

plicable to the facts of the present case, they are controlling, not only as authority, but in principle as well.

In the case at bar the trade-mark for which protection is claimed consists of nothing beyond the mere name of the firm, C. Benkert & Son, read in the light of the circumstances under which the name was established, and in which its use has been continued. Casper Benkert for more than 20 years before the complainant entered the firm of C. Benkert & Son, was engaged in the manufacture, in the city of Philadelphia, of boots and shoes whose sole characteristic, except the name "C. Benkert," which he stamped upon them, was the excellency of their manufacture. Because of their fine quality they attained a high reputation in the markets of the country. His name it was that first gave to boots and shoes so manufactured and put upon the market their value and reputation, and when he took the complainant into partnership with him under the firm name of C. Benkert & Son, and continued the manufacture of the same quality of boots and shoes, giving them as a trade-mark the name "C. Benkert & Son," his name and skill continued, at least in part, to be a guaranty of the excellency of their manufacture, and to give reputation and value to the goods. Yet the complainant was also an original member of the firm of C. Benkert & Son, continued such throughout its existence, and finally, as his brothers one by one conveyed their interest in it to him, became sole successor to its business. The evidence shows that for more than two generations the name "Benkert" has been associated by the trade with the business established in Philadelphia by the father, first under his own name, and afterwards, in connection with the complainant, under that of "C. Benkert & Son," of making and selling boots and shoes of a specially fine grade, and in the course of that long period the name has become indicative of the quality of the goods, irrespective of the particular Benkert who was their manufacturer. Under such circumstances, we are of opinion that the public could not have been misled, and that the complainant cannot be fairly held to have incurred the charge of misrepresentation. 26 Am. & Eng. Enc. Law, 260, and cases there cited. Judgment affirmed.

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POIRIER v. CLEMENTSON et al.

(Circuit Court, D. Minnesota, Fifth Division. November 20, 1895.)

PATENTS—INFRINGEMENT—PACK STRAPS.

The Poirier patent, No. 268,932, for an improved pack strap, construed as limited to the particular combination shown, and *held* not infringed.

This was a suit in equity by Camille Poirier against Gabriel Clementson, Jr., Tobias Clementson, and Martin Clementson, for alleged infringement of a patent for an improvement in pack straps.

Towne & Davis, for complainant.

Wm. R. Spencer, for defendants.

NELSON, District Judge. This is a suit brought by Camille Poirier for alleged infringement of his patent, No 268,932, dated De-

cember 12, 1882, for a new and improved pack strap. The validity of the patent is not disputed, and the sole defense is noninfringement. There are four claims in the patent, which are as follows:

"(1) The combination with the bag, A, of the shoulder straps, F, and the head strap, E, substantially as herein shown and described, and for the purpose set forth. (2) The combination with the bag, A, of the straps, F, and the sliding pads, K, substantially as herein shown and described, and for the purpose set forth. (3) The combination with the bag, A, of the straps, F, the sliding pads, K, the sliding straps, I, and the buckle, J, substantially as herein shown and described, and for the purpose set forth. (4) The bag, A, provided with the flap, B, the straps, F, and the strap, M, on the back of the bag, substantially as herein shown and described, and for the purpose set forth."

The pack strap made and sold by defendants consists of a bag with a flap similar to complainant's, but it has no head strap, nor strap, M (which is stated to be for holding an umbrella or sunshade). Therefore the first and fourth combinations are not infringed, and the real question is whether the shoulder straps and the method of attachment used by defendants are infringements of complainant's second claim; for, if the second claim is not infringed, neither is the third. Complainant's specification as to the use of the shoulder straps, F, is as follows:

"Two shoulder straps, F, have their upper ends secured to a piece of leather, G, on the bag, A, and the lower ends of said straps can be secured to the bag by means of buckles, H, fastened to the lower corners of the bag, on the surface that is to rest against the back."

Neither the sliding pads, K, straps, I, nor buckle, J, as described in the patent, are shown in the Exhibit A of complainant, nor are any of them contained in defendants' pack strap, as shown in the Exhibit B of complainant, which purports to be a pack strap manufactured and sold by the defendants. In defendants' pack strap no portion of the weight is borne by a head strap, but it is held on the shoulders by crossed shoulder straps, and by two encircling straps, which go round the pack and connect with a ring running between the shoulder straps, by means of a snap catch. The contention of complainant is that defendants' pack differs from his only in the fact that the attachment of the straps to the pack is at a point somewhat lower than in the patented device, though there is no place designated in his patent as to where this point of attachment should be. Defendants, on the other hand, insist that the method of attachment is different, and that the load is sustained in a different position from that set forth in the patent. In determining this matter, we must look to the patent, and the subject-matter thereof. It is merely a combination of old devices to produce a new and useful result. No patent could be maintained upon a bag with flaps, nor upon the method of carrying a pack by means of shoulder straps, and it is only the particular mode of arranging the shoulder straps in combination with other devices, so as to constitute a new and useful improvement over the old plan, that gives vitality to the patent. Complainant cannot by his patent cover all methods of carrying a pack by means of shoulder straps, but it is the particular method which he employs, in combination with

other appliances or their mechanical equivalents, to which he has the exclusive right. He must be held to a fair construction of the combinations set forth by him, and, in view of the patent and the exhibits offered, I do not think that the crossed shoulder straps used by defendants, with their method of attachment and support, constitute an infringement of the second or third claims of the patent. The first and fourth claims, obviously, are not infringed. A decree will be entered dismissing the bill of complaint.

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**WESTINGHOUSE AIR-BRAKE CO. v. BURTON STOCK-CAR CO.**

(Circuit Court, D. Maine. September 30, 1895.)

No. 463.

**1. PATENTS—PRELIMINARY INJUNCTION—EFFECT OF PRIOR DECISIONS.**

Although, for the purposes of this hearing, defendant acquiesced in an adjudication in another circuit in which the patent was held valid, and made no question as to infringement, yet, inasmuch as it appeared that the complainant did not use the patented device, but only made and sold it, and that the defendant did not manufacture, but only used, the patented device, and had no intention of acquiring additional patented devices, and as it further appeared that there was no difficulty in making full compensation on an accounting for damages, except a possible difficulty made by the complainant itself, interlocutory injunction was refused. *Morris v. Manufacturing Co.*, 3 Fish. Pat. Cas. 67, Fed. Cas. No. 9,833, and *Hoe v. Advertiser Corp.*, 14 Fed. 914, followed.

**2. SAME—PUBLIC INCONVENIENCE.**

In determining whether a preliminary injunction shall issue, public inconvenience is not to be considered, where the result would be to deprive the patentee of his property without just compensation.

This was a bill by the Westinghouse Air-Brake Company against the Burton Stock-Car Company for alleged infringement of letters patent No. 376,837, granted January 24, 1888, to George Westinghouse, Jr., for an improvement in air brakes.

John F. A. Merrill (George H. Christy and Frederic H. Betts, of counsel), for complainant.

Fish, Richardson & Storrow, for defendant.

PUTNAM, Circuit Judge. The patent in issue, so far as it concerns this cause, has been sustained, after a full hearing on the merits, by the circuit court, and also by the court of appeals in the Second circuit, in a suit by the present plaintiff against the infringing manufacturer. *Westinghouse Air-Brake Co. v. New York Air-Brake Co.*, 59 Fed. 581, and 11 C. C. A. 528, 63 Fed. 962. For the purposes of this motion the defendant is content to rest the case on that fact, but reserves for the final hearing all questions as to the validity of the patent or its scope. There is no issue on the question of infringement. But the defendant is not a manufacturer, and only uses a number of the infringing devices, with no apparent intention of making any additions thereto pending this litigation. It also appears that the complainant does not use its own devices, or receive any royalty from their use, but manufactures