

On Rehearing.

(May 19, 1898.)

Richard C. Dale and Henry E. Everding, for petitioners.

GOFF, Circuit Judge. The court has duly considered this petition for a rehearing, and it is ordered that the mandate issue as heretofore directed. The opinion filed in this cause on the 3d day of May, 1898, found error in the decree appealed from, not, as stated in the petition for a rehearing, solely because the complainants below had failed to prove material allegations of their bill of complaint, but also because the court found that the word "Pocahontas" could not be exclusively appropriated by complainants as a trade-mark or word-symbol, for the reason that it was and is a geographical word, in and to which all the people of the section of country to which it refers have the common right of use in connection with their business in such locality. It follows, therefore, that further proofs relating to the same would be unavailing, and it was for this reason that the court remanded the cause, with instructions that the bill be dismissed. The ruling is adhered to. We are clearly of the opinion, not only that complainants below are not entitled to an injunction, but also that there is no equity in their bill, and that, therefore, it will be a useless expenditure of time and money, and cause fruitless delay, to take the evidence mentioned in the petition for a rehearing. The prayer of the petition is refused.

BASS, RATCLIFF & GRETTON, Limited, v. HENRY ZELTNER BREWING CO.

(Circuit Court, S. D. New York. May 13, 1898.)

TRADE-MARKS—UNFAIR COMPETITION.

One using, in connection with pale ale, a plain red triangle stamped on a label, cannot enjoin, on the ground of unfair competition, one who uses, in connection with his lager beer, a similar red triangle, having a large white "Z" thereon, the labels and posters being so utterly unlike that the ordinary purchaser would not be deceived.¹

This was a suit in equity by Bass, Ratcliff & Gretton, Limited, against Henry Zeltner Brewing Company, to restrain alleged unfair competition in trade.

Rowland Cox, for complainants.

Goepel & Raeger, for defendant.

TOWNSEND, District Judge. The complainants herein are the proprietors of "Bass' Ale." They and their predecessors have for many years continuously used labels stamped with the well-known plain red triangle on an elliptical figure, with black border and red lace-work design, bearing the words "Bass & Co.," to designate their

¹ As to trade-marks and unfair competition in trade generally, see elaborate note to Scheuer v. Muller, 20 C. C. A. 165.

chief product, "Pale Ale." The defendant has used, to designate its "Old-Fashioned Lager Beer," a circular label, and posters representing a strap and buckle stamped with a red triangle, having a large white "Z" thereon. The labels and posters are so utterly unlike those of complainants in shape, color, and collocation of symbols and letters that a mere inspection shows that the ordinary purchaser would not be deceived. Furthermore, the defendant's product is a different article, sold under a different name, in bottles of a different color and shape, with different cork and capsule, from those of complainants, and no unfair competition or improper use of the red triangle has been proved. For these reasons the bill may be dismissed. This conclusion dispenses with the necessity of considering the further forcible contention of defendant as to complainants' use of said symbol.

WALLACH et al. v. WIGMORE.

(Circuit Court, E. D. Pennsylvania. April 2, 1898.)

TRADE-NAMES—INFRINGEMENT—SUITS—PARTIES—LICENSEE.

No injunction can issue against infringement, on a bill to which an exclusive licensee (when there is one) is not a party.

This was a suit in equity by Leopold Wallach and Moritz Wallach against William H. Wigmore for alleged infringement of a trade-mark or trade-name. The cause was heard on a motion for preliminary injunction.

H. Gordon McCouch and R. C. Dale, for complainants.
Wm. Morris, for defendant.

DALLAS, Circuit Judge. There can be no property in any name or word, abstractly considered; and accordingly the bill in this case avers that it is by reason of the appropriation of the term "Phonendoscope" to identify a certain patented instrument that the alleged exclusive right to its use in connection with that article, or with any instrument closely resembling it, though not identical therewith, has been acquired. The trade-name claimed, and the right to deal in the patented article, must be united in the same person or persons, or there can be no valid title to the exclusive use of the former. Here, however, the proofs of the plaintiffs show that a firm which has not been made a party to the suit is the exclusive licensee of the plaintiffs, as respects both the patent and the name; and while it is true that a licensee, less than exclusive, should not be joined in a suit for infringement (*Blair v. Glass Co.*, 52 Fed. 226), it is also true that an exclusive license is, in effect, a grant (*Johnson Railroad-Signal Co. v. Union Switch & Signal Co.*, 59 Fed. 23), and that, therefore, no injunction can issue to restrain future infringements, upon a bill to which an exclusive licensee (if there be such a one) has not been made a party (*Waterman v. Mackenzie*, 138 U. S. 255, 11 Sup. Ct. 334). This is shown by several authorities which are cited upon the defendant's brief, but it is not necessary to mention any others than those to which I have referred. These cases all relate to pat-