

cession, giving him the exclusive right of selling ice cream in cones of edible paste, known as the "Ice Cream Cone Concession." He tendered for the same privilege in 1912, but was outbid by the Neilson Company, who paid \$2,000 for the privilege—a sum which indicates how valuable was this exclusive right. The clerk in charge of such contracts, fearing a possible attempt by plaintiff to encroach upon the rights of the Neilsons, was careful to stipulate that the right to sell frozen fruits did not empower the plaintiff to infringe upon the concession to the Neilsons.

On the first day of the exhibition the plaintiff sold, in addition to Hamburger steak, edible cones of the same size and general appearance as the cones which, filled with ice cream, the Neilsons had the exclusive right to sell. The cones as sold by plaintiff were filled, not with frozen fruit, but with a mixture of fruit, water and sugar, frozen as ice cream is frozen, in short, a fruit ice.

Complaint was made to Dr. Orr, the defendants' manager, that the plaintiff was infringing upon the Neilson privilege. Dr. Orr went toward one of the plaintiff's booths, and heard as he approached the cry of one of the plaintiff's employees: "Ice Cream Cones." When he came up he saw prominently displayed dishes containing piles of the cones. Hopkins was absent at the time. Dr. Orr told the persons in charge for the plaintiff that they must discontinue selling the cones, and asked to have plaintiff call at his office. The sale was stopped, and the plaintiff called on Dr. Orr, who told him that he must stop selling the cones and the fruit ices with which the cones disposed of were filled. Hopkins appeared to consider that, as Dr. Orr charged, he had infringed upon the Ice Cream Cone Concession, but a day or two later protested against the act of the manager.

There is a conflict of testimony between Dr. Orr on the one side and the plaintiff and several of his employees on the other, as to the signs and cries used to attract the people to the plaintiff's booths. The plaintiff says his sign was "California Frozen Fruits," and his employees corroborate him. A photograph of one of the plaintiff's stands is in evidence, and the sign shewn there is "California Fruit Ices." It is hard to believe that the error of plaintiff and his witnesses on the point can be a mere fault of recollection. I incline strongly to accept the testimony of Dr. Orr where it is in conflict with plaintiff or plaintiff's witnesses.