

Frederick R. Gillinder makes affidavit that he severed his connection with the firm in 1888, before final decree, and that he has not been connected with the manufacture or sale of chimneys since that date. The master will inquire and report upon this, and will ascertain whether Frederick R. Gillinder is responsible for the manufacture or sale of the infringing chimneys here involved.

The objection to the motion founded on the failure to serve an injunction subsequently to the decree is, under the circumstances, without substance.

MACBETH et al. v. BRADDOCK GLASS CO., Limited, et al.

(Circuit Court, W. D. Pennsylvania. July 5, 1890.)

PATENTS FOR INVENTIONS — PRELIMINARY INJUNCTION — EFFECT OF PRIOR DECISIONS.

On a motion for a preliminary injunction against the infringement of letters patent No. 14,373, issued October 30, 1883, to George A. Macbeth, for a design for lamp chimneys, the court will not disregard prior decisions sustaining the patent, upon new evidence, consisting of the affidavits of five persons, resting entirely in personal recollection after the expiration of eight or ten years as to the date of certain alleged prior uses, when there are other affidavits fixing a later date, and the latter are strongly corroborated by circumstances.

In Equity. Bill by Macbeth & Co. against the Braddock Glass Company, Limited, and others, for infringement of letters patent No. 14,373, granted October 30, 1883, to George A. Macbeth, as assignee of Henry Dietrich, for designs for lamp chimneys. Heard on motion for preliminary injunction. **Granted.**

James I. Kay and George H. Christy, for the motion.
W. L. Pierce, contra.

ACHESON, Circuit Judge, (orally.) The patent in suit has already been sustained at final hearing in two hotly-contested cases—First, by this court in *Macbeth & Co. v. Evans & Co.*,¹ and then by the circuit court of the eastern district of Pennsylvania, in *Macbeth v. Gillinder*, 54 Fed. Rep. 169; in which cases it was held also that the patent was infringed by ornamentation similar to that appearing on the top edge of the lamp chimneys manufactured by the defendant company, of which Exhibits Nos. 1 and 2 are samples. Upon this state of facts, then, under the general rule of law applicable here, the complainants are entitled to a preliminary injunction against the present defendants. But, notwithstanding the prior adjudications, it is now asserted by the defendants that as early as the year 1882, before the patent in suit was applied for, or the patented design was produced by Dietrich, the fine crimping of the top edge of lamp chimneys, producing the bead-like ornamentation complained of as an infringement, was openly and extensively practiced at the Independent Company's glassworks, in the city of Pittsburgh, and the affidavits of five persons have been offered

¹ No opinion rendered.

in evidence to establish the truth of the allegation. Now, if such were indeed the fact, it is very remarkable that it was not shown at the hearing before this court, in the fall of 1884, upon the motion for a preliminary injunction in the Evans suit. That case was one of notoriety, and excited great interest in the trade, and the application for a preliminary injunction was most earnestly resisted. But, if this alleged prior use was by any means overlooked at the preliminary hearing, how is it to be accounted for that it was not set up as a defense at the final hearing, if the defendants' witnesses are correct in what they state? After a careful consideration of all the affidavits, my conclusion is that these witnesses are mistaken in respect to time. Evidently they testify from mere recollection, for the particular facts of which they speak as fixing dates have no necessary or natural relation to the main fact here in question. On the other hand, the statement of Michael Ward, Sr., the manager of the Independent Company's glassworks, that the fine crimping with the bead-like effect was first introduced there in the winter of 1884, and after he had been shown a specimen of the complainants' pearl-top chimneys, is entitled to great weight. Moreover, Mr. Ward's testimony is very strongly corroborated by that of the other rebutting witnesses, and also by an entry in Charles Fischer's books, so that, upon the whole, I am entirely convinced that the defendants' witnesses are at fault as to their recollection as to the year when the design similar to the patented design first came into use at the Independent Glass Company's works, and that in fact it was in the year 1884, instead of 1882, as they now think.

I have only to add that, in my opinion, the specimen of the defendant company's manufacture, Exhibit No. 3, is an infringement equally with Exhibits No. 1 and No. 2, and that the injunction should embrace all three. Let a preliminary injunction issue against the defendants, in accordance with these views.

Sur Rule for Attachment for Contempt of Court.

(July 5, 1892.)

PER CURIAM. The above rule rests on two points—First, whether the 20-crimp chimneys, such as Exhibits Braddock No. 4 and Felix & Marston No. 4, made by defendants, are an infringement of the Dietrich patent in suit; and, second, whether the defendants are guilty of violation of the injunction by the disposal of the enjoined stock. The court has no doubt whatever but that the 20-crimp chimney is as much an infringement as the chimneys Braddock Nos 1, 2, and 3 enjoined, but it has decided to look upon this rather in the light of an inconsiderate, than of a willful, act.

As to the second point, there is a possibility that the chimneys bought in Chicago might have come into the hands of Felix & Marston otherwise than through the Braddock Glass Company, and the court has decided to give the defendants the benefit of every doubt, so that we will not hold them guilty of contempt. We will therefore make an order discharging the rule, and ordering that the defendants pay the costs of the investigation.

IMPROVED FIG SYRUP CO. et al. v. CALIFORNIA FIG SYRUP CO.

(Circuit Court of Appeals, Ninth Circuit. January 30, 1893.)

No. 70.

1. TRADE-MARK—EQUITY—DECEIVING THE PUBLIC.

While a court of equity will not protect a trade-mark based on misrepresentation and deceit, and intended to deceive and defraud the public, yet where the testimony in an action to enjoin an infringement fails to show that plaintiff has attempted to practice any fraud, or impose upon and damage the public, the court will not refuse to extend its aid.

2. SAME—WHAT WILL BE PROTECTED—"SYRUP OF FIGS."

The phrase "Syrup of Figs" adopted by the manufacturer to designate a medical preparation, composed in part of fig syrup, and which, during a course of trade, has become known to the public by such name, indicates the origin of the preparation, rather than its quality or nature, and constitutes a valid trade-mark.

3. SAME—INFRINGEMENT.

The use, to designate a medical preparation, of the phrase "Improved Fig Syrup" upon bottles, wrappers, and devices, resembling in appearance a similar preparation manufactured and sold under the name of "Syrup of Figs," and calculated to deceive and mislead the public, will be enjoined as an infringement of trade-mark.

Appeal from the Circuit Court of the United States for the Northern District of California.

In Equity. Suit by the California Fig Syrup Company against the Improved Fig Syrup Company and others to enjoin the infringement of a trade-mark. A demurrer to the bill was overruled, (51 Fed. Rep. 296,) and the circuit court subsequently made an order continuing a temporary restraining order against defendants. Defendants appeal. Affirmed.

John L. Boone, for appellants.

Warren Olney, (Paul Bakewell, of counsel,) for appellee.

Before GILBERT, Circuit Judge, and MORROW and BEATTY, District Judges.

BEATTY, District Judge. This is an appeal from an order of the circuit court of the northern district of California, continuing a temporary restraining order against appellants *pendente lite*. It appears from the complaint that the appellee for a number of years last past has been engaged in the manufacture and sale of a liquid medical preparation, designated by it as "Syrup of Figs;" that such designation has been pressed upon the bottles containing the preparation, and printed upon the paper boxes containing the bottles, and that, through such and other means during a long course of trade, the medicine has become known to the public as "Syrup of Figs," also as "Fig Syrup," and appellee's name as "California Fig Syrup Co.," "Fig Syrup Co.," and "Syrup of Fig Co.," to such an extent that business letters concerning the same refer to it and appellee by such names and terms; that appellee was the first to manufacture such preparation, and to adopt and use the name so given to it; that, subsequently, the appellants