

Legal Notes.

THE BATES DRILL PATENT AGAIN IN COURT.—Suit was brought by the American Pneumatic Tool Company against the Philadelphia Pneumatic Tool Company (123 Fed. Rep. 891) for the alleged infringement of letters patent 364,081, granted to A. J. Bates. The defendants stated in their answer that the complainant had no title in the Bates patent. The uncontroverted evidence, however, showed that complainant was the owner. Of the nine claims of the patent, only one, the third, was involved, which reads as follows:

"In the pneumatic drilling tool described, and in combination with the case having an inlet and exhaust port, the cylinder, *D*, having a piston chamber and a valve chamber arranged separate from each other, and connected by means of ports and air passages, the piston, *B*, and valve, *J*, for controlling said piston through the medium of said ports and air passages, substantially as and for the purpose set forth."

The defendants answered by setting up the usual defenses of non-infringement and want of patentability and novelty in view of the prior art.

The Bates patent has been in suit several times before; and its scope has been variously construed in different suits by the Circuit Court of Appeals. In the case of the American Pneumatic Tool Company vs. Fisher (69 Fed. Rep. 467) the claim was considerably narrowed. In the Fisher case the tool under consideration was manufactured by the defendant under patent 472,495 to Drawbaugh. Afterward in the case of American Pneumatic Tool Company vs. Bigelow (100 Fed. Rep. 467) Judge Townsend, considering the validity of the Bates patent and its scope as settled by the Fisher case, granted a preliminary injunction which, however, was dissolved on appeal. The opinion of the court by Judge Shipman, limiting the scope of claim 3, which had previously been accorded a broad interpretation, influenced the court in deciding the controversy under discussion.

Defendants' portable pneumatic tool, alleged to be an infringement of the Bates patent, was manufactured under the Keller patent, 647,415. The Keller tool is extensively used for various kinds of heavy calking and riveting in metals; and its utility has not only been generally recognized, but as a hand tool it has in the last few years gone far toward displacing the hammer and other ordinary hand implements in shops where the arts of metal-working and of drilling in stone, and especially of chipping and riveting in metals, are made industries. Patents were cited by the defendant which were not considered in the previous adjudications, as well as other patents which the court previously had analyzed. From the evidence, and from a careful reading of the decision in the Circuit Court of Appeals limiting and defining the scope of the patent, and from the decision of Judge Townsend in the Bigelow case, the court came to the conclusion that claim 3 is entitled to a narrow interpretation only.

The general parts and functions of the Bates tool can be briefly described. The mechanical functions of the ports or passages or channel ways which are located between the cylinder and the outer inclosing case are to transmit motion and energy between movable portions or mechanical metal parts in the manner as hereinafter stated. The inner case or cylinder is bored lengthwise to provide a chamber or enough space for a movable piston or hammer. The cylinder is also bored crossways at its upper part to provide a chamber or sufficient space for a direct-acting balanced valve. The valve is spool-shaped. The spaces referred to—more properly called the valves and piston chambers—are divided or separated by a diaphragm. The movable parts in the cylinder are the valve above described and the piston or hammer, which are contained in the chamber specially arranged as above stated. The velocity of the valve and reciprocating piston or hammer is governed and controlled by means of compressed air projected against the upper side or rear end of the piston. The piston has through its length a round opening, wherein is firmly secured a movable striker. The striker has an annular flange wedged or fitting tight into the lower end of the piston, and is riveted down at its upper end. From the lower end the striker extends into a hub of suitable space to permit the movement of the striker, which is operated by the movement of the piston. The piston has two annular grooves, which provide space for an inlet and exhaust of the motive fluid. The cylinder, which slides telescopic fashion into the inclosing case or sleeve, has ports, grooves, or channel ways for inlet and exhaust motive fluid, and its surface is a medium in the control of the piston at each end.

An examination of the expert evidence on both sides, together with the drawings, specifications, and exhibits, satisfied the court that the principle of operation of the valve and piston in defendant's device practically attained the same result, but not by the employment

of equivalent means, in view of the narrow scope of the claim upon which infringement depended. Defendant's valve and piston device may be described as follows: The valve is located in a separate box or valve chamber; not, as in complainant's device, integrally with the cylinder or piston chamber, but in a direct line with the piston. The center line of the piston is also the center line of the valve. The movement of the valve is vertical, and in a direct line with the movement of the piston. Thus it will be seen that the Keller valve chamber is contained in a separate piece of metal, and is removable from its place at the upper end of the piston chamber by unscrewing the cap which holds the valve box in place close to the piston chamber. The Keller piston is a solid piece of metal, having a groove which is alternately in connection with live-air pressure near the forward end of the stroke. Both the upward and downward movement of the piston are by means of the air passages and ports leading from the valve chamber to the piston chamber.

Although an expert decided that "the valves in both tools control the application of air to both sides of the piston or reciprocation hammer," it was understood, and correctly, to the court's mind, that the structural dissimilarities of the valve and piston produce a different mode of direct operation. Furthermore, the evidence tended to establish the impossibility of using the defendant's valve and piston in a separated valve and piston, which were described in the patent in suit, without completely changing complainant's tool. Although the operation of defendant's valve and piston practically resulted in the valves' controlling each end of the piston, such valvular control seemed to be a functional result caused by the valve and piston arrangement, which, as already stated, was not strictly equivalent to complainant's device. The bill was dismissed.

UNITED STATES FLAGS AS TRADEMARKS IN NEW YORK.—The Appellate Division of the Supreme Court of the State of New York has decided that Sec. 640 of the Penal Code, which prohibits the use of the representation of the United States flag for the purpose of trade advertisement, is unconstitutional.

The court holds that the section violates not only the State, but also the Federal Constitution, and is an unwarranted interference with personal liberty and an attempt at class legislation. There can be nothing, says the Court, in the use or representation of the Stars and Stripes to belittle or degrade the United States ensign. On the contrary, its depiction and the colors that usually accompany such decoration must inspire a feeling of patriotism.

John H. McPike, the manager of the cigar department of a general store, was arrested some months ago for offering for sale several brands of cigars upon the boxes of which the Stars and Stripes were displayed.

The Appellate Division upholds his release on a writ of habeas corpus, saying that it is nowhere apparent that the defendant's cigar box labels tended to degrade or belittle the flag. The trademark and label adopted by the cigarmakers had been used long before the passage of the amendment to the Code, and had always been considered legitimate. The right to a trademark, says the Court, is a well-defined property right.

While it is plain that the provision of the Code regarding the defilement, mutilation or degradation of the flag comes well within the authority and police power of the legislature, the same cannot be said of the provisions regarding advertisements. If the flag is publicly degraded, says the Court, there is liable to be popular anger and possibly riot. Therefore, the legislature in its police power has the right to make such defilement a crime.

But, continues the Court, the advertisement provisions are unwarranted and unconstitutional. In the first place, they are an unjustifiable interference with the liberty of citizens, and secondly they exercise an unjust discrimination and interfere with commerce.

The law also, says the Court, clearly makes a class discrimination which is unconstitutional, since book publishers, jewelers, stationers, and newspaper proprietors are expressly exempted from its penal provisions.

A WIRE ROPE TRADEMARK DECISION.—The A. Leschen & Sons Rope Company filed a bill in equity against the Broderick & Bascom Rope Company, seeking to enjoin the alleged infringement of a registered trademark which was thus described: "The trademark consists of a red or other distinctively colored streak applied to or woven in a wire rope. The color of the streak may be varied at will so long as it is distinctive from the color of the body of the rope."

Judge Adams of the United States Circuit Court sustained a demurrer filed by the defendant. The court said:

"I cannot escape the conviction at the outset that the mark claimed by complainant is obnoxious to the

first principles of the law governing the acquisition of a valid trademark. At common law the mark must be some symbol or device not descriptive of the character, quality, or composition of an article, or the place where it is manufactured, but such a thing as indicates origin or ownership of the goods.

"One might as well say that a manufacturer of chairs can adopt the diagram of a chair, or that a watchmaker can adopt the diagram of a watch or a stovemaker the diagram of a stove, unaccompanied by any surrounding form, figure, symbol or display, as his trademark."

Referring to that portion of the complainant's description of the trademark in which it says "the color of the streak may be varied at will as long as it is distinctive from the color of the body of the rope, the court says:

"This permissible shifting of the most striking feature of the mark from time to time is in itself fatal to its validity. The fundamental purpose of the trademark is to indicate on sight the ownership or origin of the goods to which it is applied. It must therefore be permanent, the same to-day, to-morrow and at all times, otherwise its legitimate purposes cannot be subserved and the public may readily be deceived."

Quoting from Brown on trademarks the court says:

"We can describe and recognize a Maltese cross, a diamond within a circle, a five-pointed star, a flag of fixed proportions, having a certain number of stripes and stars or national emblems. Then color may well be a valid essential constituent, but it is hardly within the range of possibility to convey an adequate idea of a thing which has no fixed, invariable limits."

AN IMPORTANT ALUMINIUM REDUCTION PATENT CONSTRUED.—The Circuit Court of Appeals in the case of the Electric Smelting and Aluminium Company vs. the Pittsburg Reduction Company (125 Fed. Rep., 926), upheld the validity of the Bradley patent 468,148 for a process of separating metals from their highly refractory ores, relating especially to aluminium ores. The essential features of this process are first, dispensing with external heat, and secondly, the use of the same electric current to produce and maintain fusion and to electrolyze the ore. The court held that this patent was not anticipated, and that its claims were entitled to a liberal construction. The Court held that the Hall process covered by patent 400,766, in which cryolite is used as a fusing bath for alumina, while an improvement upon is also an infringement of the Bradley process when practised without the use of external heat for fusing the ore.

The defendants relied upon the experiments made by Sir Humphry Davy in 1807 as an anticipation of the Bradley process. Davy decomposed small pieces of moistened potash or soda by using an electric current to effect both fusion and decomposition. The Court thought that these interesting experiments could not be held to anticipate the Bradley process, in view of the facts that the materials operated upon were wholly different, and that for seventy-five years, with full knowledge of these experiments, chemists and electricians were unable to make the possibilities suggested thereby practically available for the separation of aluminium from its ores. This decision is all the more just when it is considered that the attempts of Davy himself to separate aluminium by means similar to those employed with soda and potash, were unsuccessful. The Court stated the underlying rule thus: A process is not an anticipation of one subsequently patented unless, if invented later, it should have been an infringement.

ARE STAGE RENDITIONS OF SONGS COPYRIGHTABLE?—The case of Bloom & Hamlin vs. Nixon, decided by the Circuit Court for the Eastern District of Pennsylvania, presents a state of facts which are of peculiar interest. The plaintiffs were owners and producers of a copyrighted song, which was rendered during the performance of an extravaganza by an actress who was required during the action to step to one of the boxes, single out a particular person, and sing the song to him alone, assisted in the chorus by a number of other actresses. The court held that an imitation of the actress while singing such song by another actress, in which she, in good faith, attempted to mimic the postures and gestures of the original actress, and used the chorus of the song only as a vehicle for the imitation, was not prohibited by Rev. St., Sec. 4966, as amended in 1897 [3 U. S. Comp. St. 1901, p. 3,415], prohibiting any person from publicly performing or representing any dramatic or musical composition for which a copyright had been obtained, without the consent of the proprietor.

Merely changing the form or condition of a substance by mechanical means, by grinding or reducing it to a finer state, or, conversely, by producing it in a granular, instead of a powdered, form, does not make it a new article, in the sense of the patent law, where it remains unchanged in composition and properties.