

of the name "Chatterbox" upon their series of juvenile publications in this country. No occasion appears for repeating what was there said. The question of laches is more relied upon here as a defense than it was there. There is a question as to the effect of a decree in favor of the defendants against the orators, entered by consent in the court of common pleas of New York in 1881; and a question whether the use of that name by the defendants upon their publication amounts to any misrepresentation as to their source.

Mr. Johnston, from whom the orators derive their right, appears to have had the exclusive use of this name for his series of publications, both in England and this country, without interference, from 1866 to 1876, and his works to have become well known by that name in both countries. By that means he had acquired a clear right to that name for the admittance of his works among customers. So far as is shown, he vindicated this right as often as it was invaded to his knowledge until the time when he conveyed it to the orators in 1880. Since then they have not, for any length of time, abandoned it, but have continually asserted it in one way or another, although not against all trespassers at once. No right as against these defendants appears to have been lost in this manner. *Collins Co. v. Ames*, 20 Blatchf. 542; S. C. 18 Fed. Rep. 561.

The operative part of the decree of the court of common pleas restrained the orators from selling any publication called the "Chatterbox" or "Frank Leslie's Chatterbox," with the name "Frank Leslie," or the address "Frank Leslie's Publishing House, 53, 55, and 57 Park place, New York," thereon. This did not extend to the name "Chatterbox," and no right to its use was decreed to either party, or affected by the decree in any manner.

Whether the use which the defendants make of the name is calculated to put their publications in the place which those of the orators would otherwise take is principally a question of fact, and is the most important one open in this case. The publications of Johnston were composed of selections of stories, sketches, and poems, with pictorial illustrations intended for, and interesting to, the young; printed with a head-line, "Chatterbox," on each page; bound in square form, in illuminated boards, with vignette slightly varying in style from one number to another, and the name "Chatterbox" prominently on the front, and with a plain cloth back. The selections had been made with such care and skill, and the illustrations and style of binding made so attractive, that they had acquired great popularity, and found large sales, as well in this country as elsewhere. The same method of selection and illustration, square form, style of binding, and of vignette, as well as name on the cover, have been taken by the defendants. The name is the only thing in question in this case, but the adoption of so many other features tends to show the intent with which the name is used. All these things together lead plainly to the conclusion that the name has been appro-

priated to gain an advantage from the reputation and popularity which Johnston's work had acquired under it, and that this appropriation of it is calculated to make the works of the defendants pass for his to some extent. It is true that the name "Frank Leslie" is added, so that the title is "Frank Leslie's Chatterbox," and the address of the publishing house is put on. This appears to be done, however, for the purpose of adding the reputation of Frank Leslie and of that publishing house to that of the Chatterbox, rather than for that of building up a new reputation under that name. If nothing had been wanted of the popularity which had been acquired under it, and which it stood for, it could have been left, and another name taken to build up. The defendants do not copy the orators' publications, but imitate them, and apply the name of the orators' publications to their imitations.

Let a decree be entered for the orators for an injunction and an account, with costs.

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### ATLANTIC MILLING Co. v. ROWLAND and others.

(Circuit Court, S. D. New York. February, 1886.)

#### TRADE-MARK—INFRINGEMENT—DAMAGES—PROFITS.

Where a party has made profits by the sale of goods in violation of the rights of another in a trade-mark, the owner of the trade-mark is entitled to them, whether the same profits would have been made by him or not, and not to any more if they would, for the same profit could not be made by both.

In Equity.

*Antonio Knauth*, for orator.

*Fred'k P. Foster*, for defendants.

WHEELER, J. The final decree establishes the right of the orator to the use of the word "Champion" as a trade-mark for flour; that the defendants have infringed upon that right; and that the orator is entitled to recover of them the profits to the defendants, and damages to the orator, due to the infringement. The master has reported that the defendants have used the trade-mark in the sale of 900 barrels of flour, and have made a profit of 25 cents per barrel through that infringement, amounting to \$225; and that the orator has suffered damages to that amount thereby. The defendants except to this finding only. The principal question is whether it is warranted by the evidence. The evidence tended to show that flour of the orator's having that mark was in the same market, that it would bring 25 cents more per barrel on account of that mark, and that the defendants used the mark in making the sales. The defendants' evidence tended to show that the flour would not bring any more on account of the

mark, and that they lost, on all the lots making up the 900 barrels, except one, \$43, and on that one made only \$7.50. All questions as to the weight of conflicting evidence were for the master. The defendants might get 25 cents per barrel more on account of the trade-mark, and still lose on the whole transaction. The profits due to the trade-mark only, and not the profits of the whole business, were the subject of inquiry. *Garretson v. Clark*, 15 Blatchf. 70; S. C. 111 U. S. 120, and 4 Sup. Ct. Rep. 291. The general loss would be less on account of what the trade-mark brought more.

It is argued that the evidence does not show that the orator would have made this profit if the defendants had not. This might be true, and not affect the rights of the parties. If the defendants made profits by their invasion of the orator's rights, the orator is entitled to them whether the same profits would have been made by the orator or not, and not to any more if they would, for the same profits could not be made by both. But the master seems to have inferred that they would, and therefore to have found that the orator was damaged by the loss of profits to the same extent that the defendants saved by them. The fact that the flour of the orators bearing this mark was in the same market would seem to be sufficient to warrant this finding. *Faber v. Hovey*, 1 Wkly. Dig. 529; S. C. 73 N. Y. 592.

Exceptions overruled, report accepted and confirmed, and decree to be entered accordingly.

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### CAFFERY v. JOHN HANCOCK MUT. LIFE INS. CO.

(Circuit Court, E. D. Michigan. March 15, 1886.)

#### 1. LIFE INSURANCE—WAIVER OF STATUTORY PROVISION.

An act of the legislature provided that, upon the payment of the first premium upon a policy of life insurance, the policy should remain in force for a certain time for the full amount thereof, "anything in the policy to the contrary notwithstanding." *Held*, that this act might be waived by the express agreement of the parties, by the substitution of a non-forfeitable policy of a different character.

#### 2. SAME—BENEFICIARY BOUND BY ORIGINAL CONTRACT.

The beneficiary of a policy is bound by all the terms of the original contract entered into between the insured and the company.

This is an action upon a policy of life insurance for \$1,000. The facts were all stipulated, and were substantially as follows:

(1) The defendant is a corporation, organized and existing under the laws of the state of Massachusetts prior to the dates of any of the statutes of the state hereinafter mentioned.

(2) On the fifteenth day of November, 1880, one John F. Mills, of Michigan, made his written and printed application to the defendant for insurance on his life for \$1,000, for the term of 20-year endowment, and in said application agreed as follows, to-wit: