

CHAPTER 5

THE THEORY AND PURPOSE OF THE PATENT SYSTEM

[142] We have quoted (§ 31), as custom requires, the few words in the U.S. Constitution on which our patent legislation and whole system nominally rest. And we have quoted in full the Venetian patent law of 1474 which was its first embodiment, and is still the gist of our American patent law, although other countries and formerly our own have elaborated it somewhat more. Our present law can be put in a nutshell of 27 words thus: Any author of an invention may file a description for publication and secure a transferable right to exclude others therefrom, for 17 years from date of allowance. But to explain for our purposes, not for patentees' or lawyers', the reasons for this law, and its social implications and consequences, so that we may compare the patent system with the rival means for eliciting invention, to see which were best in which circumstances—this must occupy us for the next three chapters.

THE OLDER PHILOSOPHY OF PATENTS

[143] Patents began, not with a philosophy, but with practical experience, sounder than the philosophy which arose centuries later, but still not well reasoned, since the system amounted to little for the first three centuries of its use, as we have seen (§ 29). The philosophy which arose later in the Age of Rationalism was based on the doctrine of Natural Rights,¹⁷⁷ and held that an inventor has a natural right to own that which he had created. Natural Rights doctrines are today abandoned by secular philosophers and social scientists, although still reflected in some religious, popular, and legal circles. For who can say what *is* the natural right, e.g., the right to own what one has created, or the right to make use of the best ideas one can find?

[144] Along with this philosophy of natural rights go three other interrelated ideas much more durable and influential to this day, although easy to disprove and replace by better reasons for having patents. First is the notion that the inventor creates his idea himself, "out of whole cloth," one might say, only more than that, out of nothing. A tailor acknowledges the value of the cloth he uses, but a patentee makes no allowance for the prior art, for his teachers, unless they hold current patents—he picks up all other ideas free. The second notion is that since no one else has ever made this invention before, no one else ever could, or at least not for a long while. It would follow from this and the first idea that the inventor who gives the world what it could not get without him, is entitled to its whole value forever, or at least for 17 years, and could not possibly overcharge us for his services. If he asked more for his invention than