

## Legal Notes.

**TWO DESIGN PATENTS CONSTRUED.**—Suit was brought by Christopher C. Bradley against Richard Eccles (Bradley vs. Eccles, 122 Fed. Rep. 87) for the alleged infringement of two design patents issued to the complainant and owned by him. One design patent covered thill couplings, the other a washer for thill couplings. The former was granted on May 29, 1900, the later on May 10, 1898.

Section 4929 of the Revised Statutes in force at the time of the commencement read as follows:

"Any person who, by his own industry, genius, efforts, and expense, has invented and produced any new and original design for a manufacture, bust, statue, alto-relievo, or bass-relief; any new and original design for the printing of woolen, silk, cotton, or other fabrics; any new and original impression, ornament, patent, print, or picture to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful, and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon payment of the fee prescribed, and other due proceedings had the same as in cases of inventions or discoveries, obtain a patent therefor."

Both of Mr. Bradley's patents were taken out for designs for a manufactured product and purport to be new and original designs for a manufacture, and new, useful, and original shapes or configuration of articles of manufacture, and that they were not known or used by others before their invention or production.

The court thought that a thill coupling is a manufacture, and that a washer for a thill coupling is a manufacture could not be successfully denied; and that a new and original design for such a manufacture was within the statute. While the patent granted under this section was for the design of a manufacture or article, such design was not rendered unpatentable, or placed without the statute, for the reason that the article of manufacture to which the design related, and which was manufactured according to the design, was an article of use in some branch of industry.

In the opinion of the court, it mattered little whether the new and original design, or new, useful, and original shape or configuration, of an article of manufacture, is applied to ornamental wall paper, pictures, or any other manufacture intended simply for ornament, or to the picture frame intended to hold the picture in place, or to a window intended to light a house or church, or to a plow or hammer used in agricultural and industrial pursuits. All are equally within the statute, and were intended to be.

"The carpenter who sings while he swings his hammer admires the design of the instrument he is wielding; that is, the appearance presented to his eye and created by imposing on the physical substances constituting that instrument a design which gives to his hammer some peculiar shape or ornamentation that makes it pleasing to his eye. The plowboy who whistles as he follows in the new-turned furrow admires and is impressed by the design of the plow that turns the sod, which is nothing more or less than the appearance presented to the eye and created by imposing on physical substances making the plow some peculiar shape or ornamentation."

"Nor can it matter," in the judgment of the court, "that the new and original design for a manufacture, or the new, useful, and original shape or configuration of the article of manufacture is designed for use in some obscure place. Primarily, it comes from the hands of the manufacturer, and is placed upon the shelves of the shopkeepers for sale, whence it passes into the hands of purchasers and users, and so is observed, and, if of a new and beautiful design, admired, not only by all patrons of the shop where kept for sale, and by all would-be purchasers, but by all who use the article thereafter, or observe it while in use. Common experience teaches that the element of beauty or tasteful construction adds largely to the salability, and hence to the value, of the most common articles in use by the human family. A harness is used upon a horse for the purpose of attaching to such animal the vehicle in which the driver is to be seated, and, so far as mere use is concerned, it matters little as to the design of the harness, but who would think of denying that the harness beautifully designed is within the statute? Who would think of denying that a new, useful, and beautiful design for a buggy is not within the statute? If this be true, then each and every part of such vehicle, if handsomely designed, ought to be and must be within the statute. This court is of the opinion and holds that the thill coupling is an appropriate subject for a design patent. This court is also of the opinion that a washer for thill couplings is also an appropriate subject for a design patent. Both are articles of manufacture, and, while

designed for sale and use, it is important to the manufacturer and merchant that the design be pleasing to the eye and ornamental; and it is also important to the user of the vehicle to which they are attached that the design be ornamental. The expense of carriages for pleasure riding is probably double because of the use of designs purely ornamental to the carriage. Carriages are painted in various designs, and this painting is intended to be ornamental. Would not a new and ornamental design for painting a wagon be within the statute? The painting is useful as well as ornamental, but double the money is frequently paid for ornamental painting, where the utility is not added to in any degree. The complainant's design patent for his thill coupling is new, taken as a whole, and in its design is ornamental to the carriage and pleasing to the eye, in and of itself. Both singly and in combination with the carriage it is new, useful, and ornamental. Hanging by itself upon the wall of a house, it would not be ornamental as part of the house; but, hanging by itself as an article of manufacture for use as part of a carriage, it is ornamental, and at once attracts the attention and excites the admiration of all who love and admire beautiful vehicles."

The court did not hold that a patent must be ornamental in the ordinary sense in which that word is used; that is, that it must be an ornament in a parlor or room of a house or an ornament solely upon a vehicle with which it is used, or ornamental if worn by a person. The court was of the opinion that the statute, even as amended May 9, 1902, means that "the design or form for the article of manufacture is to be such that it is ornamental when offered for sale in the market, if designed for sale in the market, or ornamental in the place where used, and that the statute is satisfied if it be ornamental in either place. If a design patent for a washer for thill coupling looks fine and handsome (that is, ornamental), and if it produces this effect upon the eyes of those who desire to purchase and use such an article of manufacture, and upon all who observe it, and, when observed, produces pleasant emotions in one who has an understanding of and an eye for a thing of beauty, which is a joy forever, whether it be useful or non-useful, because of the design, then it is within the statute and patentable."

The court tersely said that complainant's device for a washer for thill couplings answered these conditions. "No one in a civilized community would think of using a string of them for a necklace. They are not designed to be ornamental in that sense. They would be ornamental, properly strung and hung in a carriage factory, carriage house, or stable. The form in which this washer for a thill coupling is made adds or lends beauty and attractiveness to itself; that is, to the washer. In other words, its design is such that the washer itself, ordinarily not pleasing, or at least not attractive, to the eye, is made a handsome and attractive thing in the eye of all who have a taste for vehicles and their attachments. This washer is not intended as a decoration, but may in places be used as such, and, aside from its usefulness, might add beauty, grace, or attractiveness to the places in which kept for sale or use, or in which carriages are kept for sale or use. The design is such that an unattractive article of manufacture is made beautiful and attractive to the dealer, the trade, and the user, and those who see it in use. It is not intended for exhibition as a mere ornament when completed according to the design, but is intended to be ornamental in its sphere of usefulness, and attractive and pleasing to the senses of all observers, and may be used in the places mentioned as an ornament."

It was held that both these patents were unanticipated, valid, and infringed.

**A SLATE-PICKER PATENT CONSTRUED.**—Two patents were issued in 1888 and 1893 to Septimus Thomas for what is known as a slate-picker, or device for mechanically separating and removing slate and other impurities from coal. These patents were made the basis of a suit of Thomas vs. Spencer (122 Fed. Rep. 877).

The court said that the general principle made use of is the greater weight, and consequently slower motion, of the slate as it passes along with the coal down and over certain chutes or planes of different materials differently inclined, which are so constructed and arranged that the slate is induced to drop into an opening near the end, while the coal leaps over it and goes on. There is nothing particularly new in this, the same idea having been similarly made use of in several preceding structures, including two patented to the same inventor, one in 1875 and the other in 1878. The patents in suit depended for their novelty and validity, not on new features previously used, but on a particular combination of them devised by the inventor to produce the result in mind. The alleged infringement was also to be judged in the same way. The question was not whether the machines constructed by the defendants had anything in common with the patents in suit, but whether they employed the same combination of elements in substantially the same way to effect the same result.

The court said that the mistake plaintiff made consisted in supposing that the adaptation of any element of the patents constituted an infringement, however old such development may be, and without regard to the combination in which it figures.

"The defendants make use, for instance, of a feeder, and they also employ a stone slab as a deflector plate near the end of the chute. But it by no means follows that either of these is an infringing use—both of these devices being old—simply because they are found in the patents in suit. No doubt, in general effect, a rocking or rotary feed, such as those in the defendants' machine, is the equivalent of the reciprocating vertical feed employed by the plaintiff, however much it may improve thereon. But a reciprocating feed actuated by an eccentric in exactly the same fashion as now is an element of the Thomas ore separator, patented in 1878, and was adopted again by express reference in that of 1888, so that when the earlier of these ran out, as it did in 1895, as a device it was open to every one, and the defendants were at perfect liberty to make use of it as they have. The same is true with regard to the slab of slate or stone, of which much seems to have been made. Assuming that the use of a mere material could be so monopolized, which is at least debatable, it is specified as appropriate in such a structure in both of the Thomas patents, which have just been alluded to; so that, if ever otherwise, it certainly now is free. The adjustable opening at the foot of the lower chute stands in exactly the same situation. As to both the patents in suit, therefore, these three things were all old, and no just complaint can be made with regard to the use of either of them as single, independent features in the defendants' machines."

The court held that the claims were not infringed.

**AN INTERESTING TRADE MARK DECISION.**—In the case of Uri vs. Hirsch (123 Fed. Rep. 568), it appeared that a bill was filed by the complainant for the infringement of an alleged trade mark, the complainant asserting that since the 15th day of April, 1892, he was engaged in compounding and selling liquors variously labeled "R. H. Parker Rye," "R. H. Parker Whiskey," "Parker Rye," "Old Park Rye," and "Parker Bourbon." In these names a common law copyright and trade mark was claimed. The bill tendered directly the issue that the defendant's use of the name "Parker" originated in the fraudulent purpose to reap benefit from the reputation of complainant's whiskies, with the allegation that the defendants for a long time had been so engaged. The defendants asserted that they had been engaged since 1879 in the handling, compounding, and selling of liquors in Colorado, in which State they had marked packages of liquor with the name "Old Parker."

The court stated that if it be conceded that the names employed by the defendants designating their whiskies "possessed no special significance as indicating a grade and qualities of goods of class and kind," this would not show such appropriation of the name "Old Parker" as would establish in the defendants a trade mark right. It appeared from the evidence that the only sales known by complainant to have been made by the defendants were two barrels, early in 1901, under the style of "Old Parker." The testimony of the purchaser shows that he understood in making these purchases that the liquor was not from the complainant's house. The court strongly intimated that the complainant's pleading was characterized by utter recklessness of allegation. The trade mark had been published and recorded in the Fifth Kentucky District of Internal Revenue, Nelson County. Many exhibits were produced which showed how conspicuously he had advertised his products.

The court denied the prayer for injunction and dismissed the bill, since it could not be shown that the defendant had fraudulently endeavored to injure the complainant's business.

**SMOKELESS POWDER PATENT CONSTRUED.**—Letters patent were granted June 3, 1890, to Richard von Freeden, for a process for making smokeless gunpowder from nitro-cellulose. The process consisted, first, in completely dissolving the nitro-cellulose by a solvent, and, after it is kneaded or rolled into a plastic mass, in adding a "liquid or vapor chemically indifferent to the constituents of the mass," preferably water or steam, and swelling until complete granulation has been produced. Suit was brought against Dupont de Nemours & Co. by Wolff (122 Fed. Rep., 944), in which an infringement of this patent was claimed. In the Dupont process finely divided nitro-cellulose is distributed uniformly by means of stirring throughout the body of the water or liquid which holds it in suspension. The solvent is then added and the stirring continued, by which means gelatinization or granulation are simultaneously effected. The court entertained some doubt as to the sufficiency of the description of the Von Freeden patent. It held, however, if the patent be not invalid because it does not specify the quantity of water or steam required to produce granulation, it is not infringed by the Dupont process.