A Trade Mark Case.

Supreme Court of the United States. The Brown Chemical Company, makers of Brown's iron bitters, *vs.* Meyer *et al.*, makers of Brown's iron tonic. Decided April 6, 1891.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

It is well established that words which are merely descriptive of the character, qualities, or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade mark.

An ordinary surname cannot be appropriated by any one person as against others of the same name, who are using it for a legitimate purpose.

A trade mark with the words 'Brown's Iron Tonic" upon it does not infringe another bearing the words "Brown's Iron Bitters," when the cartons and bottles in which the two medicines were offered to the public were wholly different in size, color, and appearance, and the labels and wrappers were correspondingly different.

The law does not visit with its reprobation a fair competition in trade; its tendency is rather to discourage monopolies, except where protected by statute, and to build up new enterprises from which the public is likely to derive a benefit. It is only when such competition is based upon fraud that the law will interfere.

The right of the owner of a trade mark to assign the same to a partner or to a successor in business, as an incident to its good will, affirmed.

In Holloway *vs.* Holloway (13 Beav., 209), Thomas Holloway had for many years made and sold pills and ointments under the label "Holloway's Pills and Ointments." His brother, Henry Holloway, subsequently manufactured pills and ointment with the same designation. The pill boxes and pots (of ointment) of the latter were similar in form to, and were proved to have been copied from, those of the former. The Master of the Rolls in granting the injunction said:

"The defendant's name being Holloway, he has a right to constitute himself a vendor of Holloway's pills and ointment, and I do not intend to say anything tending to abridge any such right. But he has no right to do so with such additions to his own name as to deceive the public, and make them believe that he is selling the plaintiff's pills and ointments. The evidence in this case clearly proves that pills and ointments have been sold by the defendant, marked in such a manner that persons have purchased them of the defendant, believing that they were buying goods of the plaintiff."

The principle of this case was approved by this court in the case of McLean *vs.* Fleming (96 U. S., 245), in which a person was enjoined from using his own name, in connection with certain pills, upon the ground that they were put up in such form that purchasers exercising ordinary caution were likely to be misled into buying the article as that of the plaintiff. These cases obviously apply only where the defendant adds to his own name imitations of the plaintiff's labels, boxes, or packages, and thereby induces the public to believe that his goods are those of the plaintiff. A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property. If such use be a reasonable, honest, and fair exercise of such right, he is no more liable for the incidental damage he may do a rival in trade than he would be for injury to his neighbor's property by the smoke issuing from his chimney, or for the fall of his neighbor's house by reason of necessary excavations upon his own land. These and similar instances are cases of *damnum absque injuria*. In the present case, if the words are not in themselves a trade mark, they are not made a monopoly by the addition of the proprietor's name, provided, of course, the defendant be legally entitled to make use of the same name as connected with his preparations.

The theory of a trade mark proper then being untenable, this case resolves itself into the question whether the defendants have, by means of simulating the name of plaintiff's preparation, putting up their own medicine in bottles or packages bearing a close resemblance to those of plaintiff, or by the use of misleading labels or colors, endeavored to palm off their goods as those of the plaintiff. The law upon this subject is considered in the recent case of Lawrence Mfg. Co. *vs.* Tennessee Mfg. Co. (138 U. S., 537). The law does not visit with its reprobation a fair competition in trade; its tendency is rather to discourage monopolies, except where protected by statute, and to build up new enterprises from which the public is likely to derive a benefit. If one person can by superior energy, by more extensive advertising, by selling a better or more attractive article, outbid another in popular favor, he has a perfect right to do so, nor is this right impaired by an open declaration of his intention to compete with the other in the market. In this case, the usual indicia of fraud are lacking. Not only do defendant's bottles differ in size and shape from those of the plaintiff, but their labels and cartons are so dissimilar in color, design, and detail that no intelligent person would be likely to purchase either under the impression that he was purchasing the other. There are certain resemblances in the prescriptions and instructions for the use of the respective preparations, but no greater than would be naturally expected in two medicinal compounds, the general object of which is the same.

BATH LIFT FOR THE SICK AND PARALYZED.

Dr. S. A. K. Strahan has described in the London *Lancet* a bath lift for the use of the sick. Our engraving shows the operation of the device, which the doctor indorses in the following words:

"This bath lift, to which I would call the attention of the profession, was designed with a double object: (1) to prevent those accidents which from time to time occur during the bathing of the paralyzed and otherwise helpless, and make the bathing of the most helpless patient by a single nurse at once possible and safe; and (2) with a view to the better carrying out of prolonged immersion—a mode of treatment frequently resorted to at present in various diseased conditions. The accompanying diagram gives a very good idea of the apparatus. It consists of a light, rigid frame supporting a strong net, and raised at the end to form a pillow. This net can be elevated to the level of the top of the bath and lowered at will by means of the handles attached to the revolving bar. A rack-and-pinion arrangement makes it impossible for the net to 'go down with a run,' and the bent crossbars (shown through the net in the engraving) keep the net three inches from the bottom of the bath tub when at its lowest. In use, when the patient is brought alongside the bath, the net is raised, the patient comfortably placed thereon, and gently lowered into the water prepared for him beneath.

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Bathing over, the net is raised again to the level of the top of the bath, the patient rubbed dry, and prepared for bed. Nurses and others who have single-handed attempted to lift a helpless person from the bottom of a bath will be able to appreciate the usefulness of this contrivance. The advantages of the lift in cases of prolonged immersion are many, not the least of which is that the patient is supported in mid-water, his weight being equally distributed, and no portion of his body being allowed to come in contact with the bottom of the tub. Should the patient be delirious or maniacal, the limbs can easily be secured to the net, and all dangerous struggling is obviated. There is sufficient space between the edge of the net and the side of the bath to prevent injury to the fingers should the bather grasp the rods. The apparatus can be made to fit any size or shape of bath, and can be fixed to an ordinary bath in a few minutes. It is also to be noticed that the net and revolving bar can be removed in a moment, so that in a private house the bath may not be monopolized by the invalid. The machine should, I think, prove of great value both in the private house and in the public institution."

A Week without Sleep for a Wager.

At noon on Monday, March 30, in Detroit, Mich., six men entered into a competition to test their ability to do without sleep for a period of 168 hours, or a full week. Four of the contestants had dropped out before Thursday, the two remaining being Townsend, a six day walker, and Cunningham, a ship carpenter. Townsend succumbed on Sunday evening, and the manner of his failure, and the great difficulty experienced by Cunningham in keeping up his vigil for the full period, afford a vivid illustration of the exquisite torture which can be inflicted by forcibly depriving one of sleep. At about 10 o'clock Townsend began to weaken; he walked like a man asleep and reeled about the floor. An hour later he complained that the floor had all at once grown very steep and he could not keep on climbing. He stuck to his task, however, until midnight, when he leaned against the wall for a moment's rest. He was so tired that he fell to the floor. The shock roused him, and he begged the watchman to keep him awake, but it could not be done. Again he reeled about the floor for a few minutes and then with tears in his eyes he said it was all up with him. He could not stand it any longer—he must lie down a minute. Down on the floor he threw himself, and before the watchman could get to him, a full-fledged snore was heard, and he was out of the race.

Cunningham was left alone with a 12 hours' vigil before him. He walked, he sang, he danced and shouted and tried every means he could devise to ward off sleep. Hundreds of people clustered about him to see the last hour pass. "Why did you stop the clock," he almost screamed as the minutes dragged by. At length it was over, and he was conducted to the theater stage and introduced, but before the introduction was over, he was sound asleep. Cunningham lost eight pounds and Townsend six in the match. The men were allowed to sleep in 15 minute naps at the conclusion of their several vigils, and were said to have suffered no permanent ill from their novel contest.

Liquid Fuel for Firing Porcelain.

The large porcelain factories at Limoges have been for a long time studying the question of reducing the price of fuel, the existence of the famous industry being threatened by the excessive cost of firing china. While in Bohemia this is not more than $2 per ton, and in England $2.60, at Limoges the cost was $6.90. In order to compete against this immense advantage, wages were reduced to the lowest minimum, and still the manufacturers, in many cases, lost money. The coal that is employed is necessarily costly, as a smokeless, long flame variety is required. Many of the factories burn wood only, as that produces a purer white than the very best kinds of coal. Wood, however, is dearer than coal, and is consequently only used in firing the muffles and in the finest grades of porcelain. Under these circumstances one of the most progressive houses in Limoges was induced to employ petroleum or residuum oil as a fuel. To accomplish this an American firm using the Wright burner was requested to come and make a trial with the fuel. The results were far better than anticipated. No gases or smoke in any way discolored the china, which came from the kiln much whiter and in better condition than when it is fired with the best of wood. In the muffles there was a most decided advantage. The delicate colors, which show at once the presence of the slightest quantity of gas, were perfect. This new discovery, according to a recent consular report, promises to revolutionize the whole porcelain industry. It is estimated that by employing these oils there will be a reduction of about 15 per cent or 20 per cent in the making of china. The only question now is the present classification of residuum oils, as the present duty on petroleum (120 francs per ton) is prohibitive, but strong pressures are being brought to bear on the government now to have fuel oils classified as fuel, which pays only 1·30 francs per ton.

The Inventors' National Association.

Referring to the organization of the National Association of Inventors and Manufacturers, an outcome of the recent patent centennial celebration, the *Electrical Review* thinks every inventor should take a hand in this matter. The immediate work to which the organization should address its energies should be, first, to cover with its membership every inventor of note in the country, and their concentrated effort should be directed upon Congress to relieve the present congestion in the Patent Office. The Interior Department and Land Office, which have pushed themselves into the building paid for out of the patent fund for the use of the Patent Office, should be ignominiously bounced and Congress should be made to provide them with quarters elsewhere.

While these squatters are grandly occupying the larger part of the building with one desk to two rooms, the Patent Office is literary killing its corps by filling each room with from six to ten clerks and the necessary office paraphernalia. A large amount of sickness and a number of deaths are directly attributable to this cause. All this is hard on the inventor. His cases lie in the examiners' rooms awaiting action. A reduced and insufficient complement of examiners prevents early examinations, danger is invited of rival applications being filed and of expensive interference contests arising.

The association will find work to do in combating a growing opposition to patents among farmers; it is perfectly clear that those offering such opposition do not know on which side their bread is buttered. As was well said by several of the distinguished speakers at Washington recently, there is no other factor of our great national prosperity so large as the fruits of invention. An important object to be attained is the establishment of more liberal international patent laws. We are gradually drifting toward that, but this association can expedite matters by showing the State Department what is needed and how to get it.