the scope of the patent because the patent owner always has the right to exclude an alleged infringer from making, using, or selling the claimed invention.²³⁹ Although the settlement resolves the litigation with some uncertainty remaining as to invalidity and infringement, that uncertainty does not render the settlement outside the scope of the patent, and thus, susceptible to being declared an unreasonable restraint on trade.²⁴⁰ The Chief Justice fears that the majority’s rule of reason analysis will fold in these questions of patent law in order to ascertain antitrust liability, a cumbersome and unwarranted intrusion that will discourage settlements.²⁴¹

Strikingly, Justice Breyer and Chief Justice Roberts both adhere to the basic and oft-repeated legal rule taken from *Line Material* (which relies on *Bement*’s first iteration of this rule)²⁴²: “The precise terms of the grant define the limits of a patentee’s monopoly and the area in which the patentee is freed from competition.”²⁴³ The squabble in *Actavis*, and other contentious cases from the past decade, is over how courts should determine whether a patent owner is keeping within his exclusive statutory rights when engaging in activity that Justice Douglas referred to as “attractive private perquisites”²⁴⁴ grafted onto patents by owners using contracts: licenses, assignments, post-sale notices, patent pooling agreements as in *Bement*, and settlements like the “pay to

236. *Id.* at 2239 (Roberts, C. J., dissenting).

237. *Actavis*, 133 S. Ct. at 2240 (Roberts, C. J., dissenting).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 2243.

242. *Actavis*, 133 S. Ct. at 2231 (majority opinion) (citing *United States v. Line Material Co.*, 333 U.S. 287, 310–11 (1948)); *Id.* at 2238 (Roberts, C. J., dissenting) (quoting *Line Material*, 333 U.S. at 300); see *Bement v. Nat’l Harrow Co.*, 186 U.S. 70, 93 (1902) (“The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented.”).

243. *Actavis*, 133 S. Ct. 2238 (Roberts, C. J., dissenting) (quoting *Line Material*, 333 U.S. at 300).

244. *Line Material*, 333 U.S. at 316 (Douglas, J., concurring).

delay” agreements challenged in *Actavis*.²⁴⁵

This tension between patent policy (to encourage innovation using private exclusive rights) and other policies (e.g., to encourage competition through antitrust, to encourage bargained for exchanges through contract) is not a new one—the twentieth century Court visited this question in many cases, most involving patents and competition, but it did so for the first time in *Bement*.²⁴⁶ Placed in this historical context, *Actavis* attempts to answer a profound question that has haunted the Court for more than a century: What kinds of anticompetitive restraints on trade are within the scope of the patent and which are without?²⁴⁷

In *Bement*, the Court avoided the hard question of dissolving the Harrow Trust by focusing only on the contracts in evidence.²⁴⁸ However, the public nature of the Harrow Trust’s dealings, the decisions by at least two courts that the agreements in question in *Bement* were void as against public policy because they purported to restrain trade in harrows, and the extreme measures by which the trust protected its market share through threats of litigation and financial ruin apparently pushed some courts to interpret the decision as broadly giving patent agreements immunity from suit under the Sherman Act.²⁴⁹ As the Court grew more antagonistic to patent monopolies, the mid-century Court comprehended that antitrust law, in fact, could police some of the more egregious conduct by patent owners to remove competition between each other, to raise prices, and to restrict output.²⁵⁰ Although the Court in *Bement* found no problem with price and use restrictions between a patent owner and a licensee, its inability to consider those restrictions in the context of a pool of competing patent owners who have agreed to sell substitute goods prevented the Court from earlier engaging with the complexities of a rule of reason.²⁵¹ In all

245. *Id.* at 317; see *Actavis*, 133 S. Ct. at 2227; *Bement*, 186 U.S. at 94.

246. *Bement*, 186 U.S. at 85; see Richard J. Gilbert, *Antitrust for Patent Pools: A Century of Policy Evolution*, 2004 STAN. TECH. L. REV. 3, 6–8 (2004).

247. *Actavis*, 133 S. Ct. at 2227 (citing 15 U.S.C. § 1 (2012)).

248. See *Bement*, 186 U.S. at 92–93 (discussing the validity of contracts A and B in regard to the Sherman Antitrust Act).

249. *Id.* at 91 (“The general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts.”).

250. See *United States v. Line Material Co.*, 333 U.S. 287, 314 (1948); see also *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 400 (1948).

251. *Bement*, 186 U.S. at 91.

likelihood, National Harrow's patent licensing scheme would not survive modern scrutiny under Section 1 of the Sherman Act.²⁵²

The misperception of *Bement* as a case championing complete patent immunity from antitrust liability also plays an important role in the history of patent law and antitrust.²⁵³ Had the Court in *Bement* followed along with earlier cases rendering National Harrow's activity unlawful, perhaps a per se rule prohibiting patent pooling agreements would be its lasting legacy, long forgotten as a more sophisticated rule of reason has replaced older per se rules.²⁵⁴ Instead, viewed in light of the debate in *Actavis*, regarding the contours of the scope of the patent applied to the unique circumstances of reverse payments, the spirit of *Bement* that frames a patent's exclusive rights as exceptional remains an integral part of this debate.²⁵⁵

CONCLUSION

In the 1890s, the Sherman Act presented a host of unknowns for patent owners and lax enforcement enabled the proliferation of trusts like the Harrow Trust embodied in the practices of National Harrow.²⁵⁶ *Bement*, a profligate license violator, ended up fighting the trust all the way to the Supreme Court, but the surprising outcome left an enduring impression on the interplay between antitrust and patent law.²⁵⁷ In this way, the case has been both important and forgotten over time.²⁵⁸ Given the outcome in *Actavis*, and the possibility for a change of personnel on the Court that may shift it further to Chief Justice Roberts's dissenting view, perhaps the time has come for this forgotten case to be remembered for the way in which it pushed along the important patent-antitrust cases of the twentieth century.²⁵⁹

252. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 74 (2007), www.usdoj.gov/atr/public/hearings/ip/222655.pdf.

253. *Bement*, 186 U.S. at 91; see Gilbert, *supra* note 246.

254. See generally Frank H. Easterbrook, *The Limits of Antitrust*, 21 OCCASIONAL PAPERS L. SCH. U. CHI. (1985) (discussing the challenge courts face in hearing cases concerning patent law in the context of antitrust enforcement and whether a per se rule or a rule of reason is the better approach for handling them).

255. See Gilbert, *supra* note 246; see also *Bement*, 186 U.S. at 91–94; *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013) (debating the legality of reverse payment settlement agreements).

256. See generally *Bement v. Nat'l Harrow Co.*, 186 U.S. 70 (1902) (discussing how to reconcile conflicts between patent law and antitrust legislation).

257. *Id.* at 91, 95.

258. See generally Gilbert, *supra* note 246 (explaining the history of patent law and antitrust law, beginning with, and evolving from *Bement*).

259. Compare *Actavis, Inc.*, 133 S. Ct. at 2227 (holding reverse payment settlement

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agreements can sometimes violate antitrust laws), *with Actavis, Inc.*, 133 S. Ct. at 2238 (Roberts, J., dissenting) (“A patent carves out an exception to the applicability of antitrust laws.”).