

AMERICAN DRUGGISTS SYNDICATE }  
 LTD. .... } PETITIONER;

1923  
 March 12.

AND

BAYER COMPANY, LIMITED.....OBJECTING PARTY.

IN RE "ASPIRIN"

*Trade-mark—Essentials—Distinctiveness—Publici juris—Trade-mark valid when registered may be subsequently attacked for invalidity—Effect of expiry of a patent of an article upon the trade-mark of the name given to such article—Publication and user—Abandonment.*

*Held* that when a person invents a new article and at the same time invents a word to designate it, he cannot claim the exclusive use of that word to denote his own manufacture as distinguished from others. The name given to the invented article becomes part of the English language and is therefore *publici juris*.

2. That as the word "Aspirin" *qua* the public did not distinguish the goods of one trader from those of another it was incapable of exclusive appropriation, and lacked the essentials of a valid trade-mark.
3. That where a new article is invented on which a patent is taken and a new name given to the article, when such patent expires, the public, who are free to make use of the article, may also use the name by which it is known. That moreover in the present case, the article never having been patented in Canada, the name had been *publici juris* there from the beginning.
4. That where a word is originally registerable as a valid trade-mark, if it subsequently becomes merely descriptive of the article and loses its distinctiveness, it may be attacked as invalid and, in the discretion of the Court, may be ordered to be expunged from the register.
5. That B. & Co., never having used the trade-mark "Aspirin" alone, and having later registered two trade-marks consisting of the name Bayer and the Bayer Cross, and having then used these along with the word "Aspirin", and having advertised this combination, such non-user of the trade-mark "Aspirin" coupled with the above facts constituted a distinct manifestation of real and intentional abandonment of the word "Aspirin" alone as a trade-mark, and amounted to a notice to the public of their intention to use such name simply as the name of the drug.

ACTION by the petitioner herein to have the trade-mark "Aspirin" expunged from the Canadian Register of Trade-Marks.

December 11th to 15th, inclusively, 20th to 22nd inclusively and 27th to 29th inclusively, 1922.

Case now heard before the Honourable Mr. Justice Audette at Ottawa.

*W. F. Chipman, K.C., Russel S. Smart and B. H. L. Symmes* for petitioner.

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*The Honourable Wallace Nesbitt, K.C. and A. W. Langmuir* for objecting party.

The facts and questions of law involved in this case are stated in the reasons for judgment.

AUDETTE J., this (March 12th, 1923), delivered judgment.

This is an application, by the petitioner, to expunge from the Canadian Register of Trade-Marks a specific trade-mark, to be applied to the sale of pharmaceutical preparations which consists of the word ASPIRIN, and which was registered by Farbenfabriken Vormals Friedrich Bayer & Company, of Elberfeld, Kingdom of Prussia, Empire of Germany, on the 28th April, 1899 (Ex. No. 1) upon an application for the same, dated the 12th April, 1899.

On the 1st August, 1898 (ex. No. 8), one Felix Hoffman, chemist, residing at Elberfeld, Germany, applied for and obtained on the 27th February, 1900, in the United States, a patent for what he claimed

a new and useful improvement in the manufacture or production of acetyl salicylic acid

stating that

In the *Annalen der Chemie und Pharmacie*, Vol. 150, pages 11 and 12, Kraut has described that he obtained by the action of acetyl chlorid on salicylic acid a body which he thought to be acetyl salicylic acid.

This American patent, No. 644,077, of the 27th February, 1900, which further states that Felix Hoffman assigned it to The Farbenfabriken of Elberfeld Company, of New York, expired in 1917.

Moreover, on the 3rd April, 1899, the said The Farbenfabriken of Elberfeld Company of New York, applied for and obtained, in the United States, on the 2nd May, 1899, the registration of the Trade-Mark "Aspirin" which they

adopted for a trade-mark for a pharmaceutical compound, etc. (ex. No. 91).

This American trade-mark was, on the 8th March, 1919, cancelled and avoided. (See exhibits 92 and 93.)

The British trade-mark "Aspirin" was under special legislation, avoided, in England, on the 5th February, 1915, as from the 22nd December, 1914. (See Ex. No. 20.)

Then on the 12th June, 1913, Farbenfabriken Vorm Friedrich Bayer & Co., of Leverkusen, Germany, sold,

assigned, transferred and set over unto the New York Corporation, The Bayer Company Inc., the good will of its business and all the trade-marks, trade-names and brands owned by the Farbenfabriken vorm Friedr. Bayer & Co., in the Dominion of Canada. This assignment was registered in the Canadian Register of Trade-Marks on the 26th March, 1919.

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And on the 30th May, 1919, The Bayer Company, Incorporated,

did sell, assign and transfer unto The Bayer Company, Limited, the trade-mark "Aspirin" for the Dominion of Canada, etc., and all the good-will and business in the Dominion of Canada in connection therewith.

*Bowden Wire, Ltd., v. Bowden Brake Co.* (1), *Edwards v. Dennis* (2).

It might have been well to state the pleadings in the interest of a clearer understanding of the varied issues and contentions between the parties, but they are too lengthy for full quotation here and they do not admit of being succinctly paraphrased.

At the opening of the trial, counsel for the petitioner moved for judgment by default against the said Farbenfabriken Vorm Friedr Bayer & Co., upon which, under special order of the court, a notice of the said petition to expunge the Canadian trade-mark above referred to had been served in Germany, requesting them to file any plea to the said petition that they saw fit, within sixty days from the service upon them of the said petition.

The Farbenfabriken Vorm Friedr Bayer & Co. are the predecessors in title of the present objecting party, to whom they have assigned whatever rights they had in respect of the said trade-mark. After hearing counsel both for the petitioner and for the objecting party upon this application, I reserved judgment intimating that I would dispose of the motion for judgment by default when I pronounced upon the merits of the whole controversy.

The Canadian Custodian of Alien Property was also served with a similar notice and he appeared and filed a declaration reading as follows:—

The Secretary of State, acting in his capacity as Custodian under the terms of the Treaty of Peace (Germany) Order 1920, hereby declares that

(1) [1913] 30 R.P.C. 580.

(2) [1884] 30 Ch. D. 454, at p. 479.

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he is not interested in the present petition herein, filed on the 11th day of April, 1921, inasmuch as the interest in the word "Aspirin" registered in folio 6889 of Register 29 in the Exchequer Court of Canada, does not come within the purview of section 33 of the Treaty of Peace (Germany) Order 1920.

From all of which it will be seen that the present controversy involves intricate and complex facts, as well as some nice questions of law from which the clouds of doubt have not been, in Canada, cleared away up to the present time.

This court is given general jurisdiction over trade-marks under section 23 of the Exchequer Court Act, and general as well as special and discretionary jurisdiction under section 42 of the Trade-Mark and Design Act. *Billings & Spencer v. Canadian Billings* (1); *Auto Sales Gum and Chocolate Co.* (2).

Now, on the 1st August, 1898, when Hoffman applied for his patent in the United States, he clearly set out that his patent was for an improvement in the manufacture or production of acetyl salicylic acid, stating that Kraut had already obtained that acid in a given manner. That has not been controverted.

Therefore, in 1898, before Hoffman's discovery or improvement became known, it must be found that Acetyl Salicylic Acid existed and was known as such and that Hoffman's discovery was only an improvement in the manufacture or production of the same.

Moreover, that is confirmed and corroborated by *viva voce* evidence establishing that, as far back as that date and before the patent and the two trade-marks were issued Swiss Aspirin, German Aspirin and French Aspirin as well as Swiss, German and French acetyl salicylic acid, were known as such by the trade, were in existence and being sold and used for medicinal purposes even in Canada. And that would suggest this *quaere*, as to whether that would or would not amount to user and publication by others before the issue of the trade-mark "Aspirin."

Then, simultaneously, I will say, Hoffman's assignees, whom I will call the "Farbenfabriken" people, applied and obtained both in Canada and in the United States the registration of the specific trade-marks above mentioned

(1) [1921] 20 Ex. C.R. 405, 410.

(2) [1913] 14 Ex. C.R. 302.

for their word "Aspirin" to be applied to pharmaceutical preparations and compounds, etc.

The application for the patent and the trade-marks went hand-in-hand, so to speak; at the same time with the combined purpose of the patent for the improvement in the process and the trade-marks for the name of that improvement or drug.

A person who invents an article and wishes to maintain a trade-mark on it must give it one name by which it can be identified and known as such and give it also another name to indicate his manufacture. One name or word cannot both describe the thing as made by any body and the thing made by a particular person or maker.

By paragraph 10 of the statement of objection, the objecting party avers that

the objecting party and its predecessors in title in the said trade-mark were the first to adopt and use the said word "Aspirin" as a trade-mark, and have for many years past used the same in connection with the distribution and sale of their manufacture of acetyl salicylic acid in order to distinguish it from the acetyl salicylic acid manufactured, produced, prepared or offered for sale by any person, firm or corporation other than the objecting party and its predecessors.

That clearly means that the respondent claims to use the trade-mark "Aspirin" to distinguish the Hoffman acetyl salicylic acid from the acid manufactured by any other firm or persons, including "its predecessors," that is, to denote the manufacture by it of the acetyl salicylic acid covered by the patent No. 644,077, as distinguished from the manufacture of the same by any other person, including its predecessors. Therefore, the word "Aspirin," according to the objecting party's own view, would mean both the acetyl salicylic acid manufactured by them, as distinguished from any other manufacturer, and furthermore the word "Aspirin" would also mean the acetyl salicylic acid manufactured under the Hoffman patent, as distinguished from the acetyl salicylic acid of Kraut, or any such acid manufactured by its predecessors.

In other words, "Aspirin" would be the name of the new acetyl salicylic acid manufactured under the Hoffman patent, as distinguished from Kraut's acetyl salicylic acid or any such acid produced before by the objecting party's predecessors, by any one before the Hoffman patent. Hoffman's product became known and was chris-

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tened as "Aspirin" by the objecting party's predecessors in title. Moreover, "Aspirin" also meant, according to the pleadings, the acetyl salicylic acid manufactured by them.

It is quite clear and logical from the above that if the product of that Hoffman patent were put on the market, the mere name acetyl salicylic acid, *per se*, would not identify the "new compound"—that "new article of manufacture"—; but that some name had to be given to this new birth in pharmacy. It was christened "Aspirin." A generic name which became part of the English language; and by which name, as was stated under oath by one of the company's officials, the product of Hoffman's patent became known to pharmacy. No one can monopolize the English language. Nor can anyone have a monopoly in the name of anything.

The chemists, says witness Grant, use to-day the two names of acetyl salicylic acid and aspirin simultaneously, meaning interchangeable terms. However, witness Heebner says, the public, the consumer, probably knows no other name than "Aspirin." These two witnesses were heard on behalf of the objecting party. Aspirin is the name of a drug not indicating the name of the manufacturer or dealer. The public asks for Aspirin, says witness Munroe, there is no other name. *Dadirrian v. Yacubian et al* ("Matzoon") (1); *The Gramophone Case* (2); *Williams, Ltd., Appl. (Chocaroons Case)* (3); *Manhattan Medicine v. Wood* (4).

When a person invents a new article and at the same time invents a word to designate it, he cannot claim the exclusive use of that word to denote his own manufacture as distinguished from others. The name given to the invented thing becomes part of the English language and is thereby made *publici juris* and that person cannot appropriate it to the exclusion of others.

There is this difference between a patent and a trade-mark: Under the former, every sale made without a license of the patentee must be a damage to the patentee. In the case of a trade-mark

(1) [1896] 72 Fed. Rep. 1010.  
 (2) [1910] 27 R.P.C. 689.

(3) [1917] 34 R.P.C. 197.  
 (4) [1882] 108 U.S.R. 218, 222.

the property and the right to protection is in the device or symbol which is invented and adopted to designate the goods to be sold and not in the article which is manufactured and sold.

Sebastian, pp. 12 and 13.

And in that view—respecting the creation of a name to designate a new article and using the same to denote the manufacture of the same as distinguished from others—the objecting party is corroborated by the documentary evidence produced as exhibit No. 94 by the petitioner. This exhibit is the bill in equity in the case of *Farbenfabriken of Elberfeld Company v. Edward A. Kuehmsted*, for infringement of the word “Aspirin,” wherein it is stated, in the third paragraph of the second page, that the product described and claimed in the said letters patent (No. 644,077) and patented thereby is the substance now known in pharmacy as “Aspirin.”

This declaration and affirmation is furthermore sworn to by one Wm. Diestel, the treasurer of the complainant, the *Farbenfabriken* people, who are the objecting party's predecessors in title and who are thereby bound. This admission by the assignors of the objecting party, in respect of the very trade-mark assigned by them, and its legal effect upon the trade-mark in question must be taken as if the admission had been made by the objecting party itself. *Keuhmsted v. Farbenfabriken* (1); *Smith v. Farbenfabriken* (2); *Farbenfabriken v. Kuehmsted* (3).

And after all, the evidence of the fifty odd druggists heard in this case, between Halifax, N.S., and Victoria, B.C., from coast to coast, amply confirms that fact.

Acetyl salicylic acid became first known to the trade in Canada as a powder or crystal, under the name “Aspirin.” The druggists became acquainted with it from the doctors' prescriptions who, barring a few exceptions, used the word Aspirin to designate the acid. In some cases, a doctor, being somewhat pedantic or desirous that his prescription should retain as much as possible the character of a scientific document, not intelligible to the man on the street, would use the word acetyl salicylic acid. The word mono-aceticacidester of salicylicacid too cannot be said to have been used. *Qua* the public, the word “Aspirin” did not

(1) [1910] 179 Fed. R. 701.

(2) [1913] 203 Fed. R. 476.

(3) [1909] 171 Fed. R. 887.

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indicate the origin, but the name of the drug. The powder or crystal came first, then the tablet with the name of the chemist and then the tablet with the name of the manufacturer,—all being known and sold as Aspirin.

The trade, that is the druggist, the wholesale dealer and the manufacturer were aware of the two names, but the public was not. The druggists treated the names of "Aspirin" and acetyl salicylic acid as synonymous and interchangeable when filling prescriptions; and they were treated in the same way by the doctors. The use is *qua* the public, the consumer, as pointed out in *Ford v. Foster* (1). The public up to the present time does not know it under any other name than Aspirin. The sale over the counter, to which reference will be made hereafter, did really and actually begin with the tablets and was always sold as "Aspirin," from somewhere in 1906 on. "Aspirin" became the name of the drug acetyl salicylic acid, just as much as salt means and is the popular name for sodium chloride; Epsom salts, for magnesium sulphate; calomel, for sub-chloride of mercury; blue pill, for pill hydrag; paregoric, for tint of camph. Co., and sugar for saccharin. Chemical or scientific names are not expected to be used by the public,—as the fact truly is—because they are not known to the public.

Now, as has been mentioned before, Hoffman's product has been christened "Aspirin."

The name acetyl salicylic acid does not define, so as to identify, the product of Hoffman's patent, as distinguished from that of Kraut, the German or from the Swiss and the French acetyl salicylic acid, and therefore the objecting party's assignors,—predecessors—christened that product "Aspirin" which, according to their own statement, substantiated under oath, became known in pharmacy under that generic name and as the name for that particular product described and claimed in said (Hoffman's) letters patent. Therefore Aspirin is not and never was a trademark, but is merely the name of a new product which anyone in Canada, at any time, and in the United States at the expiry of the patent, might and may use as a word to designate the same.

(1) [1872] L.R. 7, Ch. App. 611.



“Aspirin” is both the commercial and the generic name of the product of Hoffman’s patent, which being so christened by those who then owned the patent, was presented to the whole world as describing that particular article.

Distinctiveness is the cardinal requirement for a trade-mark to be good and valid,—and distinctiveness means that the word, symbol or device shall be used or adapted to distinguish the goods of the proprietor of the trade-mark from those of other persons.

While the word “Aspirin” has no descriptive signification to persons unacquainted with the druggist trade, save and except that it is the name under which the drug is known to the public, it does indicate to persons versed in the trade an article prepared according to a definite process. Therefore it becomes descriptive and incapable of exclusive appropriation. Sebastian, 5th ed. 66-72.

The function of the trade-mark is merely to distinguish the goods of one proprietor from that of any other proprietor of similar or other goods. There is a wide distinction to be made between a patent and a trade-mark. In the former the monopoly given to the patentee, for a certain period, is the consideration in return for which the patentee dedicates his invention to the public at the expiration of the patent. While in the case of a trade-mark there is no such consideration and any attempt to prolong the term of a patent by means of a trade-mark will be discouraged. If that were allowable, a patent could be made perpetual, notwithstanding the existence of the Statute of Monopoly. Sebastian, 5th ed. p. 12.

The development of “Aspirin” as a household remedy and household word, as a self-prescribed drug and a valuable anodyne, has been contemporaneous with the application of that name to the drug itself. It became generally and universally known to the public under the generic name of “Aspirin.” From the beginning the word was part of the English language, the name by which the drug was christened, as attested to by dictionaries (1) and by the

(1) Littré-Dictionnaire de Médecine; Larousse-Supplément; Nelson-Encyclopaedia; Cyc Britannica; Squire’s Companion, the *Vade Mecum* of all druggists; American Medical Dictionaries. See Ex. No. 18 and all other exhibits filed at trial. It is not necessary for the purpose hereof to mention them all.

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price lists of manufacturers of drugs and pharmacists. It was used by the doctors in their prescriptions to designate the drug, with few exceptions. It is the name by which the public now knows the drug and by which it has been known ever since the public became aware of its existence, and ever since sales over the counter began. It was so used in trade literature and in common daily practice, as established by the evidence of record.

As a result of these uncontrovertible facts, the public is entitled to the free use of the word "Aspirin," which from its origin has been the name by which the drug is known and so has become part of the English language and *publici juris*. This use cannot be taken away from the public under a pretended monopoly resulting from the registration "without sufficient cause" of a trade-mark which does not possess the essentials for its proper and legal existence.

Our Canadian Trade-Mark Act provides, by section 5, what shall be deemed to be a trade-mark, and section 9 provides for its registration, which does not confer any new right but merely gives him a *locus standi* in the courts to enforce his rights. Then by sub-section (e) of section 11, it is provided that the minister may refuse to register any trade-mark.

if the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark properly speaking.

After citing the above section, the judgment of the Judicial Committee of the Privy Council in *The Standard Ideal Co. v. The Standard Sanitary Mfg. Co.* (1), states:

The Act does not define or explain the essentials of a trade-mark, nor does it provide for taking off the register an alleged trade-mark which does not contain the requisite essentials. In applying the Act the courts in Canada appear to consider themselves bound or guided mainly by the English law of trade-marks and the decisions of the Courts of the United Kingdom.

Having found, as before stated, that the word "Aspirin" is a common English word, and applying the judgment in the *Standard Ideal Case* (ubi supra 85) it can be said, without attempting to define "the essentials necessary to constitute a trade-mark properly speaking," that this word, which, although originally a coined one, has become a

(1) [1911] A.C. 78 at p. 84.

common English word to designate the new product manufactured under the Hoffman patent, and that standing alone and by itself,—as shown in the trade-mark certificate (ex. No. 1) it cannot be an apt or appropriate instrument for distinguishing the goods of one trader from those of another. It has no distinctiveness to identify the product of any particular trader. The word “Aspirin” primarily means the product of the Hoffman patent and cannot be exclusively used to mean specifically the goods of any distinct manufacturer. The trade-mark does not contain

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the essentials necessary to constitute a trade-mark properly speaking, and the owners thereof are not entitled to register the word “Aspirin” as a valid trade-mark.

The result is in accordance with the decision of the Supreme Court of Canada in *Partlo v. Todd* (1) that the word though registered is not a valid trade-mark.

A word first invented to designate a substance may cease to retain the characteristics which it once possessed of conveying the idea of the goods being of a particular manufacture,—having become purely descriptive of an article which all may freely make. Sebastian, 5th ed., p. 68.

2nd. The proprietor of a word, mark or symbol can register the same as a trade-mark, giving him *primâ facie* exclusive use thereof before and after registration. If he is truly the proprietor and first to use it,—a matter of vital and fundamental importance—it gives him the exclusive use thereof and the right to sue upon the same; but it does not give him any new right which he did not otherwise have before. The Act establishing registration “takes nothing from anybody.” It confers, under certain conditions and under particular circumstances, rights which but for the Act, would not be as clearly asserted, but it takes nothing away and is merely declaratory of a claim to a right. See also *Vulcan Trade-Mark* (2).

No right is created by the registration of a generic name. *Liebig’s Extract of Meat Co. v. Walker* (3).

(1) [1888] 17 S.C.R. 196.

(2) [1914] 15 Ex. C.R. 265, at p. 272; 51 S.C.R. 411.

(3) [1902] 115 Fed. R. 822-826.

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Judge Howlay is reported as saying that registration *per se* is of but little value, if any, except for the purpose of creating a permanent record of the date of adoption or where it is necessary to give the court jurisdiction in certain cases. Hopkins, 3rd ed., p. 384. See also Paul on Trade-Marks, pp. 29, 30.

It has been contended at bar that if, at the time of the registration of the trade-mark, the owner had a right to register, that the validity of that trade-mark could not afterwards be attacked. With that contention I am unable to agree. In the case of *The Autosales Gum and Chocolate Co.* (1) the learned trial judge quoted the language of the Master of the Rolls upon this question in the *Batt case* (2) as follows:—

The entry of these marks is “an entry made without sufficient cause in the register.” We are not disposed to put a narrow construction on this expression nor to read it as if the word “made” were the all important word and as if the words “made without sufficient cause” were “made without sufficient cause at the time of registration” so as to be confined to that precise time. If an entry is at any time on the register without sufficient cause however it got there, it ought, in our opinion, to be treated as covered by the words of the section. The continuance there can answer no legitimate purpose; its existence is purely baneful to trade \* \* \*.

This case was taken to the House of Lords (3), and the proposition above quoted has been approved and stands unimpeached. See also re *Smollens Trade-Mark* (4); *Billings et al v. Canadian Billings* (5).

(See now in England, 9-10 Geo. V, ch. 79.)

A *primâ facie* title to the mark does not take away the right of other persons to question the validity of the same. *Partlo v. Todd* (6).

The registration of the word “Aspirin” alone was made by persons claiming to be the proprietors thereof “by reason . . . of having been the first to make use of the same.” *Edwards v. Dennis* (7).

Witness Buckley testified having started selling “Aspirin” somewhere about 1898, and witness Laroche said he began selling and handling “Aspirin” in 1898. It was just known as Aspirin without any reference to Bayer.

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| (1) [1913] 14 Ex. C.R. 302, at p. 307.                    | (3) [1899] A.C. 428.        |
| (2) [1898] 2 Ch. D. 432, at p. 441; [1898] 15 R.P.C. 534. | (4) [1912] 29 R.P.C. 158.   |
|   | (5) [1921] 20 Ex. C.R. 405. |
|   | (6) [1888] 17 S.C.R. 196.   |
|   | (7) [1884] 30 Ch. D. 454.   |

Before Aspirin was known in Canada, his father imported from a German firm called Sherings, and it was labelled "Aspirin." See also witness Vadeboncoeur. The general trend of the evidence, including Merck's Report, exhibit No. 101, would also seem to establish that there was German, Swiss and French aspirin and acetyl salicylic acid on the market at the time of the application for the trade-mark.

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Section 13 of the Canadian Trade-Mark Act provides that the applicant may have his trade-mark registered upon forwarding a declaration that it was not in use to his knowledge by any other persons than himself at the time of the adoption thereof.

Does all this amount to publication and user by others before the registration of the trade-mark?

3rd. Moreover, as above set forth, the Hoffman patent was obtained in the United States in 1900 and expired on the 27th February, 1917.

It has long since been recognized, as a sound doctrine of patent as well as trade-mark law, that when an article has been patented and a name has been given to such article, so that this particular patented thing has become known to the public under the particular and distinctive name thus given to it, when the patent expires, the public at large has the right not only to make that thing, but in making it the public has a right (indeed it is its duty if it desires to designate that particular thing) to apply to it the name which has thus become the characteristic name of such patented thing.

In other words a patentee under his patent obtains a monopoly, in return for which he is held to dedicate the invention and the name by which it is known to the trade, to the public upon the expiration of the patent. Such dedication would be rendered ineffective if another manufacturer were unable to sell the product under the name by which it has become known. Such dedication would also be clearly ineffective if the patentee could continue and perpetuate his monopoly under the guise of a trade-mark.

Furthermore, if a trade-mark were valid for the name of a new article, newly invented, and whether patented or not, the name by which it becomes known to the public, it would be giving to the owner a monopoly in perpetuity

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which would be far more valuable than any patent could ever be. The right of an owner of a trade-mark ends where that of the public begins.

It has been said that as the American patent has expired this only makes the name of the invention *publici juris* in the United States. Is not that assertion the result of confusing trade-mark with patent rights? If a patent has been obtained both in the United States and in Canada the question as to whether or not the expiry of the American patent would entail also the expiry of the Canadian patent is one dependent altogether upon legislative enactments;—but in trade-mark law it is quite different. If a person tacitly contracts in the United States,—as he does when he obtains a patent in consideration of the limited monopoly he obtains,—to make the object of his patent public property at the expiration of the same, the right of the public is not limited to the citizens of the United States. It extends to the whole civilized world. After the expiry of the American patent it would seem that an application made in Canada for the first time to register “Aspirin” as a trade-mark could not be entertained.

A trade-mark is used in the place of a person’s name,—the mark, device or symbol replaces his name. Does not therefore the trade-mark become the name in the trade the world over? Does not the trade-mark assume an international character since it distinguishes the goods of a trader from that of another trader. If a trade-mark is in lieu of a trader’s name, should not the trade-mark, alike the name of the trader, be operative the world over? And if such a mark is allowed to be imitated or is otherwise abused in any country other than the one in which it is registered, is there no remedy at law there? Or should the trade-mark be limited to the country of origin wherein it is registered? The refusal to respect or control such a mark would affect trade to the detriment of all countries in their intercourse in trade and commerce.

The text-book writers, supported by decisions of the courts both in the United States and in England, confirm that view.

In re *Ford v. Foster* (1), Sir G. Mellish L.J., says:

(1) [1872] L.R. 7 Ch. App. 611, at p. 628.

Then the question is, has it become *publici juris*? And there is no doubt, I think, that a word which was originally a trade-mark, to the exclusive use of which a particular trader, or his successors in trade, may have been entitled, may subsequently become *publici juris*, as in the case which has been cited of Harvey's Sauce.

If a name used by way of a trade-mark was originally, or has since come to be merely descriptive of the article to which it is attached so that while serving to indicate what the article is, it does not serve to connect it with any particular manufacturer or manufacturing establishment, that name cannot be protected as a trade-mark or registered as special and distinctive. Sebastian, 5th ed. p. 76.

In the leading case of *Singer Mfg. Co. v. June Mfg. Co.* (1) it was held that:—

On the expiration of the patent the right to make the patented article and to use the generic name passed to the public with the dedication resulting from the expiration of the patent.

On the expiration of a patent, one who uses a generic name by which articles manufactured under it are known, may be compelled to indicate that the articles made by him are made by him and not by the proprietors of the extinct patent.

The decision in *Holzapfels Composition Co. v. Rahtjen's Amer. Comp. Co.* (2) is direct and clear authority to establish that on the expiration of the English patent the trade-mark rights disappeared in the United States. In that case, Rahtjen invented in Germany a new and improved paint especially useful in the protection of ships' bottoms. He and his sons set up the business of making and selling the paint which became known as "Rahtjen's Composition." In 1873 that paint was patented in England. The product of that patent was of course a paint, but its virtue laid in the fact that it was made in accordance with the invention of Rahtjen and possessed the virtues of that invention, and, hence that particular paint possessing the virtues of that invention later patented in England became known, so as to be identified, under the name of "Rahtjen's Composition." The name of "paint" or "ships' bottoms paint" would not have identified it, because other paints and other ships' bottoms paint were known; but that particular paint having the virtues of Rahtjen's invention could only be identified by the name "Rahtjen's Composition."

(1) [1895] 163 U.S.R. 169.

(2) [1901] 183 U.S.R. 1, at pp. 10-12.

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That "Rahtjen's Composition" having become a well known article of commerce by that name, through the expired English patent and the operations thereunder, the name had become descriptive of the article rather than indicative of its origin and it is open to anyone to sell that same article under that name.

In the case of *Centaur v. Heinsfurter et al* (1) Mr. Justice Brewer, after referring to the fact that the case turned upon the question as to whether or not the plaintiff had an exclusive right to the use of the word "Castoria" as a trade-mark, because in that case (as is true with respect of "Aspirin") the defendant had merely used the name "Castoria" as a product made in accordance with the expired Pitcher patent and clearly indicated on all of its labels that it was the manufacturer of the substance or product marked with the name "Castoria", the distinguished judge said, page 956:—

Whether the defendants had a right to use this name depends on the further question whether the word "Castoria" is the generic name of the thing manufactured and sold or is a mark or name used to distinguish one party by whom the thing is manufactured and sold from all other manufacturers of that thing. The relation of the patent to this matter must be first considered. In 1868 Dr. Pitcher compounded a medicine composed of various ingredients, according to a certain formula which he invented and discovered. For this invention and discovery he obtained a patent which gave to him the exclusive right of making, using and selling this new medicine. During the life of that patent he alone or his successors in interest had the right to manufacture and sell that medicine by whatsoever name it might be called. The patent gave no right to any particular name but simply to the exclusive manufacturing and sale. All such rights expired in 1885 and from that time forth any party has had a right to manufacture and sell that particular compound and also a right to manufacture and sell it under the name by which it has become generally known to the public; and, if to that public the article has become generally known only by his single name, that name must be considered as descriptive of the thing manufactured and not of the manufacturer.

In connection with this holding reference has already been herebefore made that the bill in equity stated that the product described and claimed in the said letters patent, and patented thereby, is the substance now known in pharmacy as "Aspirin." *Farbenfabriken v. Kuehmsted* (2).

Mr. Justice Brewer in the "Castoria" case at page 957 further adds:—

It is true that during the life of a patent the name of the thing may also be indicative of the manufacturer, because the thing can then be

(1) [1898] 84 Fed. R. 955.

(2) [1909] 171 Fed. R. 887.



manufactured only by the single person; but when the right to manufacture and sell becomes universal, the right to the use of the name by which the thing is known becomes equally universal. It matters not that the inventor (or his assignee) coined the word by which the thing has become known. It is enough that the public has accepted that word as the name of the thing, for thereby the word has become incorporated as a noun into the English language and the common property of all.

And further at page 958 the learned judge, after citing the Singer case (*ubi supra*), said:—

The word has become known as the name of the thing and as such it could not be appropriated as a trade-mark.

Then in the case of *The Linoleum Mfg. Co. v. Nairn* (1) it was held:—

That where the inventor of a new substance has given to it a name and having taken out a patent for his invention has, during the continuance of the patent, alone made and sold the substance by that name, he is nevertheless not entitled to the exclusive use of that name after the expiration of that patent.

Those who made and sold the invention, this new floor cloth, and who appropriated it under the patent, gave to this new floor cloth the name "Linoleum." After the patent expired the company that had formerly owned and operated it under the patent for this new floor cloth and who had named the product of this patent "Linoleum" sought to monopolize the name "Linoleum" as the name of that patented product and brought suit against one who, after the patent had expired, made exactly the new kind of floor cloth of the expired patent and gave it the name by which that product had become known. The English courts refused to recognize any such claim, refusing to hold that the name "Linoleum" was a trade-mark; but, that on the contrary, it was simply the name given that new product made under the patent, which name anyone could use for that particular floor cloth, after the patent had expired.

It is impossible for one who by taking out a patent obtains a monopoly on a particular article, to which article is given a particular name, as was decided in the case of *The Formalin Hygienic Co.* (2), to say

that that name which he says means the patented article means something else, namely, the article made by him \* \* \* . If a man has once said, "Here is a process; if you manufacture in accordance with that process that is the name to call it by," he has, as Mr. Ingle Joyce suggested,

(1) [1877] 7 Ch. D. 834.

(2) [1900] 17 R.P.C. 486.

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made a present of that name to the whole world as describing that particular article.

In our own Canadian courts there is also the case of *Rubberset Co. v. Boeckh Bros. Co., Ltd.* (1), in which while the controversy resolved itself into a passing off case, nevertheless the same doctrine, as provided in the *Singer* and other cases, has been followed. And in the judgment of the First Division, Ontario, the learned judge cites therein from Lord Davey in *Cellular Clothing Co. v. Marton et al* (2), in which the language of Fry L.J., in *Siebert v. Findlater* (3), is cited as follows:—

If a man invents a new article and protects it by a patent, then during the term of the patent he has, of course, a legal monopoly; but when the patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the patentee has attached to it during the time when he had the legal monopoly of the manufacture. But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article; all the world may make the article, and all the world may tell the public what article it is they make, and for that purpose they may *prima facie*, use the name by which the article is known in the market.

In the *Cellular* case (*ubi supra*), it was held that the word “Cellular” was an ordinary English word which appropriately and conveniently described the cloth of which the goods sold by the defendant were manufactured; and that the term had not been proved to have acquired a secondary meaning or special meaning so as to designate only the goods of the appellants. See also *Merriam et al v. Syndicate Pub. Co.* (4), approving of *Merriam et al, v. Holloway Pub. Co.* (5), where the same principles are accepted and wherein it was held:—

As is the case with patents, so after the expiration of copyright securing the exclusive right of publication, the further use of the name by which the publication was known and sold cannot be acquired by registration of a trade-mark.

There is also the other English leading case of *The Magnolia Metal Co. v. Atlas Metal Co. et al* (6). In this case the plaintiff owned the invention relating to certain anti-

(1) [1918] 46 Ont. L. R. 11.

(2) [1899] A.C. 326, at p. 344.

(3) [1878] 7 Ch. D. 801.

(4) [1915] 237 U.S.R. 619.

(5) [1890] 43 Fed. R. 450.

(6) [1897] 14 R.P.C. 389.

friction metal and gave to the product of that invention the name of Magnolia. He also claimed a registered trade-mark for the metal, the product of the said invention, consisting of the picture of a magnolia flower and the word "Magnolia". Mr. Justice Collins at page 396 clearly shows that the name Magnolia applied to the metal made in accordance with the invention and patent meant that particular patented metal and not the manufacturer or maker of the manufacture of a particular manufacturer and said:—

It was started as a secret process. It was afterwards covered by a patent and, in that sense, a practical monopoly by that means was secured for a certain time; and, in point of fact, the only persons who did manufacture for all practical purposes, were the plaintiff. In my judgment, that does not give them a continuance of the monopoly as soon as any other person legitimately can manufacture the same article.

On appeal, on the same line of reasoning, Lord Esher M.R. and Chitty L.J. followed Mr. Justice Collins and affirmed his finding above quoted and held that the defendants were at full liberty to use the word "Magnolia" applied to that metal so long as they also indicated, attaching their own name thereto (as is in the case of Aspirin), that the Magnolia metal which they made and sold emanated from them and not from the plaintiff.

In the case of *St. Louis Stamping Co. v. Piper* (1) it was held with respect to the product called "Granite" that after the expiration of the patent anyone who made that particular ironware, in accordance with the invention of the patent, could lawfully make such ironware with the word "Granite" and the plaintiff had no trade-mark rights in the name.

In the case of *Dover Stamping v. Fellows* (2) the same doctrine and principle were adopted with respect to an egg-beater called "Dover".

In *Leonard and Ellis* (the Valvoline case) (3) it was said by Fry L.J.:—

When a new material is invented, and at the same time a new single word is invented which is applied to that material alone, I am by no means satisfied at present that that single word can be treated as a special and distinctive word within the meaning of the section. It is difficult to suppose that one word can both describe the thing as made by anybody and the thing as made by a particular maker.

(1) [1895] 33 N.Y. Supp. 443. (2) [1895] 163 Mass. 191.

(3) [1884] 26 Ch. D. 288 at 304.

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In that case the Court of Appeal held that a firm who invented a new description of oil and called it "Valvoline" had no right of trade-mark in the word. No patent was taken to protect the invention, just as in the case of "Aspirin" in Canada. If a person who invents a process for making a new article invents at the same time a new name for describing the same article, and the article comes to be known by that name only, he cannot afterwards, when everybody is at liberty to make that article, claim a monopoly in the name.

See also *B. B. Hill Manufacturing Co. v. Sawyer-Boss Manufacturing Co.* (1); *Yale & Towne Mfg. Co. v. Renstein et al* (2); *Young v. MacRae* (3); *Powell v. Birmingham Vinegar Brewery Co.* (4); *Singleton v. Bolton* (5); *Hos-tetter v. Fries* (6); *Leclanche Battery Co. v. Western Elec-tric Co.* (7); *Adee v. Peck Bros (Foley's Patent Valves)*; (8); *Selchow v. Baker* (9); *Lecouturier's Trade-Mark (Chartreuse Case)* (10); *Woodward's Trade-Mark* (11); *Bayer Co. Inc. v. United Drug Co.* (12).

From the above decisions and the facts in connection with the Hoffman patent and the admission in the Bill above mentioned, it would appear that the name acetyl salicylic acid does not define, so as to identify it, the product of the Hoffman patent; but that, as the assignor of the Bayer patent in the United States contends, the word "Aspirin" is the name known in pharmacy as the name for that particular product described and claimed in Hoffman's letters patent and patented thereby, and that, therefore, "Aspirin" is not and never was a trade-mark but instead, is the name of a new product which anyone who may lawfully make that product (as may be done by anyone after the patent has expired) may use to designate the same.

When a new thing is invented or discovered, whether it be patented or not, if in fact it be a new substance or pro-

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| (1) [1901] 112 Fed. R. 144.                 | (7) [1885] 23 Fed. R. 276.                          |
| (2) [1912] 196 Fed. R. 176.                 | (8) [1889] 48 U.S. Pat. Gaz. 823.                   |
| (3) [1862] 9 Jur. 322.                      | (9) [1883] 93 N.Y.R. 59.                            |
| (4) [1896] 2 Ch. D. 54; 65 L.J. Ch. D. 563. | (10) [1907] 25 R.P.C. 265.                          |
| (5) [1783] 3 Dougl. 293.                    | (11) [1916] L.J. 85 Ch. D. (N.S.) 27, at pp. 30-31. |
| (6) [1883] 17 Fed. R. 620.                  | (12) [1921] 272 Fed. R. 505.                        |

duct, the name given to such thing under which it has become known commercially and to the public, is the proper name for that thing. A trade-mark may be removed from the register, notwithstanding the argument to the contrary at Bar, not only on the ground that it was not originally distinctive, but on the ground that its distinctiveness has ceased. Kerly on Trade-Marks, 4th ed. 370.

The doctrine propounded above is to be found supported and analysed in Fulton on Patents and Trade-Marks, 2nd ed. at pages 261 and 262 in cases where a patent has been taken out or not.

4th. Coming now to the question of non-user and abandonment, one may cite *in limine* the words of Hughes J. in *Blackwell v. Dibrell* (1):—

That the right to use a trade-mark may be lost by abandonment or disuse is too clear to need argument or the support of authority.

It may be abandoned in several ways, such as the non-user during a certain period and the longer the period the stronger the inference, because no one has right to ask for a trade-mark and tie up that name, so to speak, and not use it. It may be deduced from the evidence that the name so protected by registration has been openly used during a number of years, in a manner that was so public that it must have come to the knowledge of the owner of the mark and more especially if the user by others was by persons engaged in the same trade and business as the owner. It is practically a question of fact, from which logical and reasonable deduction may be made. Paul on Trade-Marks, 100.

The circumstances of each case must be considered, yet the underlying principle seems to require intention to abandon, if abandonment can be distinguished from non-user.

In the present case it has been established by evidence that the objecting party, or its predecessors in title, refused to sell any more Aspirin some little time before the war or at the time of the war.

One must bear in mind that from the 12th June, 1913, the Bayer Co., Inc., of New York, were the owners of the trade-mark in question and had been assigned the good-

(1) [1878] 14 U.S. Pat. Gaz. 633.

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will of their predecessors in title with respect to the same. That they only assigned to the Canadian company on the 30th May, 1919. That is the same year when the assignment bearing date of June, 1913, was registered in Canada.

Therefore, between these two dates, the company was an American company which refused to sell Aspirin.

That in 1906 or thereabouts, the manufacturers of "Aspirin" in tablets began to develop that trade which created before long a large demand from the public who from that time on began to know the medicine by the name of "Aspirin" and by no other name. The objecting party has to-day the full benefit of that tablet trade established by other manufacturers and dealers than itself.

The trade of "Aspirin" tablets increased gradually and received a new impetus in about 1919, by a system of extensive and intensive advertising by the new Canadian company

Looking into this literature and advertising campaign of the objecting party, the new Canadian company, one is primarily struck with the total absence of the word "Aspirin" appearing by itself. Numerous samples of such advertising have been produced as exhibit No. 19, and from the perusal of this very literature is found an admission of the general existence of the drug "Aspirin" as distinct from the "Aspirin" that is being sold by the objecting party

Taken at random, one finds one sample stating: "There is only one genuine "Aspirin"—and that genuine Aspirin has Bayer cross and that indeed is accompanied by a label showing a round tablet with the word Bayer written perpendicularly and horizontally within the circle. There can only be one meaning resulting from such language and that is there exists some other "Aspirin" besides the one sold by us with our trade-mark of the Bayer Cross, and that these advertisements claim that the "Aspirin" manufactured and sold by Bayer is better and preferable, from their own standpoint, from the other "Aspirin" on the market, manufactured or sold by anybody else.

And these samples which are numerous and varied, but all to the same effect, are in the aggregate a distinct and definite manifestation of the real and intentional abandon-

ment of the use of the word "Aspirin" alone and by itself, as registered, and, further, a declaration or notice to the public that in future they intend to use the word as the name of the drug but with their own name attached thereto to show it has been manufactured by them.

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This intention is further manifested in a tangible and open manner by, I may say, the objecting party in 1919. Indeed, on the 8th August, 1919, the Bayer Co., Inc., of New York, registered two new trade-marks: one registered in Register No. 105, folio 24895 (ex. No. 96), and the other in the same register but under folio No. 24896 (ex. No. 95). These trade-marks also registered by the Bayer Co. of New York in August, 1919, were respectively assigned to the present objecting party, The Bayer Co., Ltd., of the city of Toronto, on the 15th May, 1920.

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The trade-mark registered under folio No. 24895 is a specific trade-mark to be applied to the sale of synthetic coal-tar remedies, chemicals, medicines and pharmaceutical preparations of every kind and description and which consists of the word "BAYER."

The other trade-mark under folio No. 24896 is also a specific trade-mark to be applied to the sale of synthetic coal-tar remedies, chemicals, medicines and pharmaceutical preparations of every kind and description and which consists of a conjunction of letters in the form of a cross having four arms of equal length, the said letters being B A Y E R, arranged horizontally and vertically at right angles in the form of a cross, the letter "Y" forming the centre of such cross.

It is quite significant, indeed, that these two trade-marks should be taken and registered with respect to synthetic coal-tar remedies. Aspirin is a coal-tar drug.

These two new trade-marks can readily be applied to coal-tar drugs and ever since 1919, by reference to exhibit No. 19, it will be seen that they were used with the word "Aspirin." The only deduction and inference to be drawn from the fact of getting these two new trade-marks and using them ever since 1919, as shown by exhibit No. 19, in union and with the trade-mark for the word "Aspirin" alone, in 1899, is a clear manifestation of the

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intention of the objecting party (presumably acknowledging it has no right to) not to use the word Aspirin by itself, but to associate it, as it has done, with both trade-marks taken out in 1919 and assigned to it in 1920. The label with the combined words of "Bayer" and "Aspirin" never appeared on the Canadian market until 1919.

It is obvious that by such a practice the old trade-mark "Aspirin" used by itself loses its distinctive character and is an indication that the word "Aspirin" is accepted as the name of the drug and not as the name of the manufacturer of the product of the patent. In *re Lea v. Millar* (1) it was held that in addition to the evidence as to the common use of the registered trade-mark by persons other than the plaintiff, the fact that the plaintiff had recently adopted a new label upon his goods on the ground that his existing label did not afford sufficient protection was a public abandonment of the latter; and, in *Manhattan Medicine Co. v. Wood* (2), it was held that a mark had been lost by abandonment, a new form of bottle and label having been adopted in place of the old ones. An exclusive right to a mark may be lost by its owner using it habitually and exclusively upon goods which passed through other persons' hands so they acquired a right in it. See also *Wood v. Butler* (3); *MacMahan Pharmacal Co. v. Denver Chemical Mfg. Co.* (4).

In *re Hare* (5), and in *re Paine & Co., Ltd.* (6), registrations were limited by excluding certain goods in which the registered proprietor did not deal; and in *re Philippart v. Whiteley* (7), Parker J. suggests at page 573 that section 37 might be construed as enabling the court to remove a mark which had ceased to be used or had never been used for the legitimate purposes of a trade-mark. The section 37 referred to here is the section of the English Act of 1905 providing for the removal from the register of a mark for non-user. *Jones v. Horton* (8).

(1) [1876] *Sebastian Digest T.M.*  
 No. 513 at p. 305.  
 (2) [1882] 108 U.S. 218.  
 (3) [1886] 3 R.P.C. 81, at pp.  
 88-90.

(4) [1901] 113 Fed. R. 468.  
 (5) [1907] 24 R.P.C. 263.  
 (6) [1908] 25 R.P.C. 329.  
 (7) [1908] 25 R.P.C. 565.  
 (8) [1922] 21 Ex. C.R. 330.



The objecting party long before 1919 or 1920 did not use its trade-mark at all. From 1919 it did not use the word "Aspirin" by itself. In fact, *qua* the consumer, the public, the Trade-Mark "Aspirin" by itself, has never been used by the objecting party or its predecessors in title. Their position has been consistent that from the very first the word meant then, means now and has always meant the name of the drug itself. In *Ayre v. Rushton* (1).

the plaintiffs (had) invented and prepared a medicine for chest diseases to which they gave the name of "Cherry Pectoral," which was extensively known and sold as "Ayre's Cherry Pectoral;" one of the ingredients was extract of wild cherry, and the word "pectoral" had been before the invention of the plaintiffs' medicine, applied to medicines for chest diseases. (It was) held, that the plaintiffs could not claim the exclusive use of the words "Cherry Pectoral" as a trade-mark.

See Paul on Trade-Marks, p 114.

In *Perry Davis & Sons v. Harboard* (2) a distinction is drawn between the use of a trade-mark alone or with other words.

Sebastian, 6th ed. at p. 109, says:—

Numerous trade-marks have been removed from the register, or limited to certain goods, for non-user.

He cites a number of decisions. See also Kerly, on Trade-Marks, 4th ed. p. 413; Sebastian, p. 128.

All of this, coupled with the facts of the case, cannot mean anything else than a recognition by the Bayer people that they have no monopoly over the word "Aspirin" and that they are selling it, as they have the right to do, with their own name attached to it; accepting thereby and recognizing implicitly that the word "Aspirin" is the name of the drug which is now known and accepted by the public to designate it. There is nothing to prevent Bayer, or anyone, to sell "Aspirin" with their own name attached to it.

The public does not know the drug under any other name. It has become part of the English language and the objecting party realizing that fact is now advertising in a manner that the public can understand; that is: using the name of "Aspirin" as the name of the drug coupled with its name to show it was manufactured by it.

(1) [1877] 7 Daly (N.Y.) 9.

(2) [1890] 15 A.C. 316.

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I might go over all the samples produced as exhibit No. 19 and in each will find the same characteristic expression which amounts to the same admission. The matter is too obvious to be questioned.

Therefore, taking the chain of circumstances and of facts which transpired from 1913, it must be first found that the owners of the trade-mark refused to sell. Then they lay dormant, so to speak, and watched the unusual development of the tablet trade of "Aspirin" created by new manufacturers and dealers. They realized that "Aspirin" had become almost universally known in the public, and in 1919 they purchased from the American people both the trade-mark and the good-will, for a price unknown, unless it is taken to be the amount mentioned in the assignments; or these American people came to Canada, formed a company and started the business of manufacturing pharmacists.

We have no evidence on the record to tell us what actually transpired between 1913 and 1919. There is a kind of blank in the life of the company during that period. And then it suddenly revives and starts that extensive advertising by the means of the language already referred to, which on its very face admits implicitly almost all that has been said above.

Under these circumstances does it not appear clearly that there has been non-user and abandonment of the trade-mark for the word "Aspirin" used alone, and that it has become the name of the drug, a name which has become part of the English language, which has become *publici juris*, and that anyone may use with impunity to designate the drug which is now part of pharmacy? No one has any right to register a trade-mark, tie it up, take it away from the public and not use it.

No one of the public is to-day deceived by the word "Aspirin." The word is used to denote the drug and not the manufacturer of the same, and when Bayer, the objecting party, advertises as Bayer's Aspirin, or under any of the forms in exhibit No. 19, the public knows that it is Bayer's Aspirin, whilst the word "Aspirin" of itself would not necessarily indicate that it is aspirin manufactured by Bayer.

5th. In the view I have taken of the case, it becomes unnecessary to discuss a number of other questions raised at bar. Among others: (a) The effect upon the trade-mark of the objecting party or their predecessors in title, allowing the tablet-makers for years to use the powder and put it out into tablets with the label "Aspirin," with the name of the manufacturers, without any interference. Did it viciate the trade-mark? The manufacturing of tablets, involving the mixing of Aspirin with starch, sugar or any other adhesive binder, constituting a product different from the one actually pure and free from any ingredients. (b) The official analysis of the powder. (c) The Order in Council alleged to have been passed with the view of giving authority to the Crown to institute an action to determine the respective rights of the Bayer people and of the public in respect of the trade-mark "Aspirin." (d) The assignment alleged to be in gross under the evidence of Weiss (See also exhibit Z39). (e) The question of the chain of title of the objecting party's predecessors in title, the sale by the Alien Property Custodian of the shares of the Bayer Co., Inc., of New York, to the Sterling Products, Inc. (see exhibit Z39). (f) The question of effervescent aspirin (exhibits 56, 57, 62 and 63) and many others.

I may further add I am not overlooking the Canadian decision in *The Centaur Co. v. American Druggists Syndicate* (1), but, with all deference, I am unable to follow it. I do not feel bound thereby, and moreover the case is distinguishable both on the law and the facts. The Canadian Bar Review (1923), pp. 14 to 16.

I have therefore come to the conclusion, for the reasons above set forth, to adjudge and order to expunge from the Register of Canadian Trade-Marks, No. 29, folio 6889, the specific trade-mark registered on the 28th day of April, 1899, of the word "Aspirin," as applied to the sale of pharmaceutical preparations,—the whole with costs in favour of the petitioner.

There will also be judgment granting the motion for judgment by default against *Farbenfabriken vorm Friedr.*

1923  
 AMERICAN  
 DRUGGISTS  
 SYNDICATE  
 v.  
 BAYER  
 COMPANY.  
 Audette J.

(1) [1922] 68 D.L.R. 84.

1923  
AMERICAN  
DRUGGISTS  
SYNDICATE

Bayer & Co., named in the petition, declaring the present judgment effective as against them—as if parties in the action.

v.

BAYER  
COMPANY.

*Judgment accordingly.*

Audette J.

Solicitors for petitioner: *Brown, Montgomery & Michael.*

Solicitors for objecting party: *Osler, Hoskin & Harcourt.*

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