

LICHTENSTEIN *et al.* v. GOLDSMITH.

(Circuit Court, D. Massachusetts. January 28, 1889.)

**1. TRADE-MARKS—WHAT WILL BE PROTECTED.**

A label consisting of the head of an elk, with the word "Elk" printed in large letters upon the face of the label, together with the words printed on it, "Patented by the Elk Cigar Factory, June 15, 1875," sufficiently indicates origin and ownership, to be a valid trade-mark, when applied to a box of cigars, which is also stamped with the district in which the cigars are manufactured.<sup>1</sup>

**2. SAME.**

The fact that the owner of the trade-mark also allows the boxes to be labeled with the names of the dealers to whom the cigars are sold, does not amount to a deception or false representation, so as to invalidate the trade-mark.

**3. SAME.**

The fact that such labels are put on different brands of cigars is also immaterial, it appearing that these brands are designated by something which distinguishes one from another, so that no deception is practiced.

In Equity. Bill for infringement of trade-mark.

*George L. Huntress*, for complainants.

*Edward H. Pierce*, for defendant.

COLT, J. The complainants are the owners of a trade-mark consisting of the head of an elk, with the word "Elk" printed in large letters upon the face of the label, and this mark has been used by them for a number of years upon boxes of cigars. The defendant brands certain boxes of cigars made by him with substantially the same device. In view of the close identity of the two devices, the defendant cannot deny infringement, but he places his defense on other grounds. I will consider those which are most important.

It is said that the trade-mark is invalid because it does not designate origin or ownership. This is manifestly unsound. The original design contained the letters "A. L. & Bro.," standing for A. Lichtenstein & Brother, and, as now used, it has the words printed on it, "Patented by the Elk Cigar Factory, June 15, 1875." There is also stamped upon the box the district in New York in which the factory is located. Since 1875 these cigars of the Elk brands have been made by A. Lichtenstein & Bro., or their successors, A. Lichtenstein, Son & Co., and their factory has been known as the "Elk Cigar Factory." It seems to me that the trade-mark sufficiently indicates origin and ownership.

Again, it is said that the complainants deceive the public, in that they allow the boxes to be labeled with the names of dealers to whom the cigars are sold, or for whom they are made. But this is shown to be a custom in the cigar trade, and I do not think it results in any deception or false representation. All these cigars are in fact made at the Elk Factory, and they are so stamped, and when the public buy them, they are

<sup>1</sup>Concerning what will be protected as a trade-mark, see *Manufacturing Co. v. Stone Co.*, 35 Fed. Rep. 896, and note; *Brown Chemical Co. v. Stearns*, *post*, 360, and cases cited.

purchasing a genuine Elk cigar, made by these complainants; and I do not see that the additional label put on the box in accordance with a custom of the trade is in any just sense such a false representation as should invalidate the trade-mark.

It is further urged as a defense that the complainants make different brands of cigars, all of which are called "Elk." But if, as appears, these brands are designated by something which distinguishes one from the other, then no deception is practiced. I see no reason why this trade-mark should not be used in good faith on different brands or grades of cigars all of which are made by the complainants.

The defendant also claims that the complainants gave him permission to use this trade-mark on the goods sold by him, but the evidence does not, in my opinion, sustain his position. This seems to me a case where the defendant has wrongfully appropriated a trade-mark belonging to others, and in none of the defenses brought forward can I find any justification for his action. Let an injunction issue as prayed for. Injunction granted

### BROWN CHEMICAL CO. v. FREDERICK STEARNS & CO.

(Circuit Court, E. D. Michigan. January 7, 1889.)

#### 1. TRADE-MARKS—"IRON BITTERS."

The words "Iron Bitters," being indicative of the composition of the article so called, cannot be claimed as a trade-mark.<sup>1</sup>

#### 2. SAME—DISHONEST COMPETITION IN TRADE.

If one person can, by superior energy, by more extensive advertising, by selling a better or more attractive article, or by greater frankness in disclosing the ingredients of his compound, outbid another in popular favor, he has a right to do so, provided he does not attempt to palm his goods off as those of another. This right is not impaired by an open avowal of his intention to compete with the other, or even to drive him out of the market. But he has no right, however honest his personal intentions, to use so much of his rival's name or trade-mark as will enable any dishonest trader, into whose hands his own goods may come, to sell them as the goods of his rival.

#### 3. SAME.

Hence where plaintiff was the proprietor of a preparation known as "Brown's Iron Bitters," and defendant of another, called "Iron Tonic Bitters" which it falsely stated to be made by "Brown & Co., New York," it was held that such statement should be enjoined.

(*Syllabus by the Court.*)

#### In Equity.

This was a bill to restrain the illegal use of plaintiff's trade-mark. The bill alleged that the plaintiff many years ago adopted as a designation for a medicinal preparation the words "Brown's Iron Bitters," which designation it has since continuously used. That the preparation is now and has been known to consumers, and identified by the name "Iron

<sup>1</sup>In general, as to what words will be protected as a trade-mark, see *Manufacturing Co. v. Stone Co.*, 35 Fed. Rep. 396, and note; *Indurated Fibre Co. v. Fibre Ware Co.*, *post.*, —, and note.