

## Legal Notes.

**A RAILROAD SWITCH PATENT IN COURT.**—The case of Pettibone, Mulliken & Co. against the Ajax Forge Company (118 Fed. Rep. 733), recently decided by the Circuit Court of Appeals for the Seventh Circuit, brings out an interesting state of facts. The patent in suit was one granted to Strom on August 18, 1891, for a switch. In a split switch the movable rails are planed to a point, respecting their width. The point-rails are coupled by a tiebar, which, by means of its connections with the lever of a switch-stand, throws the switch. As the switch is set for the main or the side track, the appropriate point-rail should be brought into close contact with its adjacent stationary rail, while the other should stand several inches away from its fixed neighbor. If the contact is not close, the flanges on the wheels of engines and cars are likely to cause disaster. By the wearing of the rails, and of the bolts and nuts used in connecting them to the tiebar, as well as by the accidental bending of the tiebar, or other disarrangement of parts, the original fixity of relation between the point-rails becomes impaired, and the switch is made dangerous. At least twelve years before the Strom patent was granted, means were employed for spreading the point-rails to take up lost motion.

Three claims were made, the first covering in combination a split switch and a connecting medium for the switch rails, adjustable lengthwise thereof; the second covering in combination, a split switch and a tiebar connecting the switch rails and adjustable lengthwise thereof to set the gage; and the third claim covering in combination, a split-switch and a tiebar extending obliquely between and connecting the switch-rails and adjustable at one end lengthwise of the adjacent rails to set the gage. None of these specific devices was ever made or used. Appellant marketed split switches made under the Strom patent of 1891, and under a patent granted in 1895. The former is called the "Channel" switch; the latter is referred to as the "Transit" device. In the "Channel" patent, guard-rails are rigidly attached to the switch-rails and extend some little distance beyond the points. The extensions are bent inwardly toward each other in the plane of the rail-flanges. The spreading of the switch-rails is accomplished by moving a bar forward into the throat of the convergence, and fastening it by means of plates that slide along the web of each rail, and are attached thereto at the proper point, in a series of bolt-holes. In the "Transit" construction, to each switch-rail is rigidly fixed a plate that extends inwardly in the plane of the rail-flanges. In each plate is a series of holes in a right line that runs obliquely to the line of the rail, toward either the point or the heel of the rail. The switch-rails are spread by moving a bar forward and bolting it at the proper points in the plates.

The appellee manufactured split switches under the Bradley patent of 1900. To each switch-rail is rigidly fixed a plate that extends inwardly in the plane of the rail-flanges. In each plate is a circular opening with notched circumference. In the opening fits a toothed disk that has an eccentric bolt-hole. A bar, having its jaws at each end, is securely bolted, through the eccentric holes, to the disks and plates. The separation of the switch-rails to compensate lost motion is effected by changing one or both eccentric bolt-holes to a point further removed from the rail.

In affirming the decree dismissing the bill the Court remarked that in the bottom of appellee's argument was to be found the contention that each of the claims sued on is generic and covers every construction in which the connecting medium between the switch rails is used to separate them by being moved lengthwise the rails.

The Court cites several patents to show how old this device of Strom's is. The Court found that the first and second claims were not infringed because the appellee's device was not within the alleged new way, depending for its efficiency solely upon the normal convergence of the switch-rails. The third claim was not infringed because it was in the old field and must be limited to the means stated.

**TESLA "SPLIT PHASE" PATENT DECLARED INVALID.**—The Westinghouse Electric Manufacturing Company brought an action against the Catskill Illuminating and Power Company, alleging infringement of two patents granted to Nikola Tesla, December 26, 1893. The Circuit Court sustained both patents, and found infringement of both claims of the one patent and of the first claim of the second patent. An appeal was taken by the defendant, the result of which was that the Circuit Court's decree was reversed.

The two claims of the first patent in issue (511,559) are as follows:

"1. The method of operating motors having independent energizing circuits, as herein set forth, which

consists in passing alternating currents through both of said circuits and retarding the phase of the currents in one circuit to a greater or less extent than in the other.

"2. The method of operating motors having independent energizing circuits, as herein set forth, which consist in directing an alternating current from a single source through both circuits of the motor and varying or modifying a relative resistance of self-induction of the motor circuits and thereby producing in the currents differences of phase as set forth."

The first claim of the second patent in issue (511,560) is as follows:

"1. The combination with a source of illuminating currents and a circuit from the same, of a motor having independent energizing circuits connected with the said circuit and means for rendering the magnetic effects due to the said energizing circuits of different phase, and an armature within the influence of the said energizing circuits."

The system of operating electrical motors by means of alternating current from a single original source covered by these claims is technically known as the "split phase system."

Tesla was the inventor of what is known as the polyphase system of transmission, which he covered in earlier patents and applications for which were filed during the fall and winter of 1887 and the winter and spring of 1888. Patents were finally issued May 1, 1888.

By the methods and means described in the patents in suit Tesla dispensed with one of the line circuits and was able to run a motor by means of an alternating current from a single original source, which was accomplished by the process and by the apparatus described in the claims cited, the phase of the current in all circuits being so retarded, or the relative resistance of the motor circuits being so varied as to maintain the necessary difference of phase in the circuits. This utilization of a single original source by splitting a single current into two currents was an improvement of great practical value.

On April 22, 1888, there had been published in Milan, in an Italian journal, a report of a lecture by Prof. Galileo Ferraris, in which the system covered by the patents in suit was fully described. In the opinion of the court this printed publication was such a disclosure of the subject-matter of the patents in suit that, if prior thereto, it would constitute an anticipation. Witnesses were introduced by the complainant to prove that Tesla was not anticipated by Galileo Ferraris. The testimony offered was not very satisfactory to the court. In view of the inadequate testimony offered of priority on Tesla's part, the court held that Tesla did not prove that his invention antedated that of Galileo Ferraris.

**PATENTS AND THE ANTI-TRUST LAW.**—The General Electric Company brought an action against Wise (19 Fed. Rep. 922) for an infringement of the Tournier patent No. 559,232 for an incandescent lamp socket. The defendant set up an alleged anticipation by the Weston socket and the Westinghouse push button socket. The court, however, held that both of these latter devices failed to accomplish the result sought and obtained by the devices of the Tournier patent. It is a well-known principle of patent law that a patent for an invention which successfully accomplishes a useful result is not void for anticipation or prior use because of the prior device, however similar in combination or close in resemblance to that of the patent, where such device was not operative and failed to produce the result sought, which result is, however, produced by the device of the patent. The defendant in this suit set up as a defense that the complainant is a member of a combination in violation of the anti-trust law of July 2, 1890. But the court held that even this circumstance did not give the third person the right to infringe a patent of which the complainant was the owner; nor did it preclude the complainant from maintaining a suit in equity to enjoin the infringement.

**THE KODAK CASES IN ENGLAND.**—The verdict in the long and closely contested suit by the Eastman Kodak Company against several English manufacturers for alleged infringement of their registered trademarks, "Kodaks," "Brownie," "Bull's Eye," etc., has been rendered. The decision of the judge, Mr. Justice Swinfen Eady, who took great pains to bring out all the points in the case on both sides, is wholly in favor of the Kodak Company and is so succinct and far-reaching in its scope that it is thought there will be no appeal. Briefly stated, the bone of contention was that when customers of certain houses asked for a "Brownie" film or a "Bull's Eye" film, meaning, of course, a film to fit a Brownie or Bull's Eye camera, they were supplied with other makes of film which were got up in size and requirements to fit these cameras. The Kodak Company stated in their complaint that they had no objection to the general use of the trade names, which they claimed as their own property, if they were used in a certain manner. For example, if the film was

said to be a film for an F. P. K. or Brownie as the case might be, but if a customer asked for a "Brownie" film he must be supplied with a Kodak make of film. The decision of the judge was fairly rendered and establishes a precedent. Having coined certain words and registered them as descriptive of certain goods of their own manufacture and created a demand by extensively advertising the same they are justly entitled to protection in the benefits to be derived therefrom.—Am. Amateur Photographer.

**AN ENGLISH FELS-NAPHTHA TRADE-MARK DECISION.**—Before Mr. Justice Byrne in the Chancery Division, the case of Fels against Hedley & Co. recently came up for hearing. The old question was raised as to the right of a manufacturer to appropriate a word in common use for the purpose of describing his goods. The plaintiffs were the well-known American soapmakers, who introduced both in the United States and England a household soap widely advertised by the name "Fels-Naphtha." The defendants subsequently introduced a soap which they called "Ladybird Naphtha Soap." Both articles were widely sold. The plaintiffs sought to restrain the defendants from designating their goods by any title in which the word "naphtha" formed part, unless precautions were taken clearly to distinguish their goods from those of the plaintiffs. It was contended that the words "naphtha" and "naptha" in connection with soap had come to be used by the public to denote Fels-Naphtha soap and no other. The court, however, was of the opinion that the word "naphtha" as applied to soap was a descriptive word, and had not acquired the particular meaning which the plaintiff claimed. An injunction was, therefore, refused.

The English law upon this subject of trade names is much the same as in this country. In a case which came before the House of Lords in 1899, Lord Davey said that "a man who takes upon himself to prove that words, which are merely descriptive or expressive of the quality of goods, have acquired the secondary sense to which I have referred, assumes a much greater burden—and, indeed, a burden which it is extremely difficult to discharge—a much greater burden than that of a man who undertakes to prove the same thing of a word not significant and not descriptive, but what has been compendiously called a 'fancy word.'"

**THE RIGHT OF PRIVACY.—UNAUTHORIZED USE OF PORTRAITS AS TRADE-MARKS PROHIBITED BY STATUTE.**—The Rochester Folding Box Company case has called forth so much criticism that the Legislature of the State of New York has felt compelled to pass an act prohibiting the use of the name or portrait of any living person for purposes of advertising or trade without the written consent of such person. An injunction may be obtained and suit may be brought to recover damages for any injury sustained by reason of such use. If the defendant shall have knowingly used a name or portrait in the manner forbidden, the jury may use its discretion in awarding exemplary damages.

The question presented by the case was by no means new. It had been decided time and time again in the same way in this State. The court simply held that the right of privacy has as yet received no judicial recognition. Even if it had received judicial recognition, it would not be within the province of a court of equity to protect it; for a court of equity cannot protect absolute personal rights. The so-called right of privacy is founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others or his eccentricities commented upon in handbills, circulars, catalogues, periodicals, or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors whether the comment be favorable or otherwise.

Obviously, if a court of equity could logically protect such an absolute right by injunction, a vast amount of litigation would result bordering upon the absurd. A court of equity would then be compelled to restrain the publication of libels, or in a word to assume quasi-criminal jurisdiction, which it never had and which it was never intended that it should have. The statute which has been passed gives a court of equity the power which it has hitherto lacked, and which will prevent the unauthorized use of any person's picture for advertising purposes.

When infringement would necessarily or naturally result from the ordinary use of a device, a defendant cannot escape liability for infringement merely by showing the possibility of a different use. The decisive question is whether the operation of the alleged infringing device when in use is the same and produces the same results.

An idea is not patentable, but only the particular mechanical device or combination for carrying it into effect.