

H. C. OF A.
1909.
HOPE
v.
THE KING.
Higgins J.

not that kind of instrument which should, in the first instance, be produced, or accounted for, before evidence of an inferior nature can be given. The objection is founded upon a presumption that there is a document of an authentic nature, showing what the proceedings were, and that it is not competent to give evidence of those proceedings, without producing that document. The evidence offered is to show the transactions of the meeting; what was said by the one and the other; in short, the general conduct of the assembly. This cannot be rejected because there was some person there who took notes of what passed. Possibly, that person may have a more accurate account; but it goes no further than that." The other Judges concurred.

Leave to appeal refused.

Solicitors, for the appellant, *P. J. Ridgeway.*

B. L.

[HIGH COURT OF AUSTRALIA.]

JONES APPELLANT;
INFORMANT,

AND

GEDYE RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A.
1909.
MELBOURNE,
October 11.
Griffith C.J.,
O'Connor and
Isaacs JJ.

Trade Mark—Falsely applying trade mark—Defence—No intention to defraud—Trade Marks Act 1905 (No. 20 of 1905), sec. 87.

The words "intent to defraud" in sec. 87 of the *Trade Marks Act 1905* mean intent to induce purchasers to believe that goods to which a trade mark is falsely applied, and which are manufactured by the seller, are manufactured by some person other than the seller.

An information for an offence under the section, to which it was a defence to show that the defendant had no intent to defraud, having been dismissed,

Held, that the evidence justified the justices in finding that the defendant had no intent to defraud.

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1909.

Special leave to appeal from the decision of the Supreme Court of Victoria (*Hood J.*) refused.

JONES
v.
GEDYE.

MOTION for special leave to appeal from the Supreme Court of Victoria.

At the Court of Petty Sessions at Cobram before *R. Knight*, Esq., P.M., an information was heard whereby David Jones, governing director of E. Rowlands Proprietary Ltd., on behalf of the company, charged that Leonard Gedye on 9th March 1909 at Cobram did unlawfully have in his possession for sale certain goods, to wit, lemonade, to which goods a registered trade mark was falsely applied. The information was laid under sec. 87 of the *Trade Marks Act* 1905.

It appeared in the course of the evidence that the defendant was the licensee of a hotel at Cobram and manufactured his own aerated waters, and that on the day in question there were found in his factory, among about 20 dozen bottles filled with lemonade manufactured by the defendant, several bottles belonging to the above-named company and on which was moulded the registered trade mark of that company, which also contained lemonade manufactured by the defendant.

At the close of the evidence the Police Magistrate found that it did not appear that anyone had been defrauded; that the company had not done any business in the town of Cobram for many years; that there was no reason to think that anyone expected to get something different from that supplied; and that although the defendant had those bottles in his possession he acted without intent to defraud either the company or any one else, and he therefore dismissed the information.

An order *nisi* to review this decision was obtained by the informant on the grounds (1) that on the evidence properly admitted the Police Magistrate was wrong in holding that the defendant had acted without intent to defraud, and (2) that on the evidence and finding of the Police Magistrate the defendant should have been convicted. On the hearing of the order *nisi*, *Hood J.* held that upon the evidence the Police Magistrate was

H. C. OF A. justified in finding that there was no intent to defraud, and he
1909. therefore discharged the order *nisi*.

JONES The informant now applied to the High Court for special leave
v. to appeal from the decision of *Hood J*.
GEDYE.

Bryant, for the informant, referred to *Starey v. Chilworth Gunpowder Co.* (1); *Wood v. Burgess* (2).

GRIFFITH C.J. No doubt a very important question of law may be raised upon the construction of sec. 87 of the *Trade Marks Act 1905*, when the facts are such as to form a basis for argument. In this case the only question that arises is whether upon the particular evidence the magistrate was entitled to find that the defendant had no intent to defraud. Upon the evidence the magistrate might have come to the conclusion that nobody was likely to be deceived into believing that the lemonade sold by the defendant was manufactured by E. Rowlands Proprietary Ltd. He might have found that the circumstances of the district in which the defendant carried on business were such that persons buying lemonade from him, though it was in bottles bearing the trade mark of that company, would understand that it was lemonade manufactured by the defendant. If the magistrate came to the conclusion that those were the facts, he might find that the defendant had acted without intent to defraud. The expression "intent to defraud" in the section means intent to induce purchasers to believe that the goods which they are purchasing, and which are manufactured by the defendant, have been manufactured by somebody else. Upon the evidence the magistrate might properly come to the conclusion that no such intention existed. From any point of view, it is merely a question of fact, and this Court never grants leave to appeal upon mere questions of fact.

Per curiam. Leave will be refused.

Special leave to appeal refused.

Solicitors, *Westley & Dale*.

B. L.

(1) 24 Q.B.D., 90.

(2) 24 Q.B.D., 162.