

"Merely labeling each bottle 'original package' does not make it one, if it was not really the original package. The term 'to pack,' in its ordinary signification, especially when used in reference to carriage, means to place together and prepare for transportation,—as to make up a bundle, or bale, or box, or other receptacle. They do not form as many and separate packages as there are articles, though they may be wrapped separately. The case or bale in which separate articles are placed together for transportation constitutes the original package."

So, *In re Beine*, 42 Fed. 546, which holds that the importer will be protected in his importation, however small may be the bulk of the package, decided that bottles could be original packages when they were sealed and nailed up separately, not packed in any other box, but shipped singly and separately. This case, by the way, is at variance with the Pennsylvania cases quoted by the attorney general, (*Com. v. Paul*, 170 Pa. St. 284, 33 Atl. 82; *Com. v. Schollenberger*, 156 Pa. St. 201, 27 Atl. 30), and its conclusion is preferred to them. Retail trade, as well as wholesale trade, is included in the idea of commerce.

Considering all these cases and the others quoted in argument, it appears that the original package is the package delivered by the importer to the carrier at the initial place of shipment, in the exact condition in which it was shipped. If in single bottles, shipped singly, or if in packages of three or more securely fastened together and marked, or if in a box, barrel, crate, or other receptacle, the single bottle, in the one instance, the three or more bottles, in another instance, the barrel, box, crate, or other receptacle, respectively constitute the original package. If sold or delivered, it must be sold or delivered as shipped and received. If the package be broken after such delivery, it comes within the police regulations of the state, and any sale or delivery in such case is unlawful.

Let an order be prepared in each case in accordance with this opinion.

DANIEL v. MILLER et al.

(Circuit Court, E. D. Pennsylvania. May 12, 1897.)

1. PATENTS—INFRINGEMENT—ACQUIESCENCE.

Knowledge of a long-continued acquiescence by a complainant in an infringement may, in special cases, be fatal on a motion for a preliminary injunction.

2. SAME—VALIDITY OF—ESTOPPEL.

The assignor of a patent and those in privity with him are estopped to set up, as against the assignee, the invalidity of a patent.

3. SAME—PACKING FOR PISTON RODS, ETC.

Letters patent, No. 524,178, for an improvement in packing for piston and other rods, *held* valid and infringed.

Bill for an injunction against the infringement of a patent and an accounting. Sur motion for preliminary injunction.

The bill averred that Norman Bruce Miller, one of the defendants, had assigned to the complainant, in February, 1894, his patent, for which application was then pending, for improvements in the packing for piston rods, etc., and

that on August 7, 1894, the patent (No. 524,178) was issued to the complainant, as assignee of the said Norman Bruce Miller, the inventor. It further set out that the other defendants were acting in privity with said Miller in infringement of the patent, and prayed an injunction and an accounting in the usual form. The answers virtually admitted the infringement, but contended that the patent was invalid, and that, therefore, recovery could not be had.

Preston K. Erdman and Chas. Howson, for complainant.
Charles L. Smyth, for defendants.

DALLAS, Circuit Judge. This case has been heard upon the plaintiff's motion for a preliminary injunction, and I am persuaded that, under the circumstances disclosed by the proofs as now presented, the defendants should be restrained from continuance of the infringement complained of, which is virtually admitted, until final hearing. The several matters urged in resistance of this motion are separately stated and discussed in the defendants' brief, and they may be briefly disposed of.

1. "Knowledge of and long-continued acquiescence by a complainant in an infringement may, in special cases, be fatal on a motion for a preliminary injunction." *Taylor v. Spindle Co.*, 22 C. C. A. 205, 75 Fed. 303. But the evidence now before the court, instead of establishing acquiescence, seems to disprove it. See, also, the case above cited, in 69 Fed. 837.

2. The plaintiff does not allege either prior adjudication or public acquiescence in support of the validity of his patent. He stands upon the presumption of its validity, and upon the fact that he acquired it by assignment from one of the defendants, who, therefore, is precluded from asserting that it is void. The fact that he so acquired it is plainly shown, and is not controverted; and that the estoppel relied upon as against the assignor exists has not been seriously questioned. As to him, at least, there can be no doubt about it.

3. There is more room for dispute as to whether the other defendants are also estopped; but I am clearly of opinion, upon the proofs of privity and of co-operative infringement which have been adduced, that they are.

4. In view of what has already been said, the attack made upon the validity of the patent need not be considered; but I may say that, as the case now appears, it is not very forcible, and does not commend itself to favorable consideration.

The motion for a preliminary injunction is granted.

MEMORANDUM DECISIONS.

BURLINGAME v. LYONS. (Circuit Court of Appeals, Ninth Circuit. February 6, 1896.) No. 260. In Error to the Circuit Court of the United States for the Northern Division of the District of Washington. Bausman, Kelleher & Emory, for plaintiff in error. White & Munday, for defendant in error. No opinion. Dismissed by agreement pursuant to the twentieth rule.

BURNS v. WELLS CULTIVATOR CO.¹ (Circuit Court of Appeals, Sixth Circuit. May 6, 1897.) No. 469. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. Chas. H. Fisk, for appellant. N. S. Wright, for appellee. No opinion. Decree reversed and bill ordered dismissed.

CAMPBELL et al. v. IRON-SILVER MIN. CO. (Circuit Court of Appeals, Eighth Circuit. February 15, 1897.) No. 906. In Error to the Circuit Court of the United States for the District of Colorado. Edward O. Wolcott and Joel F. Valle, for defendant in error. No opinion. Docketed and dismissed, with costs, pursuant to the sixteenth rule, on motion of defendant in error. See 10 C. C. A. 172, 61 Fed. 982.

CENTRAL TRUST CO. OF NEW YORK v. SOUTHERN RY. CO. et al. (Circuit Court, W. D. North Carolina. June 30, 1897.)

SIMONTON, Circuit Judge. This bill is filed by the trustee of a mortgage executed by the Southern Railway Company to secure bonds to the amount of millions of dollars. The mortgage covers the entire system and all the property of the mortgagor, including the lease of the North Carolina Railroad. The bill declares that this lease is of vital importance to the value of the system, and to the security of the mortgage; that the threats to rescind, destroy, or break the lease will not only result in a permanent injury to the security it holds, but is now creating alarm, and is disturbing the value of the securities on the market; that the danger and loss threatened are irreparable. The bill, stating the same facts, is against the same parties, meets the same responses, and depends on the same facts and principles as in the case of Southern Ry. Co. v. North Carolina R. Co. (just decided) 81 Fed. 595. It is subject to the same conclusion. It is therefore ordered that the question of fact inquired into, which question is as follows: "Was the lease executed bona fide, without fraud, covin, misrepresentation, or malpractice of any sort? This is a question wholly of fact. The charge is made by the defendants Messrs. Russell and Walser, and of the new board of directors, and in the answer of the lessor filed by them." Let this issue be referred to Kerr Craige, Esq., as special master, under the following instructions: That he take such testimony as may be produced before him touching all matters relating to or incidental with this question, holding references at such time and place as may be most convenient; that upon this issue the defendants the new board of directors and Messrs. Russell and Walser have the affirmative of this issue, and the opening and reply in the testimony; and that they be allowed 60 days, if so long be necessary, within which to produce testimony, dating from the service of this order; that the complainant and the old board of directors have the negative of this issue, and that they be allowed 60 days, if so long be necessary, after the opposite party announce their evidence closed, and that 20 days, if so long be necessary, be allowed for reply, beginning when respondents announce that

¹ Rehearing denied July 6, 1897.