

collector's acts go to the jury, on the evidence now in and such other as may hereafter be produced, in case the government desires another trial.

KOHLER MANUF'G CO. v. BEESHORE.

(Circuit Court of Appeals, Third Circuit. December 4, 1893.)

No. 8.

1. TRADE-MARKS—INTENTION TO ADOPT.

Sales of a few dozen bottles of a medicinal preparation, with written labels affixed, bearing a name different from that previously used for such preparation, does not amount to use in such circumstances as to publicity, and to such length of use, as show an intention to adopt the written words as a trade-mark. 53 Fed. 262, affirmed.

2. SAME—REGISTRY AS EVIDENCE OF INTENTION.

Although registration of a trade-mark under the act of March 3, 1881, may not prevent the adoption of another device as a common-law trade-mark for the same article in domestic markets, such registry may be evidence, in a suit to restrain infringement of such common-law trade-mark, to show what complainant really claimed.

3. SAME—STATEMENT TO OBTAIN REGISTRATION.

In such suit, the statement filed to obtain registration, and attached to the affidavits on motion for a preliminary injunction, may be considered on the final hearing.

4. SAME—INFRINGEMENT.

"One Night Cure," used as a trade-mark for a cough remedy and for a corn remedy, is not infringed by the use of the words "Beeshore's One Night Cough Cure." 53 Fed. 262, affirmed.

5. SAME—INJUNCTION—QUACK MEDICINES.

Query, whether equity will intervene by injunction to protect the use of words claimed as a trade-mark, between owners of quack medicines.

6. SAME—WORDS MAKING FALSE ASSERTION.

It seems that an injunction should not be granted to protect the use of words, as the trade-mark of a medicinal preparation, which assert a manifest falsehood or physiological impossibility.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity. Bill by the Kohler Manufacturing Company, of Baltimore city, against Ellsworth S. Beeshore, for infringement of a trade-mark. Bill dismissed. 53 Fed. 262. Complainant appeals. Affirmed.

Statement by SHIRAS, Circuit Justice:

During the year 1888 the firm of the Kohler Medicine Company, composed of Louis Yakel and Charles W. Greble, carried on the proprietary medicine business in Baltimore, Md. Among other preparations, the firm made and sold a cough remedy called "Rocky Mountain Cough Syrup." The formula for this medicine the firm had received from the estate of Dr. P. W. Kohler, together with formulas for other medicines, and also the right to use the name "Kohler" in connection with said remedies, and the business in which they were manufactured. The firm also purchased from the Kohler estate a quantity of the syrup which had been prepared by Dr. Kohler, and all the labels which he had on hand at the time of his death. The cough syrup thus purchased was bottled and labeled, and sold by the Kohler Medicine Company during the spring and summer of 1889, and when the stock was exhausted more syrup was made, and sold under the same label that had been

used by Dr. Kohler. During the early part of 1889, the Kohler Company began to make, and extensively sell, an article which they called "One Night Corn Cure." During November, 1889, the labels for the "Rocky Mountain Cough Syrup" gave out, and the firm concluded to change the name of the remedy, and adopted the name "One Night Cough Cure." They did not use printed labels, but wrote the name upon paper which was pasted on the bottles containing the syrup. Several dozen bottles with this written label appear to have been sold from time to time during November and December, 1889, and perhaps later. The label bore the words "One Night Cough Cure" alone, but the agents who sold it stated that the syrup was made and sold by the Kohler Medicine Company. In February, 1890, a corporation of the state of Maryland was formed, styled "The Kohler Manufacturing Company," and the assets, trade-marks, and business of the firm were transferred to it, and the previous business was continued under the same management. In December, 1890, the corporation filed an application for the registration of the words "One Night Cure" as a trade-mark for a corn remedy and a cough syrup, and on January 20, 1891, a certificate numbered 18,867 was issued to the Kohler Manufacturing Company for said trade-mark. On January 28, 1891, Ellsworth S. Beeshore filed an application for registration of the words "One Night Cough Cure" as a trade-mark for a cough remedy, and for which a certificate was issued to him, dated March 3, 1891, and numbered 19,112.

On February 17, 1892, the Kohler Manufacturing Company, as a corporation organized under the laws of the state of Maryland, filed its bill of complaint in the circuit court of the United States for the eastern district of Pennsylvania against Ellsworth S. Beeshore, as a citizen of the state of Pennsylvania. In this bill the complainant alleged that, ever since the summer of 1889, it and its predecessor, the Kohler Medicine Company, had been engaged in the manufacture and sale of a medicinal preparation for the cure of coughs and colds, bearing the arbitrary symbol or name of "One Night Cough Cure," which name it had duly adopted as a trade-mark for said article, and had caused the same to be fixed to the bottles containing said syrup by means of labels, and that said article was sold to the public generally, was known to the public as an article made and sold by the complainant company, and that the name "One Night Cough Cure" was recognized as an indication of the ownership and origin of the same. The bill charges that the defendant Beeshore, in the month of November, 1890, and ever since, had manufactured and sold a medicinal preparation of substantially the same descriptive properties as those of the complainant, and bearing printed labels and wrappers, with the name "One Night Cough Cure," in such a manner as was likely to mislead and deceive careless or ignorant purchasers into buying the medicine of defendant in mistake for that of the complainant. The bill prayed for an injunction, account, etc.

On March 15, 1892, the defendant answered, denying that complainant had, since November, 1889, manufactured and sold an article with the name "One Night Cough Cure" as a trade-mark, and denying that complainant was the owner of the said words as a trade-mark. The answer admitted that defendant had, since November, 1890, sold an article of merchandise with label bearing the words "One Night Cough Cure" as a trade-mark, but not with intent to mislead or deceive, and claimed that he was the lawful owner of the trade-mark described, viz. "One Night Cough Cure," by virtue of his having registered the same, and procured a certificate therefor from the United States patent office on March 3, 1891. The defendant further alleged in his answer that the complainant never had affixed the said words to its medicine until defendant had duly adopted it as his trade-mark, and that complainant had interpolated the word "Cough" into the words "One Night Cure," which it had previously used as a trade-mark for a corn remedy, with the purpose of getting the public to mistake complainant's cough cure for that of the defendant.

Issue was joined, evidence taken, and the cause was argued on November 10, 1892, and on November 22, 1892, the opinion and decree of the circuit court were filed, dismissing the bill of complaint, with costs, from which decree the present appeal was taken.

Arthur Stewart, (Price & Stewart, of counsel,) for appellant.
Wm. Henry Browne, for appellee.

Before SHIRAS, Circuit Justice, and ACHESON, Circuit Judge.

SHIRAS, Circuit Justice, after stating the facts, delivered the opinion of the court.

It has been more than once held in this circuit that courts of equity will not intervene by injunction in disputes between the owners of quack medicines, meaning thereby remedies or specifics whose composition is kept secret, and which are sold to be used by the purchasers without the advice of regular or licensed physicians. *Fowle v. Spear*, (Nov. Term, 1847,) 7 Pa. Law J. 176; *Heath v. Wright*, 3 Wall. Jr. 141. A similar view has prevailed in several state courts. *Wolfe v. Burke*, 56 N. Y. 115; *Smith v. Woodruff*, 48 Barb. 438; *Laird v. Wilder*, 9 Bush, 132. In the present case, the so-called "trade-mark," "One Night Cough Cure," asserts a manifest falsehood or physiological impossibility. A cough or cold so far seated as to require medical treatment cannot be cured in a single night, and a pretense to the contrary is obviously an imposition on the ignorant. If it be said that the court cannot take notice of such a state of facts, and that there is no evidence from which the court can infer it, we can, at all events, take notice of the plaintiff's evidence, whereby it is shown that the trade-mark in question was not selected because experience had shown that the nostrum availed to cure coughs and cold within the period of a single night, but because a similar trade-mark or designation, "One Night Corn Cure," had proved to be a popular and taking one.

This view of the case was not called to the attention of the court below, nor has it been urged in this court. As the contest is really for the ownership of the trade-mark, the defendant could not be expected to resort to a defense which, if successful, would deprive the coveted words of any market or legal value. It does not appear that the supreme court of the United States has, in any reported case, expressed an opinion on the right of owners of so-called patent medicines to protection by injunction. The reports do show that that court has dealt with trade-mark cases in which proprietary medicines, whose composition was not disclosed, were involved, without condemning them as unfit to receive the protection of courts of equity. Thus, the case of *McLean v. Fleming*, 96 U. S. 245, is a leading case, often referred to, and related to a trade-mark of a patent medicine. So, too, in the southern district of New York, in the case of *Filkins v. Blackman*, 13 Blatchf. 440, Judge Shipman protected the trade-mark "Dr. I. Blackman's Healing Balsam." We therefore prefer to determine this case upon the facts and law, as dealt with in the court below.

The plaintiff, in its bill, puts itself upon its adoption and use of a certain phrase or name as a trade-mark, and does not allege the fact that it has registered a trade-mark in the patent office. The trade-mark so registered was "One Night Cure," and the accompanying statement was as follows:

"The trade-mark of said company consists of the words 'One Night' preceding the word 'Cure' or 'Remedy.' These have generally been arranged as shown in the accompanying fac simile of one of their labels, which represents the words 'One Night Cure' printed on a circular label; but the style of printing and the shape of the label are unimportant, and can be varied at will without affecting the character of the trade-mark, the essential features of which are the words 'One Night Cure.'"

Exception is taken to an expression in the opinion of the court below, in which it was said that "the registration was notice to everybody that the trade-mark claimed was what was there set up, and nothing else." It may be that this statement by the court below of the effect of registration was too broad. We are not willing to affirm the proposition that the registration in the patent office of a certain name or phrase as a trade-mark for an article made and sold by the owner will in all cases prevent or estop the owner from adopting and using another name or phrase as a trade-mark, which might become his property by reason of such adoption and use. If, indeed, the legal effect of registry of a trade-mark would be to protect the owner, in all markets, from infringement of the name so registered, it would probably follow that registry of a given name for an article would conclude the owner, and he could not be permitted to claim that his trade-mark was other than that which the registry notified the public was claimed by him. But as the effect of such a registry in the patent office of the United States is restricted by the act of March 3, 1881, (21 Stat. 502,) to the case of a trade-mark to be used in commerce with foreign nations or Indian tribes, the contention that, as to domestic commerce, he might adopt and use a different trade-mark than that registered would seem to be reasonable. As the scope and operation of a trade-mark act is constitutionally confined to foreign commerce, trade with Indian tribes, and commerce between the states, and as the act of March 3, 1881, provides only for a trade-mark to be used in commerce with foreign states and with Indian tribes, a trade-mark might well be adopted and registered for the purpose of those trades, and a different one be used in domestic commerce. Trade-Mark Cases, 100 U. S. 82; *Ryder v. Holt*, 128 U. S. 525, 9 Sup. Ct. 145. This view is not inconsistent with the doctrine of the case of *Richter v. Remedy Co.*, decided in the western district of this circuit, and reported in 52 Fed. 455. That was the case of a foreigner, who, prior to his registration, had never sold any of his medicines in the United States, and who, not having here a common-law trade-mark, had to depend upon his registry. He alleged in his bill of complaint that the defendants were infringing his trade-mark as registered, and, when met by the defense that the defendants had used the trade-mark prior to the plaintiff's registry, he sought to invoke the doctrine of a common-law trade-mark; and this the court rightfully held he could not do, but that he was restricted to the trade-mark described in his registry. The complainant in that case was unable to support his claim that he had acquired, as against the defendants, a common-law right to the exclusive use of certain words in connection with the manufacture and sale of medical compounds.

Complaint is also made of the court below in holding that there was no sufficient evidence that the plaintiff had acquired a trade-mark in the collocation of words stated. It may be, as is argued by complainant's counsel, that the interference of a court of equity does not depend on the length of time the name has been used, and that the rule is that he who first adopts a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use had been applied. Nevertheless, however short the time may be in which a person may acquire a title to a trade-mark, there must be shown an actual intention to acquire such a title. A merely casual use, interrupted, or for a brief period, would not support a claim to a trade-mark. *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143. Nor will a court of equity recognize by injunction a proprietary right in a phrase or name, unless it has been used in such circumstances, as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article.

We agree with the court below in thinking that the complainant's evidence in these particulars was very unsatisfactory. A sale of a few dozen bottles, with written labels pasted on the bottles, in the circumstances disclosed by the evidence, could not suffice to establish such an intentional use and appropriation of the words as a trade-mark as to warrant the interference of a court of equity.

Moreover, while we do not think it necessary to hold that mere registry in the patent office of the United States of a trade-mark for a specific article of manufacture would of itself prevent the use and adoption of another device as a common-law trade-mark in domestic markets, yet such registry can operate as evidence tending to show what was really claimed by the complainant. And, in the statement accompanying the complainant's application for a certificate of registry, it is stated that the words "One Night Cure" have been used by the corporation as a trade-mark, continuously, since the middle of January, 1890; and such continuous use is not alleged to have been restricted to the trade of the company with foreign nations and Indian tribes, if, indeed, it has such. We agree with the court below in thinking that the defendant's label or trade-mark, "Beeshore One Night Cough Cure," was so materially different from the trade-mark "One Night Cure" as not to lead to any mistake of one article for the other.

It is, indeed, said that the court cannot take notice of the contents or statements of the complainant's statement in the patent office, because it was neither set up in the bill, nor put in evidence. However, it seems to have come into the case as an exhibit attached to one of the complainant's affidavits used on a motion for a preliminary injunction; and, as the correctness of the copy is not denied, we think that the court below, where it had been read on the preliminary argument, might legitimately refer to it at the final hearing.

Upon the whole, we think the court below was right in its conclusion, and that its decree dismissing the bill should be affirmed.

RICHTER v. REYNOLDS et al.

(Circuit Court of Appeals, Third Circuit. December 12, 1893.)

No. 21.

1. TRADE-MARKS—INTENTION TO ADOPT.

Sales of medical preparations in this country by a foreign manufacturer, to a limited extent, upon special orders, to supply particular customers, do not amount to use in such circumstances as to publicity, and to such length of use, as show an intention to adopt a symbol placed upon such preparations as a trade-mark. *Kohler Manuf'g Co. v. Beshore*, 53 Fed. 262, followed. 52 Fed. 455, affirmed.

2. SAME—REGISTRY AS EVIDENCE OF INTENTION.

The registry of a trade-mark under the act of March 3, 1881, may be evidence in a suit to restrain infringement of a common-law trade-mark used for the same article in domestic commerce, to show what complainant really claimed. *Kohler Manuf'g Co. v. Beshore*, 53 Fed. 262, followed.

3. SAME.

The registry of a trade-mark, the essential feature of which is described as the representation of a red anchor in an oval space, is not proof of intention to adopt a trade-mark consisting of the word "anchor" and the symbol of an anchor, irrespective of color and surroundings. 52 Fed. 455, affirmed.

4. TREATY WITH GERMANY—CONSTRUCTION.

The treaty of 1871 between the United States and Germany, (article 17; 17 Stat. 931,) which provides that, with regard to the marks of labels of goods, or of their packages, the citizens of Germany shall enjoy in the United States the same protection as native citizens, does not give to a citizen of Germany who has acquired the right to a trade-mark in that country a similar right to the trade-mark in the United States.

Appeal from the United States Circuit Court for the Western District of Pennsylvania.

In Equity. Suit by Dr. F. Ad. Richter, doing business as F. Ad. Richter & Co., against W. E. Reynolds and John Sullivan, doing business as the Anchor Remedy Company, for infringement of a trade-mark. Bill dismissed. 52 Fed. 455. Complainant appeals. Affirmed.

Wm. L. Pierce and Arthur v. Briesen, for appellant.

Before DALLAS, Circuit Judge, and BUTLER and GREEN, District Judges.

DALLAS, Circuit Judge. There are 17 assignments of error in this case. Only 2 of them relate to matters of fact, and by them it is alleged that the circuit court erred—

"In finding that complainant had made no sales in this country of medicinal compounds bearing the trade-mark in issue prior to the date of the opening of his New York branch house; and in finding that the complainant had not made sales in the United States, nor importations thereto, prior to his registration of 1885."

What the court said is:

"The proofs show that the plaintiff's factory is at Rudolstadt, Germany, where his goods are and always have been manufactured, marked, labeled, and put up for the market. All the plaintiff's medical compounds, of which we have before us many specimens, are unmistakably German preparations, with printed labels, directions, etc., thereon in that language, although having

also labels in English; and they are all distinctly marked, 'Manufactured by F. Ad. Richter & Co.' The bill, it will be perceived, is quite indefinite as to the length of time the plaintiff had been engaged in the city of New York in the sale of his medicines before this suit was brought. Nor do his proofs certainly fix the date when his branch sales house was established in that city. It was undoubtedly after May 1, 1887, for Charles Bernhart Drugulin, who opened that house for the plaintiff, did not leave Rudolstadt until that date. Prior to that time the plaintiff had no establishment in the United States. Neither had he ever sold any of his medical compounds in this country before he opened his New York branch house. It is true there had been previously some importations, to a limited extent, into the United States, of the plaintiff's medicines, but by druggists and others who sent orders for the medicines to Rudolstadt, to supply persons who had lived in Europe, and there had used them."

The record sustains this finding; and the other material facts are so well and fully presented by the learned judge of the court below that it would be superfluous to here detail them at length, especially in the absence of any specification respecting them.

The propositions affirmed by the remaining assignments, so far as they raise any question which it is necessary for us to consider, are that (1) the complainant had a common-law right to the word "Anchor" as his trade-mark in this country; and, also, to the symbol of an anchor, irrespective of color and surroundings; (2) the complainant had, by registry in this country, a trade-mark consisting of the word "Anchor" and the symbol of an anchor, irrespective of color and surroundings; and (3) by virtue of a certain treaty between Germany and the United States; the acquisition by complainant, as alleged, of a right to the trade-mark in issue in Germany, was also the acquisition of that right in the United States.

The first of these propositions cannot be maintained, in view of the opinion of this court delivered by the circuit justice during the present term, in the case of Manufacturing Co. v. Beeshore, 59 Fed. 572. That opinion deals with the character of the use which is requisite to the acquisition of title to a trade-mark, and also with the effect of the registry of one device upon a claim made by the same person to a different device as a common-law trade-mark for use upon the same kind of goods. In that case the use shown was the sale of a few dozen bottles of a proprietary medicine, having written labels thereon which displayed the collocation of words which was claimed; and the registry in the patent office was of the words "One Night Cure," while those set up by the plaintiff, and to which he asserted a common-law title, were "One Night Cough Cure." This court said:

"Complaint is also made of the court below in holding that there was no sufficient evidence that the plaintiff had acquired a trade-mark in the collocation of words stated. It may be, as is argued by complainant's counsel, that the interference of a court of equity does not depend on the length of time the name has been used, and that the rule is, that he who first adopts a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use had been applied. Nevertheless, however short the time may be in which a person may acquire a title to a trade-mark, there must be shown an actual intention to acquire such a title. A merely casual use, interrupted, or for a brief period, would not support a claim to a trade-mark. *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143. Nor will a court of equity recognize by injunction a proprietary right in

a phrase or name, unless it has been used in circumstances, as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article. We agree with the court below in thinking that the complainant's evidence in these particulars was very unsatisfactory. A sale of a few dozen bottles, with written labels pasted on the bottles, in the circumstances disclosed by the evidence, could not suffice to establish such an intentional use and appropriation of the words as a trade-mark as to warrant the interference of a court of equity.

"Moreover, while we do not think it necessary to hold that mere registry in the patent office of the United States of a trade-mark for a specific article of manufacture would of itself prevent the use and adoption of another device as a common-law trade-mark in domestic markets, yet such registry can operate as evidence tending to show what was really claimed by the complainant."

Reference was also made to the decision of the present case by the circuit court, as reported in 52 Fed., at page 455, as follows:

"That was the case of a foreigner, who, prior to his registration, had never sold any of his medicines in the United States, and who, not having here a common-law trade-mark, had to depend upon his registry. He alleged in his bill of complaint that the defendants were infringing his trade-mark as registered; and, when met by the defense that the defendants had used the trade-mark prior to the plaintiff's registry, he sought to invoke the doctrine of a common-law trade-mark, and this the court rightfully held he could not do, but that he was restricted to the trade-mark described in his registry. The complainant in that case was unable to support his claim that he had acquired, as against the defendants, a common-law right to the exclusive use of certain words in connection with the manufacture and sale of medical compounds."

The defendants in the case before us, had, in good faith, used the mark complained of as early as in the fall of 1887; and, as appears from the findings of the court below, the complainant, although there is evidence of his having established a branch house in New York at some time not fixed, but certainly after May 1, 1887, has not shown sales of his medicines in this country prior to the defendants' use, nor any importations, except to a limited extent upon especial orders, to supply particular customers. This is not enough. It does not amount to use "in such circumstances, as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article." It indicates no intention to acquire title, and therefore none was acquired. The judgment in *Manufacturing Co. v. Beeshore* is conclusive, also, as to the effect of the registry made by the complainant in this country. As late as July 7, 1885, he registered as his trade-mark an accurately and distinctively defined design, the "essential feature of which" [as he then declared] "is the representation of a red anchor in the oval space." As evidence tending to show what was really claimed, or had been intended to be appropriated, the court below was clearly right in taking this into consideration; and, in our opinion, it was right, also, in concluding therefrom that the complainant's intention was to confine his claim of trade-mark to the specific device designated and described, and which he further declared to be the one which he had "adopted." Upon both the grounds which have been discussed, the complainant's claims to the word "Anchor," and to the symbol of an anchor irrespective of its being red, and inclosed in an oval space, were properly rejected.

The complainant registered twice in this country,—once in 1885, as already mentioned, and again in 1889. The mark was not the same in both instances. The registry of 1885 is not set up in the bill, and that, if it had been, it could not have availed the complainant is apparent from what has already been said, inasmuch as the defendants have not marked their goods with anything which, in the sense of the law of trade-mark, is at all like a red anchor in an oval space. The registry of 1889 was made after defendants' rights had accrued and this suit had been threatened. Furthermore, as is said by the learned judge below, the defendants never used the device covered by this registry, or any design in imitation or simulation of it. This disposes of the matter, and no further discussion of it would be profitable.

The courts of the United States take judicial notice of its treaties with other countries, but, where a treaty is relied on the burden is on the party asserting it to inform the court, when, in fact, without knowledge of the subject, of its existence and terms. In this case it does not appear that the point was considered by the court below, but the brief for the complainant informs us that the treaty which he invokes was made between the United States and Germany, in 1871, "to remain in force for ten years, and, in case neither party gave notice, was extended each year for an additional year." The brief adds, "It is therefore understood that its terms are still effective." Article 17 is quoted, as follows: "With regard to the marks of labels of goods, or of their packages, and also with regard to patterns and marks of manufacture and trade, the citizens of Germany shall enjoy in the United States of America, and American citizens shall enjoy in Germany the same protection as native citizens." We accept this statement and the quotation, but what stipulation does the latter disclose, of which the complainant has not had the benefit? His right to enjoy the same protection as, under the laws of the United States, is enjoyed by citizens of the United States, has been fully recognized; and the question raised by him as to the effect in this country of his alleged acquisition of a right in Germany to the mark which he claims in this suit, has been adjudicated in the manner, and under the laws of this country, precisely as any similar question would be adjudicated if presented to the same court for decision, by one of our own citizens. To more than this the complainant was certainly not entitled. The plain intent of the treaty is to reciprocally assure to the citizens of the respective countries the protection of the laws of the other. It was not intended to give to the official acts, or laws, of either country any peculiar extraterritorial effect.

It follows from what has been said that the mark used by the defendants is not used in violation of any right of the complainant; and, therefore, the decree of the circuit court dismissing his bill, with costs, is affirmed.

WESTINGHOUSE et al. v. NEW YORK AIR-BRAKE CO. et al.

WESTINGHOUSE AIR-BRAKE CO. v. SAME.

(Circuit Court, S. D. New York. November 20, 1893.)

Nos. 4,976, 4,977, and 5,315.

1. PATENTS—ANTICIPATION—AIR BRAKES.

A patent for a device to be used in connection with a quick-acting automatic air brake is not anticipated by a prior patent for a somewhat similar device, used in combination with the old direct-action air brake, which patent contained no suggestion of how the device could be adapted to the automatic system; it appearing further that, if it were so reorganized and reconstructed as to be used in the automatic system, it would be utterly inoperative for accomplishing its purpose.

2. SAME—INVENTION.

Where several patents cover a series of progressive inventions, all tending to the accomplishment of a given result, and it appears that the last of the series contains the first successful embodiment of these inventions, and that the improvement thereby added was only devised after a series of practical experiments for the purpose of obviating previous defects, this shows that the conception of such improvement involved invention.

3. SAME—LIMITATION—"SUBSTANTIALLY AS DESCRIBED."

A claim covering a combination "substantially as described" should not be limited to a construction which does violence to the other wording thereof, and which is not specified either in the description or claim, especially when such construction does not appear to be material, and only affects the apparatus when not in use.

4. SAME—INFRINGEMENT.

Infringement is not avoided by simply dividing one element of the patent into two parts, so arranged that the action of one necessarily causes the action of the other in the same way as though they were one, and their combined operation performs the same function and produces the same results as the device of the patent.

5. SAME—COLORABLE CHANGES.

The fact that defendants have made a different construction of one device, which is conceded inferior to that of the patent, while retaining all the other elements thereof, suggests that the difference is only a colorable one, merely designed to avoid the claims of the patent.

6. SAME—DIVISIONAL PATENTS—ENLARGEMENT OF CLAIMS.

Where a device covered by a divisional patent is described in the original application therefor as capable of being employed in connection with and supplementary to another device, which generally accomplishes the same purpose, but is not claimed in such connection, a subsequent amendment, so as to claim it only in combination with such other device, is not an enlargement, and does not render the claim invalid.

7. SAME—COMBINATION—WHAT CONSTITUTES.

When a supplementary device is only intended to operate in case the main device fails to work, but the two are so related that the very failure of the latter so directs a force that it causes the former to act, there exists the co-operation which constitutes a true combination.

8. SAME—LIMITATION.

Claims for an air-brake emergency valve "controlled" by a "piston connected to said valve," and for a "piston stem, a valve on the piston stem controlling the passage," etc., call for a piston mechanically connected with the valve, and are not infringed by a device in which the valve is unseated by a piston whose stem merely rests against it, but which cannot be reseated by the piston for want of actual connection therewith.

9. SAME—INFRINGEMENT.

A claim in an air-brake patent for a combination containing a port through the center of the piston, described as substituted for a side port,