

In the Matter of
**Certain Toothbrushes and the
Packaging Thereof**

Investigation No. 337-TA-391

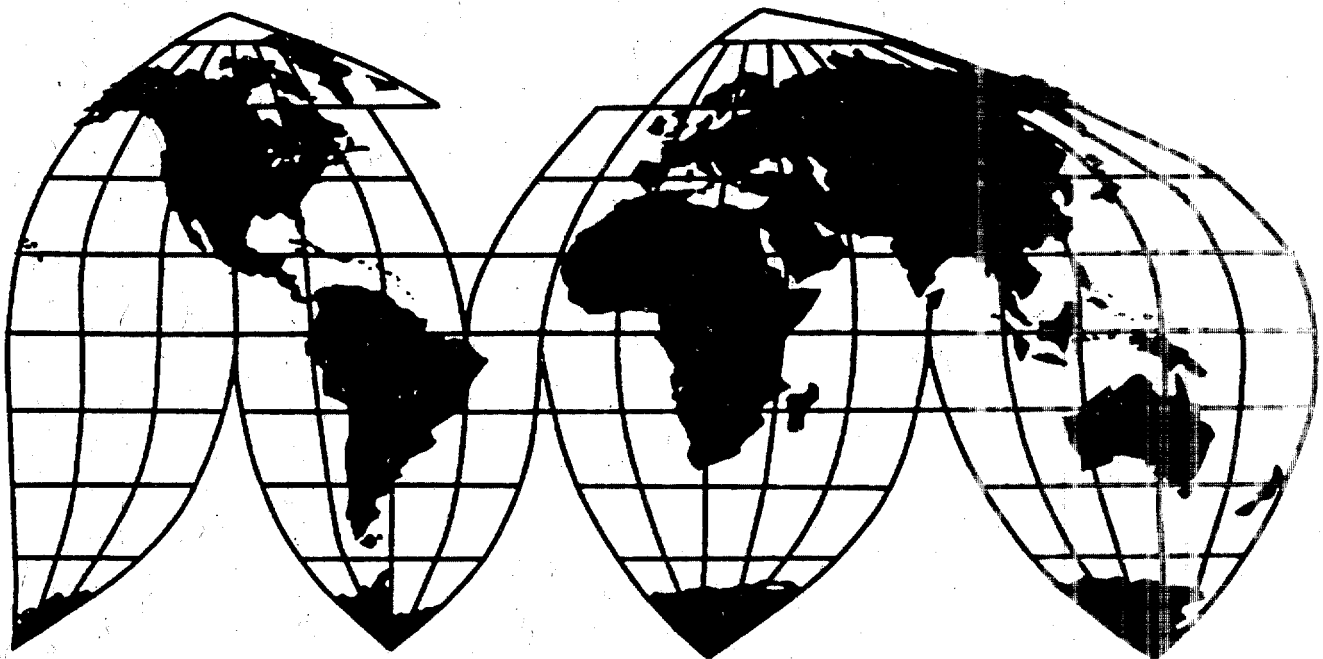
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Publication 3068

October 1997

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Washington, DC 20436**

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LIMITED EXCLUSION ORDER

The Commission has determined that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), as amended, in the unlawful importation and sale of certain toothbrushes covered by the claim of U.S. Letters Patent Des. 328,392.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry for consumption of infringing toothbrushes. The Commission has also determined that the public interest factors enumerated in subsection 337(d) (19 U.S.C. § 1337(d)) do not preclude issuance of the limited exclusion order, and that the bond during the Presidential review period shall be in the amount of one hundred (100) percent of the entered value of the imported toothbrushes.

Accordingly, the Commission hereby ORDERS that --

1. Toothbrushes covered by the claim of U.S. Letters Patent Des. 328,392 that are manufactured abroad by Shumei Industrial Co., Ltd. of Shenzhen, China, Shummi Enterprise

Co., Ltd. of Taipei, Taiwan, or Giftline International Corporation of Taipei, Taiwan, or any of their affiliated companies, parents, subsidiaries, contractors, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States for the remaining term of that patent, *i.e.*, until August 4, 2006, except under license of the patent owner or as provided by law.

2. The toothbrushes that are subject to this Order are entitled to entry for consumption into the United States under bond in the amount of one hundred (100) percent of their entered value, pursuant to subsection 337(j) (19 U.S.C. § 1337(j)), from the day after this Order is received by the President until such time as the President notifies the Commission that he approves or disapproves this action but, in any event, not later than sixty (60) days after the receipt of this action.

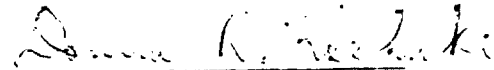
3. In accordance with subsection 337(l) (19 U.S.C. § 1337(l)), the provisions of this Order shall not apply to toothbrushes that are imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

4. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

5. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the U.S. Customs Service.

6. Notice of this Order shall be published in the *Federal Register*.

By Order of the Commission.



Donna R. Koehnke
Secretary

Issued: October 15, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of)
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CERTAIN TOOTHBRUSHES)
AND THE PACKAGING THEREOF)
_____)

Investigation No. 337-TA-391

NOTICE OF ISSUANCE OF LIMITED EXCLUSION ORDER

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a limited exclusion order in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Tim Yaworski, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-205-3096.

SUPPLEMENTARY INFORMATION: The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.50).

The Commission instituted this investigation on November 22, 1996, based on a complaint filed by The Procter & Gamble Company (P&G) concerning allegations of unfair acts in violation of section 337 in the importation and sale of certain toothbrushes covered by U.S. Letters Patent Des. 328,392. The complaint, as amended, also alleged copyright infringement by certain respondents, but those allegations were subsequently withdrawn from the investigation.

The Commission found Shummi Enterprise Co., Ltd (Shummi) and Shumei Industrial Co., Ltd. (Shumei) in violation of section 337 and found Giftline International Corporation (Giftline) in default for failure to respond to the complaint and notice of investigation.

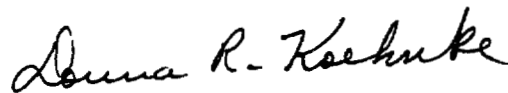
On July 2, 1997, the presiding administrative law judge (ALJ) issued a recommended determination (RD) on the issues of remedy and bonding for respondents Shummi and Shumei. The ALJ recommended a limited exclusion order and a bond in the amount of 100 percent of entered value during the 60-day Presidential review period.

On August 20, 1997, the Commission published a notice requesting written submissions on the issues of remedy, the public interest, and bonding. The Commission investigative attorney and complainant P&G filed submissions on these issues, essentially concurring with the ALJ's recommendations as to Shumei and Shummi and arguing for the same remedy and bond to apply to Giftline. No other submissions were filed.

Having reviewed the record in this investigation, including the parties' written submissions, the Commission determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of infringing toothbrushes that are manufactured abroad by or on behalf of Shummi, Shumei, or Giftline. The Commission further determined that the public interest factors enumerated in subsection 337(d) do not preclude issuance of the limited exclusion order, and that the bond during the Presidential review period shall be in the amount of one hundred (100) percent of the entered value of the articles in question.

Copies of the Commission's order, the public version of the Commission's opinion in support thereof, and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. Hearing impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal at 202-205-1810.

By order of the Commission.



Donna R. Koehnke
Secretary

Issued: October 15, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

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CERTAIN TOOTHBRUSHES)
AND THE PACKAGING THEREOF)

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97 OCT 15 P2:02

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COMMISSION OPINION ON REMEDY, THE
PUBLIC INTEREST, AND BONDING

We have determined that a limited exclusion order directed to respondents Shummi Enterprise Co., Ltd ("Shummi"), Shumei Industrial Co., Ltd. ("Shumei"), and Giftline International Corporation ("Giftline") is the appropriate form of relief. We have further determined that the statutory public interest factors do not preclude the issuance of such relief, and that respondents' bond during the period of Presidential review shall be in the amount of one hundred (100) percent of the entered value of infringing imported toothbrushes. This opinion explains the bases for our determinations.

I. PROCEDURAL BACKGROUND

Complainant the Procter & Gamble Company ("P&G") filed a complaint with the Commission on October 26, 1996, and an amended complaint on November 14, 1996, alleging a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) by respondents Shummi, Shumei, Giftline, MAS Marketing Inc. ("MAS"), and Lollipop Imports & Exports

("Lollipop").¹ P&G alleged that these five respondents were importing, selling for importation, and selling in the United States after importation certain toothbrushes that infringed the claim of complainant P&G's design patent (U.S. Letters Patent Des. 328,392) and/or P&G's copyright (U.S. Copyright Registration No. TX 4-103-537). P&G subsequently withdrew the copyright infringement claims from the investigation.

On August 5, 1997, the Commission determined not to review two initial determinations ("IDs") (Orders Nos. 6 and 7) of the presiding administrative law judge ("ALJ") terminating the investigation as to respondents MAS and Lollipop on the basis of consent orders. Also on August 5, 1997, the Commission determined not to review an initial determination (ID) (Order No. 8) finding a violation of section 337 by Shummi and Shumei. The finding of a violation was in response to a stipulated motion filed by P&G, Shummi, and Shumei requesting entry of a limited exclusion order against Shummi and Shumei and termination of the investigation as to those respondents. On August 13, 1997, the Commission determined not to review an ID (Order No. 9) finding the only remaining respondent, Giftline, in default.

Having found Shummi, Shumei, and Giftline in violation of section 337, the Commission issued a *Federal Register* notice requesting submissions from the parties on the

¹ The Commission instituted an investigation of the complaint on November 22, 1996. 61 *Fed. Reg.* 60304 (November 27, 1996).

issues of remedy, the public interest, and bonding.² Complainant P&G and the Commission investigative attorney ("IA") were the only parties to file written submissions on these issues.

I. REMEDY

To remedy violations of section 337, the Commission has the authority to issue either a general exclusion order,³ a limited exclusion order,⁴ and/or cease and desist orders.⁵

² 62 Fed. Reg. 44290 (Aug. 20, 1997).

³ A general exclusion order directs the U.S. Customs Service to exclude from entry all articles which infringe the involved patent, trademark, or copyright, without regard to source. Thus, a general exclusion order applies to persons who were not parties to the Commission's investigation and, indeed, to persons who could not have been parties, such as persons who decide to import after the Commission's investigation is concluded. A general exclusion order is the broadest type of relief available from the Commission.

Because of its considerable impact on international trade, the Commission balances the complainant's interest in obtaining complete relief against the public interest in avoiding the disruption of legitimate trade that a general exclusion order might cause. For these reasons, the Commission exercises caution in issuing general exclusion orders and requires that certain conditions be met before one is issued. As the Commission stated in *Certain Devices for Connecting Computers Via Telephone Lines*, although the Commission's remedial authority is quite broad, it has applied this authority "in measured fashion and has issued only such relief as is adequate to redress the harm caused by the prohibited imports." Inv. No. 337-TA-360, Commission Opinion (Dec. 12, 1994) at 9.

⁴ A limited exclusion order directs the Customs Service to exclude from entry all articles which infringe the involved patent, trademark, or copyright and that originate from firms that were respondents in the Commission investigation.

⁵ Section 337(f)(1) provides:

In addition to, or in lieu of, taking action under subsection (d) . . . of this section, the Commission may issue and cause to be served on any person violating this section . . . an order directing such person to cease and desist from engaging in the unfair methods or acts involved [unless precluded by consideration of enumerated public interest factors.]

(continued...)

On July 2, 1997, the ALJ issued his recommended determination (“RD”) on remedy and bonding, pursuant to Commission rule 210.42.⁶ In the RD, the ALJ recommended that the Commission issue a limited exclusion order directed to infringing toothbrushes of Shummi and Shumei.⁷ The ALJ did not address the appropriate remedy as to respondent Giftline.

Both complainant P&G and the IA supported the issuance of a limited exclusion order against respondents Shummi and Shumei.⁸ In addition, they argued that the same remedy should apply to Giftline. Having found respondent Giftline to be in default, subsection 337(g) directs the Commission, upon request, to issue a limited exclusion order and/or a cease and desist order directed to the defaulting respondent, unless consideration of the statutory public interest factors precludes those remedies.⁹ P&G has made a request for issuance of a limited exclusion order, but not a cease and desist order, against defaulting respondent Giftline.

⁵(...continued)

19 U.S.C. § 1337(f)(1). The Commission's purpose in issuing cease and desist orders typically has been to afford complete relief to complainants where infringing goods are already present in the United States, and thus cannot be reached by issuance of an exclusion order. *See, e.g., Certain Compound Action Metal Cutting Snips*, Inv. No. 337-TA-197, Commission Opinion at 5-7. Unlike an exclusion order, which is enforced by the U.S. Customs Service, a cease and desist order is an *in personam* order typically directed to a party in the United States and is enforced by the Commission, not Customs.

⁶ 19 C.F.R. § 210.42.

⁷ RD at 4.

⁸ Complainant seeks to exclude only entries intended for consumption in the United States.

⁹ 19 U.S.C. § 1337(g).

Since no evidence has been presented in this investigation that would provide a basis for issuance of a general exclusion order, and since the remaining respondents have not contested the ALJ's recommendation or the positions of complainant and the IA on this issue, we have determined to issue a limited exclusion order prohibiting the importation of infringing toothbrushes manufactured abroad by or on behalf of Shummi, Shumei, and Giftline.¹⁰

II. THE PUBLIC INTEREST

Before granting relief, the Commission must consider the effect that such relief would have on "the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers."¹¹ Complainant P&G and the IA maintain that issuance of a limited exclusion order would not raise any public interest concerns under subsection 337(d). In their stipulated motion for entry of a limited exclusion order, respondents Shummi and Shumei stated that entry of a limited exclusion order would be in the public interest.¹² Complainant P&G and the

¹⁰ As noted above, respondents Shummi, Shumei, and Giftline did not respond to the Commission's request for written submissions on the issues of remedy, the public interest, and bonding. Therefore, they may be deemed not to have objected to any of the ALJ's, complainant's, or the IA's proposals for relief. Indeed, respondents Shummi and Shumei filed a stipulated motion wherein they specifically sought a limited exclusion order to be applied to toothbrushes manufactured by them and imported into the United States. Stipulated Motion for Entry of a Limited Exclusion Order Against Shumei Industrial Co. Ltd. and Shummi Enterprise Co. Ltd., and Termination of Investigation at 3, para. 8.

¹¹ 19 U.S.C. §§ 1337(d).

¹² Stipulated Motion for Entry of a Limited Exclusion Order Against Shumei Industrial Co. Ltd. and Shummi Enterprise Co. Ltd., and Termination of Investigation at 5, para. 17.

IA have noted that there is no evidence that the U.S. demand for toothbrushes of the type at issue could not be supplied by complainant or other noninfringing sources and, moreover, the public interest favors protection of intellectual property rights.¹³ Complainant P&G further noted that toothbrushes are not the type of product that have raised public interest concerns in the past.¹⁴

We do not find that issuance of a limited exclusion order would have an adverse effect on the public interest for the same reasons articulated by complainant P&G and the IA. More specifically, the public interest favors the protection of U.S. intellectual property rights,¹⁵ the U.S. market for toothbrushes of the type at issue could be supplied by complainant or by noninfringing alternatives, and toothbrushes are not the type of product that have in the past raised public interest concerns (such as, for example, drugs or medical devices). Nor are we aware of any other public interest concerns that would militate against entry of a limited exclusion order. Accordingly, we have determined that issuance of a limited exclusion order would have no adverse effect on the public interest.

III. RESPONDENTS' BOND

¹³ Brief of the Office of Unfair Import Investigations on Remedy, Bonding and the Public Interest at 8-9.

¹⁴ Complainant's Submission on the Issues of Remedy, Public Interest and Bonding; and Complainant's Proposed Remedial Orders at 4.

¹⁵ See Rosemount v. United States Int'l Trade Comm'n, 15 U.S.P.Q.2d at 1572, 910 F.2d 819 (Fed. Cir. 1990)(patent protection is a dominant factor in determining the public's interest in granting relief).

If the Commission enters an exclusion order, respondents may continue to import their products during the pendency of Presidential review under a bond in an amount determined by the Commission to be "sufficient to protect the complainant from any injury."¹⁶ The bond should not be set so high as to prevent importation during the Presidential review period. The period of Presidential review is, however, relatively short and the consequences of any bond are therefore likely to be short-lived.

The ALJ recommended that the bond be set at a substantial level -- 100 percent of entered value -- to protect the U.S. industry from any injury.¹⁷ He noted that in view of the fact that Shummi and Shumei have requested the entry of a limited exclusion order, they are unlikely to import infringing toothbrushes during the Presidential review period, and it is therefore appropriate to set a high bond rate.¹⁸ The ALJ did not address the bond to be applied to imports of infringing toothbrushes manufactured by Giftline. Complainant P&G and the IA agreed with the ALJ that the bond during the 60-day Presidential review period be set at 100 percent of the entered value of toothbrushes imported by or on behalf of Shummi and Shumei. With respect to Giftline, the IA argued that since Giftline did not provide any information regarding the pricing of Giftline's toothbrushes, it is appropriate to set a bond at 100 percent.¹⁹

¹⁶ 19 U.S.C. §§ 1337(e) and (j)(3); Commission rule 210.50(a)(3), 19 C.F.R. § 210.50(a)(3).

¹⁷ RD at 5.

¹⁸ *Id.*

¹⁹ Brief of the Office of Unfair Import Investigations on Remedy, Bonding and the Public
(continued...)

Complainant P&G argued that an identical bond should be set for Giftline as for Shummi and Shumei, since this is necessary to protect P&G from further injury.²⁰ None of the respondents objected to the ALJ's recommended bond or argued for any alternative bond.

We agree with the ALJ, complainant P&G, and the IA and have therefore determined to set respondents' bond at 100 percent of entered value. Our bond rate is based on the assumption that the entered value of any infringing toothbrushes imported during the Presidential review period will approximate the toothbrushes' U.S. sales price.

¹⁹(...continued)

Interest at 9-10, *citing Certain Wire Electrical Discharge Machining Apparatus and Components Thereof*, Inv. No. 337-TA-290, Commission Opinion at 20 (March 16, 1990).

²⁰ Complainant's Submission on the Issues of Remedy, Public Interest and Bonding; and Complainant's Proposed Remedial Orders at 5.

Form TO 55 (12-80)

U. S. DEPARTMENT OF COMMERCE
United States Patent and Trademark Office

December 15, 1993
(Date)

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office
of U.S. Patent Design 328,392.



By authority of the
COMMISSIONER OF PATENTS AND TRADEMARKS

N. Williams
Certifying Officer.



US00D328392S

United States Patent [19]

[11] Patent Number: **Des. 328,392**

Holstein, II et al.

[45] Date of Patent: **** Aug. 4, 1992**

[54] **TOOTHBRUSH HANDLE**

[75] Inventors: **Kurt E. Holstein, II; Michael P. Whan, both of Cincinnati; Mary F. Minnis, Loveland; Thomas J. Hall, Cincinnati, all of Ohio**

[73] Assignee: **The Procter & Gamble Company, Cincinnati, Ohio**

[**] Term: **14 Years**

[21] Appl. No.: **553,194**

[22] Filed: **Jul. 13, 1990**

[52] U.S. Cl. **D4/104; D4/138**

[58] Field of Search **D4/104-114, D4/130, 132, 134, 136, 138, 139; D28/64; 15/105-106, 159 R, 159 A, 160, 143 R, 167.1-167.3**

D. 318,760 8/1991 Kreisher et al. D4/104
D. 321,286 11/1991 Aldrich D4/104
3,120,670 2/1964 Amodeo 15/167.1
4,679,272 7/1987 Florence 15/106

OTHER PUBLICATIONS

Price list for Celluloid Brush Products; GOLD METAL International Hygiene Exhibition, Dresden, 1911, J. E. Faller.

Four sheets of drawings of toothbrushes—The CREST Between, CREST Access, and CREST Angled V-brush (Publication Date unknown).

Primary Examiner—Wallace R. Burke

Assistant Examiner—Lavone D. Tabor

Attorney, Agent, or Firm—Richard C. Witte; Eileen L. Hughett; Kevin C. Johnson

[57] CLAIM

The ornamental design for a toothbrush handle, as shown and described.

DESCRIPTION

FIG. 1 is a side elevational view of a toothbrush handle showing our new design, the opposite side being a mirror image;

FIG. 2 is a top plan view thereof;

FIG. 3 is a bottom plan view thereof;

FIG. 4 is a front end elevational view thereof; and,

FIG. 5 is a rear end elevational view thereof.

The broken line showing of bristles in FIG. 1 is for illustrative purposes only and forms no part of the claimed design.

[56] References Cited

U.S. PATENT DOCUMENTS

D. 209,736	2/1968	Halm	.....	D4/104
D. 227,719	7/1973	Lindbo	.....	D4/104
D. 240,981	8/1976	Hill et al.	.....	D4/104
D. 268,795	5/1983	Ohama	.....	D4/104
D. 276,193	11/1984	Tanabe	.....	D4/104
D. 284,236	6/1986	Collet	.....	D4/104
D. 285,263	8/1986	Hill	.....	D4/104
D. 287,790	1/1987	Fay	.....	D4/104
D. 300,990	5/1989	Jagger	.....	D4/104
D. 301,938	7/1989	Ambasz	.....	D4/104
D. 302,076	7/1989	Kirberger	.....	D4/104
D. 312,729	12/1990	Auttaiarik	.....	D4/104

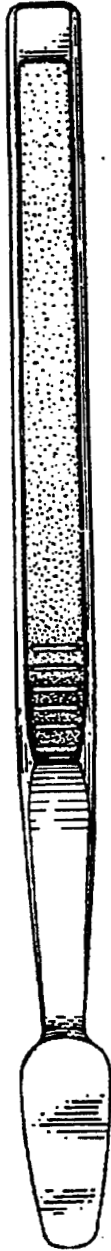


FIG. 2



FIG. 1

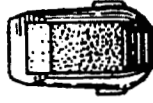


FIG. 5



FIG. 4

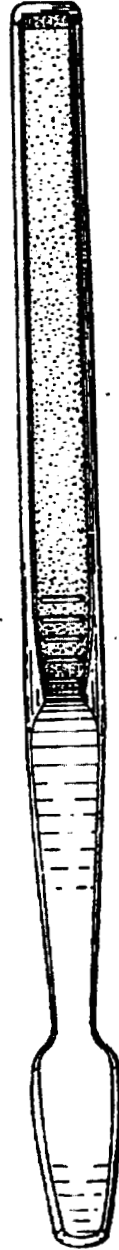


FIG. 3