[HIGH COURT OF AUSTRALIA.]

THE BENDIGO AND COUNTRY DISTRICTS TRUSTEES AND EXECUTORS CO. LTD. . . . . Defendants, } Appellants;

AND

THE SANDHURST AND NORTHERN DISTRICT TRUSTEES, EXECUTORS, AND AGENCY CO. LTD. . . . . Plaintiffs, } Respondents.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 28, 29; *Oct.* 1.

Griffith C.J., O'Connor and Isaacs JJ.

Trade name—Name adopted by company—Similarity to name of another company—Both companies carrying on same business—Likelihood of confusion—Burden of proof.

In an action by one company to prevent another company from using a name so like that of the plaintiff company as to be likely to deceive, the plaintiff company must show that it is reasonably certain that what the defendant company are about to do will cause imminent and substantial damage to the plaintiff company.

Royal Insurance Co. Ltd. v. *Midland Insurance Co. Ltd.* (26 R.P.C., 95), followed.

Held, that the name of the appellant company was not so like that of the respondent company as to render it reasonably certain that anyone intending to employ the respondent company and make them trustees under a will or settlement, or employ them as agents, would be led to believe the appellant company were the respondent company.

Decision of the Supreme Court of Victoria (*Madden* C.J.) reversed.

APPEAL by special leave from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by the Sandhurst and Northern District Trustees, Executors and Agency Co. Ltd. against the Bendigo and Country Districts Trustees and Executors Co. Ltd., claiming an injunction "restraining the defendant company from using the name style or title of the 'Bendigo and Country Districts Trustees and Executors Co. Ltd.,' or any other style or name which includes the plaintiff company's name or so nearly resembles the same as to be calculated to induce the belief that the business carried on by the defendant company is the same as the business carried on by the plaintiff company or in any way connected therewith."

By order of the Court the plaintiff company was given liberty to apply by motion for an injunction in the terms stated above, and both parties undertook to treat the hearing of the motion as the trial of the action.

The motion was heard by *Madden* C.J., who granted an injunction in the terms asked for.

From this judgment the defendant company now by special leave appealed to the High Court.

The material facts sufficiently appear in the judgments hereunder.

Duffy K.C. (with him *Macfarlan*), for the appellants. The proper remedy is by opposing the registration of the appellant company under the *Companies Acts*. See sec. 21 of the *Companies Act* 1890. The respondent company has not itself used the word "Bendigo," and has gained no right in that way, and the word has not acquired a secondary meaning. It is merely a geographical term, and those who speak of the respondent company as the "Bendigo Company" mean only the company carrying on business in Bendigo. That gives the respondent company no exclusive right to the name: *British Vacuum Cleaner Co. Ltd.* v. *New Vacuum Cleaner Co. Ltd.* (1); *Helidon Spa Co.* v. *Campbell* (2). The evidence for the appellant company shows that the two names, "Sandhurst" and "Bendigo," are used for the purpose of discrimination. The appellant company has offered

(1) (1907) 2 Ch., 312. (2) 10 Q.L.J., 1.

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to give up the use of the word "Districts." The name adopted by the appellant company is not calculated to deceive people: *Australian Mortgage, Land and Finance Co.* v. *Australian and New Zealand Mortgage Co.* (1); *North Cheshire and Manchester Brewery Co. Ltd.* v. *Manchester Brewery Co. Ltd.* (2); *London Assurance* v. *London and Westminster Assurance Corporation Ltd.* (3); *Whitstable Oyster Fishery Co.* v. *Hayling Fisheries Ltd.* (4); *Grand Hotel Co. of Caledonia Springs Ltd.* v. *Wilson* (5).

[ISAACS J.—In a case of this kind the plaintiff must satisfy the Court that what the defendant is about to do will prove an imminent and substantial damage to the plaintiff: *Dunlop Pneumatic Tyre Co. Ltd.* v. *Dunlop Motor Co.* (6); *Royal Insurance Co. Ltd.* v. *Midland Insurance Co. Ltd.* (7).]

Irvine K.C., and *Weigall* K.C. (with them *Cohen*), for the respondent company. The appellant company should be required to adopt a name which could not reasonably lead to confusion. A company which desires to start in business, with a name the use of which may lead to confusion in the minds of any section of people who are likely to have dealings with it, must guard that name in such a way as to prevent reasonable probability of confusion arising. It comes down to a question of fact in each case. In principle it does not matter whether the name is a geographical name, a proper name, or a fancy name. The nature of the name only affects the facility of proof. The character of the business to be carried on should be considered. There is no duty on the respondent company to take steps to avoid the confusion. The difficulty might be got over in every case if there was such a duty.

[GRIFFITH C.J.—Can a company get a legal right to a name other than their corporate name ?]

Yes.

[They referred to *H. E. Randall Ltd.* v. *British & American*

(1) (1880) W.N., 6.
(2) (1899) A.C., 83.
(3) 32 L.J. Ch. 664.
(4) 18 R.P.C., 434.
(5) 21 R.P.C., 117.
(6) (1907) A.C., 430.
(7) 25 R.P.C., 728; 26 R.P.C., 95.

Shoe Co. (1); *Buckley on Companies*, 9th ed., p. 157; *Hendriks* v. *Montagu* (2).]

[ISAACS J. referred to *Cooper & McLeod* v. *G. & J. Maclachlan* (3).]

It is more reasonable that the appellant company should distinguish themselves from the respondent company than that the respondent company should take steps to distinguish themselves from the appellant company. The Court will approach the case more readily when it is only proposed to bring a company into existence than where the company is in existence and is carrying on business. The question is, is the one name in the ordinary course of affairs likely to be confounded with the other? *Fine Cotton Spinners' and Doublers' Association Ltd.* v. *Harwood Cash & Co. Ltd.* (4); *Tussaud* v. *Tussaud* (5); *Palmer's Company Precedent*, 8th ed., p. 380.

Duffy K.C., in reply. The possibility of danger to the respondent company must amount to a moral certainty in order to justify the Court in interfering: *Royal Insurance Co. Ltd.* v. *Midland Insurance Co. Ltd.* (6). The words "Sandhurst" and "Bendigo" have in each case been adopted to show where the particular company carry on business. The Court will not interfere because the two names denote the same place, but only if the two names are so alike to eye or ear as to be likely to cause confusion. In no case has it been suggested that the Court should interfere where the two names are not alike in appearance or in sound.

Cur. adv. vult.

October 21.

GRIFFITH C.J. This is an appeal from a judgment of the learned Chief Justice of Victoria granting an injunction restraining the defendant company, the appellants, from using their name, style or title, "or any other name, style or title which include the plaintiff company's name or so nearly resembles the same as to be calculated to induce the belief that the business

(1) (1902) 2 Ch., 354.
(2) 17 Ch. D., 638.
(3) 18 R.P.C., 380, at p. 387.
(4) (1907) 2 Ch., 184.
(5) 44 Ch. D., 678, at p. 686.
(6) 26 R.P.C., 95, at p. 97.

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carried on by the defendant company is the same as the business carried on by the plaintiff company or in any way connected therewith." In substance the action may be described shortly as an action to prevent personation of the plaintiffs by the defendants. The terms of the injunction are in substance the same as the terms employed in sec. 21 of the *Companies Act* 1890, which prohibits a company from being registered under a name identical with or so nearly resembling that of a company which is already registered as to be calculated to deceive. Very similar words are also found in Trade Marks Acts, and, indeed, it has been said for a very long time that the principles to be applied in an action of this kind are very analogous to those applicable in a passing-off action. There are many decisions on the subject. I do not think it necessary to refer to more than one or two of them. The very latest case is *Royal Insurance Co. Ltd.* v. *Midland Insurance Co. Ltd.* (1), a case almost exactly the same as the present and in which almost the same relief was sought. *Cozens-Hardy* M.R. said (2):—"The Court has to remember in the first place that this is a *quia timet* action. Now what does that mean? There have been a great many decisions upon that point, but I think they all really come down to this, that in a *quia timet* action you have to satisfy the Court that what the defendant is doing will prove an imminent and substantial damage to the plaintiff's property, or his business whatever it may be." The same principle was stated by *James* L.J. in *Hendriks* v. *Montagu* (3), which has often since been cited. The question there propounded to be answered by the learned Lord Justice was this:—"Is there such a similarity between those names"—that is the names of the two companies —"as that the one is in the ordinary course of human affairs likely to be confounded with the other?" The words "in the ordinary course of human affairs" may, I think, very well be qualified by the words of Lord *Low* in the Court of Sessions in Scotland in delivering his judgment in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Dunlop Motor Co. Ltd.* (4), viz., that the persons to be considered are "persons acting with reasonable care and

(1) 26 R.P.C., 95.
(2) 26 R.P.C., 95, at p. 97.
(3) 17 Ch.D., 638, at p. 645.
(4) 23 R.P.C., 761, at p. 773.

observation," not careless or unwary or ignorant persons. That is all I think it necessary to say about the law.

In regard to the facts they are simple, though the affidavits are voluminous. The City of Bendigo was called by that name until 1855, and then its name was changed to Sandhurst, by which name it was called until 1891. The plaintiff company was incorporated in 1888, and the case the plaintiffs make is that since 1891 the two names Bendigo and Sandhurst are practically synonymous, so that a person using either name means also the other, and that in fact the plaintiffs have come to be known as the "Bendigo Trustees Co.," so that persons who in talking to one another spoke of the "Bendigo Trustees Co." would understand that the plaintiff company was meant. I think that might be taken for granted, even without the evidence. It is quite natural —indeed almost inevitable—that, so long as there is only one trustee company carrying on business in Bendigo, many persons will speak of it as the "Bendigo Trustees Co.," meaning the trustee company that carries on business there. So considered, the name is merely a description of the locality of the company, the two names "Bendigo" and "Sandhurst" being two synonymous geographical expressions. But a new trustee company may be established in Bendigo lawfully if Parliament confers the necessary powers. It certainly may be called a trustees and executors company, and all that is necessary is that the name shall be so far different from that of the plaintiff company that persons using ordinary care and observation may not be deceived. What sort of persons are likely to deal with this plaintiff company? They are not persons who go down the streets to buy goods, see the name of the company over the door, and go in. They are persons who employ the company intending to make them trustees of a will or settlement, or employ them as agents to transact business for them. In appointing a trustee of a will or settlement or an agent the person intending to be testator or settlor or principal inquires who are the persons he is going to trust. Is it likely, I ask myself, that a person of that sort, intending to appoint a person a trustee or agent, would not inquire who the person is in whom he is going to repose his confidence? So regarded, it seems to me that almost any distinction in name would be

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sufficient. Apart from the peculiar historical circumstances, the names are *primâ facie* quite distinct, and would not lead to confusion in anyone's mind. The conclusion I come to, taking the whole of the evidence for the plaintiffs exactly as it stands and giving the fullest weight to it, is that, in the words of *Farwell* L.J. in *Royal Insurance Co. Ltd.* v. *Midland Insurance Co. Ltd.* (1), it is perfectly impossible for any person of ordinary intelligence to be under any misapprehension—that is, anyone of the class to which I have referred. I think, therefore, that the plaintiffs entirely failed to make out their case, and that their action should be dismissed.

O'CONNOR J. The litigants in this appeal have both very long names, which, for convenience, I shall abbreviate in the course of this judgment. The appellant company, which I shall call the "new company," is registered under the name of the "Bendigo and Country Districts Trustees and Executors Co. Ltd.," and the respondent company, which I shall call the "old company," is registered under the name of the "Sandhurst and Northern District Trustees, Executors, and Agency Co. Ltd." There are no unnecessary words in the names because the kind of business which the companies carry on, and the place in which they carry it on, necessitate, I think, every word which has been used. Now, there are certain things that must be taken for granted in this case before we discuss the appellants' claim. The first is that the new company are entitled to carry on in Bendigo and in the district around it the same business as the old company. They are entitled also to use in their title—very often an important thing in attracting business—the name of the place in which they carry on business and of the district which they serve. There is, however, a limitation upon that right. When a new company are starting to carry on business in a place where an old company are already carrying on the same class of business, the new company must take care in choosing their name that they do not infringe certain rights which the law gives to the old company. Those rights are concisely stated in the last edition (9th) of *Buckley on Companies*, p. 14, which is well known

(1) 26 R.P.C., 95.

to have been edited by *Buckley* L.J., so that the notes are of particular value. He says:—"If a company about to register is to carry on the same business as and to bear a name so similar to the name of the plaintiff company as to be calculated to deceive, there is jurisdiction, not under the section but under the general law, to restrain the registration, and none the less that the plaintiff company is not a registered company." The basis upon which that right is given is stated lower down on the same page:—"The jurisdiction in these cases rests either upon fraud or upon property; not that there is property in the name, but that the use of a name in which another carries on business will deceive and will affect property by diverting customers to the person taking the name. When this is not the case, there is no jurisdiction."

In the case of *Royal Insurance Co. Ltd.* v. *Midland Insurance Co. Ltd.* (1), to which the learned Chief Justice referred, *Fletcher Moulton* L.J., said:—"This is not a case in which it is alleged that goods could be passsed off as the goods of another manufacturer. It is a case in which it is said that the customer will be deceived as to the person with whom he is contracting." The essence, therefore, of the cause of action is that persons likely to deal with the new company are being deceived into supposing that the business carried on by the new company is the business which the old company carried on, and in that way the new company is attracting business to itself. In these cases, just as in cases of passing off goods, the law will consider who is likely to be deceived, and it will take no heed of the fact that stupid or ignorant persons, or persons who conduct their affairs in unbusinesslike ways, are likely to be deceived. The person to be regarded, in considering whether there is likely to be deception or not, is the ordinary person who conducts his business in a businesslike way.

The question then is:—Having regard to the nature of the business of these companies and the people who are likely to deal with either of them, are the similarities in name such as to deceive persons of the class I have mentioned into mistaking the business of one for the business of the other? There are

(1) 26 R.P.C., 95, at p. 99.

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none of the cases at all like this in one respect, in that the names alleged to be in conflcit are on the face of them entirely dissimilar, and, if the matter rested merely upon the names, the plaintiffs would have no case. But the case is put in this way. Though the old company is registered as, and has as its corporate name, the "Sandhurst and Northern District Trustees, Executors and Agency Co. Ltd.," it has by reason of its carrying on business in Bendigo come to be known so extensively as the "Bendigo Trustees Co." that for the purpose of this proceeding it must be taken as if its name were the "Bendigo Trustees Co." I was at first disposed to think that it would be impossible in a case of that kind to apply the principle upon which the respondent company's case rests, but Mr. *Irvine* satisfied me that, if you find a case where a popular name is so universally applied to a company as to put it in the same position as if it were carrying on business in that name, the acquired name will be protected on the same principles as if it were the real name. The case of *H. E. Randall Ltd.* v. *British and American Shoe Co.* (1), was relied on by Mr. *Irvine* in support of that position. That was a case in which a limited liability company with the registered name of "H. E. Randall Ltd." opened certain shops in London in which it carried on business under the name of the "American Shoe Co." The company carried on business under that name, and dealt with persons openly and publicly by that name and that only. The question was raised whether they were not bound in addition to use their registered name. The Court held that they did not lose the right to protection for their acquired name merely because they used the other name. It appears to me, therefore, that a company may acquire by reputation a general use of a name, which, though not its corporate name, may be taken to be so for the purpose of invoking the protection of the Court on the principle of the cases to which I have referred. But considering the obligations imposed by the *Companies Act* 1890 on a company to make use of its registered name, it would be somewhat difficult to prove it had acquired any other name in the sense in which that expression is used in the cases. The onus imposed upon the plaintiff in such a case is very heavy. In *Royal*

(1) (1902) 2 Ch., 354.

Insurance Co. Ltd. v. *Midland Insurance Co. Ltd.* (1), *Cozens-Hardy* M.R. described the burden as being that "of proving that it is reasonably certain that what the defendant is threatening and intending to do will cause imminent and substantial damage to the plaintiff." In the same case *Farwell* L.J. said (2):—"They have, therefore, to show such a possibility of danger as amounts to moral certainty." On this principle of law, and such being the onus upon the plaintiff, I now turn to the evidence. It must occur to any one reading the evidence that it is almost inevitable that the old company would not in ordinary conversation be called by its registered name, but by some abbreviation of it, and that in ordinary conversation that abbreviation would be used probably by everybody dealing with it. When you can describe a company by a short name in such a way as to identify it, it is improbable that it will be ordinarily described by its registered name. The way in which this company is spoken of amongst business men is as the "Bendigo Trustees Co.," although those same business men would take good care to describe the company by its proper name in their formal dealings with it. I have gone through the affidavits of the witnesses—there are nine of them—who give the evidence by which the old company attempts to prove their case, and it seems to me that the evidence is of the most flimsy and inconclusive character. What does it amount to? It may be summed up in a few words:—Persons generally in conversation speak of the old company as the "Bendigo Trustees Co." What is the inference to be drawn from that? Surely not that anyone wishing to enter into business relations with the old company would be likely to mistake the business of the new company for that of the old company.

I have already referred to the *Companies Act* 1890 which obliges a registered company under a heavy penalty to paint in visible letters on its office its corporate name, to advertise under that name, and to have its letters headed with that name. I find it stated in McQuie's affidavit that the plaintiff company has since it commenced to carry on its said business spent very large sums in extensively advertising itself, has been very successful

(1) 26 R.P.C., 95, at p. 97. (2) 26 R.P.C., 95, at p. 100.

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in its business operations, has acquired a good and widespread reputation, and is now and has for a considerable time past been doing a large business in the City of Bendigo and the districts surrounding such city extending for many miles on every side, that it has also a large number of agencies in the Northern Districts of and in other places in Victoria, including the following country districts:—then follow the names of the districts. In all those advertisements and at the office and the agencies the corporate name of the old company must be prominently displayed, and it is highly improbable that persons dealing with it, however they may describe the company in conversation, would do business with it in any other name than the "Sandhurst and Northern District Trustees Executors and Agency Co. Ltd."

The real value of the evidence may be well estimated by that of the present manager, who has been manager for nine years—who, one may suppose, gives the strongest evidence that fairly can be given on the subject. The only definite statement he makes is "that letters have on several occasions been received by the plaintiff company in the ordinary way of business addressed to the plaintiff company by the name of the 'Bendigo Trustees,' the 'Bendigo Trustees Co.,' the 'Bendigo Trustees and Executors Co.' or some other combination of names containing the word 'Bendigo.'" Three envelopes are produced to him addressed in one or other of these ways, and he says that many other letters similarly addressed have been received by the plaintiff company, but that he has been unable to find them and believes they have been lost. How can it be seriously contended on such evidence that the name of the new company is calculated to deceive persons desiring to deal with the old company into believing that the business of the new company was that of the old company?

Under these circumstances it appears to me that the respondents have shown no case upon which the Court can fairly come to the conclusion that the use by the appellants of their name is likely to deceive people in the way alleged. I am therefore of opinion that the learned Judge in the Court below came to a wrong conclusion, and that the appeal must be allowed.

ISAACS J. read the following judgment:—

The first thing is to ascertain the test which the law applies to such a case as the present. That is stated most clearly in the *Royal Insurance Co. Case* (1), while *Cozens-Hardy*, M.R., points out the true nature of the case, that such an action as the present is a *quia timet* action, and that the decisions all really come down to this, that in a *quia timet* action you have to satisfy the Court that what the defendant is doing will prove an imminent and substantial damage to the plaintiff's property or business whatever it may be. "The Court," says the Master of the Rolls (2), has to draw an inference from all the circumstances of the case; *ex hypothesi* you cannot prove actual damage, but the plaintiff takes upon himself the burden of proving that it is reasonably certain that what the defendant is threatening and intending to do will cause imminent and substantial damage to the plaintiff."

All that the defendants here, as in the case before the English Court of Appeal, can be said to have threatened to do, is to carry on their own business, and, it must be presumed, in a perfectly fair and honest manner. If they do not, a remedy quite independent of the present one sought may be applied. But assuming they trade honestly and fairly, and assuming, too, as I think we are bound to assume, that the plaintiff company carry on their own business with all the reasonable precautions which every competitor in business must expect to be called upon to take if he deserves success, and certainly if he complains of undue interference, how have the plaintiffs succeeding in establishing what the Master of the Rolls says it is incumbent upon them to establish ?

It is said that the learned Chief Justice of Victoria has found the facts in their favour. So he has. But this is an appeal from his judgment, and an appeal upon facts is as much within the defendants' rights under the Constitution as an appeal upon the law. The only distinction—sometimes a very real one—consists in the means afforded to the Appellate Court of performing the task assigned to it. I have so fully expressed my views on this subject in *Dearman* v. *Dearman* (3), where I referred to the law as laid down in the English Court of Appeal and the House of

(1) 26 R.P.C., 95.
(2) 26 R.P.C., 95, at p. 97.
(3) 7 C.L.R., 549, at p. 559.

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Lords, that I do no more here than refer to my observations in that case. In the case at bar there are no complications. The evidence is all on affidavit. It is not a question of demeanour or credibility founded on the manner of giving testimony, and we are in precisely the same situation to judge of the matter as the learned primary Judge himself.

At the outset the defendants' name is composed of words of common property. It is admitted it has been honestly selected; it is appropriately descriptive, and presumably will be fairly used. In the words themselves no deception was or is intended. To prohibit the use of the name under any circumstances is therefore an extreme step, and only justifiable if the plaintiffs clearly satisfy the burden they have undertaken.

Shortly put, the plaintiffs say they are, and will be, themselves so extensively known and referred to as the "Bendigo Trustees Company" that confusion is reasonably certain to exist in the public mind to such a degree as to substantially injure them in their business.

To establish that, the whole case of the plaintiffs really rests on one fact, namely, that for very many years people called what is now the City of Bendigo by the name of Bendigo, and although for 36 years it was officially known as Sandhurst, yet previously it was known as Bendigo, and since 1891 it has resumed that name as its legal appellation. No doubt that is so, and no doubt it clearly appears from the evidence as well as from common knowledge that Sandhurst as a designation of the locality is of the rarest occurrence. One may say that almost invariably the locality is referred to as Bendigo. But that is by no means decisive of the question at issue.

The question is whether the name of the defendant company is calculated to deceive a person, exercising ordinary common sense, into believing that that company is the plaintiff company. That appears to be the test adopted by the Court in the *Royal Insurance Co.'s Case* (1); it was so expressly stated by *Vaughan Williams* L.J. *in arguendo* in *Electromobile Co. Ltd.* v. *British Electromobile Co. Ltd.* (2), and in effect by Lord *James of Here-*

(1) 26 R.P.C., 95.

(2) 25 R.P.C., 149, at p. 153.

ford in the *Dunlop Pneumatic Co.'s Case* (1), and the Scottish Court, the Inner House, from which that appeal came (2).

Now when the evidence is looked at, it consists in this: That various persons—nine in all, some connected with the plaintiff company and some not—state that the plaintiff company have been and are generally referred to as the Bendigo Trustees Co., and that in their opinion confusion would result if the defendants were permitted to trade under the name they have taken. Four of these deponents do not live in Bendigo, and are evidently speaking of persons who do not reside in Bendigo; and therefore, in these instances at least, the reason may well be to indicate merely the locality of the company. Of the remaining deponents one is the manager and one the solicitor of the plaintiff company. I say this in no disparagement of their credit, but as indicating that they would not knowingly understate the strength of the plaintiffs' case. Only one deponent, Mr. Madden, refers to the expression Bendigo Trustees Company as an abbreviated name, and says they have been so known to him for 15 years and upwards. But Mr. Madden does not say, and cannot be supposed to have meant, that he thought that was their real name, or that he would have written in those words to a document in the belief that he was correctly so styling the company.

No one comes forward and says he believes that the plaintiffs' real name was the Bendigo Trustees Company.

The plaintiff company act as trustees, both under deed and under testamentary dispositions, as executors and as agents, of course of living persons or of corporations.

As to their transactions with living persons they must be expected, as already said, to be reasonable, thoughtful persons, who for some tangible reason have formed a desire to do business with the plaintiff company in preference to any other, and who supposing a mistake occurred would very soon discover it. Ordinary business methods if adopted by the plaintiffs would render such an error of the rarest possibility.

The little likelihood of misapprehension of the plaintiffs' true name is strikingly evidenced by the fact that during 21 years only one instance of a testator calling them the Bendigo Company

(1) (1907) A.C., 430, at p. 438. (2) 24 R.P.C., 572, at p. 577.

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can be adduced; and if it were once known that there were two Bendigo companies, and therefore some degree of care was needed to describe the one desired, the possibility of deception is so remote and rare as to be almost imperceptible. But it must not be forgotten that there is a large body of evidence on the side of the defendants, and although a witness who has not heard the company styled the Bendigo Company is not so important as one who has, many of the deponents are people who would be likely to hear the title if extensively used. There is also evidence that the "Sandhurst" Building Society co-exists with the "Bendigo" Building Society, and they trade with the public and advertise side by side and apparently without confusion, though their business is one which depends partly upon correspondence (see pp. 54 and 45 of transcript).

The plaintiffs' name was obviously designed to indicate the district in which they aspired to operate, and to that district they added the nature of their business. The defendants, admittedly without fraud, also select a name to indicate practically the same things. But the words are inherently distinct. It is only extraneous facts which can make them for business purposes synonymous. The plaintiffs then start with the onus of showing that what is *primâ facie* distinct is really not distinct. If the words be regarded as synonymous only in indicating that the operations of the company are intended to cover the same area, that is not enough. Unless they are to be regarded as synonymous for the purpose of indicating the company themselves, the plaintiffs must fail. It is to my mind a significant and powerful circumstance against the plaintiffs' contention that, as appears from the solicitors' letters of 1st December 1908 (fol. 186), and 19th January 1909 (fol. 222), it is only since the city's name was changed from Sandhurst to Bendigo that any claim to wide recognition of the plaintiff company as "The Bendigo Trustees Company" is made. That appears to me to indicate that the word Bendigo in that connection is a familiar way of expressing locality.

I cannot therefore see that the plaintiffs have succeeded in satisfying the test laid down for a *quia timet* action, as stated by the Master of the Rolls, because it has not shown that when the

companies are working simultaneously and honestly and fairly, and the public know that there are two companies, and some of them desire to specially nominate the Sandhurst Company as trustees, or executors, or agents, that any confusion of an appreciable character will arise.

Prohibition of a name as honestly chosen, and as distinctive *primâ facie* as "Bendigo and Country" from "Sandhurst and Northern," might be justified in proper circumstances. If the word "Bendigo" had come to be so closely identified with the plaintiffs' business, and to have so far supplanted their true name in the public mind as to be reasonably certain to mislead, I am not prepared to say the plaintiffs, for the protection of their business as distinguished from their official title, would not succeed. See *per* Lord *Halsbury* in *Electromobile Co.'s Case* (1), and *per* Lord *Dundas* in *Scottish Union and National Insurance Co.* v. *Scottish National Insurance Co. Ltd.* (2).

But as I cannot see, and cannot believe on the testimony before us that there is a real substantial probability of confusion, causing appreciable damage, when both companies are carrying on business with all the precautions and all the efforts usually present, and reasonably to be expected of competitors in such business, I think the plaintiff should fail, and this appeal be allowed.

An argument was faintly suggested by the appellants that the opinion of the Registrar, under sec. 21 of the *Companies Act* 1890, was conclusive. I would merely say I do not think it has any substance.

Appeal allowed. Judgment appealed from discharged. Motion dismissed with costs. Respondents to pay the costs of the appeal.

Solicitors for the appellants, *Tatchell, Dunlop, Smalley & Balmer*, Bendigo.

Solicitors, for the respondents, *Cohen, Kirby & Woodward*, Bendigo.

B. L.

(1) 25 R.P.C., 149, at p. 155.

(2) 25 R.P.C., 560, at p. 563,

H. C. OF A. 1909.

BENDIGO AND COUNTRY DISTRICTS TRUSTEES AND EXECUTORS CO. LTD. v. SANDHURST AND NORTHERN DISTRICT TRUSTEES, EXECUTORS, AND AGENCY CO. LTD.

Isaacs J.