

DECISIONS RELATING TO PATENTS AND TRADE MARKS.

By the Commissioner of Patents.

(Appeal from the Examiners-in-Chief.)

HARRISON et al. vs. HOGAN et al.—HEELING MACHINE.

Application of Hall and Harrison filed March 20, 1879. Application of R. M. Harrison filed February 8, 1879. Patent No. 206,237, to Hogan and Whitlock, granted July 23, 1878. Marble, Commissioner:

1. As between an employer and a party employed for a special purpose, features suggested by the employe which are merely tributary to the main invention can give to him no claim as an inventor, and in regard to such features as amount to independent inventions a presumption exists in favor of the employer.

2. An award of priority cannot be rendered in favor of joint inventors as to a part of a machine which is in itself a distinct improvement capable of supporting a separate patent, and in the conception and completion of which one of such joint inventors had no part.

It is a familiar doctrine that as between an employer and a party employed for a special purpose matters merely auxiliary or tributary to the main invention can give to the employe no claim as an inventor, and in regard to such features as amount to independent inventions a presumption exists in favor of the employer as the author of the same which can only be overcome by conclusive and unequivocal proof. The stop used in connection with the slide is a feature which, in my judgment, cannot be said to be more than tributary to the invention of the slide, the movement of which it is designed to regulate. The conception of the one naturally followed that of the other, and even if this feature was added by the workmen it is not such a distinct invention as would warrant them to make claim to the same. Were this otherwise, however—were the stop other than a tributary element—the weight of evidence satisfies me that the patentees are the parties rightfully entitled thereto.

By the Commissioner of Patents.—Trade Mark Decisions.

EX PARTE HEYMAN.

Marble, Commissioner.

1. The law is well settled that words merely descriptively used are not proper subjects for trade mark registration.

2. If the descriptive character that might attach to a word is so very remote as to be but secondary, so that the word will be understood by the public not as a descriptive but as a fanciful term, it may then constitute a valid trade mark.

Abstract.—The applicant in this case seeks to register the word "Invigorator" as a trade mark for spring bed bottoms. The registry is denied by the Examiner on the ground that "the word in question is, in a certain sense, descriptively used by the applicant; or the objection may be stated in another form, that the word is not distinctly an arbitrary designation, and hence would not serve the purpose of indicating the original ownership of the articles to which it is designed to be affixed."

It is undoubtedly a well settled rule of law that words that are merely descriptively used are not proper subjects for trade mark registration. If, however, the descriptive character that might attach to a word is so very remote as to be but secondary, so that the word will be understood by the public not as a descriptive but as a fanciful term, it will then accomplish the office of a trade mark, and to the use of a word which in connection with a particular article is primarily fanciful an exclusive right can exist. Indeed, it is common to find words, either newly coined or arbitrarily selected, the validity of which as trade marks has been sustained by the courts, which contain a suggestion more or less remote of some peculiarity, real or supposed, of the article to which they are attached. An example of this is afforded by the case of *Davis vs. Kendall* (American Trade Mark Cases, 112), where the term "Painkiller" was held to be a proper trade mark as applied to a medical compound.

I do not think that the word "Invigorator" stamped upon spring bed bottoms could be regarded as merely descriptive. It is true, perhaps, that by a process of logical deduction it may be resolved into a description in one sense, since a spring bed bottom may be conducive of sleep, and sleep invigorates; but, in my judgment, the primary signification which the public would attach to this term would be a fanciful one.

The decision of the Examiner is reversed.

EX PARTE OLIVER.

Application of R. W. Oliver and J. E. Robinson filed March 3, 1880.

Marble, Commissioner:

A geographical name, although also the name of a historical personage, is not a proper subject for trade mark registration.

Applicants in this case seek to register the word "Raleigh" as a trade mark for manufactured tobacco, whether such word be accompanied by a portrait of Sir Walter Raleigh or not. The Examiner holds the word alone to be geographically descriptive when used upon tobacco, it being a name of a leading city of a tobacco growing State, and he has accordingly refused the registration.

It is contended on behalf of the applicants that the word as here used is the name of an historical personage, and that it would be more likely to be associated with the person than with the place of that name. In this statement of counsel I cannot concur. Situated as the city of Raleigh is, in the cen-

ter of a tobacco growing region, the vast majority of persons, and especially the inhabitants of that section of the country, as well as many elsewhere whose historical knowledge is defective, would, I think, regard this word as indicative of the place of manufacture. The mere circumstance that the name of a place is also the name of a person cannot alter the fact that any manufacturer of tobacco in Raleigh, and there are doubtless such there, would have a perfect right to use this mark upon his wares, thus destroying the exclusiveness of the right of user—an essential feature in a lawful trade mark—nor the fact that many, and I think most, persons would understand the mark as geographically descriptive. The authorities are numerous and conclusive upon the point that, as a rule, geographical names are not proper subjects of trade marks. (*Ex parte Knapp*, 16 O. G., 318; *Marsching & Co.*, 15 O. G., 294; *Cornwall & Bros.*, 12 O. G., 312.) There have been, it is true, exceptions to this rule, where the geographical words employed were obviously fancifully used, and were of such a character that they could not be misunderstood as indicating the locality in which the goods were made; but this cannot, in my judgment, come under the excepted cases.

The decision of the Acting Examiner of Trade Marks is affirmed.

STRAITON & STORM.

Application of Straiton & Storm filed August 20, 1879.

Marble, Commissioner:

1. A band or ribbon of such shape and so attached to the wares of a manufacturer as to enable them to be readily distinguished in the market may properly be allowed registration as a trade mark.

2. The mere fact that such strip or ribbon may also be the vehicle of other matter cannot detract from its efficiency as a means of distinguishing the goods upon which it is placed.

Abstract.—Applicants in this case seek to register as a trade mark for cigars—

"A waved band or ribbon of rectilinear form longer than it is wide, which is fastened to the two ends of a cigar box, and so placed with reference to the cigars within the box as to be below some of said cigars and above the remaining cigars."

The Examiner denies the registration for the reason, as he states in answer to applicants' appeal, that—

"The matter sought to be registered does not amount to an arbitrary symbol, the band or label serving the office of a mere label, which, besides the descriptive matter contained thereupon, may also contain matter indicative of origin and ownership, and thus serve as the vehicle of a lawful trade mark. A contrivance, design, device, name, symbol, or other thing, to be a lawful trade mark, must be of such a character that its employment in connection with a particular commodity will indicate the origin and ownership of that commodity."

There have been numerous definitions of a trade mark, the difficulty seeming to be to find one sufficiently comprehensive to embrace the many means which a manufacturer may employ to distinguish his wares. The Acting Commissioner in the Gordon case before referred to, says:

"Thus a box, barrel, or wrapper containing merchandise, whatever its form, cannot, *per se*, be a trade mark, but a name, symbol, figure, letter, form, or device cut, stamped, cast, impressed, or engraved thereto, or in some other manner attached thereon or connected with the article itself, may be a proper trade mark."

This statement is fully sustained by the case of *Moorman vs. Hogs* (2 Sawyer, 78), to which reference is there made. Surely under so broad a definition applicants' mark must find some place. It is a "device" "attached to the box and connected with the article itself" for the purpose of indicating the origin of the goods. Will it serve this purpose? An inspection of the illustration at such a distance that the printed matter contained on the band cannot be read shows at a glance that applicants have attached to their wares a device by which it can be readily distinguished from the wares of another. This is the purpose of a trade mark, and this purpose applicants have, in my judgment, accomplished by a means which is clearly comprehended under all the authoritative definitions of a lawful trade mark. In the case of Gordon the following language occurs, which, although but a dictum, is here in point:

"Perhaps this objection (the useful functions of the mouth-piece of the cigarette) would not lie if, as in the case cited by applicants—that of Mommer, for which a trade mark was granted for a silk band around a champagne bottle—a silk band was attached to the cigarette, or a colored piece of paper or similar device connected therewith, for in such instance the device would answer no other purpose than that of a trade mark—perform no mechanical function."

This language would seem to recognize the propriety of granting registration for such marks as applicants'.

The mere fact that applicants' strip can be made the vehicle of other matter which may constitute a trade mark does not detract from the efficiency of the strip itself as a means or device for distinguishing the wares upon which it is placed. The same objection might be urged to a figure in the form of a star or crescent or other fanciful shape, for upon such, as upon applicants' strip, a trade mark might be stamped, and yet these fanciful figures without any matter marked thereon would certainly be understood as distinguishing marks in the trade as trade marks. The Office has re-

peatedly allowed the registration of strips, either of peculiar shape or attached in some distinctive manner to various articles, as appears by the numerous cases to which my attention has been drawn.

The decision of the Examiner is reversed.

Complaints about the Patent Laws.

There is a growing disposition in some branches of industry in this country to find fault with our patent laws, and the manner in which they are enforced. There is hardly a trade that has not at frequent periods its crop of harassing patent suits, which perplex the manufacturer, the dealer, and the consumer. It is not surprising, therefore, that the dissatisfaction thus created finds expression in complaints. Naturally, the subject comes up before the associations formed among those belonging to the various trades for their mutual protection and the advancement of common interests. A committee is appointed, and, if its members are in earnest, a report is drawn up suggesting possible measures of reform. Such has been the course pursued by the millers, and we learn that the brewers have taken the first steps in that direction.

All this is very well in its way, but it does not seem as though the agitation of the subject is conducted in the manner best calculated to secure the reforms desired. The reports of such committees are so evidently biased by the interests of the members, as defendants in patent suits, as to have, as the rule, little or no value. The one great and sole object of their effort seems to be to beat the particular patent or patents which menace them, and the fact is lost sight of that it is to the interest of every enterprising manufacturer to aid in sustaining patents. In many cases where complaint against the patent system is loudest, known rights have been infringed, and the protests of patentees disregarded, in the belief that it was cheaper to take the chances of infringing than to recognize the demands of those whose claims were disregarded. Patents thus ignored almost always acquire an unexpected value before they expire, and it is quite usual for them to be made the basis of expensive suits. Often they are sustained by the courts and become very valuable, for the simple reason that they have been infringed without regard to consequences. Manufacturers who find themselves figuring as defendants in suits of this character commonly have a great deal to say about the injustice of our patent laws.

Perhaps they are unjust in their requirements in some instances, but to modify them in any essential particular, in points touching the value of valid patents, would be to destroy an immense property right, and to make it extremely difficult for inventors or the owner of a patent acquired by purchase to protect himself in the enjoyment of the rights it is designed to secure to him. It may be vexatious to settle or defend frequent demands for royalties and damages; but it is still more so to know that you have valuable rights in patents which you are unable to enforce, and that which should belong to you alone has become common property. The only safe and honorable position for the manufacturer is one of justice and fair dealing. He should act advisedly with regard to the payment of royalties and the infringement of patents. If he manifests a fair and liberal disposition in this matter, and a willingness to recognize the rights of others as beginning where his own rights cease, he is not likely to have serious trouble. As the rule, it is cheaper to purchase a right under a patent than to defend an infringement; but when a manufacturer persistently disregards notices and warnings, and takes his chances as an infringer, he should stand by the consequences like a man, and not whine nor complain if called upon to pay for what he has taken without leave. He may, at least, have the satisfaction of knowing, under such circumstances, that every decision of the courts affirming the validity of patents increases the value of those he owns and controls, and that he has thus a direct interest in sustaining all good patents. But then we must make some allowance for human nature, and it certainly does make a great difference in a man's feelings whether he appears as plaintiff or defendant in a patent suit. He often does and says a great many things when he is defending an infringement suit which he would be very sorry to have quoted against him should he ever find it necessary to move for the protection of his own rights and interests. Our patent laws may be susceptible of improvement, but the men to improve them are not found on committees representing cliques of defendants interested in suits brought to recover damages for the wholesale infringement of valid patents. What they have to say may always be taken with some allowance.—*Iron Age*.

Shooting at Balloons.

English papers report some experiments, lately made at Dungeness, which show remarkable success in reducing the efficiency of military balloons. An ordinary service balloon was used, and after it had risen to a height of 800 feet was fired at with an 8 inch howitzer at a distance of 2,000 yards. The gunners were not instructed as to the precise range, but were required to find it for themselves. An 8-inch shell was accordingly fired into the air as a trial shot, and this, despite the novelty of the target, sufficed to supply the gunners with the necessary information. The next shot brought down the balloon. The projectile was a shrapnell shell, and the fuse had been so well timed that the shell burst just in front of the balloon, projecting some thing like 300 bullets through the fabric, and causing its immediate descent.