

Case No. 4,996.

FOWLE v. SPEAR.

[11 Law Rep. 130; 7 Pa. Law J. 176; 4 Pa. Law J. Rep. 145; Cox, Am. Trade-Mark

Cas. 67; Cox, Manual Trade-Mark Cas. 48.]<sup>1</sup>

Circuit Court, E. D. Pennsylvania.

Nov. 7, 1847.

TRADE MARKS—QUACK MEDICINES—PROTECTION BY COURT OF EQUITY.

1. A court of equity will not, in a contest between persons who profess to be manufacturers of quack medicines, interfere to protect the use of trade marks, by injunction.

[Cited in Tufts v. Tufts, Case No. 14,233; Heath v. Wright, Id. 6,310; Kohler Manuf'g Co. v. Beeshore, 59 Fed. 574.]

2. A complainant, whose business is imposition, cannot invoke the aid of equity against a piracy of his trade marks.

In equity. This was an application for an injunction, upon notice given to the defendant, to restrain him from using wrappers, labels and bottles, resembling those used by the complainant in his business of selling "Wistar's Balsam of Wild Cherry." The bill, filed November 7th, 1847, stated that Lewis Williams, in 1844, was proprietor and possessor of the original receipt for preparing and compounding a certain valuable medicine invented by Dr. Henry Wistar, of Virginia, called "Wistar's Balsam of Wild Cherry," and that the said Williams prepared the same, and sold it in Philadelphia, and all the principal cities in the United States, with great profit and advantage; that about the 20th of May, 1844, Williams transferred to Isaac Butts of New York, and his assignees, the sole and exclusive right to manufacture and sell the said medicine in various states and places, including all the eastern part of Pennsylvania, which right Butts, on the first of March, 1845, conveyed to complainant, together with all the apparatus and appurtenances used in manufacturing the medicine, and all stereotype plates, pamphlets and bottle moulds used in vending the same. The bill contained, as part of it, the advertisements, wrappers and labels used in advertising the medicine by Fowle, and a bottle filled with the medicine, and stamped with the words, "Wistar's Balsam of Wild, Cherry. Philadelphia, I. B." was deposited with the bill, and referred to in it as an exhibit The bill then further alleged, that the defendant, for the purpose of selling some composition which, he called "The Original Dr. Wistar's Balsam of Wild Cherry," and inducing persons to purchase the same as complainant's medicine, had caused to be manufactured bottles, which exactly resembled in size and shape those used by complainant, and caused the same inscription to be stamped thereon, except two letters, "I. B.," for which defendant substituted "W. & Co." but which, as was done by complainant, defendant covered with the label he used, and also used wrappers and labels substantially the same as complainant's. The wrappers, advertisements and labels, used by the defendant, formed part of complainant's bill, and one of the bottles used by defendant was deposited with the bill, and referred to therein

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as an exhibit. The facts and allegations set forth in the bill were supported by the complainant's special affidavit thereto, and the affidavits of three other persons were filed in support of certain of the material facts and allegations thereof. A motion was made for an injunction upon the filing of the bill, and notice given to the defendant, who appeared to oppose it; but no answer was filed nor any affidavits read on his part

Mr. Ingraham, for complainant, in support of the motion for an injunction.

This case being heard upon the bill and affidavits produced by complainant, the only question is, as to the relief afforded by the law. The application is to restrain the use by the defendant of the complainant's trade marks, upon the well-known principles which courts of law and equity both enforce. The principle of protection is, that every man has a right to the means of distinguishing his own property from that of another. *Blofeld v. Payne*, 4 Barn. & Adol. 410, where it was decided that though you sell your own goods, you cannot use a wrapper resembling that of another person, and thus represent them as his; and this principle has been applied to a case where no mistake could have been made by a purchaser. *Lewis v. Langdon*, 7 Sim. 421.

KANE, District Judge. Is there any case in which a court of equity has interfered to protect a quack medicine?

Mr. Ingraham. The bill alleges that this is "a valuable medicine," and that is uncontradicted; besides, it is not very easy to understand what it meant by a "quack medicine," and what is meant by a "quack" is still harder to define.

KANE, District Judge. In a late trial for libel in this city, it seemed to be the result of the understanding of the most eminent of the faculty who were examined, that a "quack" meant a practitioner who prescribed or recommended a secret medicine.

Mr. Ingraham. That is very intelligible certainly, and of easy application, for unless I am greatly mistaken, the names of

the most eminent of the faculty are to be found to certificates recommending Swaim's Panacea; but the answer to the suggestion is, that if the plaintiff has no right to the claim he makes and appellation he assumes, another person cannot use his own name, if it be the same as plaintiff's, in such a way as to produce an eventual deception. *Sykes v. Sykes*, 3 Barn. & C. 541; *Croft v. Day*, 7 Beav. 84; *Hine v. Dart* [10 Jur. 106], 2 Sandf. Ch. 600. Damages are recovered at law in such cases. *Southern v. How*, Poph. 144. And equity interferes by injunction. *Dolland v. Bell*, *Harris v. Callaghan* (Rolls, 1825), and *Partridge v. Fatman*, circuit court of Pennsylvania, May, 1847 [unreported], were cited, and also the Case of Tom Pouce, or General Tom Thumb, in the "Tribunal de Commerce," at Paris, May, 1845; *Stratton v. Roqueplan*, in which Roqueplan was enjoined from using and announcing in playbills or placards, that one Duhamel would appear in the character of Tom Pouce; which name had become the property of young Stratton, and therefore no one else could use it. These cases were cited from newspaper reports. *Gout v. Aleploqlu*, 6 Beav. 69, note; *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Taylor v. Carpenter*, Id. 603,—were also cited and commented on, and also 2 Keen, 213; 2 Man. & G. 385. It is not at all material that the acts complained of should have been knowingly done. *Millington v. Fox*, 3 Mylne & C. 338, which case, for the process was secret there, and *Croft v. Day*, decided the very point presented for adjudication, the resemblance "being sufficient to mislead the ordinary run of purchasers."

Mr. Goodman (and Mr. Guillou was with him) resisted the motion. This claim to protection of mere names is of recent origin, and may be traced to the protection afforded in England to persons who have served apprenticeships before they are permitted to work at a trade. It will not be extended here so as to protect a useless compound, by protecting the shape of bottles, and any designation that may be used to sell articles not clearly of a useful nature; and that is the answer to *Croft v. Day*, for there is no allegation that *Day & Martin's* blacking itself is protected by a patent. The case in *Popham* is clearly on that ground; and Lord Hardwicke's determination not to protect a complainant in the exclusive use of the stamp of the "Great Mogul" on packs of cards, any more than he would prevent "one innkeeper from setting up the same sign with another," 2 Atk. 485, proceeded upon the same principle. The spirit of our patent laws is on the same principle; it must be for some "useful" invention; and in England the doctrine has been applied in practice to publications not deemed of a meritorious character, the piracy of which will not be interfered with by injunction. The cases of *Walcot v. Walker*, 7 Ves. 1, and *Southey v. Sherwood*, 2 Mer. 438, illustrate the course of courts of equity; and the case of *Pidding v. How*, 8 Sim. 477, is conclusive that in this stage of the cause such a court will not interfere, any more than it will in any doubtful case. 3 Paige, 214. In addition to the cases referred to by the complainants, *Eden*, Inj. 70; *Drew*, Inj. 235; *Canham v. Jones*, 2 Ves. & B, 218; *Daniell*, Ch. Pr. 1869, 1870 (Boston Ed. 1846), and 3 Doug. 293, were cited;

as also *Snowden v. Noah*, Hopk. Ch. 347. Besides, another ground of uncertainty in this case arises from the act of assembly of March 3, 1847 (Pamph. Laws, 198), in relation to "false stamps and labels." It is not clear that the answers to some of the interrogatories of this bill might not involve the defendant in a prosecution under that act; and the same ground upon which he could demur to any matter of that kind, will be his protection from an injunction till answer, if the court have any doubt, whether he is bound to answer at all, derived from the bill itself.

KANE, District Judge. I have considered the application for an interlocutory injunction in this case, and have come to the conclusion that it must be refused. The bill sets forth in substance, that the complainant is the manufacturer of a secret medicine, which he calls "Dr. Wistar's Balsam of Wild Cherry," and that he sells it in bottles of a peculiar form, enclosed in wrappers, which bear certain devices and directions. On one of these wrappers, which is made part of the bill, the balsam is described as "a valuable family medicine for consumption of the lungs, coughs, colds, asthmas, bronchitis, croup, whooping-cough, difficulty of breathing, pains in the side or breast, liver complaints, &c.;" to which another paper, also among the exhibits, adds "influenza, hoarseness, pains or soreness of the chest, &c." The bill then charges, that the defendant has fabricated a different medicine, and is selling it in bottles of the same form, bearing almost the same title, and enclosed in wrappers, which proclaim in the same words exactly the same virtues for the spurious, as are asserted by the complainant for the genuine, balsam. The defendant has not answered, nor filed any responsive affidavit. I should most anxiously avoid every appearance of discourtesy towards parties who have been so honorably represented before me; but speaking from the record, this is plainly a contest, real or simulated,—and whether it be the one or the other, neither the highly respectable counsel nor the court can know,—between the vendors of a quack medicine, the elements and action of which are not disclosed in evidence. For aught that appears, it may be innocent enough; but though "valuable," as it is sworn to be, to the party who compounds and sells it, it is readily conceivable that to him who buys and takes it, it may be far otherwise. It is

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not the office of chancery to intervene, by its summary process, in controversies like this; “non nostrum tantas componere,” looking at the incongruous group of diseases, for which the balsam prescribes itself to public credulity, I must apply the principle of the vice chancellor’s decision in *Pidding v. How*, 8 Sim. 477, that a complainant, whose business is imposition, cannot invoke the aid of equity against a piracy of his trade mark. The only remedy in such a case is at law. Motion dismissed.

<sup>1</sup> [Cox, Manual Trade-Mark Cas. 48, contains only a partial report]