

poses to sell a picture for a big price, and to give a quantity of spurious money as inducement to the purchase; or where, as in some cases that arose in this district, the wrongdoer offers a worthless town lot as a gift, and charges ten prices for putting the deed on record. The payment of money or something of value for the spurious coin or "green articles" is essential to the fraud in respect to which the mails are not to be used, and, plainly enough, the person practicing the fraud is to receive the payment, whatever it may be. There is, therefore, in the offense defined in the statute, the element of loss to the person deceived, and also the element of gain to the offender. The statute is not limited to the particular deceits mentioned in it, such as the "sawdust swindle" and the "counterfeit money fraud," for the first clause embraces "any scheme or artifice to defraud"; but these words must be taken to mean any scheme or artifice of the general character of those specified in the act. The general language of the act must be limited to such schemes and artifices as are ejusdem generis with those named. Bish. St. Crimes, par. 245. We have discovered that the schemes and artifices named in the act are of the kind which are gainful to the wrongdoer, and thereupon we must declare that no scheme or artifice which lacks this intent can be within the prohibition of the act. The conduct of the prisoner, charged in the indictment, was abundantly harmful to the prosecutor, but it was not gainful to the prisoner, except in the matter of malice and ill will, of which he is not in need; but malice is not the intent specified in the statute. The indictments will be quashed.

BURT et al. v. SMITH.

(Circuit Court of Appeals, Second Circuit. December 17, 1895.)

1. INFRINGEMENT OF TRADE-MARK.

The mere use by defendants of their own firm initials, "B. & S.," upon articles sold by them, is not an infringement of a registered trade-mark for the two letters, "S. B.," arranged in that order.

2. FEDERAL JURISDICTION—FRAUD ON PUBLIC.

The fact that the similarity between goods manufactured by defendants and complainants is such as to show an intent by the latter to deceive the purchasing public is not ground for the assumption by the federal court of jurisdiction of a suit to restrain defendants.

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

Suit by William W. Smith against Alfred H. Burt and another. From an order granting a preliminary injunction restraining them from continuing the alleged infringement of the trade-mark rights of complainant, defendants appeal. Reversed.

Noris Morez, for appellants.

Seward Davis, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Complainant is a citizen of Poughkeepsie, N. Y., doing business under the name of Smith Bros. He is the successor of the original firm of that name, comprising himself and his brother, Andrew Smith, who died in October, 1894. The business of the firm and of the complainant has been and is the manufacture and sale of cough drops. For 18 years last past the cough drops manufactured and sold by them have been of uniform size, color, and form, stamped on one side with a star, and on the other side with the letters "S. B.," with a bar above and below the letters. These cough drops have during the same period been put up and offered for sale in a uniform style of box or package, of a certain size and shape. On the top of the box appear two bust portraits of male figures, representing the members of the original firm,—one portrait opposite the other. Over the top of these vignettes are printed the words "Smith Brothers," and between the vignettes the letters "S. B.," with a line beneath them, the words "Cough Drops," and the statement that "S. B." is stamped on each drop; also, the words "Poughkeepsie, New York," and on a lower line the word "Trade-Mark." The letters "S. B." are the initials of the firm name, "Smith Brothers." On the bottom of the box is printed a statement of the merits of the compound, and directions for use. The form, size, color, and markings of the drops, and the shape, style, lettering, and ornamentation of the packages, are claimed to be the trade-mark or designation of the articles manufactured by complainant. On January 28, 1892, the original firm applied to the patent office for registration of portions of their trade-mark, and obtained registration therefor by patents No. 20,907, March 29, 1892, and No. 22,294, January 3, 1893. The first of these contains a fac simile of the top of the box, with a full description thereof. Then follows the statement that "all of the matter, with the exception of the portraits, may be omitted, and other matter substituted, * * * without materially altering the character of the trade-mark, the essential feature of which * * * consists of two bust portraits of male figures, representing the Smith Brothers, the registrants." The other patent of registration, No. 22,294, in like manner sets forth a fac simile, and a full description, of the top of the box. Then follows the statement that "the name Smith Brothers, the portraits, the words 'Cough Drops,' and the matter following the words 'Cough Drops,' may be omitted, and other matter substituted, without materially altering the character of the trade-mark, the essential feature of which * * * consists of the letters 'S. B.'" The defendants, Alfred H. Burt and Joseph J. Sindele, are citizens of New York, carrying on business as partners at Buffalo, in that state, under the firm name of Burt & Sindele. They are confectioners, and manufacture and sell cough drops which they mark "B. & S.," and offer to the public in packages or boxes upon which the letters "B. & S." are prominently printed. No bust portraits appear on their packages, and complainants, therefore, have sued them for infringement, not of registered trade-mark No. 20,907, but of No. 22,294.

The trade-mark statute (act of March 3, 1881) provides in its third section that no alleged trade-mark shall be registered which is merely

the name of the applicant; and defendants contend that this provision forbids the registration, as a trade-mark, of letters which are merely the initials of such name. It is unnecessary to pass upon such contention in this case, for it seems too plain for argument that if the trade-mark registered is only for the two letters "S. B.," arranged in that order, it is not infringed by the mere use of the combination "B. & S."

Complainant seeks to rely upon other facts than the mere use by defendants of their own firm initials, "B. & S." He points out similarities in the form, size, and color of the drops, in the arrangement of the package, in the text and style of the directions for use, and other details tending, as he claims, to show an intent to deceive the purchasing public. It is apparent from the opinion of the judge who heard the case in the circuit court that it was these similarities which induced him to grant the motion for preliminary injunction. But these matters are immaterial to the question presented in this suit for the determination of a federal court. The complainant and defendants are all citizens of the same state. The federal court can take jurisdiction, therefore, only of the question whether the registered trade-mark declared upon has been infringed, and that trade-mark solely for the two letters "S. B.," without any designation of style or type, position on the cover, or association with other elements of dress or decoration. The order appealed from is reversed, with costs.

JOHANN HOFF v. TARRANT & CO.

(Circuit Court, S. D. New York. January 4, 1896.)

TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT—UNFAIR COMPETITION.

Complainant acquired the right to manufacture and sell in this country "Johann Hoff's Malt Extract," under labels and trade-marks long used in Germany. This compound had been known for many years in this country both as "Johann Hoff's Malt Extract" and as "Hoff's Malt Extract," and was dealt in under the latter name quite as much as under the former. Afterwards defendant acquired the right to import and sell here "Leopold Hoff's Malt Extract," which is made by an alleged different formula at Hamburg. *Held*, that defendant had no right to sell this compound in bottles having a label bearing conspicuously, at the top, the words "Hoff's Malt Extract," although on a different part of the label and on a separate label the fact was stated that it was made by Leopold Hoff in Hamburg; and that defendant should be enjoined from using those words, unless preceded by the word "Leopold," so as to read "Leopold Hoff's Malt Extract."

This was a bill by Johann Hoff against Tarrant & Co. to restrain unfair competition and the use of misleading labels.

Charles G. Coe, for complainant.

Fisher A. Baker, for defendant.

COXE, District Judge. The complainant is a West Virginia corporation engaged in manufacturing at Newark, N. J., and selling throughout the United States, a fluid known as "Johann Hoff's Malt Extract." The complainant was incorporated May 27, 1891. The