

Legal Notes.

INVENTION AND MECHANICAL SKILL IN ADAPTATION.—No doubt it is not every slight advance in an art, such as is constantly being made by mere mechanical skill and adaptation, that is to be considered invention. It is at the same time recognized that the impalpable something which is said to distinguish invention from simple mechanical skill is not easy to discriminate and define, and in the attempt to judge it after long lapse of years the courts are in danger of being misled by the increased intermediate knowledge. One criterion of invention is that others have sought and failed, even where the process is so simple, when discovered, that many believe they could have produced it, if required.

These circumstances were all deeply considered by the Circuit Court in deciding the recent case of Hanifen vs. Armitage (117 Fed. Rep. 845). That case was a suit for infringement of letters patent for a knitted fabric issued to Levi Bywater on December 13, 1887. The patent has been the subject of marked vicissitude. It was first sustained by Judge Dallas in Hanifen vs. E. H. Godschalk Company (C. C. 78 Fed. 811), but upon a rehearing, on account of certain expert evidence, by which he felt himself controlled, he decided against it. On appeal, however, he was reversed, and the patent upheld, although the Court of Appeals was not unanimous, Judge Butler dissenting from the views of Judge Shiras and Judge Acheson, who constituted the majority (28 C. C. A. 507, 84 Fed. 649). The patent came up again before Judge Gray in Hanifen vs. Lupton (C. C. 95 Fed. 465) where its validity was conceded, the suit being defended on other grounds. Next the patent appeared in the second circuit, and was sustained by Judge Townsend in a well-considered opinion (Hanifen v. Price, C. C. 96 Fed. 435); but he in turn was reversed by the Court of Appeals of that circuit in an opinion by Judge Shipman, and the patent declared invalid (42 C. C. A. 484, 102 Fed. 509). On account of these conflicting decisions in the two circuits, the Supreme Court allowed a certiorari in the latter case, and it was supposed that the matter would be thus put at rest. But again there was a serious difference of views, which resulted in an affirmance by an equally divided court. Such an affirmation establishes no precedent or principle, for a particular circuit.

The patent was issued in 1887 to Levi Bywater, and, according to the second claim which is the one in controversy, the invention is declared to be "a knitted fabric, composed of face and back yarns of different materials, the face yarn being looped at regular intervals and on alternate stitches of adjacent rows of the back yarn, and being matted and curly, and having a smooth back, whereby the said fabric has the appearance of looped or Astrakhan cloth as described."

In the specifications which precede, the invention is said to consist of "a new and improved textile fabric having the face yarn thereof looped on the stitches of the back yarn; . . . the said face, which is formed of mohair, worsted, or other yarn, being beat up so as to present a wavy or curly surface, and the back, which is formed of woolen or other yarn brushed so as to present a smooth surface, the fabric having the appearance of looped or Astrakhan cloth." In carrying out his invention the patentee declares that he employs a circular knitting machine, a partial description of which he gives. In the operation of knitting the fabric he says that the thread by which the rough face or Astrakhan effect is produced is so placed upon the needles by the backing-wheels as to be alternately in front of and behind two needles, the backing-wheels being so set in a four-feeder machine that for successive rows of the fabric they alternately press back different needles, thus forming the loops on alternate stitches of adjacent rows. It will be thus seen that the patent is distinctly for a textile fabric of specific character and designated structure. It is not for the process by which it is made, nor the machine for making it, each of which is referred to merely to aid in describing it. The question, therefore, on which the validity of the patent depended was whether the fabric was new, or had been previously, in whole or in part, anticipated. On this question it was brought into comparison with the prior British patent of James Booth in 1881. There were other references, but, without stopping to discuss them, the case seemed to turn on this one. Unquestionably imitation Astrakhan existed before either of these inventions; but it was the woven, and not the knitted article, which Bywater was the first actually to produce. As said by Judge Dallas in his first opinion: "Knitted Astrakhan was created by Bywater, and this he accomplished not by merely applying the skill of the knitter to effect a change in either of their (i. e. prior) products, but by the exercise of his own inventive faculty." That is the whole case in a nutshell, and it is abundantly sustained by a proper consideration of the matters involved. Booth did not aim to knit Astrakhan,

and his patented invention, unaided, was not calculated to do so. What he claimed to have invented was simply a novel description of looped fabric of ornamental appearance, whatever that might mean.

Bywater, by a wise choice of yarns and continued mechanical improvement, succeeded in presenting to the public an attractive fabric, and had the great merit of being patient in the work of mechanical development, but the inventive idea was absent.

No knitter had produced Astrakhan cloth before Bywater. How then, the court asks, can it be inferred that any skilled knitter could? He could if he had the inventive genius to conceive it as Bywater did, but he could not without it.

It is the structure rather than the appearance which determines infringement, or rather the appearance and the structure combined, the latter being the controlling feature. Turning to the patent and analyzing each term, the court found that the looping of the face yarn "must be at regular intervals and on alternate stretches of adjacent rows of the back yarn." Admittedly these terms are not technical and are to be construed according to their ordinary meaning, in which the opinions of experts are of little aid.

Construing the second claim the court found that the defendant's fabric clearly infringed upon it in the main. A decree was drawn holding the patent valid and referring the case to a master to take an account.

A CHROMO-LITHOGRAPH COPYRIGHT DECISION BY THE SUPREME COURT.—In the case of Bleisten against the Donaldson Lithograph Company, the Supreme Court of the United States decided that three chromo-lithographs, designed by employes of Bleisten to advertise "The Great Wallace Shows," were entitled to protection of the copyright law, and that Bleisten was entitled to an injunction restraining the Donaldson Company from reproducing them. This was a reversal of the judgment of the Sixth Circuit Court and of the Circuit Court of Appeals. Justice Holmes delivered the opinion of the Court. In construing that section of the Revised Statutes which allows a copyright, the Court held that chromo-lithographs are pictorial illustrations. The word "illustrations" does not mean that the pictures must illustrate the text of a book, and that the etchings of Rembrandt or Steinlas' engraving of Madonna di San Sisto could not be protected to-day if any man were able to produce them. And yet that does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to "illustrations of works connected with the fine arts" is not works of little merit or of humble degree or illustrations addressed to the less educated classes; it is "prints or labels designed to be used for any other articles of manufacture."

Certainly, works are not any the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use—if use means to increase trade and to help to make money. A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement. And if pictures may be used to advertise soap, or the theater, or monthly magazines, as they are, they may be used to advertise a circus.

The Court was of the opinion that the plaintiff had rights entitling him to the protection of the law. Justice Harlan delivered a dissenting opinion, in which he said that mere advertisements were not such works of art as were contemplated by the copyright law.

EFFECT OF EXHIBITION OF A PAINTING WITHOUT NOTICE OF COPYRIGHT.—In the case of Werckmeister v. American Lithographic Company et al (117 Fed. Rep., 360), an artist transferred to complainant the copyright in his picture, and complainant caused the picture to be copyrighted in this country. Furthermore, the complainant published copies, all of which bore notice of copyright as required by the statute. After the transfer, the picture was publicly displayed at the exposition of the Royal Academy of Arts at London, for several months, without notice of the copyright. Thereafter, the defendants published copies of the picture. The complainant sought to restrain further publication.

Assuming that the artist, by the transfer, authorized the complainant to procure the copyright, then, the court said, it would follow that the complainant had the right to do precisely what the artist himself could have done, and that his rights were subject to the same burdens. The author and proprietor of a painting cannot enable another to take the copyright, reserving to himself the painting, and therefore releasing the assignee from a statutory duty. The statute commands that the subject of the copyright—here the painting—shall, if displayed, bear the notice.

The complainant could not arrange to procure the copyright in his own behalf, leaving the painting with the artist and proprietor, and rid himself of the responsibility which the statute places upon the owner of the copyright, viz., that the painting, if publicly displayed, shall bear the requisite notice. The rights and obligations of the complainant are those

conferred and imposed by the statute upon the author, designer or proprietor. It is true, that the artist, by displaying the picture has wronged the complainant; but he has also misled the public, and has been able to do this by the failure of the complainant to see to it that the duty imposed by the statute was fulfilled. In short, the statute gives to the assignee what it gives to the assignor, and no more, and all conditions subsequent that would operate against the assignor are equally effective against the assignee. The duty demanded by the statute has not been performed, and it is to be presumed that in consequence of such non-fulfillment, the persons intended by the statute to be warned that the painting was copyrighted, have not been so advised, and have acted accordingly. The motion for a preliminary injunction was denied.

THE WERNICKE "ELASTIC" BOOK CASE PATENT INVALID.—The Globe Wernicke Company brought an action against the Fred Macey Company for infringement of letters patent granted to Wernicke for sectional bookcases. The bill was discussed by the Circuit Court, and an appeal taken to the Circuit Court of Appeals (119 Fed. Rep. 696). In his patent application, Wernicke stated that his invention was a sectional bookcase of such construction that each section may be collapsed and shipped in a knockdown condition, and afterward readily assembled by the person to whom it is sold. A particular construction of the door, back, and other parts of a section and the combination of these parts was also described and claimed. The general plan of his bookcases consists in building cases for each row of books intended to be accommodated, separately, in the form of a long box opening at the front by a glass door hinged by a hook under the top of the case on a pin projecting in from the body of the case at each end, and normally hanging down and closing the case, but adapted to be turned outward and upward from the bottom and pushed back over the pivots through grooves on the inside of the case, to accommodate the removal and replacing of the books standing in the case. These doors have a strip of felt fastened to the inner edge of the top rail to close the opening and keep out the dust and air. The cases are of equal length and otherwise of such conformity that they may be piled one above the other, and the tiers placed end to end, and having interlocking dovetailed attachments at their ends, and having also two strips lengthwise on the bottom, and a corresponding single strip lengthwise of the top, adapted to fit between the two bottom strips of the next section above, by which they are secured together and made to present an even front. They could be piled as high or extended lengthwise to such an extent as is desired. Metallic strips are fastened around the ends and front corners of the case at the bottom, extending downward so as to shut down outside of the top of the case below, on which strips the interlocking attachments above mentioned are fastened. Suitable bases and caps are provided, but they constitute no part of the invention.

After an examination of prior patents the court was satisfied that it was a well-known method of attaching and using a door to hinge it at the top by an ear or other form of pivot over which the door was raised and pushed back, sometimes in guides on the inside of the case, and sometimes with the pin or grooves on the opposite members. Such devices have been employed, and so far as the court could see the form of hinge employed by Wernicke was old. After a full and careful consideration of the patent on which the complainant relied, the court felt constrained to reach the conclusion that it exhibited nothing more than a judicious selection of well-known devices, obvious in their purposes and putting them into the construction of bookcases and that there was nothing of the quality of invention in any part thereof. Given the idea of sectional bookcases the imposition of one upon another and the lateral extension of these bookcases by duplication of the tiers, all the expedients employed in carrying out that idea were borrowed and not invented. In the Court's opinion the things borrowed were close at hand and had already been discussed. The opinion of the Circuit Court was affirmed and claims 12, 15, 16, 17, 18, 19, and 20 were held to be void for lack of invention.

To sustain a patent for a new use of an old process, there must be some change in the manner of application or some result substantially distinct in its nature. If the new use is so nearly analogous to the former ones that the applicability of the device would occur to a person of ordinary mechanical skill, it is only a case of double use, and no invention is shown.

While a patent for a combination is not infringed if any one of the elements of the combination is omitted, a change in the form or the location or sequence of the elements will not avoid infringement, where they are all employed to perform the same functions, unless form, location, or sequence is essential to the result or to the novelty of the claim.