

merit. The several exceptions to admissions of testimony have not been argued, and need not be discussed; they, also, are unsound. The judgment of the district court is affirmed.

TALMAGE et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—BENGAL RICE.

Patna or Bengal rice, from which both the outer and inner cuticle have been removed, is dutiable, under paragraph 193 of the tariff act of 1894, as cleaned rice, though containing from 3 to 5 per cent. of "rice polish," and a small percentage of broken grains of rice, and commercially known, prior to August 28, 1894, as uncleaned rice. 77 Fed. 826, affirmed.

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

W. Wickham Smith, for appellants.

Henry C. Platt, Asst. U. S. Dist. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In March, April, and May, 1895, the firm of Dan Talmage's Sons imported into the port of New York sundry invoices of Patna or Bengal rice, upon which the collector assessed a duty of $1\frac{1}{2}$ cents per pound, under the provisions contained in paragraph 193 of the tariff act of August 28, 1894. The paragraph is as follows:

"Rice cleaned, one and one half cents per pound, uncleaned rice, or rice free of the outer hull and still having the inner cuticle on, eight tenths of one cent per pound; rice flour and rice meal and rice broken which will pass through a sieve known commercially as No. 12 wire sieve, one fourth of one cent per pound; paddy, or rice having the outer hull on, three fourths of one cent per pound."

The importers protested against the assessment upon the ground that the merchandise was uncleaned rice, and therefore dutiable, under the foregoing paragraph, at eight-tenths of one cent per pound, or that, if it was an unenumerated article, it was dutiable at the same rate by virtue of the provisions of section 4 of the same act (commonly known as the "similitude clause"), because it most resembled uncleaned rice in all material respects. The board of general appraisers sustained the collector, and the statement of facts which is contained in their opinion is conceded to be correct. From the decision of the circuit court (77 Fed. 826), which sustained the board of general appraisers, this appeal was taken by the importers.

By the board's finding of facts, it appears that Bengal rice contains from 3 to 5 per cent. of "rice polish," otherwise known as "rice dust," "rice flour," or "rice meal," and a small percentage of broken grains of rice, and prior to August 28, 1894, was known commercially as "uncleaned rice." The outer and also the inner or yellow cuticle had been removed from the rice; the latter process being accomplished by pestling in mortars, which is the most expensive

of the various processes of milling rice. These milling processes are six in number:

"(1) The screening, or second threshing, given the rough rice, or 'paddy,' designed to remove trash, stalks, and foreign particles. (2) The removal of the outer husk by the milling stones. (3) The separation of the chaff and other substances by the screen blower and chaff fan. (4) The removal of the yellow cuticle of the grain by pestling in mortars, which is the most laborious and expensive of the several processes. (5) The separation of the rice bran from the rice grains by sifting, and the separation of the small and large grains of rice by the bush screen. (6) Polishing, which is accomplished by a horizontal, revolving drum, covered with leather, and surrounded by a cylinder of wire gauze."

The proper classification of Bengal rice for dutiable purposes was for some years prior to 1894 a subject of disagreement and litigation between the importers of rice and the government; the question in dispute being whether it was uncleaned, or was cleaned, rice. The tariff acts of March 3, 1883, and of October 1, 1890, had imposed duties upon rice as follows: Act March 3, 1883, par. 270: "Rice, cleaned, two and a quarter cents per pound; uncleaned, one and one-half cents per pound." Paragraph 271: "Paddy, one and a quarter cents per pound." Act Oct. 1, 1890, par. 261: "Rice, cleaned, two cents per pound; uncleaned rice, one and a quarter cents per pound; paddy, three-fourths of one cent per pound." It will be perceived that no statutory definition of uncleaned rice or of paddy was given in either of these paragraphs, and consequently the question at issue mainly depended upon the commercial signification of the various terms in the statutes. The juries in two cases under the act of 1883—one case before the circuit court for the district of Louisiana, and the other before the circuit court for the Southern district of New York—differed in opinion, and these conflicting verdicts were undoubtedly based upon the conflicting testimony of commercial experts in different parts of the country. To remove the uncertainties which grew out of the unwritten commercial meaning of these terms, and the continuing contest between the treasury officers and the importers, congress introduced into the act of 1894 statutory definitions of uncleaned rice and of paddy, and said that the former meant "rice free of the outer hull and still having the inner cuticle on," and that the latter article was "rice having the outer cuticle on." It follows from this historical statement of the motive for the rice clauses of the act of 1894, and the consequent construction to be placed upon them, that Bengal rice is not to be classified as uncleaned rice. The next question is as to its proper classification. The importer suggests that it is not cleaned rice, which is still further advanced by a removal of the inner cuticle, and that, therefore, it is unenumerated, but, having a similitude in its character and use to uncleaned rice, it should pay the same rate of duty. The government asserts that, having been excluded from uncleaned rice, it must be regarded, for tariff purposes, as cleaned rice, but that, if unenumerated, it should pay the corresponding duty which is imposed upon that article. There is strong ground for the conclusion that congress, having excluded it from the lower grade, intended to classify it in the higher grade; but, whether that is true or not, the

board of general appraisers have found as facts that the only lack of substantial resemblance in material and quality between the rice in question and cleaned rice is the presence of about 4 per cent. of rice polish or flour in the former article, and its absence from the latter. The use of each is for food, the one being more merchantable than the other. It follows that in materially important particulars it is cleaned rice, and should pay the same rate of duty. The decision of the circuit court is affirmed.

WALTER BAKER & CO., Limited, v. SANDERS et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

No. 125.

1. TRADE-MARKS—INFRINGEMENT—UNFAIR COMPETITION—EFFECT OF DECREE IN ANOTHER CIRCUIT.

A decree of a circuit court in another circuit finding infringement and unfair competition, and enjoining the same, is not conclusive in a suit by the same parties against an agent of that principal, where such decree is merely interlocutory, and still subject to the control or modification of the court.

2. SAME—SUIT AGAINST AGENT—INJUNCTION.

The fact that defendant is selling alleged infringing packages as agent for a nonresident is no ground for refusing an injunction, though he may not be liable for profits.

3. SAME—USE OF ONE'S OWN NAME.

One entering into competition with another person of the same name, who has an old and established business, is bound to distinguish his goods from those of the latter so as to prevent confusion.

4. SAME.

Where by long use the words "Baker's Chocolate" had come to mean, in the minds of the public, complainant's goods, *held*, that a subsequent maker of chocolate with the same name was not entitled to use that name, whether with his given name or its initials, in such manner as to announce that the goods he sells are "Baker's Chocolate."

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

This is an appeal from a decree of the circuit court, Southern district of New York, rendered in a suit brought by the proprietors of the original "Baker's Chocolate" to restrain unfair competition by defendants in the sale of a rival chocolate manufactured and put up in the city of New York in the name of W. H. Baker, of Winchester, Va. When the case was presented to the circuit court it appeared that another suit had been brought against W. H. Baker himself in the Western district of Virginia, wherein, upon the same evidence, an interlocutory decree had been entered against Baker. 77 Fed. 181. The defendant Sanders is his chief salesman and manager of his business here. The other defendants, upon the employment either of W. H. Baker directly or of said Sanders, are concerned more or less with the manufacture and putting up of said chocolate. Some of the defendants submitted to a final decree in the form asked for by complainant, other defendants have obtained extensions of their time to plead, and this cause has been prosecuted to interlocutory decree only against the defendant Sanders. The judge who heard this case in the circuit made a decree in substantial conformity with the decree in the Western district of Virginia. It enjoins

the defendant Sanders: (1) From using on labels, wrappers, bill heads, advertisements, etc., the name "W. H. Baker & Co.," and from using the words "& Company," or any abbreviation thereof, following any form of the name of W. H. Baker, of Virginia. (2) From using in like manner the words, "Established in Mercantile Business, 1785," or any words calculated to lead dealers or consumers or the public to believe that such business (manufacturing and dealing in chocolate), carried on by said W. H. Baker, has been long established, or any words so nearly resembling the words "Established 1780," used by the complainant, as to be calculated to mislead. (3) From using in connection with the business of making or selling chocolate, on labels, wrappers, cans, boxes, cakes, molds, signs, letter heads, bill heads, or advertisements, or in any other manner whatsoever, the name "Baker's" alone, but is required to insert in lieu thereof the full name "W. H. Baker," or "W. H. Baker's," wherever the name "Baker's" now exists upon any such labels, cans, cakes, etc. (4) From using on or in connection with the sale of chocolate the label now used by respondent on plain chocolate, a sample of which is hereto annexed, marked "Exhibit Defendant's Label No. 1," and from using on or in connection with the sale of said Baker's plain chocolate any yellow label, or any label of a color resembling yellow, and from using on or in connection with the sale of said Baker's plain chocolate any label which in its lettering, arrangement, and design is not plainly distinguishable from that used by complainant. (5) But the court refuses to enjoin the respondent from using the name "W. H. Baker" in connection with the manufacture or sale of chocolate, and from using the blue wrapper upon said Baker's plain chocolate, or making and selling cakes of plain chocolate of the shape and size and with the marks and lines thereon as at present used by him, or from putting thereon the words "No. 1" and "Premium," as at present used by him, or from using molds of the shape, size, etc., in which the said chocolate is now made; and the court refuses to grant any injunction against the said defendant Sanders except as herein set forth, and refuses any other relief than that by this decree granted or reserved. The complainant appealed, and now contends that this decree allowing (or rather requiring) defendant to mark and advertise his chocolate as "W. H. Baker's Chocolate" does not give it the full measure of relief to which it is entitled, in that it allows the chocolate sold by defendant to be designated in such a way that, although W. H. Baker's own name is used, it is so used as to cause his goods to be mistaken for complainant's, and thus work a fraud upon the public. Defendant Sanders has not appealed.

Rowland Cox and William Lowell Putnam, for appellant.
Robert C. Barton and John Vincent, for appellee.

LACOMBE, Circuit Judge (after stating the facts as above). It is contended by respondent that both the circuit court and this court are concluded by the decree in the Virginia circuit, such decree being rendered in a suit between the same complainant and the principal or employer of defendant Sanders. The difficulty with this contention, however, is that the Virginia decree is interlocutory only. The whole matter is still open there, and when the case comes up on final hearing that court may enlarge or contract the measure of interlocutory injunctive relief as the record then before it may warrant, without being in any way embarrassed by its prior decision. Certainly, the defendant Sanders can be in no better position in some other circuit than his principal, W. H. Baker, will be in when his case comes before the Virginia court for further and final adjudication upon a record which contains evidence additional to that adduced in support of the interlocutory decree. Nor is the circumstance that Sanders is selling the alleged infringing pack-

ages as agent for a nonresident any ground for refusing injunction. He may not be liable for profits which his principal takes, but injunction operates upon the individual, and in a proper case the individual will be restrained from manufacture, preparation, and sale which infringe upon another's rights, whether he be principal or merely employé.

The law of unfair competition is well settled. It is only the application of that law to individual cases which requires discussion, and quite frequently it becomes necessary to recite the facts at great length in order to demonstrate that there has been such unfair competition, and to point out what precise measure of relief should, under well-settled principles, be accorded to the complainant. In the case at bar, however, it will not be necessary to rehearse all the salient points in the voluminous record now before the court. They have been most exhaustively presented, and their bearing most carefully and elaborately discussed, in the opinion of Judge Paul, rendered in the Virginia case above referred to, and which will be found reported in 77 Fed. 181. It would be a work of supererogation to undertake any restatement of them. Reference to that opinion will fully indicate the proofs upon which our conclusion is based. A brief synopsis, as near as may be in the language of Judge Paul, will be quite sufficient for the purposes of this opinion. The complainant is engaged in the business of manufacturing chocolate, having succeeded to the business originally established about the year 1780 by one James Baker at Dorchester, Mass. The business has been extensive and successful, and its preparations have a high reputation in the markets of the United States. A large amount of money has been spent in advertising it. It is put up in the ordinary size and shape of chocolate packages, wrapped in blue paper, with a yellow label thereon. Upon the top and bottom of this yellow label is a scroll of intertwined leaves, and at each end a coat of arms surmounted by a flag, also surrounded by a scroll of intertwined leaves, bearing in the upper center the words "Baker's Chocolate" in large type, and the words "W. Baker & Co., Dorchester, Mass.," in small capitals, with a list of some other articles manufactured by the complainant. This blue wrapper and yellow label have been used by complainant and its predecessors for more than 40 years. Complainant's goods had become well known as "Baker's Chocolate," and the evidence from the trade shows that when "Baker's Chocolate" was called for it was understood to be Walter Baker's chocolate that was intended. The W. H. Baker (or defendant's) package, which is of the standard shape and size, was (until a modification was made after entry of the interlocutory decree in Virginia) also wrapped in blue paper with a yellow label, having at its top and bottom a scroll of leaves, and at each end a coat of arms partially surrounded by a scroll of leaves. At the top were the words "Established in Mercantile Business 1785." Below these words, in large type, were the words, "W. H. Baker & Co.'s Chocolate," and under them, in smaller capitals, the words "Premium No. 1." Then, in smaller type, was given a description of the goods and directions for

using, and finally, at the foot, in small capitals, "W. H. Baker & Co., Winchester, Va."¹

The wrapper was the same shade of blue as complainant's. The yellow label was a shade lighter than complainant's, and of the same length and width. As is usual in such cases, the alleged infringer insists that he had no intention to dress up his goods to resemble complainant's; that, on the contrary, the very identity of the surnames, Baker, "made him all the more careful to avoid any confusion therefrom," and that in wrapping his goods he "has used every possible device to accentuate a difference by using a wholly different inscription,—a design of marked dissimilarity; figures that have no possible likeness, and a tout ensemble that strikes the eye of the most casual observer." His success in accentuating differences has certainly not been remarkable, and it is curious to note how frequently in cases of this kind the designer's efforts to produce wrappers, labels, and inscriptions which shall be distinctly characteristic of some new make of goods result only in producing confusion with some earlier and well-known brand. In the following excerpts from Judge Paul's opinion we fully concur:

"He has taken the testimony of a number of witnesses to prove his high character as a citizen and a business man. In the argument great stress is laid upon this testimony by respondent's counsel, as negating the idea of a fraudulent purpose on the part of the respondent in dressing up his goods in imitation of the complainant's. The court cannot give to this evidence the weight to which counsel insist it is entitled. It must in this case, as in every case where intent is the subject of investigation, deduce the intent from the acts of respondent. * * * It is clearly apparent from the testimony of the respondent, and from other evidence in the cause, that in the arrangement between the respondent and Sanders respondent's name of 'Baker' was to play a prominent part in the sale of his goods. When this testimony is taken in connection with the similarity in shape and size, * * * the identity in color of the blue wrappers, and the similarity of the yellow labels on each, it is impossible to escape the conclusion that it was the purpose of the respondent to put upon the market his goods in such con-

¹ The following is a copy of the label of W. H. Baker to which this court here refers:

ESTABLISHED IN MERCANTILE BUSINESS. 1786.

W.H. BAKER & CO'S CHOCOLATE.
PREMIUM No 1.

Customarily used by Bakers for all Baking purposes.
It is manufactured of the highest grades of Cocoa and guaranteed equal, if not better than any other Chocolate made in the World.

DIRECTIONS—For a beverage, grate fine one block or an ounce of this Chocolate; add about the same quantity of sugar; place them into a pint of boiling water or milk, prepare an equal portion of each. Thoroughly stir until dissolved. A few minutes boiling will show a great improvement.

W.H. BAKER & Co. Winchester, Va.
 Producers of Premium Chocolate, Breakfast Cocoa, Sweet & Vanilla Chocolate.
 PHILADELPHIA, PA. — NEW YORK.

dition and appearance that the same might be readily accepted as the goods of complainant. That such was the result, the evidence abundantly shows. * * * The testimony of grocers and consumers * * * abundantly shows that great confusion exists in the trade and with the public between the goods of the complainant and those of the respondent, and that both the trade and the public were deceived into purchasing the goods of respondent when they thought they were getting those of complainant. * * * A careful consideration of the evidence, and an inspection of the packages, wrappers, labels, inscriptions, etc., of the goods of complainant and those of respondent, can lead the court to no other conclusion than that there was deliberate purpose to place the goods of the respondent upon the market in a guise resembling the complainant's goods as nearly as possible so as to avoid a direct imitation. * * * In the preparation of his goods the respondent has closely imitated the goods of the complainant in the most prominent characteristics in which they are presented to the public. In the plain chocolate the most striking of these prominent characteristics are the shape and size of the packages, the blue wrapper and the yellow label, * * * with the prominent words, 'Baker's Chocolate.'

In all of this we fully concur, and it will not be necessary further to refer to some earmarks of intent to deceive which Judge Paul points out, such as the use of the firm name "W. H. Baker & Co.," when respondent had no partner, and the words, "Established in Mercantile Business 1785," when respondent had commenced the chocolate business only in 1894. The conclusion of Judge Paul's opinion is expressed in these words:

"The respondent entering the chocolate market under a firm name so nearly resembling that of complainant, an old-established and well-known concern, did not make the effort incumbent on him to distinguish his goods from those of the complainant so as to prevent confusion. An inspection of the great number of cans, labels, inscriptions, designations, and characteristic marks of other dealers in chocolate, American and foreign, produced as evidence in this cause, shows that there is no difficulty in one dealer so preparing his goods as to distinguish them from those of another. With the widest field from which to select wrappers, labels, cans, inscriptions, words, phrases, and designations, the respondent has so nearly simulated in these respects the chocolate goods of the complainant as to lead dealers and customers to believe that they were buying the complainant's goods, when they were really getting those of the respondent. To prevent this confusion, and to protect the complainant and the public against this unfair competition and deception, an injunction will be entered restraining the respondent in the following particulars: From using in connection with his business as a maker and seller of chocolate * * * the words '& Co.'; the words 'Established in Mercantile Business 1785'; from the use of the yellow label on his plain chocolate, and he will be required to substitute another and entirely different label therefor. * * * The court will not enjoin the respondent from using his name 'Baker' in connection with the manufacture and sale of chocolate."

And an interlocutory decree was entered substantially as set forth in the statement of facts, supra.

The conclusions of the circuit court in Virginia are expressed with no uncertain sound. Unfair competition is found, is condemned, and its continuance enjoined. Preserving to the respondent the right to use his name, the court hedges that use about with safeguards calculated to prevent his so using it as to deceive the public. Most drastic provisions to this end are contained in the decree, such as the prohibition of the further use of the yellow label. It must surely have seemed to Judge Paul that when this opinion was filed and this decree entered complainant was fully protected against this unfair competition. Certainly it so seemed to this court upon the

argument, and it was difficult at first to conceive what further relief than that embodied in the fourth paragraph of the decree, *supra*, could be asked for. But inspection of the new style of dressing the goods with the light blue wrapper (shown in the sample attached to appellee's brief), and the ingenious announcement thereon, "Best Quality now with Blue Label," and the words "Baker's Chocolate" still the most prominent feature of the inscription, demonstrates how the letter of the Virginia decree may be followed and its spirit violated.² As was said in the quotation *supra*, "complainant's goods had become well known as 'Baker's Chocolate,' and when 'Baker's Chocolate' was called for it was understood to be Walter Baker's chocolate that was intended." The public do not go into the minuter refinements of the title or the label. Whether it is described as "Walter Baker's Chocolate," or "William Baker's Chocolate," or "W. H. Baker's Chocolate," or "W. H. Baker's Best Chocolate," so long as the title contains the words which in trade and among consumers have come to be the every-day designation of complainant's goods, the chocolate so labeled will naturally be assumed to be complainant's, unless special care be taken to indicate that it is not. Of course, it would be very easy, under the Virginia decree, to mark the goods "W. H. Baker's Chocolate," and still so dress them up that no one of ordinary intelligence would be deceived as to their identity; but that presupposes a bona fide effort to "accentuate differences,"—such an effort as was made by the designer of the package of "Baker's Chocolate," which is an exhibit in this case. No such effort has yet been made, and it is hardly to be expected that any such effort ever will be made. The complainant is entitled to relief against further use of a title which causes confusion, provided such relief can be granted without depriving W. H. Baker of the right to use his own name in connection with the chocolate business. The measure of such right is tersely expressed by Judge Paul:

"The doctrine is equally well settled that equity will direct how a man shall use his name in his purpose to denote his own individuality. He will

² The following is the label to which the court here refers:

W.H. BAKER'S CHOCOLATE
PREMIUM

IT IS MANUFACTURED OF THE HIGHEST GRADES OF COCOA AND GUARANTEED PURE, NOT BETTER THAN ANY OTHER CHOCOLATE MADE IN THE WORLD.

DIRECTIONS: For a beverage, grate the chocolate or an ounce of this chocolate, add about the same quantity of sugar, place them in a part of boiling water or milk, prepare an equal portion each. Thoroughly stir until dissolved. A few minutes boiling will show a great improvement.

W.H. BAKER. Winchester, Va.
Manufacturer of Premium Chocolate, Cocoa, Sweet & Vanilla Chocolate.

TRADE MARK. WINCHESTER, VA. NEW YORK.