

other beneficiaries under the will, and transferred to himself, as trustee for another and different fund created by the will, \$33,000 more of said annuitants' fund. It appears that the executor (trustee) thus parted with so much of the annuitants' fund in compliance with a decree of the supreme court of the state of New York made in an action in which he asked leave to account and to have a new trustee substituted. Inasmuch, however, as none of the said annuitants were parties to such action, the decree was powerless to affect their rights. It appears, however, that the balance of the annuitants' fund turned over to the new trustee, plus the \$33,000 thus improperly diverted to some other fund, and which is also in the hands of the new trustee, will be amply sufficient to produce the annuities. Therefore it will not be necessary to enter upon any discussion as the extent of liability of the executor (trustee) personally. A decree directing the new trustee to pay over to the annuitants the arrears of annuities unpaid, and to retain the entire fund originally set apart for the purpose of producing such annuities, or the proceeds of such fund in whatever subsequent investments it may now be placed, will afford abundant relief, and to such relief the complainant seems clearly entitled. Decree accordingly.

DRAPER v. SKERRETT et al.

(Circuit Court, E. D. Pennsylvania. June 27, 1899.)

UNFAIR COMPETITION—PRELIMINARY INJUNCTION.

Although the rule is well settled that a preliminary injunction against alleged unfair competition will only be awarded where the right is plain, and the wrong beyond reasonable doubt, when it clearly appears, from the proofs and by comparison, that the packages in which defendants inclose and sell their goods are a misleading simulation of those of plaintiff, and intentionally so, an injunction against their use will be granted.

This is a suit in equity to enjoin alleged unfair competition in trade. On motion for preliminary injunction.

Edward Brooks, Jr., for complainant.

John W. Jennings, for respondents.

DALLAS, Circuit Judge. This is an application for a preliminary injunction. It has been so frequently said by this court, and by the court of appeals for this circuit, that such an injunction should be awarded only where the right is plain and the wrong beyond reasonable doubt, that this matter, at least, must now be regarded as settled. The present bill prays for an injunction more comprehensive than, upon the proofs as now made, and at this stage, the plaintiff is entitled to; but I am entirely satisfied that the envelope in which the defendants inclose and sell their goods is a misleading simulation of that of the plaintiff. To this extent an examination of the respective envelopes, in connection with the affidavits submitted, is thoroughly convincing. The only substantial difference between them is in the coloring; and this, in view of the undisputed fact that the color now used by the defendants is that which, at their request, they had been permitted to use when acting under agreement with

the plaintiff, is immaterial. The variation in details which is pointed out in the affidavit of one of the defendants is, when so pointed out, entirely obvious, but that an ordinary purchaser would be likely to mistake the one for the other seems to me to be evident. Moreover, no attempt has been made to satisfactorily account for the general resemblance of the two envelopes, which, notwithstanding minor differences, unquestionably exists; and, in the absence of intent to imitate the plaintiff's envelope, the striking similarity to it of that of the defendants would be quite inexplicable. Besides, the affidavit of John G. Sachs, from which it appears that the defendants in fact sent the affiant a package of the tissue in question, inclosed in one of their own envelopes, although he had asked for tissue of the plaintiff, has not been controverted, and is very persuasive as to the defendants' actual motive and design. In my opinion, a preliminary injunction to restrain the defendants from using the particular envelope complained of in the bill, or any other envelope made in imitation of that of the plaintiff, but to this extent only, ought now to be awarded, and it is so ordered.

DYGERT et ux. v. VERMONT LOAN & TRUST CO.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1899.)

No. 501.

1. USURY—WHAT LAW GOVERNS.

Where a note executed in one state is made payable in another, under the laws of which it is not usurious, while it is usurious under the law of the state where made, the law of the state of performance will govern as to usury.

2. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The question whether a promissory note is governed, as to usury, by the law of the state where it was executed and in which suit is brought, or of the state in which it is made payable, in the absence of a state statute on the subject, is one of general law, upon which a federal court is not bound to follow the decisions of the supreme court of the state.

3. USURY—PLEADING—BURDEN OF PROOF.

The burden of alleging and proving usury in a note rests on the maker when sued thereon, and the plaintiff is not required to allege that the note, when payable in a different state, was so made for convenience and in good faith, and not for the purpose of evading the usury laws of the state where it was executed, and such an allegation, if made, need not be proved.

Appeal from the Circuit Court of the United States for the District of Idaho.

S. C. Herren, for appellants.

A. E. Gallagher, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. On November 17, 1892, the appellants, Albert Dygert and Flora T. Dygert, his wife, executed to the appellee, the Vermont Loan & Trust Company, a promissory note, dated at Spokane, Wash., payable December 1, 1897, for \$3,400, with interest after date at 6 per cent. per annum, both the principal and in-