

Syllabus

IN THE MATTER OF
AMERICAN TAP BUSH COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2384. Complaint, May 9, 1935—Decision, Aug. 27, 1936*

Where a corporation dealing in the widely and favorably known "Peerless", formerly patented system for tapping beer kegs, and in selling such system or assembly, parts of which were of nickel-plated brass, insofar as they could possibly contact beverage, in competition with less costly "De-Luxe" tap, which, but for nickel-plated zinc "T" portion, was duplicate thereof, through salesmen who solicited jobbers and wholesalers of beer dispensing equipment, and breweries, in direct and substantial competition with those of said competitor throughout the United States—

Placed in said salesmen's hands report of results of test made, at its instance, of said competitor's nickel-plated zinc taps, with respect to effect thereof in souring and spoiling the beverage and absorption of zinc, to effect that such acidity was noticeably accelerated where, as in said tap, zinc base die cast metal came in contact therewith, and that such metal had a decided, harmful effect thereon, and instructed said salesmen to use such report in explaining to customers and prospective customers effect of said competitive product;

Facts being neither tap was directly in the beverage, nor did beer flow directly through any part thereof, and only direct contact therewith was temporary and immediately after insertion of rod in a completely filled keg, and action by laboratory in removing protective nickel-plated coating from inner portion of tap and exposing said zinc base metal directly to beer used in test made same neither fair nor accurate as respects effect of use of said competitive product in dispensing the beverage, and report based thereon was untrue and inaccurate insofar as concerned conditions found in the actual dispensing of beer by it;

With result that said salesmen orally falsely represented to many customers and prospective customers of such competitor that said test was made under conditions fairly representative of actual, normal use, and said tap was harmful and dangerous to use in dispensing the beverage, due to increasing acidity thereof to such extent and causing deposit therein in such quantity as to render same injurious to customer's health and not fit for human consumption, and that such increase in acidity and such deposit could be avoided through use of "Peerless", and a substantial portion of purchasers and prospective purchasers of said competitive product believed such false representations, statements and report to be true, and result of fair and accurate test, and many thereof, by reason of such erroneous belief, ceased or declined to purchase nickel-plated zinc taps of type made by said competitor and purchased, instead, taps sold and distributed by it, to the substantial injury of competitors and to injury of public:

Complaint

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Held, That such acts and practices, under the conditions and circumstances set forth, were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Joseph A. Simpson*, trial examiner.

Mr. Edw. W. Thomerson for the Commission.

Carey, Armstrong, Weadock & Essery, of Detroit, Mich., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that the American Tap Bush Company, a corporation hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of Delaware with its principal office and place of business in the city of Detroit, State of Michigan. Respondent is now, and has been for the several years last past, engaged in the manufacture, sale, and distribution of beer taps. Respondent has been and is engaged in offering for sale and selling its said product in commerce between and among the several States of the United States and the District of Columbia, and in causing its said product, when so sold, to be transported from its said principal place of business in the city of Detroit, State of Michigan, to purchasers thereof located in said State and into and across the several States of the United States and the District of Columbia to purchasers thereof located in the District of Columbia and at various points in the said several States of the United States other than the State of Michigan. In the course and conduct of its business, respondent is in substantial competition with other corporations and partnerships, firms, and individuals engaged in the manufacture of beer taps and who offer for sale and sell such products to purchasers located at various points in the several States of the United States and in the District of Columbia, and who cause their said products, when so sold, to be transported into and across the several States of the United States and the District of Columbia, to said purchasers thereof at said various points in the United States other than in the State where such transportation originated.

PAR. 2. Respondent, in the course and conduct of its business as aforesaid, has defamed and disparaged, and does defame and disparage, its competitors' products by falsely representing to purchasers and prospective purchasers of such competitors' products that beer taps manufactured by such competitors and sold in competition with respondent's said product, as above alleged, and which are composed chiefly of zinc which has been nickel-plated, are harmful and dangerous to use in dispensing beer because the use of such taps increases the acidity of the beer to such an extent and causes a zinc deposit in such beer in such a quantity as to render such beer injurious to the health of customers consuming the same.

PAR. 3. Respondent does not manufacture a beer tap of the type described in paragraph 2 hereof, but it has competitors who do manufacture that type of beer tap and respondent has made and does make the representations above alleged to purchasers and prospective purchasers of its competitors who manufacture said type of beer tap for the purpose of causing purchasers to discontinue purchasing said type of beer tap and to deter prospective purchasers from purchasing said type of beer tap from said competitors and for the purpose of causing said purchasers and prospective purchasers of said competitors to buy its product in lieu and instead of the said type of beer tap manufactured by its competitors.

PAR. 4. That aforesaid false statements so made by the respondent in the sale of its product have the tendency and capacity to mislead and deceive, and do mislead and deceive purchasers and prospective purchasers of its competitors into the false and erroneous belief that said statements are true, and that said type of beer tap is undesirable, harmful, and dangerous for use in the dispensing of beer as stated by the respondent, thereby causing a substantial portion of such purchasers and prospective purchasers of said competitors' products to discontinue or refrain from the making of such purchases from said competitors, causing such purchasers and prospective purchasers to purchase respondent's product in lieu and instead of the products of its competitors. As a consequence thereof trade is diverted to respondent from its competitors who do not defame and disparage the products of others and thereby substantial injury is done by respondent to substantial competition in interstate commerce.

PAR. 5. The above acts and practices of respondent are all to the prejudice of the public and of respondent's said competitors, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An

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Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on May 9, 1935, issued and served its complaint in this proceeding upon the respondent American Tap Bush Company, a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint, and the filing of respondent's answer thereto, the respondent entered into a stipulation as to the facts, which was duly signed and executed by counsel for the respondent and W. T. Kelley, chief counsel for the Commission, subject to the approval of the Commission, wherein and whereby it agreed that the statement of facts in said stipulation may be taken as the facts in this proceeding and in lieu of testimony in support of, or in opposition to, the charges in the complaint, and that the Commission may proceed upon said statement of facts to make its report stating its findings as to the facts and its conclusion based thereon and enter its order without the presentation of argument or the filing of briefs. Thereafter, the Commission having accepted and approved said stipulation, the proceeding regularly coming on for final hearing before the Commission on the said complaint, the answer thereto, and said stipulation, and the Commission having duly considered the same and being fully advised in the premises, finds that this proceeding is in the interest of the public, and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent is a corporation, organized and doing business by virtue of the laws of the State of Delaware, with its principal office and place of business in the city of Detroit, State of Michigan, and is now and has been for the past several years engaged in the business of selling and distributing, among other products used in dispensing beer, beer taps, and bushes. Respondent sells its taps and bushes in interstate commerce and makes sales in practically all of the States of the United States, and when sales are made the respondent causes its beer taps and bushes to be transported from its place of business in Detroit, Mich., to the purchaser thereof.

Many other corporations and many partnerships and individuals are engaged in the business of selling and distributing beer taps and bushes in commerce between and among the several States of the United States, and the respondent is in direct and substantial competition with such corporations, partnerships, and individuals in said commerce.

PAR. 2. Respondent, prior to the year 1934, perfected a system for tapping kegs containing beer, which is sold under the trade name, "Peerless". This system is widely and favorably known. It includes a bush, with an opening in the center which is built in or placed in the head of the keg prior to the time it is filled with beer. After the keg is filled with beer, a cork is placed in the opening in the bush. The bush has a sunken top, fitted with slots to which can be securely attached the tap, through which a rod can be inserted, the cork pushed in, and the contents drawn off through the rod. All portions of the bush, tap, and rod that can possibly come in contact with the beer are made of brass which is nickel plated. This includes that portion of the tap immediately surrounding the rod commonly referred to as the "T", which has attached thereto an inlet through which air is forced into the keg which causes the beer to flow therefrom through said rod.

PAR. 3. For a number of years the Peerless system of tapping kegs containing beer was protected by patents, and competitors were not able to market an exact duplicate of this system; but these patents expired prior to the fall of the year 1933, and subsequently duplicates of the tap, both as to design and as to the materials from which made, appeared on the market. One competitor of the respondent, the DeLuxe Manufacturing Company, a Michigan corporation with its principal place of business in Detroit, Mich., in the latter part of the year 1933, began to distribute a duplicate of the Peerless tap under the trade name "DeLuxe". The only difference in the DeLuxe tap and the Peerless tap of the respondent, either in design or materials from which made, is that the "T" portion of the DeLuxe tap is made of zinc which is nickel plated, while that of the respondent is made of brass which is nickel plated. The use of zinc metal instead of brass metal for the "T" portion of the tap makes the manufacturing cost less, for the "T" portion of the DeLuxe tap can be manufactured through what is known as the die cast method, while this is not possible with the brass. The respondent and the manufacturer of the DeLuxe tap market their said products principally through salesmen, who call on jobbers and wholesalers of beer dispensing equipment and on breweries. They are in direct and substantial competition with each other for trade throughout the United States, in

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many instances supplying the same jobbers, wholesalers, and breweries.

No part of either the Peerless or the DeLuxe tap is directly in the beer, nor does beer flow directly through any part of the tap, and the only contact that the tap has directly with the beer is immediately after the insertion of the rod, when, if the keg is completely filled, the beer displaced by the insertion of the rod, which usually extends to the bottom of the keg, might be forced up around the rod and come in contact with the inside portion of the "T". No beer would remain there because the tap is usually higher than the keg and the air, under pressure, which is applied immediately after tapping, comes in between the outside of the rod and the inside of the "T" portion of the tap and forces the beer out.

PAR. 4. The respondent, in June 1934, submitted to the Detroit Testing Laboratory of Detroit, Mich., one of the DeLuxe Manufacturing Company's die cast nickel plated zinc taps for a test to determine what effect the use of this tap had with reference to the souring and spoiling of beer and to determine the absorption of the zinc by the beer. A report of the results of this test was made on June 20, 1934, by the laboratory to the respondent. In this report it was concluded that the acidity in beer is noticeably accelerated if zinc base die cast metal, the metal used in the DeLuxe tap, is allowed to come in contact with the beer and that the die cast zinc base metal leaves a deposit of zinc in the beer. The opinion was expressed in said report that zinc base die cast metal has a decided harmful effect on the beer with which it comes in contact. The test made by the Detroit Testing Laboratory, on which said report was based, was not a fair and accurate test of the effect of the use of the DeLuxe tap in dispensing beer, and the report based on such test is untrue and inaccurate insofar as representing conditions found in the actual dispensing of beer with the DeLuxe tap are concerned, for, in making the test, the laboratory removed from the inner portion of said tap its protective nickel plated coating and directly exposed said die cast zinc base metal to, and placed the same in, the beer used in making the test. In using said DeLuxe tap in the normal dispensing of beer, the protective coating of nickel plating is not removed, nor is the tap placed in the beer.

Upon the receipt of the above mentioned report of the Detroit Testing Laboratory, the respondent placed copies of the same in the possession of its salesmen, with instructions to use the report in explaining to customers, and prospective customers the effect of using DeLuxe taps, and said salesmen thereafter used said report and exhibited the whole or a part thereof to customers of the DeLuxe Manufacturing Company located in the various States of the United States, represent-

ing that such report was based on a test made under similar conditions to those actually existing when using the DeLuxe tap to draw beer from kegs in the ordinary course of dispensing the same to consumers, and said salesmen made oral representations to many such customers and prospective customers of the DeLuxe Manufacturing Company in connection therewith to the effect that the DeLuxe tap is harmful and dangerous to use in dispensing beer because it increases the acidity thereof to such an extent and causes a zinc deposit therein in such a quantity as to render such beer injurious to the health of customers and not fit for human consumption and represented that by the use of respondent's Peerless tap such increase in acidity and the zinc deposit in said beer could be avoided.

In truth and in fact the said report of the Detroit Testing Laboratory so used by the respondent, is not based on a test made under conditions similar to those actually existing when using the DeLuxe tap to draw beer from kegs in the ordinary course of dispensing beer to customers. The use of the DeLuxe tap does not have a harmful effect on beer; it is not harmful and dangerous to use in dispensing beer; and it does not increase the acidity of beer to such an extent or cause a zinc deposit therein in such a quantity as to render the beer with which said tap is used injurious to the health of the person drinking it.

PAR. 5. Purchasers and prospective purchasers of beer taps desire to purchase a beer tap that will not increase the acidity of beer to such an extent and cause a zinc deposit in beer in such a quantity as to render the beer injurious or harmful to consumers of such beer.

A substantial portion of the purchasers and prospective purchasers of the DeLuxe tap, manufactured by the DeLuxe Manufacturing Company as aforesaid, to whom the aforesaid false representations and statements were made and to whom said laboratory report was exhibited, believed said false representations to be true and said report to be the result of a fair and accurate test, and, because of such erroneous beliefs, many of said purchasers and prospective purchasers, ceased purchasing or declined to purchase beer taps, composed, in part, of zinc which is nickel plated, of the type manufactured by the DeLuxe Manufacturing Company as hereinabove set out, and purchased instead beer taps sold and distributed by the respondent, to the substantial injury of said competitors and to the injury of the public.

CONCLUSION

The aforesaid acts and practices of the respondent under the conditions and circumstances set forth in the foregoing findings are to

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the prejudice of the public and of respondent's competitors, and are unfair methods of competition in commerce and constitute a violation of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Commission upon the complaint filed herein on May 9, 1935, the answer of the respondent thereto filed May 31, 1935, and a stipulation as to the facts entered into between the respondent and counsel for the Commission, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is ordered, That the respondent American Tap Bush Company, a corporation, its agents, servants, representatives, and employees, in connection with the offering for sale or sale of beer taps, used in dispensing beer from kegs, in commerce between and among the several States of the United States and in the District of Columbia, forthwith cease and desist from representing, directly or indirectly, that:

1. the use of taps composed wholly or in part of zinc which is nickel plated are harmful and dangerous to use in dispensing beer from kegs, because the use of such taps increases the acidity of the beer to such an extent and causes a zinc deposit therein in such a quantity as to render the beer injurious to the health of consumers;

2. the use of taps composed wholly or in part of zinc which is nickel plated in dispensing beer from kegs causes an increase in the acidity of the beer to such an extent and a zinc deposit therein in such a quantity as to render the beer injurious to the health of consumers.

It is further ordered, That the respondent shall, within 60 days after the service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinabove set forth.

Syllabus

IN THE MATTER OF
COLONIAL DISTILLING AND DISTRIBUTING
CORPORATION

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2470. Complaint, June 28, 1935—Decision, Aug. 27, 1936

Where a corporation engaged in purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages, and in making gin by re-distillation of purchased alcohol over juniper berries and other aromatics, and in selling its aforesaid products to wholesalers and retailers in various States and the District of Columbia, in substantial competition with (1) other corporations, individuals, and firms engaged in manufacture by distillation of whiskies, etc., and in sale thereof, and (2) other corporations, etc., engaged in purchasing, rectifying, etc., whiskies, gins, and other spirituous beverages dealt in by them, and in sale thereof as aforesaid, and which, respectively, as manufacturers and distillers from mash, wort, or wash, by process of original and continuous distillation, through continuous closed pipes and vessels until manufacture is complete, as long understood by word "Distilling," truthfully use said word or words "Distillery," "Distilleries," or "Distillers" as a part of their corporate or trade names and on their stationery and advertising and on the labels of the bottles in which they sell and ship their products, or as purchasers, rectifiers, etc., of the whiskies, etc., dealt in by them, do not use such various words as above set forth—

Represented through use of word "Distilling" in its corporate name, printed on its stationery and advertising and on labels attached to bottles in which it sold and shipped its said products, and otherwise, to its customers, and furnished same with means of representing to their retailer-vendees and consuming public, that it was a distiller and that the whiskies, etc., contained as aforesaid, were by it made through process of distillation from mash, wort, or wash, as above set forth, notwithstanding fact it neither owned, operated, nor controlled any place where whiskies and other beverages were made by process of distillation from mash, wort, or wash, and was not a distiller;

With effect of misleading and deceiving dealers and purchasing public in aforesaid respect and into belief that said whiskies, gins, and other spirituous beverages sold by it were made and distilled by it from mash, wort, or wash, as aforesaid, and of inducing dealers and purchasing public, in such beliefs, to buy such whiskies, etc., bottled and sold by it, and of thereby diverting trade to it from competitors who do not, through their corporate or trade names or in any other manner, misrepresent themselves as manufacturers by distillation of such products, as above set forth, and with capacity and tendency so to mislead and deceive and induce such purchases; to the substantial injury of substantial competition in commerce: