

ers, the contract must be construed as an offer of which defendants might avail themselves or not. Having declined to employ defendants, they incur no liability on that account.

What strikes me as most singular in the case is that the whole enterprise of establishing and operating a creamery should have been abandoned without any reasonable cause being assigned. Assuming all the defects in the buildings and equipment of the creamery claimed by the defendants to have existed, they furnish no solution for the change. The creamery as constructed could have been taken possession of by defendants under protest, defects remedied, damages resulting from the completion of the building being too late, all could have been adjusted with or without suit. Why abandon the enterprise and attempt to throw the result of it upon the plaintiffs? Even after making due allowance for the persuading influence of patent creamery builders, I cannot account from the evidence for the giving up of the project. The defendants could have explained, and if failing to do so has influenced my conclusions, it is their misfortune, if not fault.

The decree will be that defendants accept the deeds and creamery, and pay plaintiffs the sum of \$5,001, with interest from date of decree.

SOUTHERN WHITE LEAD Co. v. CARY and others.

(Circuit Court, N. D. Illinois. October 10, 1885.)

1. TRADE-MARKS—INFRINGEMENT OF.

The complainant in a trade-mark suit is entitled to relief if the marks or brands used by the defendants sufficiently resemble the complainant's marks or brands to be mistaken for them.

2. SAME—INJUNCTION.

An injunction should be granted if the defendants adopt their brand for the purpose of selling their goods as and for the goods of the complainant, or for the purpose of enabling others to do so, and the complainant has been injured or is likely to be injured thereby. In such case it will not be sufficient for the defendants to show that no deception is in fact practiced on those with whom they deal personally; but an injunction will be granted if consumers to whom the goods are intended to be resold are or may be deceived.

3. SAME—USING NAME OF PLACE TO DECEIVE.

Where manufacturers at one place falsely mark or brand their goods as manufactured at another, for the purpose of inducing trade which would otherwise go to manufacturers at such other place, such false marking will be considered as fraudulent and a "resort to a palpable trick," and, the complainant being injured thereby, the infringing manufacturers will be enjoined from thus using the name of the place where the complainant carries on its business.

In Equity.

Banning & Banning, for complainant.

Dent, Black & Cratty Bros., for defendants.

GRESHAM, J., (orally.) The complainant is a large manufacturer of white lead at St. Louis. It stamps or stencils upon the upper

end or head of its kegs the words "Southern Company, St. Louis." These words encircle the head of the keg; "St. Louis" forming the lower half of the circle, and "Southern Company" the upper half; and they inclose the words: "Warranted strictly pure white lead in pure linseed oil." The complainant uses another brand or mark, in addition to the one already described, by simply stenciling a red crescent upon the upper half of the head of the keg. St. Louis has an established reputation for the manufacture and sale of pure white lead, and the complainant has had and maintained for years a large trade at that place as a manufacturer of this article. The evidence clearly shows that the complainant's lead is pure. The defendants are manufacturers of white lead at Chicago. They brand upon the heads of their kegs "Southwestern, St. Louis," surrounding the words "strictly pure white lead;" and the words "Southwestern, St. Louis," appear in the same form as the words "Southern Company, St. Louis," appear upon the complainant's keg, and the letters are the same in size and appearance. The crescent, however, does not appear on any of the defendants' kegs. The defendants also paste upon the sides of their kegs a label containing the words: "The white lead in this package is guaranteed strictly pure, ground in bleached oil, and for purity, whiteness, and durability is not excelled by any lead manufactured."

It is shown by analysis, and not denied, that while the complainant's manufacture is unadulterated and free from impurities, the defendants' contains on an average only 50 per cent. of lead. The complainant claims a trade-mark in its two brands, one without the red crescent, and the other with it; and this bill is filed to enjoin the defendants from infringing the first of these trade-marks.

I shall not stop to inquire whether the complainant's claim to trade-mark is or is not well founded, as I think it is entitled to an injunction upon another ground. The defendants so brand the heads of their kegs as to naturally mislead and induce persons purchasing for consumption to suppose they are purchasing the complainant's lead, when they are getting an inferior article. The brand used by the defendants is so like the complainant's as to induce the public to mistake the one for the other. The defendants sell their goods to retail dealers, and it may be that such dealers are not deceived, but they sell to consumers who are or may be deceived. The complainant is entitled to relief if the brand used by the defendants sufficiently resembles the complainant's brand to be mistaken for it, and the defendants adopted their brand for the purpose of selling their kegs as the kegs of the complainant, or for the purpose of enabling retail dealers to do so, and the complainant has been injured by this fraud, or is likely to be injured by it.

The complainant manufactures its genuine white lead at St. Louis, and its reputation is already established as a manufacturer and dealer of this character. The defendants manufacture their adulterated and greatly inferior lead at Chicago, and stamp upon their kegs a false

brand in imitation of the complainant's brand. Why is this done unless it be in the hope of deceiving the public and injuring the complainant? Realizing that they could not engage in open, manly competition with the complainant, the defendants resort to a palpable trick. If this resulted in no injury to the complainant, or was likely to result in no injury to it, the bill would have to be dismissed. But the affidavits show that the defendants' kegs can and have been sold as the complainant's.

A temporary injunction will be granted restraining the defendants from branding upon their kegs the words "Southwestern" and "St. Louis."

FLEISCHMANN and others v. STARKEY.

(Circuit Court, D. Rhode Island. May 14, 1885.)

TRADE-MARK—COLOR OF LABEL APART FROM NAME OR DEVICE.

The color of a label, apart from a name or device, cannot be the subject-matter of a trade-mark.

In Equity.

Chas. E. Mitchell and Oscar Lapham, for plaintiffs.

C. H. Johnson and C. F. Parkhurst, for defendant.

COLT, J. The complainants are the owners of certain trade-marks used upon their packages of compressed yeast, and they charge the defendant with an unlawful imitation of the same. It is clear, on a comparison of the labels, that the defendant is not guilty of any infringement unless the use of a yellow-colored label makes him chargeable. The position is taken by the complainants that the essential part of their trade-marks consists of a label having a yellow color, and that, therefore, they cover all yellow-colored labels used upon compressed yeast, and that the use by the defendant of a yellow-colored label upon the compressed yeast made and sold by him constitutes an unlawful imitation of their trade-marks. The defendant has taken no testimony. The evidence of the complainants goes to prove that yeast with a yellow label sells readily, while yeast with a white label, or any color other than yellow, sells with difficulty,—the cause of this being the reputation acquired in the market of the article manufactured by the complainants; and, further, that the public are deceived into buying other and inferior yeast having a yellow label as the genuine yeast made by them. This case narrows itself down to the question whether a label of a single color, like the one in controversy, is the lawful subject of a trade-mark apart from any name, figure, or device with which it may be connected, so that a person who adopts a similar color upon his label may be charged with an unlawful imitation. Color often serves as the groundwork of a trade-mark, and