

De Ville process and the Hall process for electrolyzing aluminum is made as plain as the court can make it in the opinion filed on the merits, and nothing that has been said on the argument of this motion in the slightest degree shakes the court's views on that point. The experiments reported do not make the case different in any respect.

The motion for a rehearing is denied.

OFFICE SPECIALTY MANUF'G CO. v. COOKE & COBB CO.

(Circuit Court, S. D. New York. September 28, 1894.)

This was a suit in equity by the Office Specialty Manufacturing Company against the Cooke & Cobb Company for the infringement of letters patent No. 217,909, granted to F. W. Smith and J. S. Shannon, July 29, 1879, for a paper holder; letters patent No. 312,086, granted to William H. Clague, February 10, 1885, for a paper file; and letters patent No. 331,259, granted to J. S. Shannon, November 24, 1885, for an index for paper files. Heard on motion for a preliminary injunction.

Frederick R. Church, for complainant.
W. C. Donn, for defendant.

LACOMBE, Circuit Judge. As to patents Nos. 312,086 and 331,259, there have been no prior adjudications sustaining them. It is true that very many letter files embodying the devices described in them have been sold, but such letter files appear also to have contained other devices as well. In view of the small cost of the articles, and the multitude of other varieties of letter files on the market, the mere fact that there have been extensive sales is very unsatisfactory evidence of a public acquiescence in the validity of the patents. Patent No. 217,909 appears to have been twice sustained by Judge Blodgett (Shannon v. Printing Co., 9 Fed. 205; Schlicht & Field Co. v. Chicago Sewing Mach. Co., 36 Fed. 585); but there was before him neither the "English file" nor the Dixon patent, which are introduced here. Neither of these, it is true, is an anticipation; but, when examined in connection with the other patents which were before Judge Blodgett, they make the question of patentable invention, to say the least, a doubtful one, and a preliminary injunction, therefore, should be denied.

N. K. FAIRBANK CO. v. CENTRAL LARD CO.

(Circuit Court, S. D. New York. October, 1894.)

1. TRADE-MARK—DESCRIPTIVE NAME—"COTTOLENE."

The word "Cottolene," designating a substitute for lard composed of cotton-seed oil and the product of beef fat, is not so descriptive of the substance and quality of its component parts that it cannot be used as a trade-mark.

2. SAME—INFRINGEMENT.

The use of the word "Cottoleo" on the tierces and tubs containing a compound of cotton-seed oil and the product of beef fat is an infringement of the trade-mark "Cottolene" previously registered for the sale of the same substance, and used in marking tierces and tubs.

3. SAME.

It is no defense to a suit for infringement of the trade-mark "Cottolene" by the use of the word "Cottoleo" that defendant sold under his own name, and made no attempt, other than by use of the word "Cottoleo," to sell his goods as if manufactured by plaintiff.

In Equity. Bill by the N. K. Fairbank Company against the General Land Company for an injunction to restrain the infringement of a trade-mark. Granted.

Sullivan & Cromwell and Rowland Cox, for complainant.

A. E. Blackmar, for defendant.

TOWNSEND, District Judge. This is a bill in equity for an injunction against the infringement of the complainant's trade-mark "Cottolene" by the use of the word "Cottoleo." The complainant began the manufacture of the article, and devised and registered the word "Cottolene" as a trade-mark in 1887. It obtained a large and increasing business. In May, 1892, its sales amounted to 1,000,000 pounds a month. Cottolene is a substitute for lard. It is composed of cotton-seed oil and the product of beef fat. Beef fat or suet, under heat and pressure, yields two products, oleostearine and oleomargarine. The former is a solid, and is used in making a substitute for lard. The latter is more nearly a liquid, and is used in making a substitute for butter. The word "oleo" is used when colloquially among merchants to indicate either oleomargarine or oleostearine. At the time when defendant, in 1892, commenced the manufacture of cottoleo, which is identical in composition, character, and appearance with cottolene, other articles made of the same ingredients were on sale in the market under various names other than "Cottolene," such as "Lardine," "Cotton-Oil Lard," "Panteleia," "Golden Beef Drippings," "Beef Frying Fat," etc. These facts were known to the defendant. The compound in question was well known, and defendant had a right to manufacture and sell it. Defendant sold under its own trade-name, and, except in the use of the word "Cottoleo," stenciled on tierces and tubs, did not simulate the labels or packages used by complainant. This article, however, is frequently sold in tierces to bakers, and in tubs to grocers, who sell it to customers from such tubs by the pound; so that the customer does not necessarily see the package at all. It seems clear that "Cottolene" is a proper and valid trade-mark. Although it may suggest cotton-seed oil, it is not sufficiently descriptive to render it invalid as a trade-mark under the recent decisions. The rule that names suggestive of the nature or composition of articles may be valid trade-marks if not too accurately descriptive of their character or quality has been applied in *Burnett v. Phalon*, 9 Bosw. 192, to the use of the word "Cocoaine;" in *Manufacturing Co. v. Ludeling*, 22 Fed. 823, to "Maizena;" in *Leonard v. Lubricator*, 38 Fed. 922, to "Valvoline;" in *Battle v. Finlay*, 45 Fed. 796, to "Bromidia." A more recent case is *Keasbey v. Chemical Works*, 37 N. E. 476, decided by the court of appeals in New York since the argument of this case. The trade-mark in question in that case is "Bromo Caffeine." This was held to be a valid trade-mark in the supreme court, which decision was overruled by the general term, and cited by the defendant in support of its contention that "Cottoleo" was a descriptive word. This article, called "Bromo Caffeine," made by the plaintiff in that case, was found to contain caffeine, bromide of potassium, and other substances. The opinion

in the appellate court says that bromide "might refer to bromide of potassium, or bromide of sodium, or to any other bromide, or to bromine," and thus stated its conclusions:

"We think this case comes within the doctrine of those cases which have protected the words of the trade-mark, although they suggested more or less the composition, quality, or characteristics of the article."

It also seems clear that the word "Cottoleo" is sufficiently similar to "Cottolene" to infringe it. When the printed word, as well as the sound, is considered, the resemblance is as great as that of "Cellonite" to "Celluloid" (Celluloid Manuf'g Co. v. Cellonite Manuf'g Co., 32 Fed. 94); "Wamyesta" to "Wamsutta" (Wamsutta Mills v. Allen, Cox, Man. Trade-Mark Cas. 660); "Maizharina" to "Maizena" (Manufacturing Co. v. Ludeling, 22 Fed. 823); "Saponiti" to "Sapolio" (Enoch Morgan's Sons Co. v. Wendover, Cox, Man. Trade-Mark Cas. 713). See, also, *Estes v. Leslie*, 29 Fed. 91, in which "Chatterbook" was held to infringe "Chatterbox."

Defendant's counsel does not seem to seriously controvert these propositions. His defense is novel and ingenious. He says that complainant can have no better case here than he would have if his trade-mark had been "Cottoleo," and the defendant had used the same word; and he maintains that "Cottoleo" is so far a descriptive word that it cannot be used as a trade-mark. He says:

"If such an alleged trade-mark would not have prevented the defendant from using the same word, certainly a trade-mark claimed in any other word cannot prevent the defendant from using it."

He says that, as this was a new compound when complainant began to manufacture it, they could not, by their choice of a name adopted as a trade-mark, restrict any parties thereafter manufacturing in their choice of descriptive words. He says that defendant was justified in using a word which was euphonious, and which indicated the ingredients of which the product was composed, and that no trade-mark claimed or owned by the complainant can abridge that right.

The questions, as stated by defendant, then are: First. Is "Cottoleo" so far a descriptive word that it could not be used as a trade-mark? Second. Where a manufacturer originating a new compound has given it a name suggestive of some of the ingredients, but a valid trade-mark, may a later manufacturer adopt a name similar in appearance and sound, provided the same is so far descriptive of the article that it would not be valid as a trade-mark? Defendant's counsel, in support of his contention that "Cottoleo" is a descriptive word, quotes the following, among others, as having been held descriptive, and therefore invalid as trade-marks: "Cherry Pectoral" (*Ayer v. Rushton*, 7 Daly, 9); "Taffe Tulu" (*Colgan v. Danheiser*, 35 Fed. 150); "Rye & Rock" (*Van Beil v. Prescott*, 46 N. Y. Super. Ct. 542); "Straight Cut" (*Ginter v. Tobacco Co.*, 12 Fed. 782); "Mascassar" (*Rowland v. Breidenbach*, 1 Cox, Man. Trade-Mark Cas. 386); "Cresylic Ointment" (*Soap Co. v. Thompson*, 25 Fed. 625); "Iron Bitters" (*Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625); figures "1" on cigarettes composed of two

kinds of tobacco (*Kinney v. Allen*, 1 Hughes, 106, Fed. Cas. No. 7,826). But in these cases and the others cited by defendant the words claimed as trade-marks were either originally descriptive, or had become incorporated into the English language so as to be recognized as descriptive of the article, and therefore incapable of exclusive appropriation.

The evidence shows that the word "Cottoleo" is not formed in accordance with any established rules for the formation of a new word. "Cott" is merely suggestive of cotton oil. It does not describe it, and "oleo" may describe or refer to oleomargarine as well as to oleostearine, or to other oils. "Oleo" is ordinarily used as a prefix, and not a suffix; and it is shown to be the rule in coining compound words that the name of the more important article is placed last. There were various other words in common use describing the product when the defendant coined the word. It does not, therefore, come within the principle of those cases where there is only a single name to designate the new article, or where the new name is used merely as descriptive of the article. Defendant's theory that, where a suggestive trade-mark has been adopted, another desiring to obtain the benefit of the trade-mark may coin a word not already in the language, and not made according to the regular rules for coining new words, yet sufficiently indicative of the quality and character of the article to be invalid as a trade-mark, and sufficiently like the trade-mark in use to obtain the benefit of an infringement, seems to open the door for ingenious fraud. Under the circumstances of this case, the conduct of the defendant in rejecting all existing names, and in coining a new name, which conveys to the eye and ear so close an imitation of complainant's trade-mark seems to indicate a design to impose his article upon the public as that of the complainant, or, at least, to obtain the substantial benefit of complainant's trade-mark. It is well settled that the inventor of an arbitrary or fanciful name may apply it to an article manufactured by him to distinguish his manufacture from that of others, and that the subsequent use of such word by the public to denote the article does not deprive the originator of such word of his exclusive right to its use. *Selchow v. Baker*, 93 N. Y. 59; *Ausable Horse-Nail Co. v. Essex Horse-Nail Co.*, 32 Fed. 94; *Manufacturing Co. v. Read*, 47 Fed. 712. Neither does the fact that the defendant sold under its own name, and made no attempt, other than by the use of the word "Cottoleo," to palm off his goods as those of the complainant, constitute a defense. *Roberts v. Sheldon*, 18 O. G. 1277, Fed. Cas. No. 11,916, and cases there quoted; *Sawyer v. Horn*, 1 Fed. 24; *Hier v. Abrahams*, 82 N. Y. 519; *Battle v. Finlay*, 45 Fed. 796. It seems to be the law that, when manufacturers have educated the public to ask for a certain article by its trade-mark name, they have acquired the right to insist that products manufactured by others shall not be given to the public under that name. It is just that it should be so, for the benefit derived from such name can only be obtained by faithful service in furnishing articles of recognized value. Moreover, if the trade-mark name might be adopted by others, inferior articles might then be

produced and sold under it; and thereby the value to manufacturers of the reputation of the name used by them as a trade-mark would be destroyed.

There will be the usual decree for an injunction and an accounting.

THE HARRY BROWN.

THE BEAVER.

THE HARRY BROWN et al. v. MOREN et al.

(Circuit Court of Appeals, Third Circuit. October 15, 1894.)

No. 13.

ADMIRALTY—COLLISION BETWEEN TOWS IN MISSISSIPPI RIVER.

The steamers B. and H., each having in tow several coal barges, were proceeding down the Mississippi river. The B., which was ahead, tied up at S. landing, but lower down than, as claimed by the H., she should have done in pursuance of an agreement alleged to have been made between them. When the B. passed the point where the H. claimed she should have tied up, the H. was a mile or more further up the river, saw the B.'s movements, and had ample room to avoid her, but instead, followed the B.'s course so closely that, after the latter was tied up, the tows collided, and two barges of the B.'s tow and one of the H.'s were sunk. *Held* that, assuming the agreement as to the place for the B.'s tying up to be proved, the B.'s violation of it did not contribute to the collision, and that the H. alone was in fault.

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

This was a libel by John Moren and Michael Munhall, owners of two coal boats, against the steamer Harry Brown, for damages sustained in a collision. A petition was filed by Harry Brown and Samuel S. Brown, copartners trading as W. H. Brown Sons, claimants of the steamer Harry Brown, against the steamer Beaver, charging the latter with responsibility for damage to the coal boats and also to the steamer Harry Brown. The district court rendered a decree for libelants, apportioning the damages between the two steamers. The claimants of the steamer Harry Brown, and William J. Wood, Thomas J. Wood, Harry McDonald, and the Lysle Coal Company, claimants of the steamer Beaver, appeal.

George C. Burgwin, for the Harry Brown.

W. B. Rodgers, for the Beaver.

George C. Wilson, for appellees.

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

BUTLER, District Judge. The suit is for damages resulting from a collision between tows of coal barges, in the Mississippi river, one of which was in charge of the Brown and the other of the Beaver. The district court having found the respondents jointly liable and decreed accordingly, each appealed, and assigned as error the failure to find and hold the other alone responsible.