

[HIGH COURT OF AUSTRALIA.]

SCHWEPPES LTD. APPELLANTS;
PLAINTIFFS,

AND

E. ROWLANDS PROPRIETARY LTD. RESPONDENTS.
DEFENDANTS.

*Trade Marks Act 1905 (No. 20 of 1905), sec. 53—Infringement of trade mark—
Mark likely to deceive.*

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SYDNEY,
Aug. 17, 19.

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

The plaintiffs and defendants were rival soda water manufacturers. The plaintiffs had registered as their trade mark a serrated red seal, which they affixed to the neck label of their bottles. Subsequently to the registration of the plaintiffs' trade mark the defendants used a red seal, which was not substantially identical with the plaintiffs' mark, as a label on their bottles.

Held, that the defendants' mark did not so nearly resemble the plaintiffs' as to be likely to deceive.

The question whether a mark so nearly resembles another as to be likely to deceive, within the meaning of sec. 53 of the *Trade Marks Act 1905*, must be determined upon a consideration of the whole of the marks or designs upon the plaintiffs' and defendants' goods.

Decision of *A. H. Simpson*, Ch. J. in Eq. (15th February 1910), affirmed.

APPEAL by the plaintiffs from the decision of *A. H. Simpson*, Chief Judge in Equity, dismissing the plaintiffs' suit to restrain the defendants from infringing the plaintiffs' trade mark, and from passing off their soda water as the plaintiffs', upon the grounds that the decision was against evidence, and that his Honor should have held that the defendants had infringed the plaintiffs' registered trade mark.

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The plaintiffs had for many years been carrying on an extensive business in New South Wales and other parts of the Commonwealth as manufacturers and vendors of aerated waters, and since 1896 had used upon the neck labels affixed to their soda water bottles a device in the form of a red seal. Since 1907 the plaintiffs, in addition to the red seal, had also used a separate label representing a serrated red seal affixed to their soda water bottles below the neck labels, and in March 1908 they registered as their trade mark "a red serrated seal having thereon two shields, one overlapping the other, suspended by a gold or blue ribbon."

The defendants were also manufacturers of aerated waters, and carried on business throughout the Commonwealth. Their soda water was sold in bottles similar in shape and appearance to the plaintiffs', which until recently were labelled with a neck label only. Since 1908 the defendants had affixed to their soda water bottles an additional label, consisting of a red seal, under the neck label. The plaintiffs alleged that the use of the red seal label constituted an infringement of their trade mark, and, taken in conjunction with the general similarity of the get-up and appearance of the soda water bottles of the plaintiffs and defendants, was calculated to mislead, and to induce purchasers to purchase the defendants' soda water in the belief that it was the plaintiffs'.

At the hearing of the suit no evidence was given that anybody had been so deceived. The Chief Judge found that originally the resemblance between the plaintiffs' and defendants' labels was very slight, but that the defendants had from time to time altered their label until it was much more like the plaintiffs', and that the evidence showed that the defendants had deliberately gone as near the plaintiffs' trade mark as they thought would be safe. But he held that the defendants' label was not an infringement of the plaintiffs' trade mark within sec. 53 of the *Trade Marks Act*, and that the defendants were also entitled to succeed on the issue of passing off.

The following is a representation of the plaintiffs' label, with the serrated red seal attached, as made by them since May 1907, and of the defendants' neck label as used by them since 1906, and of the red seal added in 1908.

SCHWEPPES'SODA WATER

SEE ALSO RED LABEL OVER THE CORK.

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Knox K.C. and *Leverrier*, for the appellants. The defendants are not entitled to use a red seal similar to the plaintiffs' on the same class of goods. There is no evidence that anybody but the plaintiffs ever used a red seal or medallion on soda water bottles. The defendants put their red seal on the same part of their bottles as the plaintiffs, and they do not assign any intelligible reason for adding this red mark. The appellants are entitled to a monopoly of using a red seal on soda water bottles unless the person using such a mark takes care to distinguish it from the appellants'. In order to further complete the resemblance the defendants used the words "E.R," and a seal with wavy edges, to get as near as possible to the serrated edges of the plaintiffs' registered mark. In considering whether the defendants' mark was substantially identical with the plaintiffs' registered mark or so nearly resembled it as to be likely to deceive, the learned Judge did not apply his mind to the trade mark and the alleged infringement, independently of the other labels on the bottles.

[GRIFFITH C.J.—Suppose they have adjuncts which distinguish them would they be the same?]

The defendants cannot appropriate the plaintiffs' trade mark by putting their name on it. They are not entitled to use the trade mark or anything colourably resembling it. The question is, is the defendants' red label so like the plaintiffs' registered mark as to be calculated to deceive. The resemblance must be considered apart from the other marks on the plaintiffs' or defendants' goods. The "mark" in sec. 53 does not refer to the appearance as a whole of the defendants' goods.

[GRIFFITH C.J.—Then the Court is bound to say that the mark is calculated to deceive, when in actual use it is clear that it is not.

ISAACS J.—If the mark is not identical, you must show that its use is calculated to deceive.

HIGGINS J.—In establishing likelihood to deceive it would be grotesque not to take into consideration the other circumstances.]

The Registrar has the same point to consider under sec. 25, where he has not the get-up of the goods before him. When, as in this case, the Judge has found that there has been a deliberate attempt by the defendants to get as near as possible to the

plaintiffs' trade mark, without actually infringing it, the Court will approach the case from a stricter standpoint: *Slazenger & Sons v. Feltham & Co.* (1). The learned Judge did not give sufficient weight in his finding on this point. It is clear that the defendants thought they would get an advantage by using this mark. This could only be obtained by taking the plaintiffs' trade. If the defendants are at all likely to succeed in doing this the plaintiffs are entitled to an injunction. The Court will not be astute to help a dishonest trader. The plaintiffs introduced an entire novelty in the shape of the red seal, which is now associated in the mind of the average purchaser with their soda water. If this is so, the red mark on the defendants' bottles is likely to mislead, and it is obviously intended to have this effect.

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Pickburn and Peden, for the respondents. The principle embodied in sec. 53 is that no one is entitled to pass his goods off as another's. The identity of the marks is determined by their comparison; and their likelihood to deceive by the actual use. *Bourne v. Swan & Edgar Ltd.* (2). Sec. 53 does not alter the law as established under the English Act, and "mark" in that section includes the whole of the device on the goods. The question is, are the defendants passing off their goods as the plaintiffs', not are they passing off their mark as the plaintiffs' trade mark. If the marks are in fact dissimilar, the case must be treated as a passing off action. The defendants are entitled to follow the device adopted by the plaintiffs so long as they do not put anything on their bottles to suggest that they are the plaintiffs'. There is no allegation of fraud, and no evidence of actual deception. [They also referred to *Cope v. Evans* (3); *Edwards v. Dennis* (4); *Johnston v. Orr Ewing* (5); *Hennessy & Co. v. Keating* (6); *Lambert & Butler Ltd. v. Goodbody* (7); *Burford & Sons Ltd. v. Mowling & Son* (8); *Schweppes Ltd. v. Gibbens* (9).]

Knox in reply.

- (1) 6 R.P.C., 531.
- (2) (1903) 1 Ch., 211.
- (3) L.R. 18 Eq., 138.
- (4) 30 Ch. D., 454.
- (5) 7 App. Cas., 219.

- (6) 25 R.P.C., 125, 361.
- (7) 19 R.P.C., 377.
- (8) 8 C.L.R., 212.
- (9) 22 R.P.C., 113.

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GRIFFITH C.J. The question for determination in this case is entirely one of fact. The action was brought for infringement of a trade mark, and also for an injunction restraining the defendants from passing off their goods as goods of the plaintiffs. The plaintiffs are proprietors of a registered trade mark which is described in the certificate of registration as "a red serrated seal, having thereon two shields, one overlapping the other, and suspended by a gold or blue ribbon." A copy of the mark is on the certificate. That description should be explained by adding that what is called two shields is a blank white space in the form of two overlapping shields, which in actual use bear a representation of the Royal Arms and a representation of the Prince of Wales' feathers respectively. The mark as used also bears the words "By appointment to H.M. the King and the Prince of Wales." This mark was used for soda water only. Defendants, who are rival manufacturers of soda water, use a mark, of which the plaintiffs complain, and which may be described as a representation of a seal made of red sealing wax on the top of a cork and bearing the letters "E.R." in white, as large as the size of the red seal will allow. In my opinion the suspension of the seal by a gold or blue ribbon is a very material part of the plaintiffs' mark. What the seal really represents is such a seal as is used on letters patent. That, as is well known, is a seal on a separate piece of paper, or sometimes of wax, suspended by a ribbon to the document itself. The trade mark is used in connection with the statement "By appointment to H.M. the King and the Prince of Wales," and the idea intended to be conveyed evidently is that it is a representation of the seal attached to the documents under which the plaintiffs obtained their appointment from the King and the Prince of Wales.

The first question is whether the defendants' mark comes within the words of sec. 53 of the *Trade Marks Act*, which provides that "the rights acquired by registration of a trade mark shall be deemed to be infringed by the use, in respect of the goods in respect of which it is registered, of a mark substantially identical with a trade mark or so nearly resembling it as to be likely to deceive." From the description which I have given of the two marks it is clear that the defendants' mark is not

identical with that of the plaintiffs. Then, is it substantially identical? That question must be determined primarily by comparing the two things. As said by Lord *Westbury* in *Holdsworth v. M'Crea* (1), quoted by Lord Justice *Farwell* in *Bourne v. Swan & Edgar Ltd.* (2), in such cases the appeal is to the eye, and the eye alone, as an unerring judge of the identity of the two things. Comparing the two marks with my own eyes I say that they are not substantially identical, and that the plaintiffs cannot therefore bring their case within these words. We must then consider whether they can bring it within the meaning of the words "so nearly resembling it as to be likely to deceive?" Two views were submitted to the Court as to the construction of these words—one that the only things to be compared are the registered trade mark on the one hand, and the mark or design alleged to resemble it on the other. Assuming that to be the rule, I doubt very much whether it could be said, comparing the two marks together, that the one so nearly resembles the other as to be likely to deceive. But I think that the words "so nearly resembling it as to be likely to deceive" involve a consideration of the whole of the marks or designs upon the defendants' goods. If, for instance, the mark or representation on the defendants' goods, which if it stood alone might be likely to deceive the unwary purchaser, were accompanied by a plain statement practically incorporated with it showing that the goods are the defendants' goods and not the plaintiffs', I think that the mark used by the defendants, not being substantially identical, could not be said so nearly to resemble the plaintiffs' registered trade mark as to be likely to deceive. In the present case I will assume for the moment that the mark alone—the defendants' representation of a red seal—would be likely to deceive. But it appears on the evidence that the defendants only use it on bottles which bear round the neck a label containing in large white letters on a green ground "Rowlands' Soda Water," the seal being on the bulging part of the bottle underneath it. In my opinion the mark which the defendants use is the neck label with the seal underneath it, and taking the whole mark they put

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(1) L.R. 2 H.L., 380.

(2) (1903) 1 Ch., 211, at p. 225.

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upon their bottle, there is no such resemblance to plaintiffs' trade mark as would be likely to deceive any reasonable person.

It was also suggested that there was an element of deception in the defendants' use of the letters "E. R.," the Royal initials, taken in conjunction with the fact of the plaintiffs' mark suggesting a Royal seal, and that they also used the Royal Arms and the Prince of Wales' feathers (although the Statute does not allow such emblems to be used as part of a trade mark). It appears, however, that the letters "E. R." were used by the defendants before the registration of the plaintiffs' trade mark, and they are the initials of the company, E. Rowlands Proprietary Ltd. I do not think that this fact is sufficient to take the case out of the rule which I have stated. For the reasons I have stated I do not think that the case comes within the Statute. As to the alleged passing off, precisely the same considerations apply. In my opinion the defendants' goods are distinctly differentiated from the plaintiffs' goods by the use of the neck label and defendants' name in large letters printed upon it. In my judgment the learned Chief Judge in Equity was right, and the appeal should be dismissed.

O'CONNOR J. I agree that the decision of the learned Judge below must be confirmed. The rights of these parties are to be ascertained by a consideration of the *Trade Marks Act 1905* and of the facts, and I entirely assent to the view put by Mr. *Knox* in his very concise argument, that the decisions of other Judges in other Courts upon other states of facts cannot help the Court much in coming to a conclusion in this case. A number of marks used by both parties have been referred to, and the history of the defendants' use of their marks following on the plaintiffs' various changes of mark has been brought before the Court. But in the view that I take of the controversy the only marks in any way material are the plaintiffs' trade mark, Exhibit C., and the defendants' mark, Exhibit L. The use made of the history of the marks to which I have referred is to supply evidence in the nature of an admission by the defendants that the mark which they adopted was likely to deceive purchasers into believing that the goods of the defendants were the goods of the plaintiffs. His

Honor, it seems to me, has given full weight to the circumstances relied on by finding that the defendants have followed as closely as they could the different changes of marks which the plaintiffs made in their trade mark from time to time. But he has also found that, in doing so, they did not overstep the limit of what they were entitled to do. I agree with that finding, but it appears to me that it has no bearing upon the matter which we have to decide. There are cases in which an admission of that kind might have very strong weight. But this is not a case of that kind. The only matter we have to consider is whether the defendants have infringed plaintiffs' right to the use of the mark which is contained in Exhibit C. The argument has largely turned on the two ways in which the marks may be compared. First, you may compare the plaintiffs' trade mark, taken as a whole, with the marks, also taken as a whole, by which the defendants distinguish their goods from the goods of other persons. From that point of view the plaintiffs' trade mark is a neck label containing the words "Schweppes' Soda Water" and a small seal. There is also attached to the label a pendant seal made evidently in imitation of the seals affixed to documents containing appointments by the King or the Prince of Wales. The defendants' mark complained of is an imitation of red sealing wax on the top of a cork having a stamp impressed upon it, a stamp containing "E. R." in large white letters, and around them "By appointment to Vice-Royalty." But it is to be noted that the mark is placed on the bottle under and not far from the neck label, the latter having upon it the words "Rowlands' Soda Water," and "E. R., by appointment to Vice-Royalty." If these marks are compared, taken as a whole—that is to say, if the trade marks by which the plaintiffs distinguish their goods are compared with the marks by which the defendants distinguish their goods—it is clear that there can be no deception, that no one could be deceived by the defendants' marks into supposing he was getting the plaintiffs' goods. And in making that statement I assume that the comparison is made, as the Courts have laid down in many cases it ought to be made, not as if the intending purchaser had before him the plaintiffs' trade mark, and could compare it with the defendants' mark, side by side. In ordinary business things do not happen

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in that way. It is the intending purchaser's recollection of the plaintiffs' trade mark which he is assumed to compare with the defendants' mark complained of. Making the comparison in that way no person of reasonable intelligence, having only a general recollection of the plaintiffs' trade mark, could possibly confuse it with the defendants' trade mark, for one is attached to a label describing the plaintiffs' goods as "Schweppes' Soda Water," and the other is close under, and obviously to be read with a label describing the defendants' goods as "Rowlands' Soda Water." It has, however, been argued that that is not the proper method of comparison, but that you must compare the plaintiffs' trade mark as registered not with the whole of the distinctive marks on the defendants' bottle, but with the seal only. Indeed, if that were the true basis of comparison I can have no doubt that the learned Judge would have been justified in finding that there was no likelihood of any purchasers being deceived by the defendants' seal into supposing that he was getting goods marked with the plaintiffs' trade mark. But I think the plaintiffs' contention as to the true basis of comparison is wrong. This involves a question of the construction of sec. 53 of the *Trade Marks Act*, and the only question of law in the case. I have made no reference to the identity or substantial identity of the rival marks, because it is not contended there is substantial identity between the plaintiffs' and defendants' marks in this case, and I agree with what my learned brother the Chief Justice has said as to the proper method of comparison when identity is charged. The charge here is that the offending mark so nearly resembles that of the plaintiffs as to be likely to deceive. In considering whether a purchaser is or is not likely to be deceived by the use of a mark, regard must be had to the circumstances under which the mark is used. It would appear from the latter portion of sec. 53 that the legislature contemplated the necessity of such circumstances being considered, and has made provision for the giving of such evidence in actions. In determining the issue whether the offending mark is or is not likely to deceive it must always be important to inquire whether it has been used by itself or in connection with other letters or marks which indicate that the goods bearing the mark are of the plaintiffs' own, and not of

some one else's manufacture. The section, in my opinion, clearly authorizes that inquiry to be made. The learned Judge of first instance took that view, and comparing the plaintiffs' trade mark with the defendants' mark as a whole he came to an obviously right conclusion on the facts. For these reasons I am of opinion that the learned Judge's view of the law and of the facts was right, and must be upheld.

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ISAACS J. read the following judgment:—The appellants' argument has really been directed to the meaning of the first part of sec. 53 of the *Trades Mark Act* 1905. It was urged that, in order to determine whether a mark complained of so nearly resembles a registered trade mark as to be likely to deceive, the Court must consider nothing but the physical resemblances of the two marks.

I think that is not a correct view of the provision.

By the enactment the registered proprietor of a trade mark is protected against the use of two kinds of marks, either of which would, if permitted, deprive him of the benefit of his trade mark by enabling another person to filch his trade by means of misrepresentation.

The first kind of prohibited mark is one substantially identical with that registered. That is practically the same mark, in effect the actual and identifiable property of the registered proprietor. He is not called upon in such a case (see *Lambert & Butler Ltd. v. Goodbody* (1)), to prove probability of deception and unfair trading.

The law assumes that, and accordingly by sec. 51 gives him the exclusive right of the mark, and forbids by sec. 53 the use of even a mark not precisely but substantially identical.

This is nothing more than a statutory recognition of the well-established rule at common law re-stated recently by Lord Macnaghten in *Weingarten Bros. v. Bayer & Co.* (2) in these words:—“No trader is justified in taking the peculiar symbol, device, or mark, or any ‘accompaniment,’ to use an expression of Lord Langdale M.R., by which another man distinguishes his goods on the market, and so attract to himself the custom which would otherwise flow to his rival.”

(1) 19 R.P.C., 377, at p. 381.

(2) 92 L.T., 511, at 512.

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The criticism of learned counsel upon the phrase “substantially identical” is met, among other authorities, by the words of Lord Westbury in *Edelsten v. Edelsten* (1) where the Lord Chancellor says:—“The questions are whether the plaintiff had property in the trade mark claimed by him before the adoption of it by the defendants, and if so, whether the mark of the defendants is *substantially the same* as the trade mark of the plaintiff, and therefore an invasion of his property,” &c.

But unless the mark is at least substantially identical with that registered, and the mark complained of here is not suggested to fall within that description, then it is not the same—it is a different mark—and it is not the property of the registered proprietor. His only right to complain of its use is when it so nearly resembles his own trade mark that it is likely to deceive. It is plain that even though the mark complained of is not substantially identical, yet the circumstances in which it is used may more than compensate for the intrinsic differences, by enhancing its suggestiveness, and if so its use may be an infringement. On the other hand, the circumstances may possibly accentuate those differences or nullify the effect of the points of similarity, so that upon the whole the resemblance is not sufficient to create a likelihood of deception: *Cochrane v. Macnish & Son* (2) is an instance where the circumstances of the trade were taken into consideration by the Privy Council in determining whether the use of a material part, and indeed the distinguishing feature, of a registered trade mark was an infringement or not.

In *Edelsten v. Edelsten* (3) Lord Westbury L.C. says that relief may be given “provided the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be taken for the other,” but one of the circumstances which the learned Lord Chancellor took into account in determining that question was the fact that the defendants’ mark was impressed on a tally similar in shape, colour and material to the plaintiff’s.

To make the result depend merely upon a comparison of the two marks, without regard to accompanying circumstances, would often lead to injustice in one direction or the other. A defendant

(1) 1 DeG. J. & S., 185, at p. 199.

(2) (1896) A.C., 225.

(3) 1 DeG. J. & S., 185, at p. 200.

might escape, as some defendants have endeavoured to do, by a close analysis of the points of difference between the marks. That has never been considered sufficient, and the test is invariably adopted of ascertaining the effect which the mark alleged to offend would have when presented casually to a probable customer accustomed to the plaintiffs' mark. The relevant considerations are stated very clearly by Cotton L.J. in *Upper Assam Tea Co. v. Herbert & Co.* (1). It is the probable effect in the ordinary course of purchasing by customers which has to be considered. If so, if the question is as to the effect of the mark when presented, that must be determined by its effect as presented, which works justly to both parties, and effectuates, without straining, the intention of the Statute.

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Further, this construction of the first part of the section is the only one which gives any sensible meaning to the second portion, which is again a practical codification of the common law and previous practice on that point.

The learned Chief Judge in Equity proceeded, therefore, on a proper view of the section, and, so regarding it, his findings of fact were not seriously challenged. I see no probability of any deception, looking at the mark complained of as actually used, that is, with its surrounding safeguards.

It is unnecessary for the decision, but perhaps desirable in justice to the respondents, to state that I am not prepared to say there would be any probability of deception, even merely pitting the two red labels against each other. The appellants' is a very artistic representation of an official seal appendant to some document, and attached by a narrow strip of ribbon in a very usual way. It indicates to my mind the prominent announcement of some official recognition, which is a strong recommendation of the article; and the respondents, apparently having an equal right to make a somewhat similar announcement, do so in a way which, though containing some resemblances, is sufficiently divergent to avoid, as I think, not merely the imputation of probable deception, but also any necessary inference of improper or unfair design. I would add that no charge of fraudulent intention was made in the pleadings.

(1) 7 R.P.C., 183, at p. 186.

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I agree that the appeal should be dismissed.

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HIGGINS J. read the following judgment :—I concur in the view that this appeal should be dismissed, and it is therefore unnecessary for me to add much to what has been said. The badge used by the defendants on the body of their bottles in New South Wales is certainly not “substantially identical” with the trade mark registered by the plaintiffs; and it seems to me to be equally clear that it does not so nearly resemble it as to be “likely to deceive”—within sec. 53. I hold this opinion whether the defendants’ badge is to be looked at by itself, or with its accessories. But in ascertaining whether a mark is “likely to deceive” I think that all his mark—the whole mark that he places on his commodity—has to be examined; and, under subsec. (2), the usage of the trade is to be taken into consideration also; as in *Lambert & Butler Ltd. v. Goodbody* (1); *Hennessy & Co. v. Keating* (2). I adhere to the position which I took up in *Burford & Sons Ltd. v. Mowling & Son* (3). To imitate a rival in the manner or devices used by him in connection with his wares is not necessarily an offence; to cut into another’s trade, even by copying his methods of making his wares attractive, is not necessarily an offence. The line of legitimate competition is not crossed unless a mark is used which is substantially identical with his, or which so resembles it as to be likely to deceive purchasers into the belief that in buying the defendants’ goods they are buying the plaintiffs’.

It is admitted that unless the plaintiffs can succeed under sec. 53, they cannot succeed under the count for “passing off.”

Appeal dismissed.

Solicitors, for appellants, *Norton Smith & Co.*

Solicitors, for respondents, *Villeneuve-Smith & Dawes.*

C. E. W.

(1) 19 R.P.C., 377, at p. 383.

(2) 25 R.P.C., 125

(3) 8 C.L.R., 212, at p. 224.