[HIGH COURT OF AUSTRALIA.]

USTRALIAN WOOLLEN MILLS LIMITED . APPELLAN

PLAINTIFF,

AND

F. S. WALTON AND COMPANY LIMITED . RESPONDENT.

DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1937.
SYDNEY
April 28
May 3
Sept. 2

Dixon, Ev
and McTie
JJ.

Trade Mark—Infringement—Use of mark resembling registered trade mark—Probability of deception—Passing off.

The plaintiff, a woollen manufacturer, for many years advertized its woollens and serges under the title "Crusader." Its trade mark, registered in 1927, consisted of a knight or squire in armour but without his casque, seated on a caparisoned horse. The casque was shown at the saddle behind the rider, whose shield was suspended from the pommel, and who wore a sword. The rider was depicted as blowing a very long trumpet held in his right hand, and from the trumpet was suspended a rather large banner inscribed "Service." The horse

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was surmounted, broadside on, on a rectangular base upon which appeared in large "old English" letters the word "Crusader." The defendant, which for many years had been the distributor of cotton goods under the name "Cesarine," in 1934 began the manufacture and sale of serge. In 1935 it registered a trade mark in respect of cotton goods, which consisted of a mounted Roman soldier in a cloak with laurel on his brow and holding in his right hand a truncheon. The horse was surmounted, not broadside on, on a rectangular base on which appeared in large roman letters the words "Caesar." This mark, with the addition of the word "serges" in small type on the base, appeared in a newspaper advertisement. In a suit for infringement of trade mark and passing off evidence for the defendant was to the effect that its trade mark had been adapted from a picture of "Caesar in Gaul" in a French book owned by the young son of the defendant's manager. Prior to its adoption similarities between its design and the plaintiff's trade mark had been brought under the notice of the defendant.

Held, by *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), (1) that the probability of deception had not been established, and, therefore, that the claim for infringement failed, and (2) that on the evidence the claim for passing off failed.

Observations upon the mode of determining objective resemblances between marks and the bearing of intent thereon.

Decision of the Supreme Court of New South Wales (*Maughan* A.J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court of New South Wales in its equitable jurisdiction by Australian Woollen Mills Ltd. for an injunction against the defendant, F. S. Walton & Co. Ltd. The plaintiff in its statement of claim set up that since its incorporation in 1908 it had been engaged in the manufacture and sale of worsteds, serges and other like materials. The business, which was an extensive one with an estimated annual output since 1927 of not less than £2,000,000, extended throughout the Commonwealth.

The plaintiff is the registered proprietor under the *Trade Marks Act* 1905-1934, of two trade marks, No. 46342, registered 13th January 1927, and No. 48348, registered 7th September 1927, both in class 34 in respect of cloths and stuffs of wool, worsted or hair.

The latter trade mark was described in the statement of claim as "a distinctive device consisting of the figure of a knight or crusader or warrior on horseback surmounted on a rectangular base carrying the word 'Crusader.'" This trade mark has been used on almost all of the plaintiff's products since 1927. The word "Crusader" and the trade mark have been used by the plaintiff to identify its serges throughout Australia, and for this purpose it has extensively used window-cards, pamphlets, leaflets, calendars, tags, advertisements in the ordinary newspaper press and also in trade journals, and various other forms of publicity.

The defendant company was incorporated in 1929, and had since its incorporation carried on the business of manufacturing and selling serges and other like materials.

Evidence given on behalf of the defendant was to the following effect:—The defendant had for many years sold cotton goods under the name of "Cesarine." It had, in 1934, begun to sell serges without any distinctive name or trade mark, and this branch of its business had not been thriving. The manager of the Melbourne branch of the defendant, Mr. G. S. Hamparsun, who was of French descent, stated that he saw in a French book entitled *France Son Histoire*, the property of his son aged three years, a full page illustration depicting Julius Caesar on horseback leading his victorious troops through Gaul. Attracted by the excellence of the picture of Cæsar and the marked resemblance in sound between the word "Caesar" and the word "Cesarine" he made a tracing of the picture of Caesar with a view of recommending it as a trade mark for the defendant's new serges. A coloured sketch made from this tracing was, he said, sent to the defendant on 9th August 1935. The book, tracing and sketch were put in evidence.

A representation of each of the plaintiff's trade marks appears on the next page.

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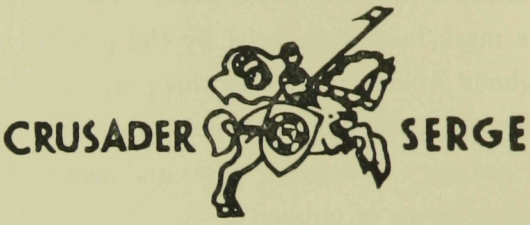
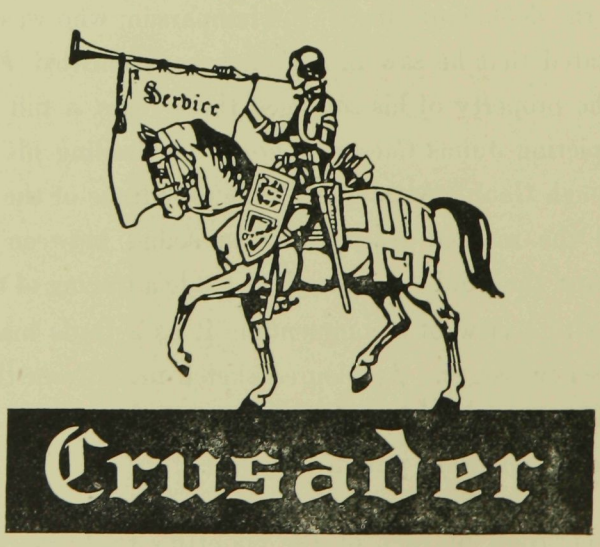
No. 46342.



No. 48348.



Representations of the sketch referred to in the evidence given on behalf of the defendant and of the registered trade mark based thereon appear hereunder :—

CAESAR SERGES

CAESAR NAVY TWILLS

This sketch became the foundation of all the defendant's advertising matter and was the infringement complained of by the plaintiff.

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The plaintiff set forth in par. 8 of the statement of claim that by reason of extensive advertising and user of this distinctive device of a knight or crusader or warrior on horseback surmounted on a rectangular base carrying the word " Crusader " in connection with almost all of the plaintiff's products such products had become favourably known to the clothing trade and public of Australia as the manufacture of the plaintiff; and, in par. 9, that by reason of the extensive use by the plaintiff of such distinctive device the same had become and was distinctive of the products of the plaintiff and persons desirous of purchasing the products of the plaintiff recognized them by reference to the said distinctive device. The actions of the defendant complained of were set forth in the statement of claim as follows :—" 11. The plaintiff has recently discovered and the fact is that the defendant caused to be published in a Sydney newspaper, namely, the 'Sun' of date the fourteenth day of January, one thousand nine hundred and thirty-six, an advertisement offering for sale its serges and has since that date continued to insert such advertisements. The said advertisements do not indicate or disclose the name of the defendant as the manufacturer or vendor of the said serges. The most distinctive part of such advertisements consisted of a knight or crusader or warrior on horseback surmounted on a rectangular base carrying the words 'Caesar Serges.' 12. The plaintiff has also recently discovered and the fact is that the defendant distributed or caused to be distributed to the trade and the public generally and is still so doing other printed advertisements of its serges in which the most distinctive part thereof consists of a knight or crusader or warrior on horseback. None of the said advertisements indicates or discloses the name of the defendant as the manufacturer or vendor of the said serges."

Based upon these two paragraphs the plaintiff made three charges against the defendant. Firstly, it charged fraud in the following terms :—" 13. The plaintiff says and charges it to be the fact that the defendant adopted such distinctive device of a knight or crusader or warrior on horseback surmounted upon a rectangular base or without such rectangular base deliberately and with the fraudulent intention of wrongfully and fraudulently and dishonestly acquiring for itself the benefit of the trade name and business reputation which

the plaintiff had built up for itself in New South Wales and other parts of Australia as aforesaid and of inducing customers and intending customers in New South Wales and other parts of Australia to believe that the said products of the defendant were those of the plaintiff and that the business of the defendant was the same business as that of the plaintiff or was a branch or an agency or in some way connected with the plaintiff's business." Secondly, it charged breach of trade mark rights in the following terms :—" 14. The plaintiff says and charges it to be the fact that the use by the defendant in its said advertising of its serges as aforesaid of the device of a knight or crusader or warrior on horseback surmounted upon a rectangular base or without such rectangular base is an infringement of the plaintiff's said trade marks and each of them." Thirdly, it charged passing off by the defendant in the following terms :—" 15. The plaintiff also says and charges it to be the fact that the use by the defendant of the said device as aforesaid is likely to deceive the trade and public generally and to cause and is fraudulently intended by the defendant to cause and has in fact caused and will continue to cause the goods of the defendant to be confused with and be mistaken for the goods of the plaintiff and the said business of the defendant to be confused with and mistaken for the business of the plaintiff and to be considered the same business as that of the plaintiff or a branch or agency of or in some way connected with the plaintiff's business." These three charges were put in issue by the defendant.

A witness, who, prior to entering the employ of the defendant on 26th August 1935, had been an employee of the plaintiff, and had since left the employ of the defendant, stated that immediately prior to his entering the employ of the defendant he had discussed with two of its directors the reasons for the success of the plaintiff in the sale of its serges and had given them a great deal of information on this point. He and another witness stated that they had from time to time pointed out to the directors resemblances between the plaintiff's trade mark and the " Caesar " sketch, and that the directors had minimized the resemblances and, in turn, had pointed out features of dissimilarity. These conversations were denied by the directors. Advertisements incorporating a design of " Caesar " as

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in the sketch appeared on 14th January 1936 and 5th February 1936 in newspapers circulating throughout New South Wales. Whilst not impugning the honesty of witnesses called on behalf of the defendant the trial judge did not, for various reasons, accept in full the evidence tendered by them on certain material aspects. He also expressed the view that the two directors had not been candid with the court and that their demeanour was most unsatisfactory. His Honour held that upon the evidence the charges had not been sustained and dismissed the suit.

From that decision the plaintiff appealed to the High Court.

Further facts appear in the judgments hereunder.

Bonney K.C. (with him *Spender* K.C. and *Sturt*), for the appellant. The trial judge did not give sufficient weight to the evidence to the effect that the emblem of " the man on the horse " was an important feature in the appellant's trade mark and trade usage. That feature, which, being in pictorial form, makes a greater and more lasting impression upon some persons, is as important as the word " Crusader." Although it is not disputed that the picture of " Caesar " in the book formed the basis for the tracing and sketch, it is suggested that the tracing was prepared for the purposes of this suit and that the sketch was forwarded to Sydney, if at all, much later than as deposed to by the respondent's witnesses. The trial judge placed too great a reliance upon *Henry Clay & Bock & Co. Ltd.* v. *Eddy* (1),and erroneously concluded that the word " Crusader " was the outstanding feature of the appellant's trade mark. The respondent's design and the appellant's trade mark show marked similarity in all essential features. This, having regard also to other evidence, indicates an intention to deceive on the part of the respondent, and the evidence shows that some people were actually deceived. Where there is a possibility of confusion calculated to cause damage the court will grant a decree (*John Brinsmead & Sons Ltd.* v. *Brinsmead* (2) ; *Harrods Ltd.* v. *R. Harrod Ltd.* (3) ; *Newman* v. *Pinto* (4) ; *R. Johnston & Co.* v. *Orr Ewing & Co.* (5) ; *The Clock Ltd.* v. *The Clock House Hotel Ltd.* (6)). Here there is evidence of actual confusion.

(1) (1915) 19 C.L.R. 641.
(2) (1913) 30 R.P.C. 493, at p. 506.
(3) (1923) 41 R.P.C. 74, at p. 81.
(4) (1887) 4 R.P.C. 508, at p. 520.
(5 (1882) 7 App. Cas. 219, at pp. 229 et seq.
(6) (1935) 52 R.P.C. 386, at pp. 392 et seq.

Weston K.C. (with him *May*), for the respondent. The real issue is whether there is a likelihood that an ordinary person intending to buy the serge of the appellant will buy the serge of the respondent. The mark was adopted innocently by the respondent. It has not been shown that the respondent, by its directors, knew or believed that its mark infringed the appellant's mark; therefore the court cannot find guilty or fraudulent origin. The sequence of events relating to the tracing and sketch is established by the evidence; therefore the trial judge's finding of innocence of origin is warranted. The finding that "Caesar on a horse" was adopted by the respondent as a trade mark within a few days of the receipt of the sketch is supported by the evidence. It was proved affirmatively that "Caesar" as a word was of innocent origin *qua* the issues of this case. The court is not so much concerned with the careless or incautious person as it is to ensure that fair and honest trading should not unnecessarily be interfered with (*Henry Thorne & Co. Ltd.* v. *Eugen Sandow and Sandow Ltd.* (1)). The question whether the person to be regarded should be the "ordinary person" or the "anxious person," was discussed in *Leather Cloth Co. Ltd.* v. *American Leather Cloth Co. Ltd.* (2); *Payton & Co. Ltd.* v. *Snelling, Lampard & Co. Ltd.* (3); *Henry Thorne & Co. Ltd.* v. *Eugen Sandow and Sandow Ltd.* (4); *Henry Clay & Bock & Co. Ltd.* v. *Eddy* (5). The word "Caesar" is dissimilar from, and cannot be confused with, the word "Crusader." The efforts of the appellant were directed to the definite association of a crusader and a horse so that the mark would be regarded as a whole as a crusader on a horse. In addition to the dissimilarity between the two words, the dissimilarity between the two marks is such as to render unlikely any possibility of deception or confusion (*Schweppes Ltd.* v. *E. Rowlands Pty. Ltd.* (6); see also *Orange Crush (Australia) Ltd.* v. *Gartrell* (7)). This court should disregard the evidence of those witnesses called by the appellant whose evidence as to confusion was not, for various good reasons, accepted by the trial judge. Even if that evidence were accepted at its face value, or subject to

(1) (1912) 29 R.P.C. 440, at p. 453.
(2) (1865) 11 H.L.C. 523; 11 E.R. 1435.
(3) (1899) 17 R.P.C. 48, 628.
(4) (1912) 29 R.P.C. 440.
(5) (1915) 19 C.L.R. 641.
(6) (1910) 11 C.L.R. 347.
(7) (1928) 41 C.L.R. 282.

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modification, it was evidence which solely related to the question of what the position was of a person who looked at the appellant's horse simpliciter.

Bonney K.C., in reply. The probative value of a defendant's intention is dealt with in *Kerly* on *Trade Marks*, 6th ed. (1927), p. 606. As regards intention there is an important distinction between infringement of trade mark and passing off. Fraud is not a necessary ingredient in the cause of action for an injunction either against infringement of a registered trade mark or against passing off. But fraud, or intent to appropriate part of the benefit of the marks or advertizing emblems of another, or to cause confusion in the minds of the public to the advantage of the defendant, is important to establish probability of deception, and it is so strong that it will prevail unless the offending mark is clearly not likely to deceive. The effect of an intention to mislead is shown in *Lloyd's* v. *Lloyd's (Southhampton) Ltd.* (1); *Claudius Ash, Sons & Co. Ltd.* v. *Invicta Manufacturing Co. Ltd.* (2); *Turner* v. *General Motors (Australia) Pty. Ltd.* (3); *Boord & Son* v. *Huddart* (4); *Harrods Ltd.* v. *R. Harrod Ltd.* (5); *F. Reddaway & Co. Ltd.* v. *Hartley* (6). If an otherwise innocent party persists in using a mark after it has been brought under his notice that it is likely to mislead, the continued use of such mark ceases to be innocent and becomes fraudulent (*Singer Manufacturing Co.* v. *Loog* (7); *Sir Henry Cochrane* v. *MacNish & Son* (8); *Orr Ewing & Co.* v. *Johnston & Co.* (9); *Wotherspoon* v. *Currie* (10); *Mitchell* v. *Henry* (11); *Harrods Ltd.* v. *R. Harrod Ltd.* (12); *Bryant & May Ltd.* v. *United Match Industries Ltd.* (13); *Crystalate Gramophone Record Manufacturing Co. Ltd.* v. *British Crystalite Co. Ltd.* (14)). In considering probability of deception the persons to be regarded are (*a*) the incautious or unwary person (*Leather Cloth Co. Ltd.* v. *American Leather Cloth Co. Ltd.* (15); *Seixo* v.

(1) (1912) 29 R.P.C. 433.
(2) (1912) 29 R.P.C. 465.
(3) (1929) 42 C.L.R. 352.
(4) (1903) 21 R.P.C. 149, at pp. 158, 159.
(5) (1923) 41 R.P.C., at pp. 84, 85.
(6) (1931) 48 R.P.C. 283, at pp. 299, 300.
(7) (1882) 8 App. Cas. 15, at p. 31.
(8) (1896) 13 R.P.C. 100, at p. 107.
(9) (1881) 13 Ch. D. 434, at p. 454.
(10) (1872) L.R. 5 H.L. 508.
(11) (1880) 15 Ch. D. 181, at pp. 190, 191.
(12) (1923) 41 R.P.C., at p. 85.
(13) (1932) 50 R.P.C. 12, at p. 21.
(14) (1934) 51 R.P.C. 315, at p. 321.
(15) (1865) 11 H.L.C., at pp. 535, 539; 11 E.R., at pp. 1441-1443.

Provezende (1); *Wotherspoon* v. *Currie* (2); *R. Johnston & Co.* v. *Orr Ewing & Co.* (3); *Lever* v. *Goodwin* (4); *Somerville* v. *Schembri* (5); *Singer Manufacturing Co.* v. *Loog* (6); *Upper Assam Tea Co.* v. *Herbert & Co.* (7); *Eno* v. *Dunn & Co.* (8); *Singer Machine Manufacturers* v. *Wilson* (9); see also *Sebastian* on *Trade Marks*, 5th ed. (1911), p. 146), and (*b*) the person who has only an ordinary memory and power of observation, and has merely a general impression of the plaintiff's mark. If a mark has come to be referred to, or has caused the goods to be referred to, by words describing the mark, e.g., "the man on horseback," a rival trader will be restrained from using a mark answering to the same description (See *Imperial Tobacco Co. (of Great Britain and Ireland) Ltd.* v. *Purnell & Co.* (10); *Re Angus Watson & Co. Ltd.* (11)). A rival trader, however innocent, will be restrained from using a trade mark which would enable unscrupulous retailers to pass off the defendant's goods as the plaintiff's goods (*R. Johnston & Co.* v. *Orr Ewing & Co.* (12); *Middlemas and Wood (Walters & Co.)* v. *Moliver & Co. Ltd.* (13); *Wotherspoon* v. *Currie* (14); *F. Reddaway & Co. Ltd.* v. *Hartley* (15)). An advertisement may amount to an infringement of a trade mark (*Forth and Clyde and Sunnyside Iron Cos. Ltd.* v. *William Sugg & Co. Ltd.* (16); *J. B. Stone & Co. Ltd.* v. *Steelace Manufacturing Co. Ltd.* (17)). The evidence establishes that the respondent's mark was not of innocent origin; was prepared and adopted with an intention to deceive; and did in fact deceive. The appellant should succeed because (*a*) the respondent deliberately tried to get near the appellant's mark to aid it in competition and persisted in that course after a warning; (*b*) the respondent's mark in fact so closely resembled the appellant's mark as to cause a probability of its being mistaken for the appellant's mark; (*c*) the respondent's mark in fact so closely resembled the appellant's mark as to enable the

(1) (1865) 1 Ch. App. 192, at p. 196.
(2) (1872) L.R. 5 H.L., at pp. 517, 519.
(3) (1882) 7 App. Cas., at p. 229.
(4) (1887) 4 R.P.C. 492, at pp. 500, 502, 507.
(5) (1887) 4 R.P.C. 179, at p. 182.
(6) (1882) 8 App. Cas., at p. 18.
(7) (1889) 7 R.P.C. 183, at p. 186.
(8) (1893) 10 R.P.C. 261, at p. 262.
(9) (1877) 3 App. Cas. 376, at p. 394.
(10) (1904) 21 R.P.C. 598.
(11) (1911) 28 R.P.C. 313.
(12) (1882) 7 App. Cas., at p. 232.
(13) (1921) 38 R.P.C. 97, at p. 102.
(14) (1872) L.R. 5 H.L., at p. 517.
(15) (1931) 48 R.P.C., at p. 300.
(16) (1928) 45 R.P.C. 382.
(17) (1929) 46 R.P.C. 406.

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respondent's goods to be easily passed off as the appellant's goods; (*d*) the appellant's mark and goods are substantially referred to by the description "a man on a horse" and like descriptions, and the respondent has designed a mark which agrees with that description and causes a likelihood of confusion and deception; (*e*) the respondent's advertisement has in fact been taken to refer to the appellant's goods; (*f*) the word "Caesar" only leads the people to regard the goods as a different grade of the appellant's goods.

Weston K.C. replied on the cases.

Cur. adv. vult.

Sept. 2.

The following written judgments were delivered:—

DIXON AND MCTIERNAN JJ. This is an appeal from a decree dismissing a suit for infringement of trade mark and passing off. The appellant is a woollen manufacturer in Australia and has a large output of serges. For some time it has widely advertised its serges and worsteds under the title "Crusader." Its trade mark consists in a knight or squire in armour but without his casque. He is seated on a white horse. The horse is caparisoned and the casque is at the saddle, but behind the rider. His shield is suspended from the pommel and he wears his sword. The horse is ambling across the picture and his near side is shown. The rider is blowing a very long trumpet held in his right hand from which is suspended a rather large banner inscribed "Service." Although the trade mark forms a part of most of the appellant's advertisements and is never inconspicuous, the word "Crusader" receives much greater prominence. There can be little doubt that the purpose is to create a reputation for the appellant's serges and suitings under the name "Crusader." It appears that great success has attended the efforts of the appellant by its advertisements to go, so to speak, over the heads of the retailers and to reach the public. It has, it seems, established Crusader serges as in effect a proprietary article. There is some evidence that from time to time the serge has been described by reference to "a man on a horse" but we agree in the opinion expressed in the judgment under appeal that it was not established

and is unlikely " that the ordinary man in the street used to ask for the ' man on the horse ' serge."

The respondent, which is the defendant to the suit, is a company that dealt in cotton piece goods. It procured its fabrics from English manufacturers and sold them under the name " Cesarine." It, too, had obtained for the goods sold under this title the reputation of a proprietary article, and the word " Cesarine " appears to be widely known among the public as the name of cotton fabrics. The chief members of the respondent company with others have lately formed a partnership for the purpose of woollen manufacturing in Australia, and in the middle of 1934 this firm began to produce serges, the distribution of which was undertaken by the company. Various attempts were made to establish the serge but at the end of a year the respondent appears to have thought that some more definite plan should be adopted. The manager of its Melbourne branch dealt with the matter in a letter to the Sydney office dated 9th August 1935. After referring to the prospect of over-production among Australian woollen mills and the competition likely to ensue, he said : " I quite agree with you therefore that our only salvation lies in establishing ourselves firmly by means of one proprietary line after the Fox Serge idea, and the sooner we do it the better." His letter goes on to relate his discussions with wholesale houses and to suggest that his company should " run " two grades of twill at prices stated. It then proceeds : " The name I have thought most appropriate (a name and goodwill which will remain in the sphere of your organization) is ' Caesar Serges ' or twills as illustrated herewith. Our friends like it immensely, as it is easy to remember, inspires might and prestige as well as being closely associated with ' Cesarine.' " What was enclosed is a matter the appellant disputes. But we feel no doubt, after an examination of the documentary and oral evidence, that it was a picture of a mounted Roman in a cloak holding a truncheon and with laurel on his brow. The writer, who appears to have French antecedents or connections, took this figure from a picture in a finely illustrated French book intended for young people and entitled *France Son Histoire*. This book was in his household. The picture represented Caesar in the van of a legion. The letter evoked an invitation to

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Sydney upon which the writer acted. He was there on 16th August 1935 and remained about six days. During his visit the company adopted his figure and title as a trade mark. On 21st August 1935 an application was lodged for registration of a mark consisting substantially of what the French picture book had supplied. It consists in the horse and rider as we have described them with the word " Caesar " underneath inscribed in Roman capitals on a block like the pedestal of a statue. The registration was not sought in respect of woollen goods but in respect of cotton piece goods, a circumstance which suggests the existence of a fear or belief on the part of the respondent that the mark was too close to that of the appellant for registration in respect of woollen goods.

The appellant's complaint is based upon the subsequent use of the representation of Cæsar and of his name made in many forms of advertisements when the respondent opened its campaign.

In deciding that there was no infringement and no passing off, the learned primary judge was guided by his opinion that no such resemblance existed between the two words or the two figures or marks, or between the word and figure together of the one and the word and figure of the other, as to lead to any probability of deception or confusion, and that no such probability arose whether the test applied was visual or verbal.

Upon the hearing of the appeal, the appellant attacked the correctness of this estimate or judgment of what may be called the objective considerations governing the decision. But it also maintained that deception was shown by the evidence to be the very purpose or motive of the respondent in choosing as a mark for its serges the title " Caesar " and the representation of the mounted Roman. In our opinion, the evidence, so far from establishing this allegation, rather shows the contrary. The manager of the Melbourne branch put forward the picture of Caesar and the proposal to adopt the name at the time and in the manner we have described. We do not think that he selected it because either the name or figure appeared to him to resemble those of the appellant's mark. He was concerned primarily with the association of the name Caesar with Cesarine. There was a natural desire to obtain whatever benefit could be derived from the very widespread reputation of Cesarine

as a word familiar to the public. In the subsequent advertisements the respondent made a feature of the connection. No merit can be claimed for it on this ground. For it untruly stated in the advertisements that Caesar serges were the product of the maker of Cesarine fabrics, although the latter were obtained by it from English manufacturers. But the intention to avail itself of the existing reputation of Cesarine not only explains the choice of the word Caesar but also rather suggests the absence of a desire to create a confusion between Crusader and Caesar serges.

Before the Melbourne manager's visit to Sydney, his directors had formed a favourable judgment of his proposal, and, as a result of the discussions after his arrival, the plan he had put forward in his letter was elaborated and adopted. But, on the day before his arrival, a new commercial traveller had been engaged. He is no longer in the respondent's employment and at the hearing of the suit gave evidence for the appellant. According to him, on the afternoon when he was engaged, one of the directors asked him who were their greatest opponents. On his answering that the appellant was, he was then asked how it had built up its business. He replied, by the quality of its materials and by extensive advertising, and then, in response to further questions, described the appellant's methods of advertising. He said that it had displays in shop windows not only of its goods but of the process of woollen production and manufacture, and it also made a widespread distribution of all kinds of literature and advertisements. He then promised to obtain price lists and samples of the appellant's goods, which he did by the next morning. He was called into the discussion or consultation between the directors and the Melbourne manager who had then arrived. He repeated his exposition of the appellant's business methods. There was, of course, nothing new or original in the methods, but they fitted in with the proposal under discussion and met with expressions of commendation from those present. Some two or three weeks later, one of the directors showed the traveller a sketch of the trade mark. It brought from the latter, he says, a comment that it was very similar to the Crusader mark and this comment was reiterated by another employee. The director merely made a vague reply that it was all right and he would look after that. Similar expressions of opinion about the

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resemblance of the figure to the Crusader mark were deposed to by two other witnesses. They had been commissioned to prepare blocks or the like, representations of Caesar, and remarked to the director concerned that it seemed too close to the Crusader and, in effect, that it would not pass muster. They received the answer that the horse was in a different position. The horse in fact is advancing towards the reader, although it does not quite face him.

In our opinion the correct conclusion from the circumstances proved is that neither the original selection in Melbourne nor the adoption in Sydney of the representation and name of Caesar was prompted by a desire or purpose of imitating the appellant's mark. We think that in the original selection no thought was given to the Crusader mark. By the time when in Sydney it was finally decided upon, the discussions with the new traveller had directed the attention of those managing the respondent's business to the manner in which the appellant conducted its business. We do not doubt, notwithstanding their denials of or refusals to admit the fact as witnesses, that those concerned had seen the appellant's mark and knew its serge was sold under the name "Crusader." But it must be remembered that the appellant is only one among many manufacturers of suitings, that the respondent was comparatively fresh to the trade and probably did not, at any rate before the new traveller said it, regard the appellant as in any more direct competition with it than other manufacturers. The new traveller may well have supposed that he was the source of inspiration in what the respondent set about doing. But we think his contribution has been over-estimated. Before his advent the not very unusual or original plan of advertising the goods had been put forward and practically determined upon. The respondent as a result walked more perhaps in the appellant's footsteps than otherwise it might, but the path was known and would have been followed in any case. The mark was not, we think, a feature adopted in conscious imitation of that of the appellant's mark. The intrinsic suitability of the representation and name of Caesar and the desire to profit by the established reputation of Cesarine was the motive for its choice which had, we think, been approved tentatively or provisionally before 15th August 1935,

when the traveller was engaged. We believe that in fact the respondent did not really perceive any resemblance between the word and the mark it was adopting and those of the appellant. But, at the same time, when the three witnesses we have mentioned stated their view that the mark was too close, we do not imagine that the question of propriety so raised caused the respondent any embarrassment and we suspect that the application for the trade mark was limited to cotton fabrics because the patent attorney raised a like question.

But the examination made of the respondent's motives and good faith seems to us to leave the question of infringement and passing off very much in the same position as it stood in without it. The rule that if a mark or get-up for goods is adopted for the purpose of appropriating part of the trade or reputation of a rival, it should be presumed to be fitted for the purpose and therefore likely to deceive or confuse, no doubt, is as just in principle as it is wholesome in tendency. In a question how possible or prospective buyers will be impressed by a given picture, word or appearance, the instinct and judgment of traders is not to be lightly rejected, and when a dishonest trader fashions an implement or weapon for the purpose of misleading potential customers he at least provides a reliable and expert opinion on the question whether what he has done is in fact likely to deceive. Moreover, he can blame no one but himself, even if the conclusion be mistaken that his trade mark or the get-up of his goods will confuse and mislead the public. But the practical application of the principle may sometimes be attended with difficulty. In the present case it has caused a prolonged and expensive inquiry into the states of mind, motives and intentions of three people whose combined judgment decided that the company should adopt the trade brand and description complained of. This in turn necessitated an investigation of the steps by which the picture was obtained, considered and adopted and what was said and done by a number of persons in relation to the subject. From all this material, it appears to us that no more emerges than that though the name and mark Caesar were not sought or taken with any fraudulent intent, yet three or four people conversant with the matter saw in them too great a resemblance to those of the appellant, that their views were disregarded by the respondent, who may have thought they were erroneous, or may

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have thought that such a resemblance, if it existed, only added to the suitability of the mark. Incidentally the issue of intention provided an occasion for the disclosure in the witness box of much want of candour on the respondent's side. But, in the end, it becomes a question of fact for the court to decide whether in fact there is such a reasonable probability of deception or confusion that the use of the new mark and title should be restrained.

In deciding this question, the marks ought not, of course, to be compared side by side. An attempt should be made to estimate the effect or impression produced on the mind of potential customers by the mark or device for which the protection of an injunction is sought. The impression or recollection which is carried away and retained is necessarily the basis of any mistaken belief that the challenged mark or device is the same. The effect of spoken description must be considered. If a mark is in fact or from its nature likely to be the source of some name or verbal description by which buyers will express their desire to have the goods, then similarities both of sound and of meaning may play an important part. The usual manner in which ordinary people behave must be the test of what confusion or deception may be expected. Potential buyers of goods are not to be credited with any high perception or habitual caution. On the other hand, exceptional carelessness or stupidity may be disregarded. The course of business and the way in which the particular class of goods are sold gives, it may be said, the setting, and the habits and observation of men considered in the mass affords the standard. Evidence of actual cases of deception, if forthcoming, is of great weight. In the present case a few people said that they mistook a newspaper advertisement of the respondent for an advertisement of the appellant. But their evidence amounted, we think, to very little. In the Supreme Court it was fully discussed and was disregarded on grounds some of which were attacked in this court. Whatever may be said about the reasons given by the learned primary judge, we think that he was right in refusing to act on an account of the mental processes set up by perusing a newspaper advertisement, an account given by witnesses long after the occurrence of what must have been a casual and unimportant mental experience.

The main issue in the present case is a question never susceptible of much discussion. It depends on a combination of visual impression and judicial estimation of the effect likely to be produced in the course of the ordinary conduct of affairs. For ourselves we find it very hard to suppose that anyone would confuse Caesar as a name or the representation of Caesar with the title Crusader or with the brand of the appellant. The impression created by each of the respective pictures or representations strikes our minds as widely dissimilar. The various reproductions of the Crusader would, we think, leave on the mind of anyone, whether his familiarity with them grew to be great or remained slight, an impression in which the banner and trumpet and the mounted knight holding them were the most definite elements. In many representations the caparison of the horse is also prominent.

The picture of Caesar in his cloak holding a truncheon on his hip, with his war horse advancing, would not, we think, be at all likely to revive latent impressions of the appellant's Crusader. It is true that both pictures are of mounted men and that neither represents a horseman in present day costume. Both perhaps are warlike. But here the points of similarity end, and, indeed, we think that when they are described in words the resemblance between the pictures sounds greater than that actually presented.

As to the word " Crusader," we do not think that there is any likelihood of " Caesar " being confused with it. It may be conceded that complete ignorance of what a Crusader was or who Caesar was may be imputed to the potential buyer. A timely reminder of the state of knowledge on matters of antiquity is given by a letter passing between the Melbourne and Sydney offices of the respondent, dated 27th August 1935, in which the former suggests for the improvement of the trade mark representing Caesar the giving " a faint suggestion in the distance of the Accropolis [*sic*] or other well-known Roman buildings." But neither in sound or popular association does the word " Caesar " appear to us at all to resemble Crusader. We agree in the observations made in the judgment under appeal as to the unlikelihood of confusion.

In our opinion the decision of the Supreme Court is right and the appeal should be dismissed.

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EVATT J. This is an appeal from a judgment of *Maughan* A.J., who dismissed the suit wherein the plaintiff claimed that the defendant company (*a*) had infringed the two registered "Crusader" trade names of the plaintiff, and (*b*) had with the fraudulent intention of acquiring the benefit of the plaintiff's business name and reputation used its "Caesar" trade device for the purpose of deceiving the public.

The two marks of the plaintiff are registered in class 34 in respect of woollen cloths and stuff. One of them, No. 48348, represents a warrior, knight or herald holding a trumpet to his mouth and riding on a horse which is moving towards the left, the word "Service" being inscribed in small lettering upon a banner attached to the trumpet and the whole design resting upon a foundation pedestal on which the word "Crusader" appears. The associated mark, No. 46342, shows a warrior with lance or banner and in this case the horse is being ridden towards the right, and the words "Crusader" and "serge" appear on the two sides of the warrior. As used on and in connection with the plaintiff's serge materials, the two marks are subject to a number of trade variations. Thus the word "Service" is frequently not visible on the trumpet's banner and the word "Crusader" is sometimes omitted altogether.

Maughan A.J. held that the chief characteristic of the plaintiff's mark was the word "Crusader" and that in most of the plaintiff's publicity material the word "Crusader" was given more prominence than the figure. "I think," he said, "that the directors and officers of the plaintiff company wished to make the word 'Crusader' practically a household word throughout Australia amongst those persons interested in the make of the serge they were wearing or buying, and I have no doubt they succeeded." Later in his judgment the learned judge returned to this same point and said: "To me the leading characteristic of the plaintiff company's design is the word 'Crusader' and of the defendant's design is the word 'Caesar.'"

In my view this opinion takes too little account of the very large number of varying impressions which must have been created as a result of the plaintiff's elaborate publicity. There is a type of mind which does not and apparently cannot remember a word like "Crusader," and yet retains a pictorial image of the warrior on

horseback. Equally there is a type of mind which rejects the picture either for the abstract idea or for the name to which the picture is attached. Trade mark legislation and interpretation cannot single out one type of mind as the standard public mind so as to exclude all others. The serge material was of the cheaper variety, and it was important to consider the class of purchasers to whom such material might appeal.

I think, with respect, that *Maughan* A.J. does not do this sufficiently, and his treatment of the evidence of the three witnesses, Nathan, Dwyer and Tremain thus becomes of first rate importance. Of the first, it is said that some of his answers " reflect so seriously on his intelligence that his evidence was worthless." Dwyer is " rather a stupid witness," presumably because, at the end of some discussion in court as to the differences between the " Caesar on horseback " and the " Crusader on horseback," he repeated that " they both look alike to me in the advertisement here." Tremain, although " quite an honest person," was " unobservant," and, like the other two, he belonged to the class of " men of poor education " who were " dull specimens of their class."

In my opinion, the judgment under appeal is over emphatic in its rejection of the view that, in determining the probability of confusion or deception, the court is " to pay attention to the actions of a careless or incautious or foolish purchaser." The result was the annihilation of the evidence of honest witnesses merely because of the diagnosis that the witness was " of poor education," " unintelligent," " stupid," " dull " or " unobservant." Further, the reason for the use of these extremely critical epithets also appears fairly plainly, for the learned judge seems to attribute dullness and stupidity to witnesses mainly because they were impressed by the pictorial representations of the two marks, the judge himself having taken a very different view as to the dominating element in the two marks.

I have carefully studied the evidence of Tremain, and I must say that I see nothing whatever to suggest that the impressions which he had received were not accurately and faithfully described by him. Tremain narrated the manner in which the customers

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demanded " Crusader " serge by reference to such words as " a man on a horse." He said :—

" Q. Apart from referring to the man on the horse what other way do they ask for it ?

A. They speak of it in funny ways, they would say ' horse back rider.' I have been asked for the ' man on the horse ' or the ' king on the horse ' or ' prince on the horse,' or the ' herald on the horse.' I have had them ask in all sorts of ways.

Q. Does that take place only occasionally or frequently ?

A. I should say it averages at a conservative estimate I suppose 20 per cent of our customers.

Q. They would ask for it in one or other of that type of way ?

A. Yes."

Now, Tremain was found to be an honest witness. The evidence I have quoted is either invented or true. No question of " lack of education " or being " unintelligent " can be allowed to confuse this important matter. If the evidence was honestly given, it clearly establishes what I should otherwise think is obvious, that a substantial percentage at least of the interested public would remember the plaintiff's mark merely as having conveyed an impression of a " warrior on horseback." Further, the evidence of the very important witness Taylor (of whom the judge says " I have no doubt that he was an honest witness ") also referred to the plaintiff's mark as that of " the man on horseback," and he so described it to the two Waltons and Hamparsun, when, on August 16th 1933, they were extracting from him valuable information as to the plaintiff's publicity methods.

Nor does the matter rest here. The defendant's trade device of Julius Caesar riding a horse and words " Caesar Serge " certainly resemble the plaintiff's marks for the purpose of forming a conclusion whether a feature of either is the rider. How did the defendant's officers themselves describe their device when in August and September, 1935, they were on the point of launching their serge on the market ? On August 31st 1935, the head office at Sydney, controlled by the two Waltons, refer to the device as including " Caesar on horseback," and the answering letter of September 5th 1935, uses the same words to describe the new design. In evidence, albeit unconsciously, Hamparsun referred to the plaintiff's mark as " a knight on a horse."

In my opinion, the evidence, including that of Tremain, establishes that the plaintiff's mark came to be referred to by many readers of the plaintiff's advertisement as "man on horseback," "warrior on horseback," "prince on horseback," &c. I cannot understand why this conclusion should be rejected. Fortunately, the reasons for the rejection are set out :—

> "The word 'Crusader' is not a very difficult word to remember, even for an illiterate person. The average person amongst the poorer classes who buys serge suits probably does not know the date of the crusades or what they were about or what country they were fought in, but he would know at least that there had been such persons as 'Crusaders' in ancient times and that they were fighting men, and in my opinion he would not ordinarily forget the word 'Crusader'."

With all respect, this general *a priori* reasoning is destroyed by the finding that Tremain was an honest witness, as well as by other evidence. As a matter of probability, I should hold that many members of the public reading the plaintiff's advertising material would fail to remember the word "Crusader" at all, and yet be sufficiently attracted and impressed by the qualities attributed to the serge depicted by the "warrior on horseback." If so, they would have to describe the wanted material by reference to the impression conveyed by the picture. The fact that in the very shops where the serge was to be obtained the picture of the "crusader on horseback" was displayed in various forms could hardly fail to cause confusion or deception.

The plaintiff took notice of the first attempt of the defendant to advertise Caesar serge, which took place on January 14th 1936. The advertisement contained a pictorial representation of "Caesar on horseback." The name "Caesar" appeared sufficiently prominently to warrant the inference that many, perhaps most, people would identify the rider with Caesar. But undoubtedly there would be many who would obtain, or at all events retain, only the impression of a "warrior on horseback." If so, the probability of confusion and deception is at once established. Those upon whom the plaintiff's advertisements left the impression of a "warrior on horseback" would probably regard the advertisement of the defendant as being connected with the material of the plaintiff or the business it conducted. Apart from the first advertisement, many other advertisements of the defendant were even more calculated to cause confusion.

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The usual technique of an infringing defendant has been employed in the present case. Many advertisements are produced and placed throughout a long hearing in close juxtaposition with those of the plaintiff. By this means, the differences are continually being emphasized; but the practical side of the problem is unconsciously overlooked. By the powerful, if subtle, suggestion of contrast, a new question is insinuated, viz., does not the judge perceive the differences in the way in which the horse is being ridden? Between "Caesar" and a "Crusader"? Would not a careful judge remember the name of the material or note it down? While the eye of the judge mainly decides these disputes, there must be a continuous realization of the classes of purchasers and possible purchasers who would be affected by the advertising and also of the differences in mental make up. All this is increasingly necessary as modern advertising methods become more and more directed to obtain, not particular, but only broad and general effects.

Maughan A.J. concludes: "I am satisfied that I personally should never have mistaken it (the defendant's mark) for that of the plaintiff company." This may readily be conceded. But the learned judge adds the reason that, in his opinion, the leading characteristic of each mark is the word and not the picture. For this reason the judge's impression should not be regarded as decisive. The learned judge adds nothing to his reasons by pointing out that, as the plaintiff cannot claim the monopoly of "any man on a horse," it cannot claim the monopoly of "a man on a horse whenever the man happens to wear some garb redolent of ancient times." All that the plaintiff claims is that the defendant's mark as used is sufficiently close to the plaintiff's to be calculated to confuse and deceive the public, and that the statutory right of the plaintiff has been infringed.

This is not a case where it is necessary for the plaintiff to show that his goods are known by the secondary title of "the man on horseback" &c. The evidence as to the use of that and similar phrases shows the general character of the impression made by the plaintiff's mark on members of the public, just as, by parity of reasoning, "man on horseback" would describe the symbol of the defendant. Probability of confusion and deception occur, not because a secondary title is attributed to the plaintiff's goods, but

because an essential, and, in many cases, the only essential feature of the plaintiff's mark is reproduced in a similar essential by the defendant's mark.

On infringement of trade mark the plaintiff should succeed.

I am also of opinion that the plaintiff has established its claim in respect of passing off. As to this, the question of the credibility of the two Waltons and their Melbourne representative Hamparsun is all important. Both inferentially and directly the findings of *Maughan* A.J. destroy the credibility of all three. As to the two Waltons, they were not " candid with the court," and the learned judge found their demeanour " most unsatisfactory."

As to Hamparsun, he swore that he first saw the plaintiff's publicity material in December 1935, before which he did not know of the plaintiff's " knight on a horse " mark. On being pressed, he swore most positively that he did not know the plaintiff's symbol until December, and that the defendant's advertising of " Caesar on horseback " had been invented before he even saw the plaintiff's symbol. The unexpected production of the witness Taylor, who had been employed by the plaintiff and was engaged by the defendant on August 15th 1935, just prior to its new " Caesar serge " campaign, forced Hampursun to admit that he had seen a sample book of the plaintiff as early as July 1935.

As to Taylor, the learned judge found, not only that he was an honest witness, but that " the substance of his evidence on the crucial points was correct." This finding involves a rejection of vital portions of the evidence of Hampursun as well as the two Waltons. Taylor's evidence shows that on Friday, August 6th, 1935, he had an interview with the two Waltons and Hamparsun and produced price lists, goods and samples. On some of these materials the plaintiff's mark was prominently displayed. Taylor says :—

> " I told Mr. Hamparsun that the Australian Woollen Mills had built up their business on their values and their trade mark which they branded every three yards, the man on horseback, on the material, also their window displays of the Crusader materials in the course of manufacture, their display cards and the literature which they distributed to the tailors' shops and the retail stores. Mr. Hamparsun agreed with Mr.———
>
> Q. You cannot say that.

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A. Well, said it was an excellent idea and should be adopted by F. S. Walton & Co.".

This evidence is of crucial importance. During Taylor's cross-examination, a certain amount of confusion as to dates was introduced, but the substance of his evidence is quite unaffected. The result of accepting Taylor as a witness of truth is that both the Waltons and Hamparsun deliberately attempted to deceive the court, not only as to the time when they became aware of the plaintiff's mark, but as to the method of conducting their " Caesar serge " campaign, which followed the lines suggested by Taylor. The evidence provides convincing evidence of an intention to appropriate as much as possible of the plaintiff's business methods. Such an intention might turn out to have miscarried by a failure to appropriate an essential part of the rival's trade mark. It is more flattering to the conspirators and more in accordance with human experience to credit them, not only with piracy, but with successful piracy. In one respect, it was certainly successful. The defendant's advertisements declared that the " Caesar serge " was " by the makers of Cesarine." " Cesarine " was a material which the defendant distributed in Australia, but it was made by English manufacturers who had nothing whatever to do with the manufacture of the defendant's " Caesar " cloth. The particular representation was a further attempt to appropriate the goodwill belonging to another person.

The learned judge found that the origin of the defendant's " Caesar on horseback " mark was innocent. This finding requires some attention. It is dependent entirely upon the evidence of the discredited Hamparsun, who swore that the first design was traced from an elementary French history book belonging to his son, aged three. A book was produced, and there is no doubt that the first design was derived from it. But when and where ? Hamparsun says it was at Melbourne and prior to August 9th, when, he says, he sent a tracing to Sydney. The letter of August 9th does not corroborate this assertion. The letter stated that " our only salvation lies in establishing ourselves firmly by means of one proprietary line." Then emerges the use of the name " Caesar serges," largely because it is " closely associated with Cesarine." The letter uses

the phrase " as illustrated herewith," but that refers, most naturally, to the name only. There is no evidence that any design was decided upon before the letter was sent.

On the other hand, the design of " Caesar on horseback " came into existence before August 21st, when the defendant applied to register the trade mark of " Caesar on horseback," but only in class 24 and in respect of " cotton piece goods." What took place between August 9th and August 21st ?

On August 12th, Walton senior acknowledged Hamparsun's letter of August 9th, but made no reference whatever to the receipt of any sketch or tracing. On August 15th, Taylor was interviewed by Walton senior and, at the latter's request, produced on Friday, August 16th, among the samples of the plaintiff's advertising material, documents displaying the plaintiff's trade mark. On August 16th, Hamparsun arrived from Melbourne to spend the week-end with the Waltons, and all three officers of the defendant interrogated Taylor. The learned judge found that " the design of Caesar on horseback was received in Sydney and adopted by the defendant company as its future label before Taylor came on the scene."

This finding is inconsistent with the letter of Walton dated August 12th, which shows that no decision was come to yet as to whether an attempt to institute a new serge " popularity " line would ever be commenced. It is also inconsistent with Hamparsun's admission that the decisions to commence the campaign were made " in Sydney." Taylor swore : " I said that the Australian Woollen Mills branded their goods every three yards with a man on horseback and I advised him to do the same thing." Taylor also said that he was told by Walton " that he was going to have the man on horseback and call it Caesar."

An analysis of Taylor's evidence, and the coincidence of the decision to employ Taylor at the very time when the new serge campaign started, make it reasonably clear that the decision to use a " Caesar on horseback " was not arrived at before Taylor's advice was given on August 15th and August 16th, and that the decision was to venture as close to the plaintiff's mark as was thought prudent.

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It is quite probable that the French history book was obtained and the tracing made after August 16th, and it is an extraordinary coincidence that of all the Caesars who might have been depicted, the one said to have been chosen at random was Caesar as a warrior on horseback.

I rather think that the significance of the defendant's failure to apply for registration of its Caesar on horseback mark in respect of its serge has not been sufficiently appreciated. The defendant naturally hesitated before embarking upon a campaign involving the use of the dangerous mark. The letter of August 23rd refers to a bas relief mark of Caesar, this time " borrowed " from *L'Illustration*. On August 27th, the " Caesar on horseback " design was being somewhat modified from the form of the drawing in the French history book, the idea being *inter alia* to make the four legs of Caesar's horse more plain. But the bas relief mark has not been abandoned. On August 29th, the details of the " Caesar on horseback " were still being reconsidered. The letter suggested that the drawing should have " a faint suggestion in the distance of the Accropolis [*sic*] or other well-known Roman [*sic*] buildings "—a suggestion which reinforces the view that, in relation to trade marks, it is a mistake to require from the public generally a keen discrimination as to mediæval or ancient history.

It is found as a fact that, before the defendant used the unregistered trade mark for serge, they were warned by a number of experts that they were trespassing upon the plaintiff's mark. It is perhaps not of decisive importance to inquire into the precise origin of the defendant's " Caesar on horseback " mark. It is undoubted that it was decided to appropriate as much of the plaintiff's valuable business connection as was possible. There was always a possibility that the inevitable law suit might be successfully compromised or defended. The defendant deliberately chose to use its mark in connection with the same class of serge goods as were sold by the plaintiff. In my opinion, the risk deliberately undertaken by the defendant was so great that taking it could only be justified by the practical certainty of gain at the plaintiff's expense if the risk came off. I am satisfied that such gain has been made, and that it has

been made partly at the plaintiff's expense by reason of the confusion and deception caused by the defendant's mark. Also I greatly regret that the risk has come off, particularly as it is clearly established that the three persons concerned in taking it all attempted to bolster up the defendant's case by an impudent attempt to deceive the court.

The appeal should be allowed.

Appeal dismissed.

Solicitor for the appellant, *W. W. Robinson.*

Solicitors for the respondent, *Weaver & Allworth.*

J. B.