

Legal Notes.

AN UNFAIR COMPETITION CASE.—The suit brought by the Enterprise Manufacturing Company vs. Lander, Frary & Clark (124 Fed. Rep. 923) brings out a state of facts which may be considered fairly typical of one class of unfair competition cases.

Complainant for many years made and sold coffee mills of different sizes, each having a distinguishing number, but all of a distinctive shape, design, and color by which they became known to the public and acquired a high reputation and large sale. Defendant, later, began the manufacture of mills of exactly the same pattern, admittedly copying those of complainant in shape and design, and even in coloring, the only distinction being in the numbers used, which were also similar, and in the initials and address of the maker, which were not conspicuous. It was shown that purchasers had in fact been deceived, and had bought and used defendant's mills supposing them to have been made by complainant.

The plaintiff's case came perilously near to being one of trade-mark law, pure and simple. For many years it had, without deviation, so prepared its coffee mills, by the use of various devices constantly employed, that they had come to be generally known as the "Enterprise" mills, and of the plaintiff's manufacture. If it had adopted one distinguishing and identifying mark or device for that purpose, and had succeeded with the one as it has with the many, a trade-mark case would have been presented, upon which a court of equity would have passed. If any mistake had been made, it grew out of the abundance of devices adopted; but, multitudinous as they were, their constant use as an identifying collocation of devices was admitted. Any possible weakness from the standpoint of a technical trade-mark case rendered the situation exceptionally strong, considering the facts of the case presented, from the standpoint of unfair trade and competition.

The boldness and evident sincerity exhibited by the defendant, which may be gathered from its answer and from the brief of counsel, was a refreshing combination. In the answer it said that it was doing what the plaintiff said that it was doing, and that it had an inherent natural right to do so, and proposed to do the things which it was alleged that it threatened to do, and that such action also was right and proper and defensible.

The fallacy of the defendant's contention has been more than once called attention to by federal judges. The plaintiff claimed no monopoly in the manufacture of coffee mills.

"The world at large, and its products are open to the defendant. It can ransack the universe, and, avoiding possible patents, put together and market what it will in the way of coffee mills, with this one exception—it shall not so arrange its materials and so dress its goods as to produce and market a coffee mill which will be liable to be mistaken for the mills upon which, by long and persistent effort, the plaintiff has been enabled to obtain a distinctive reputation."

The whole case resolved itself down to this: Had the defendant, by placing its name in some instances, and in others its initials, upon its coffee mills in the manner shown, sufficiently distinguished them so that likelihood of misconception by the ordinary purchaser, acting in the ordinary way, was eliminated? It failed to prevent one customer from sending the defendant's mill to the plaintiff for repair, and such a demonstration of fact is worth any amount of hypothesis. "If the defendant was excessively anxious to keep off the plaintiff's territory, why did it not make some change in color, configuration, or design? The confusion could have been avoided with ease. He prepared the couch with eyes wide open and he ought to occupy it now with grace. The absolute similarity of the mills in an almost endless variety of ways is so marked, the finger directing the purchaser to the plaintiff is so imperative, that it cannot be possible that the letters on the periphery of the wheels could blot from the ordinary mind the forceful evidence of plaintiff's production which the extremely attractive collocation of colors, shape, and design presents. When the first glance of the eyes fixes the idea of origin firmly upon the mind, a minor detail must in the ordinary case pass unnoticed. By dint of comparison and constant repetition in the quiet of the courtroom, such a detail may grow distinct and exceedingly luminous, but in the crowded store, in the rush and hurly-burly of everyday business life, it would fade into nothingness when opposed to the general attractiveness of the entire structure. That the defendant put into the hands of the retailer or jobber the means of deceiving, whether with or without intention, is too obvious to deserve further discussion."

The injunction granted was narrow enough not to interfere with the inherent right of the defendant to make coffee mills of such design and dress as it pleased to employ, and broad enough to prevent the de-

fendant from marketing a material which, by reason of its shape, design and arrangement of color and number, so resembled the coffee mills of the plaintiff as to be likely to create a misapprehension in the purchasers.

AN IMPORTANT ENGLISH PATENT DECISION.—Before Lords Justices Vaughan Williams, Romer, and Stirling, the case of Davis vs. Curtis & Harvey, Ltd., was brought on appeal for judicial revision. The facts of the case are brief. Davis was the inventor of a new gunpowder for blasting purposes, afterward known as "Argus" powder, in respect of which a provisional specification was lodged in April, 1898. In January, 1899, an agreement was made between Davis and Curtis, Harvey & Co., Ltd., by which Curtis, Harvey & Co. agreed to pay Davis, during the continuance of the agreement, royalties on the manufacture of the "Argus" powder, and it was provided that improvements in and additions to Davis's invention should be within the agreement. Curtis and others were afterward granted letters patent in respect of another gunpowder which afterward came to be known as "Bulldog" powder. Curtis, Harvey & Co. proceeded to manufacture and sell this "Bulldog" powder. Davis thereupon brought an action for royalties under the agreement, contending that "Bulldog" was identical in composition with "Argus" powder, or alternatively, was an improved modification of "Argus," and was subject to the agreement. At the trial it was held that the use of lignite instead of ordinary charcoal as the source of carbon in the composition of the "Argus" powder was of the essence of the plaintiff's patented invention; and that the defendants in manufacturing "Bulldog" powder without using lignite were only doing what all the world were entitled to do and without infringing Davis's patent; and that such manufacture did not come within the agreement; and also that "Bulldog" powder was not an improvement in or addition to the "Argus" invention. The action was dismissed with costs. The plaintiff appealed.

The defendants denied the identity of the "Bulldog" and "Argus" powders; but in the judgment of the Court of Appeal, the evidence fully proved the identity, with the exception that in another invention, disclosed in the complete specification filed by the plaintiff and C. W. Curtis, lignite is designated as the source of carbon. In the complete specification, the inventor points out what quality of lignite is best suited for his purpose, and then states that in case lignite in its natural condition does not conform to his requirements, it may be "subjected to a carbonizing operation at a very low temperature, in order to bring it into the desired condition." In other words, this point is expressly limited, so far as the carbon is concerned, to lignite or to lignite which has been subjected to the carbonizing operation. The argument in favor of the validity of the patent was this: That this patentee, for the first time, had used in connection with a sulphurless powder a new material in the form of carbon, and a new form of carbon, which had a special mercantile advantage, inasmuch as it was cheaper than the ordinary commercial artificially-made charcoal, which was the material ordinarily used in these sulphurless powders.

To the court it was perfectly clear that the agreement which was sought to be enforced in this action did not make the defendants liable to pay royalties on any powder which, admitting the validity of the patent, could be manufactured by anyone without infringing the patent. If any person, notwithstanding the exigencies of this patent, treating it as a valid patent, had taken the plaintiff's powder, but substituted the ordinary charcoal for lignite or lignite carbonaceously treated, that person could use the powder he so made without infringing the patent. That being so, it was clear to the court that the defendants here could have used such a powder under the agreement without paying any royalty to the plaintiff. It was clear, too, that the "Bulldog" powder, not being an infringement of the essence of the plaintiff's invention, there had been no infringement of the patent, for which reason no royalty was payable under the agreement.

The court's decision, therefore, came to this: That the essence of the plaintiff's invention was the use of lignite or lignite subjected to a carbonizing operation, and that the defendant's "Bulldog" powder was not an infringement of the plaintiff's or an improvement or addition to his invention. This was really not so much a patent case as the case of a construction of an agreement.

THE IMPORTANCE OF THE PATENT "CLAIM."—Imagine that a single individual were the originator of wireless telegraphy as it stands to-day. What would his protection depend upon? It would depend finally upon the skill of his solicitor of patents in formulating the claims of the patent. The inventor might be literary, a great scientist, an engineer, and an electrical expert,

and he would therefore be able to explain his invention better than anyone else, and yet, if the description were not according to form, and especially if the solicitor should not have sufficient skill to word the claims properly to protect the invention, the invention would be practically given to the public.

The reason I consider the matter of vital importance, arises from the observation often made in the examination of a patent that is cited as an anticipation of a claim filed later. The first step in such an examination consists in determining if the patent has a claim as broad as the one alleged to be anticipated, for if the patent has such a claim, and is not too old, it is advisable to purchase it, for evident reasons. Too often the claim in the patent is found to be short of its aim. The defect can be remedied, if at all, only by a reissue, which cannot always be possible.

My object is to show the principle underlying the difference between a properly broad claim and a narrow one, so that an inventor, in writing a description of the invention for his solicitor, may define his invention after the manner of a sufficiently broad claim. Electrical inventors are, in the present age, highly educated and should be perfectly competent to define their invention from a broad standpoint, and then the solicitor can improve the wording and form, and supplement applicant's claims by subordinate and perhaps by a slightly broader claim.

The inclination is to leave all to the solicitor, but this is not advisable, because however expert he is, he is not infallible. The attorney is superior on all formal matters, but the client is superior on the merits. The solicitor should acquire as much as possible of the technical points, and the client should have a fundamental knowledge of the nature of claims.

A few years ago there was an inventor who was the first to invent a new rheostat element adapted to be varied. His claim on this feature reads:

"The combination, with a box or case, of a pile of thin sheet-metal resistance plates therein, and a screw for regulating the pressure upon said plates, substantially as specified."

An inventor should not only make the invention in one form, but think of several ways of carrying out the device, and then formulate a definition to cover all the devices. All such devices could, I think, be covered by a claim reading:

"A variable electric resistance, consisting of the combination of a pile of electrical resistance plates, and means for varying the pressure upon said plates."

Another case is that of a photometer for measuring mean spherical candle-power. The method consists in revolving two mirrors about an axis passing through the source of light under such conditions that the light from the source is reflected in different successive angles of a single plane upon the screen of a photometer, and also transmitted in this reflected passage according to a certain simple harmonic law. The broadest combination claim reads:

"In an apparatus for measuring the mean spherical luminous intensity of a source of light, the combination of two revolving mirrors, and means for varying the intensity transmitted to the photometer according to a simple harmonic law."

Why limit the protection to mirrors, leaving a loophole for another inventor to use refraction? Why confine the scope to a simple harmonic law, when the inventors are entitled to broad protection upon any arrangement of reflecting or refracting devices for securing the same result.

The claim could have read as follows:

"In an apparatus for measuring the mean spherical luminous intensity of a source of light, the combination of a photometer, and revolvable devices so disposed as to illuminate said photometer proportionally to the mean spherical candle-power of said source."

This claim would have protected the invention, whether on the principle of a simple harmonic law or some other law. The patent claim is also faulty in the narrow term "two revolving mirrors." Other means could easily be invented, and infringement avoided. If the scope is not defined by a proper wording of the claim, the patent is about as valuable as a house standing on a lot having a defective title.—Edward P. Thompson in Stevens Indicator.

The fact that an invention constitutes an important and desirable improvement in an art, in the development of which many inventors have participated without making such improvement, affords persuasive evidence of patentability.

Equity is without jurisdiction of a suit for infringement, where prior to its commencement defendant had ceased to infringe, and was at that time neither threatening nor intending to continue infringement.

A patent for a device, which states that a part is preferably made of a stated material, is not rendered invalid by the fact that when such part is made of a certain other material the device is inoperative.