COMMITTEE REPORTS

REPORT OF COMMITTEE ON PATENTS AND TRADE MARKS, A. PH. A., 1920.*

Since the last meeting of our Association there has been no change in the fundamental patent and trade mark laws of this country. We pointed out in our last report that two bills were before Congress which would effect a reorganization of the patent office and patent litigation.

One of these was entitled "A Bill to Establish a Patent and Trade Mark Office Independent of Any Other Department and to Provide for Compensation and Infringement of Patents in the Form of General Damages and for Other Purposes." The other was entitled, "A Bill to Establish a United States Court of Patent Appeal and for Other Purposes." Neither of these bills has passed since our last meeting, but they have received the endorsement of many scientific and trade organizations.

We recommended at our last meeting that these bills be endorsed and this was done. We now recommend a reëndorsement of these bills by the American Pharmaceutical Association.

The subjects relating to patent and trade marks now exciting the most interest in medical, pharmaceutical and drug circles are as follows:

1. The Chemical Foundation, Incorporated, which, as you know, was organized to lease out the German dye patents seized by the Alien Property Custodian during the great World War. It is capitalized at $500,000. It was not organized to make money, and according to the General Council of the Corporation, Mr. Joseph H. Choate, none of the incorporators will be able to make money out of it. The President of this Corporation is Mr. Francis B. Garvan, Assistant Attorney General of the United States.

The control over the German dye patents, exercised by the Chemical Foundation, Incorporated, gives this Corporation immense power and influence, and there is much speculation in regard to the probable action of the Government in relation thereto. To insure impartiality in the issue of licenses, the trustees of the Corporation are not dye makers, but are composed of men wholely dissociated either from the dye makers or dye industries.

2. Much interest also attaches to the plan of the Government which may be described as "compulsory license" in relation to patented chemical products. The question is, what will be the final result of this system? Will it overcome some of the serious objections pertaining to our system of "product patents" by which the first inventor of a process for producing a chemical compound hitherto unproduced, by patenting both product and process, has been able to prevent all future inventors from marketing the same product until the expiration of the original patent; a system which defeats the very object of the patent law?

3. The demand on the part of certain commercial interests for legislation on the subject of trade marks to secure their registration; this registration to include the names of various chemical and medicinal products, and the names of journals, magazines, etc., as suitable subjects for registration and commercial control. By including the names of products in a group of things suitable for registration, it is hoped that legislation may be secured of such character as to practically endorse the claim that the names of chemical substances and medicines are proper subjects for commercial control, by the manufacturers, of the articles for which these names are used as appellatives. It will be remembered that the word "Aspirin" was removed from the trade mark register because the manufacturer of the product known under that name had succeeded by his advertising, in forcing the name Aspirin into the common language as a noun, so that the public in purchasing the product accepted this name as an appellative in the same manner as people accept the name "Chloroform" as the proper name for Trichlormethane; Saccharine for Benzosulphinidum; Antipyrine for Phenazone; Phenacetin for Acetphenetidinum, etc.

If is freely admitted by prominent patent lawyers that the intent is to secure control over the nomenclature of advertised chemical, medicinal and food products of such character as to create a lasting monopoly of the sale of such products under the registered names. It is admitted that the desire is to place these substances in a position that would have been acquired by the first manufacturer of quinine, if said manufacturer had patented quinine as a product, also

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patented the first process for producing quinine, and had registered the name quinine as a trade mark. If this had been done, and legislation secured of the kind now aimed for, the first discoverer of the alkaloid quinine would have been able to monopolize its sale under the control of the patents for 17 years, and then, having established the name quinine as an appellative by advertising the same as a noun of the language, would also have been able to control the sale of quinine under that name during the lifetime of the inventor and his heirs and assigns.

When it is recalled that the names of practically all the newer chemical substances, including the so-called registered names, have been incorporated in the dictionaries and textbooks as synonymous with the chemical names, and many of these registered trade names have also been included as synonyms in the Pharmacopoeia, the danger to chemical and materia medica nomenclature, and to the publishing houses, and also to the science of chemistry and materia medica, and to the educational institutions teaching this science, becomes at once apparent.

4. Much interest is also being excited on the part of those who are behind the scenes in the attempt to secure an international agreement on this subject of trade marks of such character as to make it a crime for the citizens of any nation entering into the agreement to use any of the registered names in labeling their products. In other words, to use the quinine illustration above referred to, such an agreement would have made it a crime for any person, except the original manufacturer, to produce and sell quinine under the name quinine in any part of the world subject to the aforesaid agreement.

Further information in relation to this scheme for the revision of the laws relating to trade marks may be obtained by referring to the "Report of the Commissioners Appointed to Revise the Statutes Relating to Patents, Trade and Other Marks, and Trade and Commercial Names, under Act of Congress, Approved June 4, 1898, Senate No. 20."

5. The subject of Formula Disclosure Bills is also attracting much attention, because it is realized by the so-called proprietors of secret formula preparations that such legislation may result in jeopardizing their so-called trade mark rights. The following paragraph appears in the Editorial Department of "Standard Remedies" for December 1915. As stated on the title page, "Standard Remedies is published in the interest of the Manufacturers and Jobbers of Proprietary Medicines, Cosmetics, etc." We quote from pages three and four:

> "The name of a secret or proprietary preparation is descriptive thereof, and hence is not a valid trade mark. Any one who discovers the secret and makes the goods according to the formula may use the name to describe the goods." (Cyc., 38–740.)
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> "The name of a secret and proprietary preparation will be protected against unauthorized use or imitation as the name of some other different preparation of like kind sold in competition, but not made in accordance with the formula of the original and genuine article, even though the labels and wrappers are entirely different because such a use is necessarily false and deceptive.
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> "But such names are generally descriptive and therefore may be used by anyone who discovers and knows the secret of the composition of the article and makes his own article according to the original formula. If such is the truth a subsequent user of the same must add some distinguishing statement showing that the article is his own production of the article known by that name and he must not imitate the dress or the make-up of the goods in addition to using the name, or do any affirmative act calculated to deceive the public and pass off the goods as and for the previously known goods." (Cyc. 38–835.)

The "Standard Remedies" also states that, "The principle herein set down is that the courts will not protect the manufacturer of a proprietary article against the use of the name of that article by another who 'discovers and knows' the secret of the composition, but will protect the original owner of the name against such unfair competition as might result from simulation of the package, or against any affirmative act calculated to 'pass off the goods as and for the previously known goods.'"

"In other words, Mr. Smith has a preparation known by a trade name and manufactured under a secret formula or process. Jones, his competitor, 'discovers and knows' the secret of composition and can make the identical article made by Smith and call it by a trade name originated by Smith, and the courts will not protect Smith, but the courts will protect Smith against

unfair competition resulting from an 'affirmative act' calculated to 'pass off the goods as and for the previously known goods.' Jones may not dress his goods in imitation of Smith's and must even add some distinguishing statement showing that the article is of his own production, and is not the production of Smith, but the main point is that Jones may, if he can duplicate the product exactly, call it by the trade name devised by Smith by which name the trade is accustomed to call for it and to know it."

6. Your Committee has been requested to consider the question of trade marks in relation to medicinal preparations of secret formula. The questions relating to this subject have already been considered by the Committee in former reports and some of the questions are answered in the above statement copied from "Standard Remedies." Your Committee has on file a large number of decisions of reports on this subject, to which those interested may have the opportunity of referring, by addressing the Chairman.

In closing, your Committee begs to again call attention to the following statements which appeared in the report of the Committee on Patents and Trademarks in 1917:

"The right to the exclusive use of an invention is not a natural right—that is, pertaining to a man in a state of nature; but, when it exists at all, is a civil right, pertaining to man under the protection of a civil government."[1]

"An inventor has no right to his invention at common law. He has no right of property in it originally. The right which he derives is a creature of the statute and of grant, and is subject to certain conditions incorporated in the statutes in the grants."[2]

"As pointed out in this report, trademarks differ from patents. By registering a name, the person who registers it does not receive a grant from the Patent Office, conferring upon him the exclusive right to the use of the name. Irrespective of registration, a manufacturer may adopt a word as his trademark and as long as he uses it as a commercial signature to distinguish his brand of the article from other brands of the same article, said article being open to competition under its specific designation, he will be protected in such use of the word. As already shown, it is not necessary that the word should be a coined word. Any word may be so used provided it is used as a trademark and not used as the name of the article itself."

"It is evident, therefore, that 'the policy that the mere use of a name to designate an article would give to those employing it the exclusive right to designate such article by such name, would be giving a copyright of the most odious kind, without reference to the utility of the application or the length of the title, and one that would be perpetual. Neither the Trademark Law, nor the Copyright Law, nor the Patent Law, affords any such right, or, under the pretense of the same, allows any one to throttle trade under the alleged sanction of law.' (Browne on Trademarks.)"

Committee { C. L. ALSBERG, R. P. FISCHELIS, W. A. PUCKNER, S. C. HENRY, F. E. STEWART, *Chairman*.

SOLUBLE LEAD IN THE GLAZE OF CASSEROLES.

In a recent issue of the *Experiment Station Record*, there is abstracted a report on certain experiments made by H. Masters, with several types of earthenware casseroles, of French make, glazed only on the inside; and which showed that, in some cases, a considerable amount of lead can be extracted from the glaze not only by the action of 4 percent acetic acid but (and this is important) also by the action of dilute solutions of organic acid; namely, 1 percent acetic, citric or malic acid. It is further stated that glazed earthenware casseroles should, before being used, be treated with dilute acetic acid, which is kept at boiling temperature for an hour or more in the dish.

[1] Simonds Manual of Patent Law.

[2] 1. Am. H. & L. S. & D. Mach. Co. vs. Amer. Tool and Mach. Co., 4 Fisher's Pat. cases, 294.