

chief product, "Pale Ale." The defendant has used, to designate its "Old-Fashioned Lager Beer," a circular label, and posters representing a strap and buckle stamped with a red triangle, having a large white "Z" thereon. The labels and posters are so utterly unlike those of complainants in shape, color, and collocation of symbols and letters that a mere inspection shows that the ordinary purchaser would not be deceived. Furthermore, the defendant's product is a different article, sold under a different name, in bottles of a different color and shape, with different cork and capsule, from those of complainants, and no unfair competition or improper use of the red triangle has been proved. For these reasons the bill may be dismissed. This conclusion dispenses with the necessity of considering the further forcible contention of defendant as to complainants' use of said symbol.

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WALLACH et al. v. WIGMORE.

(Circuit Court, E. D. Pennsylvania. April 2, 1898.)

TRADE-NAMES—INFRINGEMENT—SUITS—PARTIES—LICENSEE.

No injunction can issue against infringement, on a bill to which an exclusive licensee (when there is one) is not a party.

This was a suit in equity by Leopold Wallach and Moritz Wallach against William H. Wigmore for alleged infringement of a trade-mark or trade-name. The cause was heard on a motion for preliminary injunction.

H. Gordon McCouch and R. C. Dale, for complainants.  
Wm. Morris, for defendant.

DALLAS, Circuit Judge. There can be no property in any name or word, abstractly considered; and accordingly the bill in this case avers that it is by reason of the appropriation of the term "Phonendoscope" to identify a certain patented instrument that the alleged exclusive right to its use in connection with that article, or with any instrument closely resembling it, though not identical therewith, has been acquired. The trade-name claimed, and the right to deal in the patented article, must be united in the same person or persons, or there can be no valid title to the exclusive use of the former. Here, however, the proofs of the plaintiffs show that a firm which has not been made a party to the suit is the exclusive licensee of the plaintiffs, as respects both the patent and the name; and while it is true that a licensee, less than exclusive, should not be joined in a suit for infringement (*Blair v. Glass Co.*, 52 Fed. 226), it is also true that an exclusive license is, in effect, a grant (*Johnson Railroad-Signal Co. v. Union Switch & Signal Co.*, 59 Fed. 23), and that, therefore, no injunction can issue to restrain future infringements, upon a bill to which an exclusive licensee (if there be such a one) has not been made a party (*Waterman v. Mackenzie*, 138 U. S. 255, 11 Sup. Ct. 334). This is shown by several authorities which are cited upon the defendant's brief, but it is not necessary to mention any others than those to which I have referred. These cases all relate to pat-

ents, but they seem to me to be plainly applicable to the present one, especially in view of the fact that the name in question is claimed only as incidental to the monopoly granted by a patent, under which, as well as of the alleged name itself, a party not before the court is exclusive licensee. It follows that the complainants' motion for a preliminary injunction must be denied, and it is so ordered.

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TRUMAN v. CARVILL MFG. CO.

(Circuit Court, N. D. California. March 28, 1893.)

No. 12,093.

1. RES JUDICATA—JUDGMENTS IN PATENT CASES.

A judgment sustaining the validity of a patent does not operate as res judicata in a suit on the same patent against a different defendant.

2. PATENT INFRINGEMENT SUITS—EFFECT OF PRIOR ADJUDICATIONS.

A judgment sustaining the validity of a patent is not conclusive in a subsequent suit against a different defendant in respect to a defense as to which substantially new evidence is produced, and the court will exercise an independent judgment in regard thereto.

3. SAME—PRIOR PUBLICATIONS.

Trade magazines, published and copyrighted, in general circulation, and found in public free libraries as well as scientific libraries, are publications, in the sense of the patent law.

4. SAME—BREAKING-CARTS.

The Putnam patent, No. 232,207, for improvements in breaking-carts, consisting in so attaching the footboard to the vehicle that it shall move in unison with the seat, is void because of anticipation, and for want of novelty.

This was a bill in equity for infringement of letters patent No. 232,207, issued to De Witt C. Putnam on September 14, 1880, for improvements in breaking-carts.

John L. Boone, for complainant.

E. J. Mize, for defendant.

MORROW, Circuit Judge. This is a suit in equity for the infringement of letters patent No. 232,207, granted to De Witt C. Putnam on September 14, 1880, for improvements in breaking-carts. The complainant is the assignee, by a regular chain of assignments, of all the right, title, and interest in said invention and letters patent for the territory known and described as "San Francisco county, state of California, and no other place or places." The patent has been in litigation heretofore in this court, and, on appeal, in the circuit court of appeals. Truman v. Holmes, 14 C. C. A. 517, 67 Fed. 542; Id., 80 Fed. 109; s. c. (on appeal) 87 Fed. 742. In Truman v. Holmes, 14 C. C. A. 517, 67 Fed. 542, which was an action at law, the validity of the patent was sustained on a writ of error to this court from the circuit court of appeals; and the judgment of the lower court, in favor of the complainant, in the sum of \$150, as damages for infringement, was affirmed. In Truman v. Holmes and Truman v. Implement Co.,—both being "companion cases," and suits