

is included the cost of the bottles, corking, and wiring. For this reason, when the act of 1894 puts an ad valorem duty on ginger ale or ginger beer, it expressly provides that no separate or additional duty shall be assessed on the bottles, because the value of these bottles has already been estimated and provided for in getting at the value of the merchandise. The decision of the supreme court in *De Bary v. Arthur*, 93 U. S. 423, throws some light on this question. The case arose under the tariff act of 1870, upon duty payable on champagne. The importer contended that, as champagne could only be imported in bottles, the specific duty of six dollars per dozen of quart bottles, and other sums specified for smaller bottles, covered the duty on the bottles also. The court recognizes the argument, but decides that it is answered by the express language of the act, which declares that wines of all kinds, imported in bottles, must pay an additional duty of three cents per bottle. In the present case the invoice contained, among others, two items: One for 25 barrels ginger ale in Crown system, 250 dozen, against which the value at place of exportation was given. The next item is 250 dozen bottles containing above, against which was their value. The collector omitted this last item in fixing the duty, evidently supposing that, the bottles having already been estimated in the ad valorem of the ginger ale, separate or additional duty could not be imposed on the bottles. From this point of view there is nothing in conflict with this conclusion in *Dickson v. U. S.*, 68 Fed. 534, or in the same case on appeal, 19 C. C. A. 428, 73 Fed. 195.

The importer should pay the duties on the whole ad valorem value of the imported merchandise, as bought and sold in the place whence it was exported, and in the condition in which such merchandise is then bought and sold for exportation.

HOSTETTER CO. v. SOMMERS et al.

(Circuit Court, S. D. New York. December 21, 1897.)

TRADE-MARKS—UNFAIR COMPETITION.

Complainant had long sold "Hostetter's Bitters" in bottles of a peculiar form and size, and established a large business therein. Defendants sold in demijohns spurious bitters, closely resembling the real article, labeling them "Hostetter's Bitters," with intent that they should be sold by the drink at the bar as "Hostetter's Bitters." *Held*, that this was unfair competition, and should be enjoined.

This was a bill in equity by the Hostetter Company against Isaac Sommers and Louis Joseph to restrain alleged unfair competition in trade.

A. H. Clarke, for complainant.

Wm. J. Townsend, for defendants.

TOWNSEND, District Judge. The following allegations of the bill herein are admitted, namely, that complainant corporation is the compounder of a medical preparation which has been sold by it for

more than 30 years in square amber-colored bottles only, marked and labeled as "Dr. J. H. B. Hostetter's Stomach Bitters"; that said bitters are known to the trade and to the public as "Hostetter's Bitters," and have been extensively sold; and that the good will of said business is of great value to complainant. The bill charges the defendants with fraud and unfair dealing in selling as its bitters another, counterfeit stomach bitters, in bulk, so compounded as to resemble in color, taste, and smell the bitters of complainant, and in suggesting to and advising intending purchasers to procure the empty bottles of complainant, with its labels thereon, and to refill them with said imitation bitters, and sell them as complainant's bitters. The answer of defendants is a general denial. Their witnesses deny most of the material statements of complainant's witnesses. From the mass of testimony, given for the most part by interested witnesses, some of whom are discredited by inconsistencies and others by improbabilities, I find the following facts: On several occasions the agents of complainant called at defendants' place of business, and, representing themselves as liquor dealers or their agents, stated that they wished to purchase liquors and various kinds of bitters, including Hostetter's Bitters, which they wished to purchase by the gallon. Defendant Joseph, who is a partner of defendant Sommers, on four occasions sold to complainant's agent demi-johns, each containing a half gallon of counterfeit bitters, labeled them "Hostetter's Bitters," described them in the invoices as "Hostetter's Bitters," and so entered them in the sales book. After the second or third purchase complainant's agent asked the defendant Joseph "which was the best way to sell Hostetter's Bitters to make the most money." Joseph told him to put them in Hostetter bottles, and sell them over the bar, the same as his other customers did. After all of said purchases had been made, complainant's agent asked Joseph for empty Hostetter bottles. Joseph told him they did not have any, but directed him to two or more dealers in bottlers' supplies, where he said he (complainant's agent) could get a general supply of labels and bottles. One of these dealers (Westermann) admitted that, if he had second-hand bottles, he guessed he would sell them with old labels on, if people wanted them, but denied that he ever sold Hostetter bottles. In view of the fact that Joseph's testimony as to said conversation is unsupported by other evidence, and, as to various material statements, is contradicted by four witnesses, it must be considered as discredited. It is unnecessary, however, to rest the decision of this case upon any uncertain testimony. Upon the facts clearly proved, a case of infringement is shown, within the rule laid down in *Hostetter Co. v. Brueggeman-Reinert Distilling Co.*, 46 Fed. 188, and *Hostetter Co. v. Van Vorst*, 62 Fed. 600. It is established that defendants sold to complainant's agents, under the name "Hostetter's Bitters," a spurious article, so closely resembling the real article as to deceive an ordinary customer, with the intent that it should be resold by the drink, over the bar, in the usual way, as Hostetter's Bitters, in fraud of the rights of complainant and of the public. The law is not, as claimed by defendants' counsel in his brief, that "under complainant's trademark it is entitled to no protection in the sale of bitters, unless such

bitters are sold in bottles resembling the bottles of complainant, and under its labels and trade-mark, or imitations thereof." The complainant is entitled to protection against the appropriation of its trade-mark by any and all unfair and dishonorable means, and a court of equity has power to grant such protection whenever it is satisfied that an attempt has been made by ingenious subterfuges to invade the rights of an owner of a trade-mark, either by a conspiracy with others to deprive him of such rights, or by misrepresentation in the sale of a spurious article so manufactured as to deceive the public. In the sharp contest between the individual manufacturer, who strives to acquire and retain the fruits of industry and honesty, and the field of keen rivals, seeking to wrest from him the prize of the public good will, the inventive ingenuity of the infringer has conceived a great variety of devices for evading the established rules of fair dealing. Among the later of these devices are acts professedly within legal limitations, but manifestly designed to be afterwards so made available by other acts as to deceive the public. In such cases courts of equity, looking beyond the original acts, and finding that their ultimate object and effect were to enable and induce the retail seller of a fraudulent imitation to palm it off on an unsuspecting public for the genuine article, and thus to contribute to the infringement upon the rights of the original owner, have not hesitated to apply the remedy. The scheme in the present case, according to the testimony of defendants, appears to have been that the manufacturer of the bogus bitters should sell them to the wholesaler in demijohns labeled "Stomach Bitters"; that the wholesaler should change the labels to "Hostetter's Bitters," and invoice and ship them under said latter name to the retail dealer, and that the retail dealer should sell them by the drink as "Hostetter's Bitters" when "Hostetter's Bitters" were called for at the bar, from bogus bottles or otherwise, as he chose. The claim of defendant Joseph that he stated to complainant's agent that the bogus bitters were stomach bitters, and that he could not buy Hostetter's Bitters in bulk, is immaterial in view of his admission that he marked and invoiced them to the purchaser as "Hostetter's Bitters," because complainant's agent told him "his brother-in-law up there didn't know anything about the business, and there was a call up there for Hostetter Bitters," and further said, "In the country they didn't know the difference, and they are more salable as Hostetter Bitters." Therefore, upon defendants' admissions, they sold as Hostetter's Bitters a bogus compound which looked, tasted, and smelled like Hostetter's Bitters to the unwary purchaser of a drink at the bar. Defendant Joseph said he marked the demijohn "Hostetter's Bitters" because they were for the country, and in order that the purchaser might thereby "make all the money he could out of them." According to complainant's contention, sufficiently supported by the proofs, said sale was accompanied by the suggestion that, in order to make the most money, said bitters should be sold in Hostetter bottles. In either view of the case, there was an illegal appropriation of complainant's right of property, which should be enjoined. Let a decree be entered for an injunction and accounting.

D. S. MORGAN & CO. v. MAUL.

(Circuit Court, N. D. New York. January 12, 1898.)

PATENTS—ANTICIPATION AND INFRINGEMENT—HARROWS.

The La Dow patent, No. 415,113, for an improvement in harrows, consisting in the use of rotary spring-teeth, whether concave or not, in gangs angled relatively to the draft-line, was not anticipated by the Clark patent, No. 369,163, and is infringed by a harrow having similar spring-teeth, though the spring action therein is less in degree than in the teeth of the patented harrow.

This was a suit in equity by D. S. Morgan & Co. against Christian Maul for alleged infringement of a patent for an improvement in harrows.

George B. Selden, for complainant.
Josiah Sullivan, for defendant.

COXE, District Judge (orally). This action is brought for the infringement of letters patent, No. 415,113, granted November 12, 1889, to Charles La Dow for a new and useful improvement in harrows. The inventor in the specification says:

"So far as I am aware I am the first to use rotary spring-teeth, whether they be concave or not, in gangs which may be angled relatively to the draft-line."

The claims alleged to be infringed are as follows:

"(2) The combination of a gang-shaft set at an angle to the line of draft, and plate-spring harrow-teeth mounted thereon with their edges towards the soil, so as to constitute a rotary gang of spring harrow-teeth which cut through the soil edgewise and turn the earth. (3) The combination of a gang-shaft, spools, and concave spring harrow-teeth clamped between the spools and adapted to be set at an angle to the line of draft. (4) The combination of concave plate-spring harrow-teeth and a rotatable support upon which they are mounted, said support being set at an angle to the line of draft, substantially as set forth." "(6) A revolving harrow-tooth composed of a bar or bars of spring metal adapted to vibrate laterally as the implement proceeds, said vibration being caused by the pressure of the earth against the concave side of the tooth, in combination with a support for maintaining said revolving tooth at an angle to the line of draft."

The defenses are lack of novelty and invention and noninfringement. Twenty-nine patents have been introduced by the defendant, but it is unnecessary to consider any of them except No. 369,163, granted to George M. Clark, August 30, 1887, for a disk harrow. This is unquestionably the best reference offered by the defendant. If the Clark patent does not anticipate or limit the claims in question, no other reference does. It shows every feature of the invention in controversy, with the single exception of the rotary spring-tooth; so that unless patentability can be found in this feature it can be found nowhere. Clark shows an ordinary disk harrow with the outer periphery of the disk cut away or notched in the form of teeth, one figure of the drawing showing the disk with a series of teeth bolted on its outer periphery. There is nothing either in the specification or drawings to indicate that the Clark structure possessed the feature of which novelty is predicated in the La Dow patent, viz.: the spring