

CONSOLIDATED BUNGING APPARATUS CO. v. METROPOLITAN BREWING CO.¹

(Circuit Court, E. D. New York. May 1, 1891.)

PATENTS FOR INVENTIONS—No. 222,975—BEER VESSELS.

Patent No. 222,975, granted to Otto Zwietusch and Edward Heitman for an improvement in automatic pressure relief apparatus for beer vessels, was not anticipated by patent No. 219,057, granted to Emil Zesch for an improvement in relief attachments for beer-fermenting vessels.

In Equity. Suit for injunction and accounting.

Banning, Banning & Payson, (E. & H. A. Banning, of counsel,) for plaintiff.

Edward N. Dickerson, for defendant.

WHEELER, J. This suit is brought upon patent No. 222,975, dated December 23, 1879, and granted to Otto Zwietusch and Edward Heitman for an improvement in automatic pressure relief apparatus for beer vessels. The patent, and particularly the first claim, which is the one now under consideration, was construed and sustained against most of the defenses now made in *Apparatus Co. v. Woerle*, 29 Fed. Rep. 449. The views of Judge BLODGETT are concurred in and followed, and reference to them appears to be sufficient so far as the same questions arise here. Patent No. 219,057, dated August 26, 1879, and granted to Emil Zesch for an improvement in relief attachments for beer-fermenting casks, appears to have been before the court in that case, but without evidence as to the time of the invention or use of the structure. Such evidence has been produced here. But neither this evidence nor any other proof in the case shows with the clearness required for the overthrow of a patent that either Zesch or any one invented or used the combination of the knife-edge mechanical fit valve with surrounding water chamber of this claim prior to its invention by these patentees. The decision of this question in this way, with what was decided in that case and is followed in this, entitles the plaintiff to such a decree here as was had there.

Let a decree be entered for the orator, for an injunction and an account upon the first claim of the patent, with costs.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

WELLMAN & DWIRE TOBACCO Co. v. WARE TOBACCO-WORKS.

(Circuit Court, D. Minnesota, Third Division. June 10, 1891.)

TRADE-MARK—INJUNCTION.

The labels on complainant's tobacco packages had a representation of a shield or banner and an ellipse with a circle, and the words "Smoke and Chew." The colors used were red and yellow. Defendant's labels had the same figures and colors, and the words "Smoke and Chew," and were so much like complainant's that one might easily be mistaken for the other. One was called "Peach Blossom," and the other "Sweet Lotus." *Held*, that defendant's wrappers were a palpable imitation of complainant's, and that their use should be enjoined.

In Equity. Motion for injunction.

Flandrau, Squire & Cutcheon, for the motion.

E. C. Stringer, opposed.

NELSON, J. A motion is made upon a bill filed by the complainant for a preliminary injunction to restrain the defendant from using a label, brand, and wrapper, so closely resembling the complainant's trade-mark and labels and wrappers as to infringe upon the complainant's rights. The complainant, Wellman & Dwire Tobacco Company, is incorporated under the laws of the state of Illinois, and a citizen thereof, engaged in the manufacture of smoking, plug, and fine cut tobacco, and uses a duly-registered trade-mark, in connection with the mode and manner of putting up the packages of its manufacture for sale. The defendant, the Ware Tobacco-Works, is a citizen of the state of Minnesota, and is charged with infringing the complainant's trade-mark, and using wrappers and devices thereon so that the resemblance is calculated to deceive a purchaser having no cause to use more than ordinary caution, and that the defendant has copied from the complainant by design. It is clear to my mind that the method of preparing in packages the tobacco manufactured by the complainant for market is infringed by the Ware Tobacco-Works. The similitude of the wrappers, and of the labels, in connection with the combination of colors used, is apparent. While the name "Peach Blossom" used by the defendant to designate his tobacco is not similar to "Sweet Lotus," the name used by the complainant, the devices on the wrappers make the general effect of the packages the same. The shield or banner used on the wrappers is similar in shape, and of the same general curvature, and, when the tobacco is put up in the wrappers, forms a part of the defendant's package corresponding to that of the complainant. The entire wrappers and labels so closely resemble each other that dealers and purchasers would be readily misled and deceived. The differences, on critical examination, are capable of discernment and description, but to the eye of an ordinary person who knew the complainant's packages of tobacco, and never had seen the defendant's labeled as they are, and not knowing of any such kind of tobacco in the market, would be misled. The methodical imitation of the wrappers and style of labels appear to be intentional, and not accidental. For instance, when the package is put up for the market, in the center of

v.46F.no.4—19