In section 25 of this same act it is provided, under the head of "Schedule A, Stamp Duties": "Dispatch, telegraphic: Any dispatch or message, one cent."

It is contended in support of the demurrer that it was the duty of the plaintiff to affix and cancel the internal revenue stamp provided in the last section, before tendering the dispatch to the defendant for transmission, and that negligence cannot be charged against the defendant for its refusal to transmit a message which was not stamped by the plaintiff as required by law. The real question submitted to the court for decision is this: Upon whom does the law impose the burden of paying the stamp tax,—the sender of the message, or the telegraph company? The document being subject to tax under Schedule A, the fine or penalty imposed for the omission to affix and cancel the proper stamp is, under section 7, imposed upon the person who makes, signs, or issues the document. The statute is in the disjunctive, and reaches not only the omission of the person who issues a document subject to the tax, but the maker and signer of the instrument. The law for this purpose takes notice, therefore, of the person who writes out and signs a dispatch, and makes him liable for the omission to stamp the instrument he creates. By the terms of the stamp schedule, the tax of one cent is placed upon this instrument as prepared by the sender, without reference to any act of the telegraph company in transmitting the message to its destination. The instrument described is a "Dispatch, telegraphic: Any dispatch or message." Had it been intended to impose this tax upon the telegraph company, congress could certainly have identified the subject of taxation as the document transmitted by the telegraph company; and it may be said that the penalty of $10, provided in section 18 for the default of the telegraph company in transmitting a dispatch or message without the stamp denoting the tax imposed by law, is such an identification of the subject intended to be taxed. But the difficulty with this interpretation of the statute is that it does not relieve the sender from the fine of not more than $100 for his omission to affix the proper stamp to the dispatch or message as made and signed by him, and delivered to the telegraph company for transmission. Two penalties are clearly imposed upon parties engaged in making and transmitting an unstamped dispatch or message, —a fine of not more than $100 upon the party who makes, signs, or issues the document; and a penalty of $10 upon the telegraph company for transmitting it to its destination,—the first being intended to secure the payment of the tax, and the latter the attention and service of the telegraph company in the enforcement of the law.

It follows, therefore, that the instrument set forth in the complaint was subject to a stamp tax, and that it was the duty of the plaintiff, as the maker and signer of the instrument, to affix to it, and cancel, the stamp required by law, before he can charge the defendant with neglect in failing to transmit the message to its destination. The demurrer will be sustained.

DADIRRIAN v. YACUBIAN et al.

(Circuit Court, D. Massachusetts. December 1, 1898.)

No. 503.

TRADE-MARKS—FOREIGN NAME OF ARTICLE.

The word "Matzoon," which has been for centuries in Armenia the name of an article of food or diet prepared from sterilized and fermented milk, cannot be appropriated as a trade-name by the person who first introduced the article, as well as the name, into trade in this country.

This is a suit in equity by Markar G. Dadirrian against Gamaliel M. Yacubian and another to restrain the infringement of a trade mark or name.

Betts, Betts, Sheffield & Betts, for complainant.
Alex. P. Browne, for defendants.

COLT, Circuit Judge. In a suit by this complainant against these defendants in the United States circuit court for the Northern district of Illinois, Judge Showalter, on motion for a preliminary injunction, in a well-considered and able opinion (72 Fed. 1010), held that the word "Matzoon" (or "Madzoon"), having been used in Armenia for centuries to designate an article of food or diet made from sterilized and fermented milk, cannot be appropriated as a trade-mark by the complainant, who first introduced both the name and the article into trade in this country; nor can the defendants be enjoined on the theory that the word has become, in a special and secondary sense, a mark of the origin of complainant's goods, because the defendants' label plainly distinguishes their own product from that of the complainant. The present bill was filed July 7, 1894. On November 14, 1894, Judge Carpenter denied a motion for a preliminary injunction. The present hearing was had upon full pleadings and proofs. We have carefully examined the evidence and briefs of counsel, and agree with the conclusions reached by Judge Showalter in the Illinois case. We find nothing in the present record that would, in our opinion, warrant the court in reaching any different conclusion; and we do not see how we can add anything of importance to the reasoning of the court in its opinion in the Illinois case. We cannot resist the conviction that Dr. Dadirrian did not originally adopt the word "Matzoon" as a fanciful or arbitrary name, and that it was not his intention to make a new preparation or product, but that he started with the intention of introducing for the first time into this country a preparation of fermented milk well known for centuries in Armenia, Turkey, and other Eastern countries, and that he intended to call it by its common and well-known Armenian name. Dr. Dadirrian, after graduation at the New York University Medical College in 1871, returned to his old home in Armenia, Asia Minor. He came back to New York in 1884, and began the practice of his profession. In July, 1885, he first put his preparation of "Matzoon" on the market. On June 18, 1885, he read a paper before the New York Academy of Medicine on "Matzoon, or Fermented Cow's Milk," and exhibited samples. That paper declares that: