

[HIGH COURT OF AUSTRALIA.]

REMINGTON AND ANOTHER APPELLANTS;
 DEFENDANTS,

AND

WELSBACH LIGHT COMPANY OF AUS- }
 TRALASIA } RESPONDENTS.
 PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF
 VICTORIA.

Trade Mark—Passing off—Mark likely to deceive—Injunction—Damages.

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The plaintiffs, who were the registered proprietors of a trade mark, had the mark stamped on electric lamps and also on gas burners sold by them, and they had advertised and sold the gas burners so marked under the name of “Australite” burners, so that these had come to be known by that name to the public and the trade as being goods of the plaintiffs. The defendants had stamped on electric lamps sold by them the word “Australite” in conjunction with a device similar in part to the trade mark of the plaintiffs. In an action for infringement the plaintiffs obtained an injunction restraining the defendants from selling or passing off their electric lamps as and for the lamps of the plaintiffs, and also damages. On appeal to the High Court,

MELBOURNE,
 Sept. 29, 30;
 Oct. 1, 2, 5.

Griffith C.J.,
 Gavan Duffy,
 Powers and
 Rich JJ.

Held, on the evidence, that the plaintiffs were entitled to retain the injunction, but not the damages.

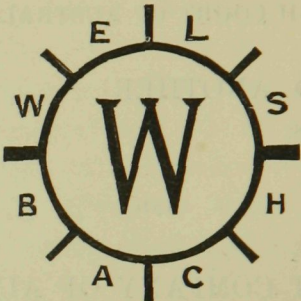
Decision of the Supreme Court of Victoria (*Hood J.*) affirmed with a variation.

APPEAL from the Supreme Court of Victoria.

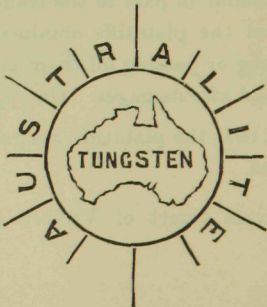
An action was brought in the Supreme Court by the Welsbach Light Co. of Australasia against Odin Leigh Remington and Joseph Allison Remington, carrying on business under the style

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of Newton's Electrical Stores, for infringement of trade mark and for passing off. The plaintiffs, who carried on business in Melbourne as manufacturers and vendors of gas and electric appliances, including electric lamps, were the proprietors of a trade mark for lamps and burners of which the following is a representation :—



This trade mark and also the word “Welsbach” were stamped on electric metallic filament lamps sold by the plaintiffs. The plaintiffs also sold gas burners inclosed in glass bulbs, similar to those of electric metallic filament lamps, upon which their trade mark and the words “Welsbach Light. Made in Germany” were stamped. The plaintiffs for some years advertised and sold the gas burners so marked as “Australite” burners, and they alleged that such burners had become known by that name to the public and the trade as being made by them. The defendants, who dealt only in electrical appliances, sold an electric lamp upon which was stamped a device of which the following is a representation :—



The action was heard by *Hood J.*, who found that the plaintiffs' gas burners marked as above described had become known as “Australite” burners to the public and in the trade as their production, and that the defendants had placed a mark on their

goods which was calculated to induce intending purchasers of the plaintiffs' goods to believe that the defendants' goods were those of the plaintiffs, but he found that there was no infringement. He therefore ordered that the defendants should be restrained from advertising or offering for sale or selling or attempting to sell or in any way passing off or attempting to pass off their metallic filament lamps bearing the device of a circle with lines projecting therefrom at equal intervals together with the word "Australite" as and for the plaintiffs' metallic filament lamps, save and except 218 of such lamps which were still in the possession of the defendants. He also ordered the defendants to pay £77 3s. 9d. as and by way of damages.

From this decision the defendants appealed to the High Court.

Schutt (with him *Owen Dixon*), for the appellants.

Mann (with him *Lowe*), for the respondents.

Reference was made during argument to *Bowden Wire Ltd. v. Bowden Brake Co. Ltd.* (1); *Burberrys v. J. C. Cording & Co. Ltd.* (2); *Dunlop Pneumatic Tyre Co. Ltd. v. Dunlop Motor Co. Ltd.* (3); *W. H. Burford & Sons Ltd. v. G. Mowling & Son* (4); *Bendigo and Country Districts Trustees and Executors Co. Ltd. v. Sandhurst and Northern District Trustees, Executors and Agency Co. Ltd.* (5); *Williams v. Osborne* (6); *Slazenger & Sons v. Spalding & Brothers* (7); "*Singer*" *Machine Manufacturers v. Wilson* (8); *Schweppes Ltd. v. E. Rowlands Proprietary Ltd.* (9); *Proctor v. Bayley* (10); *Schweppes Ltd. v. Gibbens* (11); *Hennessy & Co. v. Keating* (12); *Payton & Co. Ltd. v. Snelling, Lampard & Co. Ltd.* (13); *Warwick Tyre Co. Ltd. v. New Motor and General Rubber Co. Ltd.* (14); *In re Guttapercha and India Rubber Co. of Toronto's Applications* (15); *Weingarten Bros.*

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(1) 30 R.P.C., 609.

(2) 26 R.P.C., 693.

(3) 23 R.P.C., 761; 24 R.P.C., 572.

(4) 8 C.L.R., 212.

(5) 9 C.L.R., 474.

(6) 13 L.T. (N.S.), 498.

(7) (1910) 1 Ch., 257.

(8) 3 App. Cas., 376.

(9) 11 C.L.R., 347.

(10) 42 Ch. D., 390, at p. 400.

(11) 22 R.P.C., 113; 601.

(12) 25 R.P.C., 125.

(13) 17 R.P.C., 48; 628.

(14) (1910) 1 Ch., 248, at p. 254.

(15) (1909) 2 Ch., 10, at p. 15.

H. C. OF A. v. *Charles Bayer & Co.* (1); *Edelsten v. Edelsten* (2); *Sebastian*
 1914. *on Trade Marks*, 5th ed., p. 272; *Kerly on Trade Marks*, 3rd ed.,
 REMINGTON p. 453.

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Cur. adv. vult.

The judgment of the COURT was delivered by
 GRIFFITH C.J. There is no question of law in this case, but
 the questions for decision are mere questions of fact, as to which
 the functions of the Court are analogous to those of a jury.
 Having considered the evidence, the Court is of opinion that the
 respondents are entitled to retain the injunction, but that they
 are not entitled to the damages awarded to them.

*Appeal dismissed. Judgment appealed
 from varied by omitting award of
 damages. Appellants to pay costs of
 appeal.*

Solicitors, for the appellants, *Woolcott & Drysdale*.
 Solicitors, for the respondents, *Hodgson & Finlayson*.

B. L.

(1) 22 R.P.C., 341, at p. 350.

(2) 11 W.R., 328.