

In Error to the Circuit Court of the United States for the District of Massachusetts.

At Law. Action by James Corcoran against the Concord & Montreal Railroad Company to recover damages for personal injuries caused by being thrown from the top of a freight train while in motion. The action was originally brought in the superior court of Middlesex county, and was removed to this court by defendant. At the close of plaintiff's evidence on the question of defendant's liability, the court directed a verdict for defendant, and judgment was entered accordingly. Plaintiff brings error. Affirmed.

Plaintiff's evidence showed that he was riding on top of a freight car without having paid any fare, and that he was ordered to get off by a person carrying a lantern, whom he assumed to be a brakeman; that plaintiff said he would get off if the train were stopped; and that thereupon the alleged brakeman seized him, and threw him off while the train was in rapid motion, thus causing the injuries complained of. No evidence was offered as to the scope of the alleged brakeman's authority.

Jerome F. Manning, for plaintiff in error.

Josiah H. Benton, Jr., for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PER CURIAM. The court is of the opinion that plaintiff should have offered some evidence showing the scope of the alleged brakeman's authority. He failed to do so, and for that reason it is ordered: Judgment of circuit court affirmed.

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In re ROSENTHAL et al.

(Circuit Court, S. D. New York. June 22, 1893.)

CUSTOMS DUTIES—PEARL COLLAR BUTTONS.

Articles composed of mother-of-pearl, which are known in trade and commerce by the specific name of "pearl collar buttons," and sold at a stipulated price per line button measure, are not dutiable at the rate of 40 per cent. ad valorem, as manufactures of mother-of-pearl, under the provision for such manufactures contained in paragraph 462 (Schedule N) of the tariff act of October 1, 1890, (26 Stat. 602,) but are dutiable at the rate of 2½ cents per line button measure of one-fortieth of one inch per gross, and in addition thereto of 25 per cent. ad valorem, as pearl buttons, under the provision for such buttons contained in paragraph 429 (same schedule) of the same tariff act, (Id. 599.)

At Law. Appeal by Rosenthal and others, importers, from the decision of the board of United States general appraisers. Affirmed.

The firm of J. Rosenthal & Co. imported on November 21, 1890, by the Fulda, from a foreign country, into the United States, at the port of New York, certain articles, invoiced as "pearl collar studs." These articles were

classified for duty as "pearl buttons," under the provision for "pearl and shell buttons, two and one-half cents per line button measure of one-fortieth of one inch per gross, and in addition thereto twenty-five per centum ad valorem," contained in paragraph 429 of the tariff act of October 1, 1890, (26 Stat. 599,) and duty at the rates specified in this provision was exacted thereon by the collector of customs at that port. Against this classification and this exaction the importers duly protested, claiming that these articles were "studs," and not "buttons," and, as they were not otherwise provided for, were therefore dutiable at the rate of 40 per cent. ad valorem, as "manufactures of mother-of-pearl or as manufactures of shell," under the provision for "manufactures of ivory, vegetable ivory, mother-of-pearl, and shell, or of which these substances or either of them is the component material of chief value, not specially provided for in this act," contained in paragraph 462 of the same tariff act, (26 Stat. 602.)

Upon the receipt of this protest the collector, pursuant to section 14 of the customs administrative act of June 10, 1890, (26 Stat. 137,) transmitted the invoice of these articles, and all the papers and exhibits connected therewith, to a board of three United States general appraisers on duty at that port, to examine and decide the case thus submitted. The board of United States general appraisers took evidence, from which it appeared, among other things, that these articles were made of mother-of-pearl; that they were used to fasten collars to shirts by means of button holes; and that at and prior to the date of the passage of the aforesaid tariff act they were bought and sold in trade and commerce of this country under the specific name of "pearl collar buttons," the word "collar," thereof, indicating the use to which they were put; that at those times there were other articles made of mother-of-pearl, and known to such trade and commerce under the specific names of "pearl coat buttons," "pearl shirt buttons," "pearl shoe buttons," etc., the word "coat," "shirt," "shoe," etc., thereof, indicating the uses to which they were respectively put; and that all the above-mentioned articles were then in such trade and commerce, bought and sold at stipulated prices per line button measure. The board of United States general appraisers, citing the case of *Dieckerhoff v. Robertson*, 44 Fed. Rep. 160, overruled the protest of the importers, and decided that the aforesaid classification and exaction of the collector were correct. The importers being dissatisfied with the decision of the board of United States general appraisers, applied, pursuant to section 15 of the customs administrative act, to the United States circuit court for this district for a review of the questions of law and fact involved therein.

Curie, Smith & Mackie, (W. Wickham Smith, of counsel,) for importers.

Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for collector.

LACOMBE, Circuit Judge, (orally.) I shall affirm the decision of the board of general appraisers.

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LEVY et al. v. WAITT et al.

(Circuit Court, D. Massachusetts. July 10, 1893.)

No. 2,829.

**TRADE-MARKS — CIGARS — NAME ORIGINATED BY MERCHANT—RIGHT OF MANUFACTURER.**

Two classes of labels are recognized by cigar manufacturers, "factory brands" and "customers' brands." The latter are originated by a customer, and used only on goods manufactured for him. A cigar merchant ordered a lot of cigars, of a certain size and quality, under the name

"Blackstone," which he originated. This order the manufacturer filled, but the cigars were not taken by the merchant, and were sold to other parties. *Held*, that the manufacturer acquired no right to use the word "Blackstone" as a trade-mark.

In Equity. Bill by Armand Levy and others against Henry Waitt and others to restrain respondents from infringement of complainants' trade-mark. Bill dismissed.

George L. Huntress and Morris S. Wise, for complainants.  
Payson E. Tucker and George C. Abbott, for defendants.

COLT, Circuit Judge. This bill in equity seeks to restrain the defendants from the use of the name "Blackstone" as a brand for cigars. The evidence discloses that the plaintiffs first manufactured a lot of 5,100 cigars, branded "Blackstone," in February, 1878, and shipped them to A. R. Mitchell & Co., of Boston, who were their selling agents in the eastern states. The name "Blackstone," as applied to a brand of cigars, seems to have been first suggested by B. S. Thompson, a jobber in coffee, tea, and tobacco. Thompson's place of business was on Blackstone street, in the city of Boston; and on February 7, 1878, he ordered, through G. R. Seward, a salesman of the firm of A. R. Mitchell & Co., 5,000 cigars under this name. This order was as follows: "5 M. cigars  $\frac{1}{4}$  in. longe (longer) than Bulls same quality as Bears under Brand of 'Blackstone' at \$28.50, for B. S. Thompson." Thompson swears that he suggested the name "Blackstone" to Seward, that he took it from the name of the street where his place of business was situated, and that all private brands of cigars he sold were suggested by him. This positive evidence as to the origin of the word "Blackstone" is not met by the plaintiffs' testimony. The evidence of Armand Levy, one of the plaintiffs, and of J. L. Richards, a member of the firm of A. R. Mitchell & Co., upon this point, is indefinite and unsatisfactory.

There are other circumstances which tend to show that the plaintiffs did not originate and did not intend to adopt this name as a trade-mark in 1878. The plaintiffs formerly kept a book containing their labels, and in recent years they have kept another book, having a collection of their lithographed labels, but in neither of these books is this label found. As to the omission of this label from the latter book, it is said that it has never been lithographed. Up to the time the trade-mark law was declared unconstitutional, —November 18, 1879, (U. S. v. Steffens, 100 U. S. 82.)—the plaintiffs were accustomed to register their labels in the patent office. It is admitted that there was no registration of this trade-mark. The plaintiffs were members of the Protective Association of Cigar Manufacturers of the city of New York. This company had a book for the registration of all trade-marks which belonged to its members, but it does not appear that the name "Blackstone" was ever recorded with the association. Again, the 5,000 cigars made for Thompson, and the 100 additional, for samples, sent with the order, were the only cigars of this brand manufactured by the

plaintiffs between February, 1878, and May, 1884, when a second lot of 5,000 was shipped to Mitchell & Co. This last lot was ordered by W. G. Cook, of Woonsocket, R. I., where cigars of this brand had been made for several years previously by A. P. Holley & Son. With the exception of a third lot of 5,000, made in June, 1884, and sent to Mitchell & Co., these comprise all the Blackstone cigars manufactured by the plaintiffs until 1889, when the defendants had already built up a large trade in cigars so branded. I am of opinion that the plaintiffs did not originate the word "Blackstone," and that they did not intend to adopt it as a trade-mark in 1878, when they made the first lot for Thompson, and that whether they intended to so adopt it in 1884 or 1889 becomes immaterial, in view of the fact, which is not denied, that as early as 1881 this name was used upon a brand of cigars by A. P. Holley & Son, of Woonsocket, R. I., whose place of business was on the Blackstone river.

It is true that, for some reason, Thompson did not take the cigars which the plaintiffs shipped to Mitchell & Co. upon his order, and that they were sold to other parties. While this might be urged as a reason to prove that Thompson did not complete his right to claim this name as his trade-mark, because he never used it upon an article sold by him, I do not see that this circumstance tends to establish the plaintiffs' exclusive right to its use. If Thompson had accepted these cigars, and offered them for sale in his business, he would have become the owner of the trade-mark. The plaintiffs acquired no title to this mark by reason of being the manufacturers of the article. A dealer may originate and hold a trade-mark indicating that the goods are sold by him, whoever may manufacture them. *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. Rep. 143. Two classes of labels are recognized by cigar manufacturers,—“factory brands” and “customers’ brands.” The latter are those originated by a customer, and are used only on his goods. The manufacturer cannot rightfully claim any property in these brands. The circumstance to which the plaintiffs attach importance upon the question of adoption of this mark, that 100 samples of cigars were sent with the Thompson order, is not sufficient, of itself, to overcome the other circumstances already referred to. I do not think the plaintiffs intended to adopt this name as their trade-mark in 1878. They did not originate the name, and they took no steps to indicate that they intended to claim it as a trade-mark. The plaintiffs having failed to prove that they originated, and first adopted, the word “Blackstone,” as a trade-mark, the bill must be dismissed, with costs, and it is so ordered.

Bill dismissed, with costs.

## BRAY et al. v. DENNING et al.

(Circuit Court, S. D. New York. July 5, 1893.)

## PATENTS FOR INVENTIONS—ASSIGNMENT—WHAT CONSTITUTES.

B. and K., being owners of a patent for dress stays, entered into an agreement that any inventions in dress stays, made by either of them, should be owned jointly. The agreement recited that its purpose was "to build up a good business in dress stays, said business to be shared mutually and equally" between them. Thereafter, B. secured a patent for an improvement in dress stays. After this the two entered into partnership with an existing firm for the purpose of making and dealing in dress stays, the contract reciting that the right under the original patent owned by B. and K. should be in the partnership exclusively, and that any improvements made by either B. or K. should belong to the partnership. Several months later this partnership was dissolved by a written agreement reciting that K., for a money consideration, assigned all his right, title, and interest in and to, all and singular, the property, assets, and business of said copartnership," to the other partners. *Held*, that this assignment divested all of K.'s right and title to the patent secured by B. after the making of the original agreement between them.

In Equity. Bill by Morris P. Bray and others against Edwin J. Denning and others for infringement of a patent. Decree for complainants.

Charles E. Mitchell, for plaintiffs.

C. Godfrey Patterson, for defendants.

WHEELER, District Judge. This suit is brought upon patent No. 440,246, dated November 11, 1890, and granted to the orator Morris P. Bray, for a dress stay. The orators have the legal record title to the patent. The defendants' firm has infringed by selling dress stays made by Stewart, Howe & May under a license from John Kendrick, who claims to have an equitable title to half of the patent. The defendants stand upon this title, and also insist that the orators are not entitled to a decree because one member of the firm is not made a defendant, and because they had granted an exclusive license to another to manufacture and sell.

The infringement of a patent is essentially a tort. *Root v. Railway Co.*, 105 U. S. 189. That torts are several, and part without all may be sued, is elementary. That a licensee cannot maintain a suit for infringement, and that such a suit must be brought by or in the name of the owner of the patent, seems to be well settled. *Littlefield v. Perry*, 21 Wall. 205; *Paper-Bag Cases*, 105 U. S. 766. The orator Bray and Kendrick owned patent No. 396,533, for a garment stay, and on November 1, 1889, entered into an agreement containing these provisions:

"\* \* \* The said Bray and Kendrick, for and in consideration of one dollar each to the other paid, the receipt of which is hereby acknowledged, hereby agree not to sell any part of said letters patent dated January 22nd, 1889, number 396,533, nor to license other parties to make or sell, or cause to be made or sold, any of said stays, excepting as shall be sold jointly by said Bray and said Kendrick. It is hereby further agreed that neither party shall make any new invention on dress stays, or cause to be made any new improvements in dress stays, independent of the other party, and that any