to the supreme court of the state for relief from the alleged wrongful sentence, until he has lost the right to take such appeal, he is in no situation to invoke the aid of this court to relieve him from the consequences of his negligence. Besides, if the sentence pronounced against him is unauthorized by the statutes of the state, and for that reason is in contravention of the constitution of the United States, he can, by petition for the writ of habeas corpus, addressed to the proper state court of original jurisdiction, procure a decision of that question; and, if the decision of such court is adverse to him, he can have it reviewed by the supreme court of the state, and, if the decision of that court be adverse, he can procure its review by the supreme court of the United States touching any right secured to him by the constitution of the United States which he has distinctly asserted, and which has been denied to him by the courts of the state. As no special circumstances are shown requiring earlier interference, this court perceives no reason why it should interfere until the petitioner has been denied, by the judgment of the highest court of the state, some right, privilege, or immunity secured to him by the constitution or laws of the United States. New York v. Eno, 155 U. S. 89, 15 Sup. Ct. 30. Leave to file the petition is denied.

VON MUMM et al. v. WITTEMAN et al.

(Circuit Court of Appeals, Second Circuit. December 7, 1898.)

No. 44.

UNFAIR TRADE—CAPSULES FOR CHAMPAGNE BOTTLES.

Complainants have for many years used a peculiar, rose-colored metal capsule, with their name and other devices embossed thereon, as a distinguishing mark for the bottles containing their champagne. Defendants are manufacturers of bottlers' supplies for the trade. *Held*, that complainants were not entitled to a decree enjoining the sale merely of a rose-colored capsule, unembossed, though of the same size and shape, or even with the words "Extra Dry" impressed thereon, as on complainants', in the absence of evidence of its use in a manner to deceive customers to complainants' damage, as such capsules are capable of use in a manner not injurious to complainants.[1]

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

This cause comes here upon appeal from a decree of the circuit court, Southern district of New York. 85 Fed. 966. It is a suit in equity brought by the firm of G. H. Mumm & Co., of Rheims, France, producers of champagne wine, to restrain the manufacture and sale of alleged piratical labels and capsules. Defendants are not producers or dealers in champagne. They make and sell bottlers' supplies. The circuit court, after final hearing upon pleadings and proof, granted an interlocutory decree for an injunction and account as to the fraudulent labels, but refused to grant an injunction restraining the use of the capsules. Defendants did not appeal, and the only

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[1] For unfair competition in trade generally, see note to Scheuer v. Muller, 20 C. C. A. 165, and note to Lare v. Harper & Bro., 30 C. C. A. 376.

For misleading or false labels in general, see note to Raymond v. Baking-Powder Co., 29 C. C. A. 250.

question presented is as to propriety of the circuit court's refusal to enjoin the capsules.

Rowland Cox, for appellants.
John A. Straley, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The evidence abundantly sustains the finding of the circuit court that complainants originated, and have for many years used, a rose or brilliant copper-colored soft-metal capsule, embossed with the name "G. H. Mumm & Co.," and other devices, as a distinguishing mark for their wine. And we also concur in the further finding that, by reason of the practice of serving such wine from an ice chest or in coolers, the bottle is liable to lose its labels before it is shown to the customer, so that in such cases the capsule is the only easily-available means of identification. We are not satisfied, however, that, by reason of the widespread use of colored capsules among producers of champagne, each separate producer could not be protected in the use of his own color without depriving some newcomer of the right himself to select and use a colored capsule. The possible combinations of color are so manifold that it is hard to conceive how such newcomer, honestly endeavoring to dress his goods in such wise as to mark them as his own, could experience any difficulty in devising a new capsule. We concur, however, in the conclusion of the circuit court that complainants are not entitled to a decree enjoining the sale merely of a rose-colored capsule, unembossed, or even with the words "Extra Dry" impressed thereon. Although the capsules sold by defendants are of soft metal, and of the same shape and size and color as complainants', it is manifest that they may be so used by the purchaser as not to mislead or defraud the customer. If the words "Brown's Sparkling Cider" were printed on the capsule in bold letters of a contrasting color, no ordinarily intelligent purchaser would be deceived. And in other ways the rose-colored capsule may be so collocated with other indicia of origin as to advertise the contents of the bottles quite distinctively as the product of some one other than G. H. Mumm & Co., while the placing of the words "Extra Dry" on the capsule is not inconsistent with its honest use. When there comes before this court some cause wherein a producer or dealer in champagne has used the rose-colored soft-metal capsule of complainants in such a way as to delude the customer into the belief that the wine offered for sale is complainants' product, it will be time enough to decide whether equity will administer relief, and, if so, to what extent; but complainants have not any such exclusive right to a soft-metal capsule—qua capsule—as will entitle them to enjoin its sale as an article of merchandise separate from the bottle. The decree appealed from is affirmed, with costs.

ROSS v. RAPHAEL TUCK & SONS CO.

(Circuit Court of Appeals, Second Circuit. December 7, 1898.)

No. 23.

1. COPYRIGHTS—PENALTY FOR INSERTING FICTITIOUS NOTICE—SALE OF BOOKS.
Rev. St. § 4963, imposing a penalty on any person who shall insert or impress a copyright notice in or upon a book not copyrighted, did not, prior to its amendment in 1897, apply to a person knowingly selling a book containing a fictitious copyright notice, where he did not make the book, nor cause the notice to be inserted.

2. APPEAL—EXCEPTION TO DISCRETIONARY RULING.
Where the only objection made on an offer of testimony was that the question was leading, the ruling thereon was discretionary, and an exception saves no question for review.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Peter A. Ross against the Raphael Tuck & Sons Company to recover a penalty. Plaintiff brings error.

A. Bell Malcomson, for plaintiff in error.

Louis C. Raegener, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendant entered upon a verdict rendered by the direction of the trial judge.

The action was brought for the recovery of penalties given by section 4963, Rev. St. U. S. That section, as it read before the amendment of 1897, provided that "any person who shall insert or impress" a copyright notice in or upon any book for which he has not obtained a copyright shall be liable to a penalty of $100, recoverable one-half for the person who shall sue and one-half to the use of the United States.

It appeared upon the trial that the defendant, a New York corporation, had bought of a London corporation certain books in which there was a fictitious copyright notice, and had sold them in this country in the summer of 1896. There was evidence tending to show that the defendant gave an order to the London concern for the books, and they were manufactured for the London concern to fill that order. Further than this there was no evidence tending to show that the defendant had caused the insertion of the fictitious copyright notice in the books, or knew that it was to be or had been inserted previous to receiving books. The trial judge ruled that the evidence did not establish a cause of action, and directed a verdict.

Error is assigned of several observations of the trial judge when giving his exposition of the meaning of the statute, and also of his ruling directing a verdict. Whether these observations were correct or not need not be considered. If the ultimate ruling was right, it is quite immaterial whether or not it was reached upon a correct process of reasoning.