

Section 6 of the court of appeals act (26 Stat. 826) provides that "the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for" in the fifth section. The section then provides that in certain cases the judgment of the courts of appeal shall be final. The section further provides that in "all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed \$1,000 besides costs." The contention is that this language does not require that the judgment of the court of appeals to be reviewed in the supreme court shall be final, as expressly required in section 709, Rev. St., which confers jurisdiction on the supreme court to review judgments of state courts, and under which the cases above cited arose and were decided. The contention cannot be sustained. In *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118, it was held that under section 5 of the court of appeals act, which provides that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in any case in which the jurisdiction of the court is in issue, and that in such cases the question of jurisdiction shall be certified for decision, the supreme court had no jurisdiction to review the question until the case had proceeded to final judgment. Said Mr. Justice Lamar, speaking for the supreme court:

"It is manifest that the words in section 5, 'appeals or writs of error,' must be understood within the meaning of those terms as used in all prior acts of congress relating to the appellate powers of this court and in the long-standing rules of practice and procedure in the federal courts. Taken in that sense, those terms mean the proceedings by which a cause in which there has been a final judgment is removed from a court below to an appellate court for review, reversal, or affirmance."

If such is the construction to be put on these words when used in the fifth section, certainly the same words, when used in the sixth section in *pari materia*, are to receive the same interpretation. The application for the writ of error must be denied.

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BRUNSWICK-BALKE-COLLENDER CO. v. PHELAN BILLIARD-BALL CO.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

PATENTS—INVENTION—NOVELTY.

The Collender patent, No. 228,879, for a pool-ball frame with rounded interior and exterior corners, and made of layers of wood bent into triangular shape, and glued or fastened together, the layers preferably breaking joints, is void, as being the result of mere mechanical skill. 76 Fed. 978, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by the Brunswick-Balke-Collender Company against the Phelan Billiard-Ball Company for alleged infringement of a patent for an improvement in pool-ball frames. The cir-

cuit court held that the patent was void for want of invention, and dismissed the bill. 76 Fed. 978. The complainant has appealed.

M. B. Phillips, for appellant.

Henry A. Forster, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The bill in equity of the complainant charged an infringement by the defendant of letters patent No. 228,879, issued on June 15, 1880, to Hugh W. Collender, as assignee of Stephen De Gaetano, for an improvement in pool-ball frames. The circuit court for the Southern district of New York dismissed the bill. 76 Fed. 978. The following extracts from the specification describe the invention with sufficient fullness:

"Previous to my invention, it has been customary to make the triangular ball-holders, used in placing the balls for the game of 'fifteen ball pool' (and other games played with fifteen balls) on billiard tables, of three straight strips or pieces of wood, joined at their adjacent ends to form the angles of the frame, and to strengthen the frame at these angles by interiorly-placed corner-blocks, glued or otherwise fastened in, and sometimes to further strengthen the angles or corners by metallic angle-plates applied exteriorly to the frame. My invention has for its object to produce a 'triangle' or ball-frame which can be made much lighter, and also much stronger and more durable, than those heretofore manufactured, while at the same time its manufacture can be accomplished at much less cost than that of the construction or kind of frames heretofore made, and in its use it will be free of all the objections found in the use of the old-fashioned ball-frame. To these ends and objects, my invention consists in a triangle or ball-frame composed of several layers or thin strips of wood bent round into the requisite shape, and glued (or otherwise fastened) together. My new frame is composed of several or numerous strips or thin layers of wood, or of several strips of veneer, which are placed in close contact and perfectly united throughout their lengths, by preference in such an arrangement that no two of the end jointures of the strips occur at the same locality. My improved ball-frame, instead of having angles, has three rounded corners, so to speak, the circular curvature of each of which (at the inner surface of the frame) should correspond substantially with the curvature of the pool-ball."

The claims of the patent are as follows:

"(1) A ball-frame or triangle composed of wood or other suitable material, and formed with three interior and exterior curved or rounded corners, substantially as and for the purposes set forth. (2) A ball-frame having curved or rounded corners, and made of a series of layers of wood bent into triangular shape, and having their adjacent surfaces glued or otherwise fastened together, as and for the purposes set forth."

The gist of the improvement was a frame which, abandoning angles or sharp corners, should be a continuous, hoop-like structure, instead of a frame of three separate pieces joined at the three corners. Whether the inventor had in his mind, or in his specification, the idea of a frame composed of a single piece of wood, is denied by the defendant and is affirmed by the complainant. We assume that such a construction was sufficiently disclosed in the specification, and was described in the first claim. It is admitted that before the date of the alleged invention there were pool-ball frames which had their corner pieces made with interior curved surfaces, so as to conform substantially to the curvature of the balls. This fact destroys any patentable novelty in making a pool-ball frame with interior and exterior curved or rounded corners, and restricts the patentable character of the invention of the first claim to a frame made of a con-

tinuous strip or band of wood, or other suitable material, instead of a frame made of three strips joined together at the corners. Nothing of an inventive character can exist in the change from a triangular shaped frame made of three separate pieces of wood into the same general style of frame made of one bent piece of wood. The second claim is for a frame of curved or rounded corners, and made of a series of layers or veneers of wood, glued or fastened together, and bent into triangular shape. Preferentially, the ends can be joined together at different places on the frame, so as to break joints and secure greater strength. The novelty, in addition to the rounded corners, consists in the method of construction, whereby additional strength is imparted to the frame. It would hardly be claimed that the described mode of construction, by layers of wood joined together, is a new method of making any wooden article or structure, but it undoubtedly was a new method of making this article; and it made the frame stronger, and less liable to crack or to be strained at the corners. In like manner, the iron curve of the wagon reach in *Hicks v. Kelsey*, 18 Wall. 670, made a better, more durable, and more solid wagon reach than the pre-existing reach, which had a wooden curve, with or without strengthening straps of iron. But these advantages, the court thought, resulted from superiority of construction, and were the product of mechanical judgment in regard to the use of materials. The improvement in this case is of the same mere mechanical character. The decree of the circuit court is affirmed, with costs.

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PENNSYLVANIA SALT MANUF'G CO. v. MYERS.

(Circuit Court, E. D. Missouri, E. D. March 3, 1897.)

No. 3,905.

**1. UNFAIR COMPETITION IN TRADE—IMITATION OF LABELS AND PACKAGES.**

Complainant had long sold concentrated lye in cylindrical packages, with labels having a white background and black lines around the margin, and bearing in large black letters the word "Saponifier." Defendant adopted a similar package, and a label with the same word in prominent black letters, placing his own trade-name on the label, and otherwise differentiating the reading matter appearing in small type. He deliberately sought out the localities in which complainant had created a demand for "Saponifier," with the purpose and result of enabling retailers to pass off his article for complainant's. *Held*, that this was unfair competition, and defendant should be enjoined.

**2. TECHNICAL TRADE-MARKS—"SAPONIFIER."**

"Saponifier," while perhaps suggestive to a Latin student of an article used in soap making, is yet not so descriptive, to ordinary purchasers, as to prevent its appropriation by the corner of the word as a technical trade-mark for his concentrated lye, especially where his right thereto has been acquiesced in for 35 years.

This was a suit in equity by the Pennsylvania Salt Manufacturing Company against Emanuel Myers, doing business as E. Myers & Co., to enjoin alleged unfair competition in trade, and infringement of a trade-mark.