

Legal Notes.

EDISON AND THE MUTOSCOPE IN COURT.—The decision which was handed down in the United States Circuit Court of Appeals on March 10, by Judge Wallace, probably marks the termination of a bitter strife that has been waged by Mr. Thomas A. Edison against rival makers of moving picture apparatus. Mr. Edison was one of the first to secure patents on a chronophotographic apparatus. When other manufacturers of similar devices entered the field, a series of legal battles began in which Mr. Edison uniformly triumphed. For years he has received royalties from companies which are said to amount to many thousands a year. The last alleged infringer of the Edison patents to be attacked was the American Mutoscope Company. A decision was first rendered in favor of Mr. Edison in the United States Circuit Court. But the opinion now handed down by Judge Wallace on appeal reverses the decision of the lower court, and declares not only that the American Mutoscope Company has not infringed the Edison patent, but even that Edison invented no new combination worthy of a patent. What Edison claimed was the use of a continuous film upon which the moving object was photographed. In order to refute the claims of Edison to priority of invention, the Court dwelt long and learnedly on the history of chronophotography, and pointed out that as far back as 1864 a Frenchman named Du Cos had invented a moving picture machine very much like Edison's. A similar apparatus was patented in this country in 1866 by Le Prince. The Court said:

"It is obvious that Mr. Edison was not the pioneer in the large sense of the term, or the more limited sense in which he would have been if he had also invented the film. He was not the inventor of the film. He was not the first inventor of apparatus capable of producing single negatives taken from practically a single point of view in single line sequence upon a film like his and embodying the same general means of rotating drums and shutters for bringing the sensitized surface across the lens and exposing successive portions of it in rapid succession.

"Du Cos anticipated him in this, notwithstanding he did not use the film. Neither was he the first inventor of apparatus capable of producing suitable negatives and embodying means for passing a sensitized surface across a single lens camera at a high rate of speed and with an intermittent motion, and for exposing successive portions of the surface during the periods of rest. The predecessors of Edison invented apparatus; no new principle was to be discovered, and essentially no new form of machine invented in order to make the improved photographic materials available for that purpose. The early inventors had felt the need of such material, but in the absence of its supply had either contented themselves with such measure of practical success as was possible or had allowed their plans to remain on paper. Undoubtedly, Mr. Edison, by utilizing this film (not, however, his invention) and perfecting the first apparatus for using it met the conditions necessary for commercial success. This, however, did not entitle him under the patent laws to a monopoly of all camera apparatus capable of using the film."

LEGITIMATE REPAIR OF A PATENTED MACHINE BY A PURCHASER.—That the purchaser of a patented machine has the right to make necessary repairs, which are legitimate, without encroaching upon the patent, would seem to be a principle founded upon common justice. But at what point legitimate repair ends and illegitimate reconstruction begins is a matter that has given our Federal courts no little trouble. Recently the question came up once more before the Circuit Court of Appeals for the First Circuit, in the case of Good-year Shoe Machinery Company vs. Jackson. The very scholarly opinion handed down by Judge Colt in favor of the defendant is so shrewd a commentary on the right of repair that a digest of his views may be of some interest to our readers.

The point to be decided is not whether the purchaser has a right to make repairs, but how far that right may be exercised. When the patent is for a single thing, such as a knitting-needle, obviously the renewal of an old needle in a knitting-machine is not repair, but a reproduction of the patented thing. When the patent is for a device embracing a combination of several elements a purchaser will infringe by reconstructing the device after it has fulfilled its purpose and is substantially destroyed. When the patent is for such a machine, the question of infringement by the purchaser will depend upon the condition of the machine—whether it be only partly worn out, or entirely worn out and so beyond repair. In the case of a patent for a planing-machine composed of many parts, it was held that the renewal of the rotary knife, or the effective ultimate tool of the machine, was repair and not reconstruction. In the case of Wilson vs. Simpson (9

How. 109) the Supreme Court states two fundamental principles on which the rights of a purchaser of a patented machine are based: (1) the right of the owner to renew a material part of the patented combination; (2) and the right to renew a part of the machine that, it was known, would quickly wear out, such renewal being necessary to the continued use of the machine, and therefore contemplated by the patentee when the machine was sold. In that case the Court said: "When the material of the combination ceases to exist, in whatever way that may occur, the right to renew it depends upon the right to make the invention. If the right to make does not exist, there is no right to rebuild the combination. But it does not follow, when one of the elements of the combination has become so much worn as to be inoperative or has been broken, that the machine no longer exists for restoration to its original use by the owner who has bought its use. When the wearing or injury is partial, then repair is restoration and not reconstruction. . . . Repairing partial injuries, whether they occur from accident or from wear and tear, is only refitting a machine for use; and it is no more than that, though it shall be a replacement of an essential part of a combination. It is the use of the whole of that which a purchaser buys when the patentee sells to him a machine; and when he repairs the damage which may be done to it, it is no more than the exercise of that right of care which everyone may use to give duration to that which he owns, or has a right to use as a whole. . . . And what harm is done to the patentee in the use of his right of invention, when the repair and replacement of a partial injury are confined to the machine which the purchaser has bought?"

"Nothing is gained against our conclusion by its being said that the combination is the thing patented, and that when its intended result cannot be produced from the deficiency of a part of it the invention in the particular machine is extinct. It is not so. Consisting of parts, its action is only suspended by want of one of them, and its restoration produces the same result only, without the machine having been made anew."

BRUSH STORAGE-BATTERY SUIT.—Sitting in the United States Circuit Court for the Northern District of New York, Judge Coxe handed down a decision in an action brought by the owners of the Brush patent, the Electric Storage Battery Company, against Eugene W. Belknap, the American Bicycle Company, and the National Battery Company. Few patents have been so frequently before the courts. For more than a dozen years the Brush patent has been the subject of fierce and persistent attacks; invariably has it been sustained. The defendants introduced affidavits tending to show that the electrodes are made by the forming process described by an Italian patent granted to Brush, which patent has expired. The controversy was limited to the single proposition, "Was the defendants' electrode the one described in the expired Italian patent?" The scope of the invention and the construction of the claims had been decided upon in previous litigations. The effect of the expiration of the Italian patent upon the patent in the suit received careful attention both in the Circuit Court and in the Court of Appeals. It was held that the patent in suit covers the pioneer invention of Mr. Brush made prior to the winter of 1880, and that the Italian patent relates to an entirely different and subsidiary invention made in the spring of 1882. The defendants' electrode was made, according to the Court, pursuant to the formula of a patent granted to Elmer A. Sperry, October 23, 1900.

NEW FRENCH PATENT REGULATIONS.—The new ministerial decree which has recently gone into effect has modified the patent system of France in certain important respects.

In order to obtain a patent in France, the invention must be absolutely new, industrially useful, not injurious to the public peace, or to the laws of the country. An invention is not considered new if, prior to the date of filing the application, it has received sufficient publicity in France or abroad to render its imitation easy.

The decree to which we have referred concerns the drawings and description of the invention. The provisions are of such a nature that only a skilled patent attorney can comply with them to the letter. For the first six months of 1902, the decree will not be applied in an absolute manner.

By the law of 1844, an inventor who has obtained a patent must work his invention in France within two years after the date of the patent. The Lyons bench has decided that this working must be real, and that publicity due to the assignment of a patent is not sufficient.

THE ASPHALT CASE.—In 1893, Amos Perkins received a patent for a method of repairing asphalt pavements. In his broad claim he stated that his method consisted "in subjecting the spot to be repaired to

heat, adding new material and smoothing and burnishing it." The validity of this Perkins patent recently came up for determination before the Supreme Court of the United States in the matter of the United States Repair and Guarantee Company vs. The Assyrian Asphalt Company. In the first place the Circuit Court and the Circuit Court of Appeals found that a prior French patent issued in 1880 had anticipated the invention of Perkins, the similarity, if not identity, of the two patents being very manifest. It was claimed that the Perkins method is to be distinguished from the French method because the asphalts to which the two inventions respectively apply differ. The answer given by the Court was that the patent did not support this contention. To devise a machine for applying heat in the proper manner might be invention, but to allow still more, the Court held, would be to give a monopoly of the machine and of that which the machine can do. In view of the prior publications the Court held that the Perkins patent was invalid and that the Assyrian Asphalt Company could not be held to have infringed.

A PECULIAR DRUGGIST'S CASE.—In the Supreme Court of Iowa an opinion has been handed down on a case in which the liability of a pharmacist is defined when he furnishes, without caution or advice, but properly and lawfully labeled, an article called for, and an accident resulting in bodily injury to the purchaser subsequently occurs through ignorance of the dangerous character of the article. The case was that of Gibson vs. Torbert. Gibson, having heard that phosphorus was used as a "harmless illuminant," mailed fifty cents to W. H. Torbert, with the request to send phosphorus to that amount. The druggist bottled the phosphorus properly, labeled the bottle as prescribed by law, and expressed it to the plaintiff. Ignorant of the nature and properties of phosphorus, Gibson, when he received the package, opened it, and examined the contents with his naked hand. One of the sticks fell, and as he stooped to pick it up spontaneously ignited, thereby setting fire to the remaining phosphorus and thereby severely injuring him. Suit was subsequently brought against Torbert to recover damages for the injuries sustained. When the case first came up Torbert demurred and was sustained. The case was then carried to the Supreme Court of Iowa and the Court below was sustained, no negligence having been proven on Torbert's part.

FRAUDULENT IMITATION.—A preponderance of the testimony showed that defendant manufactured bitters and sold the same in bulk as Hostetter's Bitters, which were manufactured only by complainant in accordance with a secret formula, and advised purchasers to put the same in empty Hostetter bottles, which evidence was reinforced by testimony of a statement made by defendant's employé that he manufactured the bitters sold by defendant in imitation of complainant's, and by the fact that defendant failed to produce such employé as a witness, without any adequate excuse. Held—that such evidence was sufficient to sustain complainant's charge of fraud and unfair competition. *Hostetter Co. vs. Conron*, 111 Fed. Rep. (U. S.) 737.

EVIDENCE OF COPYRIGHT INFRINGEMENT.—Infringement of a copyright may be shown by all kinds of evidence, and especially by the resemblance between the two works; but the presumption resulting therefrom is not so strong where the work consists of compilations of facts and statistics taken from books on which the copyright has expired. When, in addition to the resemblance between a copyrighted book and one which is claimed to infringe it, there is shown an intent on the part of the author of the second work to appropriate the labors of the author of the first work, the presumption which results therefrom constitutes proof of infringement. *Beauchemin vs. Cadieux*, Rep. Jud. Que., 10 B. R. (Can.) 255.

INFRINGEMENT OF TRADE MARK.—Plaintiff's trade mark, consisting of two fields united by a bar wider in the middle than at its ends, and of a Maltese cross, with a stag's head on its face, placed over the bar, was infringed by a trade mark of two fields joined by a bar, especially similar in outlines to plaintiff's, only it was inverted, and had above the bar an enlarged stag's head, without the Maltese cross. It was immaterial, as affecting the question of infringement, that the respective trade marks bore the respective names of the plaintiff and defendant. *Dunlap & Co. vs. Young*, 74 N. Y. Supp. 184.

ASSIGNMENT OF PATENT.—The assignee of a patent right, for a limited period with the right of purchase, who at the expiration of such period elects not to purchase and reassigns the patent, cannot thereafter sell the patented article, though made by him during the time he was assignee, as his right to make and sell is to be restricted to the period limited. *Bennett vs. Wortman*, 2 Ont. Law Rep. (Can.) 292.