

vention was in this use of cinder, but it was unperceived. At any rate the matter was not followed up beyond the experimental stage. Such use, therefore, cannot avail as against the plaintiffs. *The Barbed Wire Patent, supra.*

It is significant that in the original answer, which was verified December 16, 1889, the defendants, in describing the construction of their heating furnaces at Leechburg, stated that "up until about a year last past" they had used a layer of coke on the bottom of the furnace, but that "within about a year last past" this layer of coke had been dispensed with. But on December 11, 1890, by an amendment to the answer, they fixed the time when they first substituted a layer of broken cinder for the coke at "some time in the spring of 1887."

The defense of anticipatory use at Leechburg rests upon the oral testimony of seven witnesses, doubtless honest enough, but who speak as to the time when cinder bottoms were introduced there from mere general recollection. No one of them pretends to exactitude, nor is any circumstance mentioned having any natural connection with the main fact, or tending to determine the date with certainty. They testified three years after the event. Upon the unreliability of such testimony, coming even from the best-intentioned witnesses, we need not enlarge. One of these witnesses, Harry E. Sheldon, the manager of the Leechburg works, having from recollection named the spring of 1887 as the time when the change from coke bottoms to cinder bottoms was made, was asked if he had then heard of their use elsewhere. His answer was: "How I first came to hear about cinder bottoms in sheet furnaces I cannot tell. I have been trying to think. Somebody told me, but who it was I cannot recollect; nor do I recollect where." But Sheldon's want of memory is well supplied by George B. Pavitt, a witness on the part of the plaintiffs, and John C. Wallace, a member of the defendant firm, and also a member of the Irondale firm of Wallace, Banfield & Co., who testified in behalf of the defendants. Being asked on cross-examination at which place (Irondale or Leechburg) the cinder bottom was first used, Wallace answered: "To the best of my knowledge, as far as I know anything about it, it was first used at Irondale. That was the first place I knew of its use. By 'Irondale' I mean at the works of Wallace, Banfield & Co., Limited." Pavitt, who is a sheet heater, states that he first saw the cinder bottoms used at the works of Wallace, Banfield & Co., Limited, at Irondale, Ohio, where he was then working, and that he then and there learned that Francis and Banfield were the inventors; that subsequently—to the best of his recollection, in December, 1887—he made a visit to Leechburg, and that they were then using coke bottoms at the defendants' Leechburg works; that on the occasion of this visit he conversed with Mr. Sheldon, the defendants' manager, about cinder bottoms, and he gives that conversation as this: "Mr. Sheldon asked me what I thought of the cinder bottom. I told him that it was a good thing. Then he asked me about what size they broke the tap to put in the furnace, and I told him about the size of an egg. That was the conversation between him and me." At the

time he testified Mr. Pavitt was in the defendants' employ. He seems to be an entirely disinterested and candid witness, and we discover no reason to doubt his truthfulness or the accuracy of his recollection. Moreover, as to his visit to Leechburg in December, 1887, and the then use of coke bottoms at the defendants' works there, Pavitt is directly corroborated by Charles S. Lynn, who was then a sheet heater in the defendants' employ, and Charles Woodhouse, their watchman. Both these witnesses testify that Pavitt on that visit told them, respectively, of the use of cinder bottoms at Irondale, and that very shortly afterwards the defendants made the change from coke to cinder bottoms. They say this change was made in December, 1887. Lynn states that he worked the first heat on the cinder bottom when it was introduced into the defendants' works. In addition to the witnesses just named, the plaintiffs examined 10 other witnesses, who were employes of the defendants at Leechburg, some of them during the whole, and some during part, of the year 1887. We will not undertake to recite their testimony, but content ourselves with saying that, upon the whole evidence, it seems to us clear that the defendants did not begin to use cinder bottoms at their Leechburg works before very late in the month of November, and probably not until December, 1887.

In view of this conclusion, we do not deem it necessary to discuss the evidence touching the alleged anticipations at Apollo and Mansfield, for we find in the brief of the defendants' learned counsel these frank admissions: "It is conceded on all hands that cinder bottoms were used at Leechburg prior to their use at Apollo;" and "nobody questions that they were in at Leechburg before Mansfield." In our judgment, there is no evidence in the case to justify the finding that the plaintiffs' invention was anticipated anywhere.

There is no evidence to rebut the presumption arising from the grant of the patent that the invention was the joint production of the two patentees. Nor is any inference unfavorable to the plaintiffs to be drawn from the fact that they did not take the witness stand. We do not see that there was any occasion for their testifying in their own behalf. Nor do we find in the proofs anything to show that the plaintiffs invited or encouraged the defendants to appropriate their invention, or anything upon which the defendants can rightly base a claim to a license, or which would equitably preclude the plaintiffs from calling upon the defendants for an account. In our opinion, the defendants have failed to establish a defense upon any ground.

Let a decree be drawn in favor of the plaintiffs.

BUFFINGTON, District Judge, concurs.

GEORGE *et al.* v. SMITH *et al.*

(Circuit Court, S. D. New York, November 15, 1892.)

TRADE-MARK.—EXTENT OF APPROPRIATION.—USE FOR ANOTHER PURPOSE.

The first use of the trade-mark "Epicure" by complainants as a brand for packed salmon, and the establishment of a business thereunder, entitled them to protection against the use of it by defendants for salmon, though defendants had previously used it as a trade-mark for canned fruits and vegetables.

In Equity. Bill by George H. George and another against George Waldo Smith and another for infringement of a trade-mark. Injunction granted.

Rowland Cox, for complainants.

Morris S. Wise, for defendants.

COXE, District Judge. The complainants are packers of salmon at Astoria, Oregon. The defendants are wholesale grocers in the city of New York. The controversy relates to the use of the word "Epicure" as a trade-mark for canned salmon. After a careful investigation, which discovered no instance of similar use, the complainants, on the 4th of August, 1885, registered the trade-mark in the patent office. The application was filed July 7, 1885, and stated that the trade-mark had been used in their business since June 20, 1885. For a few years prior to the latter date the defendants, at intervals and to a limited extent, had used the word as a trade-mark for canned tomatoes and canned peaches. The complainants were, therefore, the first to use the word "Epicure" as a trade-mark for canned salmon. The defendants were the first to use it as a trade-mark for canned tomatoes and canned peaches. The simple question, then, is whether the defendants' use of the word as applied to tomatoes and peaches prevented the complainants from selecting it as a trade-mark for salmon. The complainants had built up an extensive business in canned salmon under this name before the defendants asserted their right to apply it to all canned goods sold by them, salmon included. It is stated that the complainants have sold about 3,500,000 packages of "Epicure" salmon. Their business is large and flourishing. It is devoted exclusively to salmon packing. In the summer of 1891 the defendants sold one dozen cans of salmon bearing this brand. It is asserted that this was done for the purpose of testing the question now presented.

The rights of the parties must be ascertained and measured by the situation as it existed in 1885 when complainants entered the field. Had they the right at that time to use the word "Epicure?" If the defendants had then sought to restrain the complainants' use of the word they would, in all probability, have been promptly dismissed from court with the information that their business as dealers in fruit could not be injured by the use of the term "Epicure" in salmon packing. No one who has not permanently parted with his wits could purchase a can of salmon supposing he was getting a can of tomatoes. "Epicure" when