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Judah P. Benjamin. By Robert Douthat Meade. New York: Oxford University Press. 1943. Pp. ix, 432. $3.75.

The field of the biographer has been overworked, and professional biographers are hard put to it to find fresh subjects. The consequence is that we are getting some biographies that had best been left unwritten. A recent biography of Sir Wm. Blackstone proved uninteresting because, although the subject was a famous and learned man and the biographer a good writer, Sir William was neither a man of action nor had he taken a part in any great or stirring events. After stating that Sir William was the first Vinerian professor of law at Oxford, that he wrote the Commentaries and later became a judge, nothing more of interest remained to be said. In order to make "a book," the author of necessity had to resort to eulogies, encomiums and adjectives.

No such difficulty confronts Robert Douthat Meade, Professor of History at Randolph-Macon College, in writing the biography of Judah P. Benjamin. This is so because Benjamin lived in a turbulent period and, as lawyer, businessman and statesman, he played such a part successively in the affairs of two nations that the biographer's problem is one of selection and rejection from a veritable gold mine of historical facts, rather than difficulty in finding something to say.

Benjamin, a Jew, was born of impecunious parents, in the year 1811, in the British West Indies. Before the year 1852, he had become the unquestioned leader of the bar of the fast-growing metropolis of New Orleans, the promoter and builder of what subsequently became the Illinois Central Railroad, a sugar planter and refiner, owning a hundred slaves.

Benjamin's father, always a financial failure, was a rover "ever seeking to find greener pastures elsewhere." The family lived for a time in Wilmington, North Carolina, where little Judah helped his father keep the store, and at Fayetteville he was fortunate in getting a thorough grounding from an excellent Scotch teacher. Through the generosity of a family friend, Judah was enabled to go to Yale University, entering in 1825 at the early age of 14, and, for the two years of his attendance, he led his class.

In his junior year, Benjamin was expelled from Yale under circumstances which, 33 years later, enabled his political enemies to charge that he had been expelled for stealing. Prof. Meade has gone to the original sources and, for the first time, has produced all the extant facts on the subject, including the original minutes of the Yale debating

societies and the contemporary correspondence with the President of the University. But unfortunately, the record still leaves the cause of his dismissal a matter of legitimate dispute. However, confidence in Benjamin's innocence and general probity is evidenced by the curious fact that, after Louisiana had seceded from the Union and Benjamin had become Attorney General in the Confederate Cabinet, his loyal friend James A. Bayard, Senator of the United States from the State of Delaware, wrote him a warm letter of friendship and confidence, offering all possible assistance in connection with the resurrected Yale incident.

Upon receiving his license to practice law, Benjamin contracted an unfortunate marriage with Mademoiselle Natalie St. Martin, a Creole, who found life on their plantation "triste" and decamped with their 5-year-old daughter for Paris. Benjamin supported them in luxury and each summer crossed the Atlantic to pay them an annual visit. When Benjamin in a letter cautioned his wife to be less extravagant, she replied, "Don't talk to me about economy; it is so fatiguing."

Benjamin, the busy and successful lawyer, lived in New Orleans and spent only week-ends at his plantation, "Bellechasse," eighteen miles across and down the Mississippi. After the departure of his wife, he brought from Charleston and installed at Bellechasse his mother and his gifted sisters, Rebecca (whom he called "Sis"), Hattie, and Penina ("Penny"), who later became the mother of the well-known financier, Julius Krutschnitt. Life at Bellechasse is charmingly portrayed. So far had this impecunious Jewish boy, with his mother and sisters, risen in ante-bellum southern society, that when renowned people of the nation came to New Orleans they brought letters of introduction to Benjamin. On a Thursday he would write Sis that he was bringing down for the week-end a few guests, and "please have things nice, you know the way I like 'em."

Benjamin's mother, like Spinoza, Disraeli, Cardozo and Brandeis, was a Sephardic Jew, so heredity must be the explanation not only of the intellectual force but also of the innate gentility of her children. In the days of their poverty, she "always held her head high," and, on one occasion, returned to her sisters a generous chest of linen, with gracious thanks, saying "her wants were amply provided for."

In 1852 Benjamin was elected to the United States Senate, as the nominee of the Whig Party. During the eight years that he was a senator he argued more cases before the United States Supreme Court, next to Reverdy Johnson, than any other lawyer. His success as an advocate was largely due to his power of statement. In a case where he was opposed by Jeremiah Black, during a recess taken after Benjamin's opening, one of the justices is reported to have said to Black,

"You had better look to your laurels, for that little Jew from New Orleans has stated your case out of court."

In 1853 Benjamin was nominated by President Fillmore to be a justice of the Supreme Court but, unwilling to forego his handsome income as a lawyer, he declined the great honor.

On the Senate floor we see him crossing swords with the overbearing Charles Sumner and besting him, and engaging in sharp debate with Wm. H. Seward. In 1856 he renounced his allegiance to the Whig Party, and in 1858 was re-elected on the Democratic ticket. Without resort to epithets, he denounced Stephen A. Douglas, and so forcefully stated the facts convicting him of advocating one policy before the slaveholding Southern States and an inconsistent policy against Lincoln in Illinois, that he thereby forever alienated the Southern vote from Douglas.

For a time he was esteemed as being no more than adroit, clever, "nimble-witted," and the "ditto" for the other Louisiana Senator, John Slidell; but he soon demonstrated in the Senate, as well as elsewhere, that he was not lacking in personal and physical courage. In an acrimonious debate, the intolerant Jefferson Davis stated he had "no idea that he was to be met with the argument of a paid attorney in the Senate Chamber." Benjamin rose and asked if he had rightly heard the words "paid attorney," and Davis replied with asperity, "Yes, those were the very words." Thereupon Benjamin wrote a note of direct challenge to a duel, and the next day Davis offered adequate apologies on the floor of the Senate. The incident created in Davis an enduring respect, and no doubt influenced him to choose Benjamin as his right-hand man in the Confederate Cabinet.

After Louisiana had seceded, Benjamin made a farewell address in the Senate which so moved friend and foe alike that the gallery broke into spontaneous applause.

In Jefferson Davis' Cabinet, Benjamin served faithfully from the day of its formation until its collapse in 1865. As if sitting by Benjamin's side, we are shown wartime life first at Montgomery and then at Richmond. As Attorney General, he not only organized the Confederate Courts and the other affairs of his own department, but, being the only practical businessman in the Cabinet, he organized and systematized the whole work of the Government.

As acting Secretary of War, we see him struggling with the problems of getting guns, powder, clothing and medicine for the troops, and continually at odds with the military men.

Mrs. Jefferson Davis became a great admirer, and from her and other contemporaries we get rare pictures of the short, burly man, with side whiskers, a musical voice, and tireless energy. After laboring into

the night, Mr. Davis would emerge exhausted, but Benjamin would first dine well and then go off to play at cards, billiards or bowling. His habitual cheerfulness prompted a Confederate General to say that Benjamin "cared no more for the Confederacy than for a last-year's bird nest," and General Wise customarily referred to him as the "oleaginous Benjamin."

Indeed, the rare temperament of the man was the key to his success. Troubles never weighed upon him; he indulged in no repining or lamenting, but was intent only upon devising and executing the next step to be taken. During the darkest days of the Confederacy, Mrs. Hoge, wife of the Presbyterian minister, looked out of her window and said, "There goes Mr. Benjamin, smiling as usual."

After the loss of Roanoke Island, the demand for his removal as Secretary of War was insistent. But Jefferson Davis could not spare such a practical man from the Cabinet, and made him Secretary of State. There we get a new slant on the South's problems of diplomacy and her maneuvering for recognition by England and France. Should the South withhold her cotton from English and French mills and thereby force recognition; or should she ship cotton to obtain credits for the purchase of military supplies?

Upon receiving news of the surrender at Appomattox, the Cabinet fled as a body, most of them on horseback; but Benjamin, too fat to ride, travelled in a buggy. From Danville to Greensboro, to Charlotte we follow them, and all the way to Washington, Georgia, where they separated. This flight of the Cabinet, with the Union Army looking for them, is so filled with human interest that it would make an entertaining book of itself. Benjamin, with inexhaustible wit and humor, kept up the spirits of the party.

After separating from the balance of the Cabinet, Benjamin, in disguise, eventually made his way to the west coast of Florida, where he hired an open boat and escaped to Havana. Thus the career of Benjamin in America was forever terminated.

Upon arriving in England in the autumn of 1865, he determined to become a British Barrister, notwithstanding that he was confronted with rules which required that he should "eat dinners" for three years before being admitted. But, through the generosity of the British Bar, the rules were relaxed and, after a few months, Benjamin, a stranger in a foreign land, a fugitive of the collapsed Confederacy, and known to be despised by the Federal Government, became a briefless Barrister at age 55.

While waiting for business, he wrote *Benjamin on Sales,* which immediately became a sensation, and it remains today the leading work on that subject.

During these lean days, he was writing affectionately to his sisters in America, offering financial assistance, "say $100 a month," when he, himself, was eating bread and cheese, and walking to his chambers because he could not afford a cab and did not wish to be seen riding a penny bus.

In following the account of Benjamin's meteoric rise at the British Bar, we learn about practice generally in England, including the unique precedent which draws a dead line between law business which must be taken to the solicitor (roughly speaking, the business or office lawyer) and that which the solicitor (not the client) takes to the Barrister (roughly speaking, the advocate and occasional adviser). In 1870 Cyrus W. McCormick came to London to establish his harvester business in Europe, and wished to be advised by Mr. Benjamin. But in obedience to precedent, Benjamin had to send him out to employ solicitors first, and then come back, through them, in the regular way.

In the next seventeen years we see Mr. Benjamin become the absolute leader of the British Bar—his income of around $75,000 per year exceeding that of any British Barrister. His versatility and his ability to speak both French and Spanish enabled him to handle cases coming from jurisdictions not having the common law—ground upon which the ordinary Barrister feared to tread. A solicitor once handed him a document in Spanish, requesting an opinion and promising a translation next day.

"It is unnecessary," said Benjamin. "I read Spanish."

The solicitor replied, "Oh, Mr. Benjamin, what don't you know!"

So great became his reputation for ability to win cases, that solicitors and the litigants themselves felt they must have Mr. Benjamin. He finally fixed a minimum retainer of 100 pounds for appearance in any court, and it will astonish American lawyers to learn that, with the assistance of "juniors," he was customarily trying several cases on trial at the same time, and in different courts.

Upon the announcement of his retirement in 1883, the Attorney General and the entire Bar tendered him a farewell banquet, an occurrence so unusual as to be accounted for only by reason of the high regard in which he was held, and the Englishman's sense of sportsmanship. At the banquet, we hear the Lord Chancellor and the Lord Chief Justice generously expressing the affection of the Bar and its regret at his leaving.

While many men could have built either one of his careers, there is no parallel of a lawyer's having built a second great career in a foreign land, upon the ruins of the first.

Unquestionably, Mr. Benjamin excelled in commercial cases, but his practice was as general as the time afforded, and we find in this

book interesting accounts of trials of national importance, where we see Benjamin in action and get speciments of his technique and advocacy.

Prof. Meade has well performed the task of the true historian. He has searched the records of the U. S. Senate and of the Supreme Court at Washington, the archives of the Confederacy at Richmond, and the records of the English Law Courts at London. He has set forth the facts as he found them, letting the chips fall where they may, and leaving to the reader his inalienable right to form his own conclusions. To the reader-for-pleasure-only the book will be as entertaining as a novel of adventure. The lawyer and the student of human nature will read it with profit as well as pleasure, and will talk about it for a long time.

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Patent Property and the Anti-Monopoly Laws. By Otto Raymond Barnett. Indianapolis: The Bobbs Merrill Co. 1943. Pp. vii, 432. $10.00.

Mr. Barnett on account of his wide experience, is amply qualified to author the above-entitled treatise. He points out the founding of patents, copyrights, in Article I, Section 8, Clause 8 of the Constitution giving Congress the right to promote the progress of science and useful arts by securing for a limited time to authors and inventors the *exclusive* right to their respective writings and discoveries. Prior to this enactment by Congress, common law gave the inventor the right to make and use the invention, but did not give him the right to exclude others from employing the invention. Patent statutes do not give the inventor what common law has already given him, but give to him the exclusive right to exclude others from making, using, or selling the patented products.

By giving an individual a patent, the individual does not receive anything belonging to the public, but it is something new and heretofore unknown, but the public benefits by having use of the invention at the end of the patent period. It is to be noted that Congress has only constitutional authority to grant an *exclusive* right to the invention, and if Congress should enact a law giving the inventor less than the full and exclusive right of excluding others from practicing the invention, such a law would be unconstitutional.

A patentee may grant license under his patents, and may limit the number of articles made, the selling price of the articles, and the method

of sale, but this selling price cannot be carried on to the second and subsequent purchasers, as this would be contrary to the anti-trust laws.

Under a patent, a licensor cannot bind the licensee to deal only in his patented article, and not to deal in any other articles in competition with the patented article, as this is outside of the domain of the patent.

A patent is really a triple monopoly in that it gives the right to exclude all others from manufacturing the invention, the right to exclude all others from using the invention, and the right to exclude all others from selling any articles embodying the patented invention.

Since the establishment of the Supreme Court until quite recently, it has been the established law that a licensee will not be heard to urge the invalidity of the patent under which he is licensed, as a defense in a suit to recover royalties, but recently the Supreme Court has held that if the licensee alleges invalidity of the patent, and also alleges that the license is contrary to the anti-trust laws in view of the fact that it imposes limitations which are contrary to law, if the patent is invalid, can now plead invalidity of the patent even though he is licensed under the patent.

If a number of manufacturers owning different patents enter into a contract whereby competition between them is lessened, such an agreement is outside the scope of the patents, and is unlawful. Neither can a patentee compel a licensee to use unpatented supplies as a condition of the license, as this is called a tying-in contract, and is condemned by the courts.

In the absence of a contract, joint owners of a patent may each practice the invention independently of the others, and license others to do so without accounting to the other joint owners for any part of the profits, and joint owners may not lawfully agree to conditions limiting competition between themselves in the practice of the patented invention.

Where several groups are carrying on a legal business of making patented machines which do not compete with each other, a combination of the several groups does not violate the anti-trust act unless it restrains competition and builds up a monopoly extending beyond the domain of the patent.

On the other hand, where numerous patents are owned by competitors in the same field where there have been many conflicts as to infringement, and as to actual inventorship, or where there is every reason to anticipate such conflicts, and where the situation is clarified by conveyance of all patents to a common holder or trustee who thereupon licenses all parties to the pool under all of the patents with some or all of the restraints of the trade which are legitimate in such licenses, such an arrangement has been sustained as being a legitimate use of

patents in view of the full interchanges of rights thereunder. If such an agreement merely allows the parties to it to embody in their output various patented inventions which they could not otherwise use and does not restrain any potential competition, such an agreement is valid, but if it does restrain competition, it is invalid, and if in such an agreement, each owner is licensed by the pool to use only the patents which he contributed to the pool, then such an agreement is invalid in view of the anti-trust laws.

It is incumbent upon a patent owner to exercise due diligence in asserting his rights against infringers, and if he, after notification of an infringer, as to his infringement of a patent, does not use diligence in actually bringing suit, then recent cases have held that he not only cannot secure profits or damages, but cannot even get an injunction from the infringer, because the patentee has sat idly by and not only watched the infringer make large profits, but has also watched him build up a lucrative business in a field which the patentee is now endeavoring to take over.

The government is intervening more and more by prosecuting companies and individuals under the anti-trust laws for violation of patent rights. There has been a great increase in the number of suits brought, and these suits have been very expensive to the defendants. An extreme instance is the case of United States v. Aluminum Co., 44 F. Supp. 97 (1941), which was on trial in court for over two years, and cost the defendants a million dollars or more to defend, yet the court in its two-hundred page opinion carefully considered all of the issues and decided every point in favor of the defendant. In another suit of the United States v. Aerofin Corporation et al., C. A. 20-458 (D. C. S. D. N. Y. 1943) the government asked that the defendant must be compelled to license any applicant under any of his patents free of royalties and free of all restrictions and free of all limitations with respect to prices and all other practices, and that the defendant be restrained from issuing any license, distributor's agreement, manufacturer's license agreement, or any other agreement in which is contained any obligation under, or by virtue of said letters patent, and on the same day, the bill was filed, the defendants agreed to a consent decree cancelling all licenses, and the defendants agreed to the order ordering them to grant unrestricted and royalty free licenses under the patent in suit. In other words, the defendants realized that the defense of the suit would probably result in bankruptcy on account of the great expense, and gave in rather than face the enormous expense of defending the suit.

The Supreme Court has recently rendered some revolutionary decisions in which it has assumed the role of judicial legislation instead

of merely interpreting the laws. In the Morton Salt Case, 314 U. S. 488, in 1942, the Supreme Court for the first time, held squarely that the owner of a patent cannot maintain action against a clear case of infringement if it appears that in his relations with anyone, he has endeavored to use his patent to influence the sale of an unpatented supply. The Court denied the fact that a patent right is a legal right, and is not an equitable right. The Supreme Court has made this decision and other decisions regardless of the fact that Congress has refused to pass laws to that effect. For example, Congress previously had refused to pass a law stating that it would be a complete defense in any suit for infringement of a patent to prove that the complainant in such suit is using or controlling the patents in violation of any laws of the United States relating to unlawful restraint and monopolies, or relating to combinations, contracts, agreements, or understandings in restraint of trade or in violation of the Clayton Act or the Federal Trade Commission Act.

The Supreme Court has lost sight of the fact that a patent is property, that infringement is a trespass, and that denial of the right to recover for such a trespass is obviously a deprivation of plaintiff's property. The decision of the court in the *Morton Salt* Case is clearly a case of judicial legislation.

The Supreme Court also in 317 U. S. 173 (1942) decided the case of Sola Elec. Co. v. Jefferson Elec. Co., overturning the long established and seemingly settled law that a licensee may never question the validity of a patent under which he is licensed, the logical implications of that decision going much further. This case decided that where a licensee is sued for unpaid royalties—and it is noted that unless there is diversity of citizenship, such a suit must be brought in a state court, for it is not a suit under the patent laws—if the license imposes any conditions which would be in unlawful restraint or trade or any contract not within the patented domain, then the licensee may plead that the patent is invalid, and therefore, the restraint is an unlawful restraint of trade, hence under the Sherman Act, the contract is void, and there can be no recovery under it.

Followed to its logical conclusion, the doctrine announced in the *Sola* Case leads to the proposition that, in any case, a licensee may question the validity of the licensed patent. This doctrine lays open the door so that whenever the government sees fit to attack any patent agreement as in violation of the anti-trust laws, it may attack the validity of every patent which is relied on to sustain the agreement as being within the patented domain, and will resolve itself into an inquiry as to the prior patents consisting of thousands of patents. The prospects of such litigation are staggering, courts will be occupied for

years on single cases, the expense of such litigation will be ruinous to the defendant, as the plaintiff has all the resources of the United States government behind it.

In the case of United States v. Hartford Empire Co. 46 F. Supp. 541 (1942), referred to as the *Glass Machine* Case, the defendant was prosecuted for licensing one company to make one kind of container, and another company to make another kind of container, and each one limited to the amount of containers it could make. There was a pooling of patents by the various companies, but the main patent involved an entirely new and original suction device patent, enabling containers to be made very much more cheaply than they could be made under patents already expired. The various glass companies at the cost of millions of dollars had evolved and patented this new machinery which enabled the public to obtain glass containers at a very much lower price than it had heretofore obtained such containers. Nevertheless the court decided that any future distribution of the automatic machinery by defendants must be on a basis of outright sale at reasonable prices, that all existing agreements and licenses must be cancelled, and new agreements must be free of restriction, and approved by the court, and that hereafter any manufacturer of glassware may produce any item he desires, and that the defendants will be enjoined from using interstate commerce unless they comply with the orders of the court, and agree to license anyone royalty free on all present patents and pending application for patents for the life of the patents, and make available to anyone who desires them copies of the drawings and patterns relating to such devices, feeders, forming machines, and the like. In other words, this court confiscated patents or property belonging to the defendant.

The author points out that if this decision should be confirmed by the Supreme Court, it will entirely wreck our patent system, and make all patents of no value whatsoever. How can large companies invest millions of dollars in laboratories to produce containers, electric light bulbs, and many other things which otherwise would never have been produced and at greatly decreased cost, if such patents which they might obtain from such expensive laboratory experiments, are to be dedicated to the public? These cases are a clear indication of judicial legislation, and doing what Congress should do, and usurping the powers granted to Congress and not the interpreting of laws passed by the legislative branch of the government.

It is well-settled law that a patent is property and entitled to all the constitutional protection of any other property right, and that the patentee has the absolute right to exclude any utilization of the patented invention without the patentee's consent during the life of the patent,

and that the patent is subject to all laws which are pertinent to any other property, and that the patentee may license anyone he desires.

The government in many anti-trust cases heretofore brought contends that a patent is not property, but is a mere franchise granted by grace of the government and contrary to the common right, and that the patent owner is under obligations to permit anyone to practice his patented invention, and that if the patentee grants a license to anyone, the patent owner must grant a license on reasonable terms to all manufacturers desiring to participate, and that a license or agreement by a patent owner permitting a licensee to practice the patented invention only within specific limitations is an unlawful restraint of trade.

The above line of cases by the Supreme Court clearly demonstrates that the Supreme Court is judicially legislating laws which were refused to be passed by Congress. These cases show that judicial legislation has run wild. The outstanding evil is that when such judicial legislation is found in the opinions of the United States Supreme Court, which is the final tribunal interpreting all laws, there ceases to be any constitutional protection short of congressional legislation which shall determine a different policy.

In view of the principle of judicial legislation by the Supreme Court, it would seem to be unnecessary for Congress to pass a law stating that violation of the anti-trust law shall not be a defense to a suit for infringement, that in a suit by a licensor against a licensee for violation of an otherwise valid agreement, the licensee may not plead invalidity of the licensed patent, that in prosecutions for violations of the anti-trust laws by virtue of license agreement under patents, the government shall not be entitled to charge that the contracts involved are unlawful, because the patents which have been granted by that same government are invalid, but with the line of decisions as above-discussed, it would seem that we have entered a new era where such negative legislation is essential if patent owners are to be protected against the progressive trend of judicial legislation which is not based on any statutory authority, and is, in fact, contrary to the proposed laws which Congress has considered and repeatedly refused to enact.

In many typical cases brought by the United States Government within recent years, for charges of violation of the anti-monopoly laws, there has been set forth the proposition that the following practices are every one in violation of the anti-monopoly laws:

1. The granting of a license in a limited field.

2. The granting of a license to one competitor involves an obligation to license all competitors who request a license.

3. The acquiring of improvement patents by the owner of a basic patent.

4. The settlement of litigation by acquiring the patent in litigation.

5. The requirement that improvements upon the licensed patent devised by a licensee shall be assigned to the licensor.

6. The requirement that the licensee shall not contest the validity of the licensed patent.

7. Licensing the use of a patented machine only with certain co-operating licensed mechanisms.

8. Limiting the number of patented machines which the licensee may use.

9. Limiting the use of a patented machine to the manufacture of certain specified types of ware.

10. Limiting the use of a patented machine to a certain maximum output.

11. Requiring as a condition of the continuance of the license that the licensee shall produce a certain minimum output.

The government proposes that all patents shall be licensed at a reasonable royalty to anyone regardless of the cost to the patent owner of developing the new invention. If this is true, then, anyone having a horse should be compelled to hire or sell it to anyone else who desired it at a reasonable price, or anyone having a piece of land or other property should be compelled to rent or sell it to whoever desires it at what a government agent would say is a reasonable price.

In other words, it means the taking of private property and licensing competitors in using the same in competition with the lawful owner of the property. If extended to other fields, it means the taking of all property for the common use. Unless the public awakens to the danger of destroying our patent system, the leading place of this country in the world of industry will be destroyed, and it will lead to the communal ownership of all property and the disappearing of private property.

This book is loaded with dynamite, and frankly discusses the situation facing all of us today. It is a book which should be read by every member of Congress and by every member of the Bar of this country. It will not only give the general practitioner a clear idea of licenses and agreements into which his clients may enter, but it will give him a new prospectus on the danger which faces us from within.

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