

prise." The court, while dismissing the libel on the ground that nothing but a commercial transaction with the Dominican republic was involved, said:

"If there were reasonable grounds to suspect that the Madrid is not designed to go to Samana, to be delivered there in completion of a contract of sale to the Dominican republic, but to go direct to Hippolyte, taking her armament, by a preconcerted arrangement, from the Carondelet on the high seas, in that case, whether the Carondelet could or could not be refused a clearance under section 5290, the Madrid, according to the cases of *The Meteor* [17 Fed. Cas. 178] and *The Mary N. Hogan*, 18 Fed. 538, might be seized and forfeited under section 5283; but not the Carondelet; for the latter, upon the facts assumed, would not be designed "to cruise or commit hostilities" against anybody, but only to complete the arming of the Madrid, which is not a ground for forfeiting the Carondelet. She might be captured by the belligerents, but would not come within our statute."

I am forced to the conclusion that the proceedings against the Laurada cannot be sustained; and the libel is therefore dismissed.

TETLOW v. TAPPAN.

(Circuit Court, S. D. New York. March 19, 1898.)

1. BASIS OF RIGHT TO TRADE-MARK—PRIORITY—USE—INVENTION.

The exclusive right to the use of a trade-mark or device rests, not on invention, but on such use as makes it point out the origin of the claimant's goods, and must be early enough for that, but absolute priority, or invention, is not required.

2. SAME—PERMITTING USE BY ANOTHER—INFRINGEMENT.

Where the long and successful use of a trade-mark or name by plaintiff is clearly established, the fact that he has recognized and permitted the limited use thereof by another, which does not appear to have misled anybody, is not sufficient to defeat the owner's right to prevent others from using it.

3. SAME—WHAT MAY BE APPROPRIATED.

"Swan Down," as applied to a complexion powder, is not descriptive, so as to prevent its appropriation as a trade-mark therefor.

This was a suit in equity by Hentry Tetlow against Herman Tappan for alleged infringement of a trade mark or name.

Rowland Cox, for plaintiff.

Francis Eastlack, Jr., for defendant.

WHEELER, District Judge. This suit is brought against giving currency in trade to complexion powder of the defendant by using the words "Swan Down" upon labels resembling those of the plaintiff, whereby the complexion powder of the defendant is made to appear to customers as that of the plaintiff. The long and successful use of these words by the plaintiff upon labels and boxes of a popular complexion powder put up by him at Philadelphia is well made to appear and is not much questioned. One Henry H. Burrington appears to have used these words upon a similar toilet preparation in a small way at Providence, a long time before, and till after, the plaintiff began using them, and to have copyrighted them. Burrington brought suit against the plaintiff in the circuit court of the United States for the Eastern district of Pennsylvania for the use of these words, which was

settled, and assignment made by Burrington to the plaintiff of "all of the right, title, and interest, if any there be, which I have, or claim to have, in and to the use and employment of the words 'Swan Down,' as and for a name, title, designation, or trade-mark, for any preparation or article for the toilet, skin, or complexion, and the sole and exclusive right to use and employ the said words, name, or designation of 'Swan Down' for such preparation or article; saving and reserving, however, to myself and to Wm. H. Saviourin, of the city of Philadelphia, respectively, the personal privilege and authority to use the same name or designation for the article now manufactured and sold by me and the said Saviourin, respectively, by and under said name," for \$550. This use by Burrington, and recognition of it by the plaintiff, are relied upon by the defendant here to defeat any right which the plaintiff might otherwise have; and the defendant denies that his use of the words has any tendency to represent that his powder is the plaintiff's.

In *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, Mr. Justice Jackson for the court said, in enumerating the requisites of a valid trade-mark, "that the exclusive right to the use of the mark or device claimed as a trade-mark or device is founded on priority of appropriation; that is to say, the claimant of the trade-mark must have been the first to use or employ the same on like articles of production." Much reliance is placed in behalf of the defendant upon this statement; and if it means absolute priority, like that required of an inventor in a patent under an absolute statute, it would stand squarely in the way of the plaintiff's right. But a trade-mark rests on such use as makes it point out the origin of the plaintiff's goods, and not on invention; and the use must begin early enough, and be separate enough, for that. Use by another before, at the same place, or near enough to start a similar right, would prevent the use from showing such origin. The other use might be so far away, or so small, as to have no effect upon the use in question, to prevent it from becoming a representation of origin. In this case the use of the words by Burrington does not appear to have induced the plaintiff to adopt them, or to have been known to him, or to have led anybody to think that the plaintiff's goods, or the defendant's, were Burrington's, or to have done away with the effect of the use of the words by the defendant as a representation that his goods were of the same origin as the plaintiff's. Such a use cannot justly affect the right of the plaintiff or the liability of the defendant. The assignment had nothing to operate upon. The reservations were personal, and have been exhausted, without anything material here having been done under them, and the transaction seems to be now wholly immaterial to this controversy.

A suggestion that the words are descriptive of quality of the article, rather than a designation of its origin, does not seem to be well founded. That the use of these words, with other configurations of labels similar to the plaintiff's upon boxes similar to his, as is shown and admitted to have been done by the defendant, would lead ordinary purchasers to think the article was of the same origin as the plaintiff's, is quite obvious. There are differences which, if studied, might inform customers that the producers were not the same, but this is not sufficient to prevent the deceit.

HIRAM WALKER & SONS v. HOCKSTAEDER et al.

(Circuit Court, N. D. Illinois, N. D. February 15, 1898.)

TRADE-MARKS—INFRINGEMENT—WHISKY BOTTLE LABELS.

A label on whisky bottles which in size, shape, and color is an evident imitation of the label on a well-known brand of whisky, and which differs from it merely in some details of the inscriptions on the label, is a fraud, the use of which will be enjoined.

Suit by Hiram Walker & Sons, a corporation, against the firm of Hockstaeder & Levy, for an injunction.

Banning & Banning, for complainant.

Zack Hofheimer, for defendants.

GROSSCUP, District Judge (orally). This is a bill by the complainant, a corporation organized under the laws of the province of Ontario, Canada, to restrain the defendants, citizens of Illinois, from using the trade-marks, brands, and labels of the complainant's whisky, known as "Canadian Club Whisky." It is conceded that the Canadian Club Whisky, manufactured by the complainant, has acquired a widespread reputation, and is favorably known to the trade. It is conceded that the defendants themselves do not manufacture whisky, but only manufacture bottles and furnish labels, the bottles to be filled with any character of whisky that the purchaser sees fit to put into them. The bottles of the complainant start at the top with a bronze band, upon which are the words "Canadian Club Whisky." This is immediately succeeded underneath with a neck band, upon which appear the figures "1890," and in red ink upon these figures the words "H. Walker & Sons." Around the face of the bottle the complainant attaches a white label, upon which, in script, prominently appear the words "Canadian Club Whisky. Distilled and Bottled by Hiram Walker & Sons, Limited. Walkerville, Ontario, Canada." Near the center of this label is a crown, in green ink. Across the top of the bottle is a label or slip attached by the excise officers of the Canadian government, and bearing the genuine government stamp. The defendants attach a like capsule, precisely like it in color, but containing the words "Canadian Rye Whisky" instead of the words "Canadian Club Whisky," the letters in each case being about the same reddish color. Beneath this capsule the defendants enable their purchasers to attach a neck band, which in all essential particulars is precisely like the complainant's band, except that the lettering is in black instead of red, and the words "H. S. Ramsay & Sons" instead of the complainant's name, and that the figures are in red instead of in dark blue. The defendants' label on the face of the body of the bottle is likewise upon a white piece of paper, upon which is printed, in script, "Canadian Rye Whisky, Distilled and Bottled by H. S. Ramsay & Sons, London, Ontario, Canada." On the face of this label, near the center, is a green crown. The defendants have likewise printed on the face of this label the language used on the complainant's label, namely, "Matured in Cask in Warehouses, Which are Warmed During the