

bar to the relief asked for. The injunction is continued until trial, with a further clause enjoining the use of the word "Plymouth" upon any packages containing gin not in fact made in Plymouth.

BURNETT et al. v. HAHN.

(Circuit Court, S. D. New York. August 6, 1898.)

INFRINGEMENT OF TRADE MARK AND NAME — CEASING SALE AFTER SUIT BROUGHT—INJUNCTION.

When the article sold is inferior and spurious, and the packages sufficiently resemble complainant's to make it apparent that the design is to deceive the consuming public, injunction will be granted, although defendant is a dealer only, who purchased from the originator of the fraud, and, since action brought, has voluntarily ceased to deal in the goods.

Solomon Leistenstein, for the motion.
George Hahn, opposed.

LACOMBE, Circuit Judge. The label in this case does not bear as close a likeness to complainants' as is found in the Plymouth Gin Case (Collinsplatt v. Finlayson, decided to-day, 88 Fed. 693), but the spurious character of the goods sold is frankly admitted. The label somewhat resembles the complainants'; the style of bottle and of capsule are close copies; the label, by the use of the Union Jack, suggests an English origin; the designation "Old Tom," long associated with gin made by complainants and their predecessors, is used by defendant; while the statement that defendant's gin is manufactured by "Sir Edward Bruce & Co.," at the "Royal Distillery, London," is strongly suggestive of the words on complainants' labels, "Sir Robert Burnet & Co.," and "Vauxhall Distillery, London." In view of the concession upon the argument that the packages contain a cheap domestic gin, it is perfectly apparent that the designer of this form of package has been chiefly concerned in an attempt to deceive the consuming public. Defendant is a dealer only, who has purchased from the originator of the fraud with the intention of selling to others. Neither that circumstance, however, nor the further one that he has voluntarily ceased to deal in the goods since action begun, should deprive the complainants of their injunction, if otherwise entitled to it. The fraud being palpable, complainants may take injunction against the sale of gin in packages such as Exhibit B, or in similar packages, which, by collocation of label, bottle, stopper, capsule, and description, suggest the presence in the package of complainants' product, when the gin so sold is not in fact made by "Sir Edward Bruce & Co.," and was not in fact distilled at the "Royal Distillery, London."

N. K. FAIRBANK CO. v. LUCKEL, KING & CAKE SOAP CO.

(Circuit Court, D. Oregon. July 15, 1898.)

TRADE-MARKS—UNFAIR COMPETITION.

One using "Fairbank's Gold Dust" as a name for washing powder is not entitled to enjoin the use by another of the words "Gold Drop," where the packages, though similar in size and shape, are totally dissimilar in the

style of letters used, the arrangement of words, and the designs of the respective labels, so that there is no likelihood of deceiving purchasers using any care whatever.

This was a suit in equity by the N. K. Fairbank Company against the Luckel, King & Cake Soap Company for alleged infringement of a trade-mark.

Fenton Bronaugh & Muir, for plaintiff.
Cake & Cake, for defendant.

BELLINGER, District Judge. This is a suit to restrain the infringement of the trade-mark "Gold Dust," used to designate a washing powder manufactured and sold on the market by the complainant company. The appropriation complained of consists of the use of the name "Gold Drop" to designate a washing powder manufactured and sold by the defendant company in packages similar in size and shape to those of complainant. The defendant's packages are dressed up in a manner wholly different from those of complainant, and there is no resemblance between the two, except what is furnished by the similarity in size and shape of the packages of the two manufacturers, and by the use of the word "Gold" on each. Complainant's packages are distinguished by the name "Fairbank's Gold Dust Washing Powder." The style of letters used, the arrangement of words, and the designs of the respective labels, are totally dissimilar. There is nothing in defendant's packages to deceive purchasers, and there is no likelihood of deception of a purchaser exercising any care whatever, much less of a purchaser exercising ordinary care. If a retail merchant delivers defendant's manufacture to a customer who supposes he is purchasing complainant's goods, the deception of such purchaser is due to his blind reliance upon the person with whom he deals. Any inspection of the package, however careless, will necessarily lead to a disclosure of its character and origin. Such imposition can occur irrespective of the name and appearance of the package sold. If such a deception is practiced, or is liable to be practiced, it does not afford ground for relief in equity. The test is whether the substituted package is, from its name and dress, calculated to deceive purchasers. The word "Gold" is one of three words in the name adopted by complainant, "Fairbank's Gold Dust" washing powder, while the name adopted by defendant is "Gold Drop" washing powder. It is the use of this one of the three words constituting the name adopted by plaintiff that is relied upon as the ground for relief. If, with this, the goods complained of were dressed up in such a manner as to induce intending purchasers to believe they were buying plaintiff's goods, the plaintiff would be entitled to the relief prayed for. But the total dissimilarity in the dress of the respective packages, and the absence of all imitative devices, makes it impossible, so far as appearances go, to mistake one manufacturer for the other. Careless and indifferent purchasers may have defendant's washing powder palmed off on them for that of complainant; but equity cannot interfere on that account to guard against the dishonesty of dealers, nor the failure of buyers to see what is plainly to be seen. It is only in a clear case that equity will inter-

tere to restrain the freedom of individuals in the conduct of their business. Complainant is not entitled to the relief prayed for, and the decree will be that the bill of complaint be dismissed.

FLOMERFELT v. NEWWITTER et al.

(Circuit Court, S. D. New York. July 8, 1898.)

1. DESIGN PATENTS—ANTICIPATION.

An inventor may take out a patent for mechanical construction and a separate patent for the design of the same article, and hence the mechanical patent is immaterial on the question of anticipation of the design patent.

2. SAME—PRIOR USE—TESTIMONY FROM RECOLLECTION.

Testimony of a witness as to the date when an alleged anticipating article came into his possession, merely from recollection, unsupported by any other proof, and not fixed in his mind by any other occurrence which can be itself located in time, is insufficient to prove prior use.

3. SAME.

Proof that six pairs of cuff button links, like those covered by a patent, were made by another prior to the date of the alleged invention, is sufficient to invalidate the patent, though they never went into general use.

4. SAME—DESIGN FOR CUFF BUTTONS.

The Flomerfelt design patent, No. 24,091, for a cuff button, is void because of prior use.

This was a suit in equity by James A. Flomerfelt against Morris J. Newwitter and another for alleged infringement of a patent for a design for cuff buttons.

Edwin H. Brown, for complainant.

R. B. McMaster, for defendants.

LACOMBE, Circuit Judge. Design patent, No. 24,091, for a design for a cuff button, was issued to complainant, March 12, 1895. The specification describes the design as "consisting essentially in the shank portion, 2, of the cuff button, having double inclined or forwardly projecting or converging front or outer edge, 1, as combined with or viewed in connection with its angularly disposed heads, 3, 4, at opposite sides of the shank, said heads being inclined towards each other from the rear towards the front of the button, whereby the general planes of the heads tend or lean towards the planes of the two adjacent forwardly converging, angularly disposed parts of the front edge, 1, of the button shank, all as shown more clearly in the figure."

Fig. 1.



Fig. 2.

