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EN ZONEN v. ROLFES, NEBEL & CO.

1912. December 24. 1913. January 14. GREGOROWSKI, J.

Trade mark.—Infringement.—Passing off.

To constitute an infringement of a trade mark there must be either an adoption or a colourable imitation of the trade mark or of one or more of its essential particulars or of some part of the trade mark to which the applicants have the exclusive right.

In a "passing off" action the only question to be decided is whether the defendant has so taken distinctive or characteristic features of the plaintiff's "get up" as to deceive a reasonable person accustomed to buy that class of goods, and it is immaterial whether the defendant has been fraudulent or not.

Application for a perpetual interdict restraining the respondents from (a) infringing the applicants' registered trade mark and using a certain oval label, and (b) importing, selling, offering for sale or disposing of any gin, not bottled by the applicants, in white bottles similar to the white bottles containing the applicants' White Label Gin or bearing labels similar in shape, character or arrangement to the labels containing the applicants' said gin, or in bottles having their corks covered with white capsules similar to the white capsules on bottles containing the applicants' said gin or in any bottles so closely resembling those of the applicants as to be a colourable imitation thereof. The applicants further claimed delivery up or destruction of all bottles, labels and capsules complained of in possession of the respondents. The facts appear fully from the judgment.

R. Feetham, for the applicants: The oval label and the whole appearance of the respondents' bottles are colourable imitations of our label and bottles respectively. In *Martell & Co. v. Paarl Berg Wine, Brandy and Spirit Co.* (12 S.C. 326) an interdict was granted though a prominent feature of the label was not copied. The respondents are passing off their goods as ours within the tests laid down by SOLOMON, J., in *Pasquali Cigarette Co., Ltd., v. Diacomicolas* (1905, T.S., at p. 474). See also *Lennon, Ltd., v. Sachs* (1906, T.S. 331).

S. S. Taylor, for the respondents: The test in an infringement action is the same as in a passing-off action. We are entitled to make use of anything in the applicants' label, to which they have no exclusive right by virtue of a trade mark, so long as such use is not likely to deceive the public (per SOLOMON, J., in the *Pas-*

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quali case, at p. 479). I admit the applicants need not prove actual deception, but absence of such proof goes far to negative the probability of deception (*Kerley*, Trade Marks, p. 375).

R. Feetham, in reply.

Cur. adv. vult.

Postea (January 14th, 1913).

GREGOROWSKI, J.: The applicants ask (a) for an order operating as a perpetual interdict restraining the respondents from infringing their Trade Mark No. 3521 of 1911, and from using certain oval label referred to in the petition; and (b) for an order operating as a perpetual interdict restraining the respondents from importing, selling, offering for sale or disposing of any gin, not bottled by the applicants, in white bottles similar to the white bottles containing the applicants' White Label Gin or bearing labels similar in shape, character or arrangement to the labels containing the applicants' White Label Gin, or in bottles having their corks covered with white capsules similar to the white capsules on bottles containing the said White Label Gin, or in any bottles so got up as to be a colourable imitation of the get up of the said White Label Gin.

In addition the applicants ask for the delivery up or destruction of all bottles, labels and capsules complained of which are in the possession of the respondents.

The applicants are distillers carrying on business at Schiedam in the Netherlands, and are holders of a trade mark registered in the Transvaal on the 27th June, 1911, in respect of a gin known as "Rynbende's White Label Gin." The essential particulars of this trade mark consist of the facsimile signature of "Simon Rynbende en Zonen" and of the combination of devices appearing on an oval label which besides these essential particulars contains the name and address of Rynbende en Zonen. In looking at this label its most characteristic feature, and the feature which would most forcibly strike the eye of the observer are the words appearing at the top, "Rynbende's White Label Genever." As regards the essential particulars there is nothing appealing to the eye either in the signature or the combination of devices. The applicants although they have an exclusive right to their name and address except as against persons who have a similar name and address, were not

entitled to make these a part of their trade mark, but it is obvious that they might have used some more striking and distinctive symbol or device for their trade mark than the signature and the combination which appears on their trade mark, namely a circle with latitudinal lines with blank spaces within which the descriptive words of their gin appears.

After the registration of their trade mark the applicants began to sell their gin in square white bottles bearing three labels and with corks covered with white capsules. Two of the labels are placed on the face of the bottles, one, the most conspicuous, being the oval label as registered, and the other being a square label containing printed matter in very small type and the registered signature. The third label appearing on the back of the bottle is a narrow white label with printed matter and the registered signature. The white capsule has two black lines running parallel round the capsule and underneath is the signature of the firm, hardly noticeable, on the neck of the bottle.

The applicants' gin has for years been known to purchasers and it is alleged in the petition that after the new get up was adopted subsequent to the registration of the trade mark, their gin acquired a repute as white label gin, and the complaint is that some six or nine months after registration of the trade mark and the introduction of the white bottle and capsule and the three labels, the respondents, who are importing merchants, introduced into the Province a gin distilled by Messrs. Blankenheym & Nolet, of Rotterdam, in white bottles, capsules and labels similar in shape, character and arrangement with the object of passing off this gin as the applicants' gin to unwary purchasers and also thereby infringing their registered trade mark. It is further stated, and not denied, that previous to the new departure made by the applicants in the get up of their gin in white bottles, capsules and labels, the respondents imported and sold their gin in black bottles and with irreproachable labels.

In dealing with the first claim made by the applicants, we are restricted to the consideration of the registered trade mark on the oval label which is alleged to have been infringed.

The applicants have produced no evidence to show actual deception, nor any evidence of surrounding circumstances connected with the trade or the character and nature of the customers concerned in the gin trade, but they rely entirely on the production of the res-

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pective oval labels and their contention is that the mere comparison of these labels indicates that the respondents' oval labels are an infringement of the applicants' trade mark and are calculated to deceive purchasers.

There is no doubt, and it seems to be admitted, that the respondents observed that the new get up of the applicants' gin in white bottles with white capsules was an attractive get up, that it was pleasing to the eye and displayed to the intending purchaser the transparency of the gin and was a recommendation to the trade, and they resolved to present their gin in a similar manner to the public, but while admitting this the respondents' contention is that they have not infringed applicants' trade mark and on the second part of the prayer that they are not guilty of passing-off and that they have not done more than they were entitled to do.

To constitute any infringement of the trade mark there must be either an adoption of the trade mark or of its essential particulars, or of one of them, or else a colourable imitation of the mark or of some one or more of its essential particulars or some part of the mark to which the applicants have an exclusive right.

In the present case the respondents have not appropriated the trade mark or any of its essential particulars, but it is said that the oval label is a colourable imitation of the applicants' trade mark and reliance is placed on the similarity in the shape of the label, the printing matter upon it and generally the copying, which the respondents admit and which is apparent.

The applicants, however, cannot claim an exclusive right to the oval shape of the label or to its size, or to the black border lines, or to the place where the label appears on the bottle. Apart from the essential particulars which the respondents have not appropriated and imitated, the most conspicuous feature of the applicants' label is the words "Rynbende White Label Geneva," and these words the respondents have not adopted or colourably imitated. They have substituted in equally large and characteristic type the name of their own distiller "Blankenheym" with the descriptive words "Hollands Geneva", and the device surrounding the words "Rynbende White Label Geneva" and the scroll are omitted altogether. There is no signature at all on the respondents' oval label, but instead there is conspicuously substituted the picture of a key with three rings and the words, "Key Brand." It may also be noticed that the colour of the ink used in the printing is different, being

blue-black instead of the deep black colour of the ink used by the applicants.

The conclusion I come to is that there has been no colourable imitation of the applicants' trade mark or of any particular of it to which the applicants can claim an exclusive right, on the contrary the respondents have placed on their label the name of their distiller and the trade mark adopted by the latter, namely, the key with three rings and the words "Key Brand." There is no evidence (but I think I am entitled to assume although the assumption is really immaterial), that the "Key Brand" is the trade mark of Messrs. Blankenheym & Nolet.

The applicants must then fail on the claim put forward of the infringement of their trade mark.

The second claim put forward by the applicants is the more general one that the get-up of the respondents' bottles is an unlawful imitation of the get-up of the applicants, with the result of passing-off their goods as those of the applicants.

In *Perry & Co., Ltd. v. T. Kessan & Co.* (29 R.P.C., p. 509), BUCKLEY, L.J., says: "In an action for 'passing-off' the only question to be decided is whether the defendant has so taken distinctive or characteristic features of the plaintiffs' 'get-up' so that a reasonable person, accustomed to buying that class of goods, would by reason of that fact be led to believe that the defendants' goods are the plaintiff's goods. If it be established that he has done that, it does not matter whether he has been fraudulent or not. Whether he intended or whether he did not intend to lead people to believe that his goods were the plaintiffs' goods, if his 'get-up' is calculated to induce the purchasers to think that, he must be enjoined whether he is the most honest man in the world or not. Fraud, therefore, for the purpose of obtaining an injunction has no relevance except so far as I have already stated, it is a factor, an incident in the case; to enable the tribunal to come to a conclusion whether in point of fact deception has been achieved. In an action of this kind the plaintiff will succeed if he proves, either, first deception in fact or secondly such a 'get-up' as is calculated to deceive They (the plaintiffs) are entitled to show that, although no one has been deceived, still people will be deceived by the 'get-up.' They have to prove that." The learned LORD JUSTICE then deals with the nature of the evidence which is relevant in passing-off actions and this portion it is unnecessary to cite as in the present applica-

tion no evidence has been adduced, and continues, "They (the plaintiffs) had no monopoly of their particular shape of box, they had no monopoly of any particular colour or combination of colours on the box and they had no monopoly even of the floral or other design on the box. Rival traders might repeat all or any of these. The fact that they repeat all or some of them is, of course, a most essential factor to be considered, but they may repeat every single one of them provided that they so deal with their articles as to distinguish theirs from others. How to do that is a question of fact, but a pen maker might put upon a particular shape of pen the particular number and put it in the particular box of the particular design in which Perry & Co. (the plaintiffs) sold it, if they took such steps as that a purchaser could not buy it believing it to be Perry & Co.'s. Whether he has done that or not is a matter of fact. I will give an illustration of what I mean and I will take the *Schweppe's* case. It is not exactly true that Gibbens took Schweppe's label identically; he did not, because he added some words, but they were words in comparatively small type. He took Schweppe's label as regards the colours, size and shape and the way it was put over the cork of the soda water bottle, but Schweppe's put on, 'Schweppe's Soda Water,' and Gibbens put on 'Gibben's Soda Water,' and the tribunal came to the conclusion that Gibbens distinguished his from Schweppe's. If that were so, if the thing had been identically the same in every other respect, but he had put Gibbens on, so that the purchaser could see that it was not Schweppe's, he could have put on every single thing that was on Schweppe's label." The learned LORD JUSTICE then refers to labels on which the names of the rival traders do not appear and discusses the principle applicable. In the present case the names of the rival traders appear prominently on the labels. I have referred to this judgment and given this long citation from it because it summarises better and more authoritatively than I could do the principles illustrated in a series of cases decided by the Court of Appeal and the House of Lords, such as *Lever v. Beddingfield* (16 R.P.C., p. 3); *Payton & Co. v. Snelling, Lampard & Co.* (17 R.P.C., p. 48 and p. 628); *Payton & Co. v. Titus Ward & Co.* (17 R.P.C. 59); *Schweppe's, Ltd. v. Gibbens* (22 R.P.C., 113 and 601); *Hennessy v. Keating* (25 R.P.C. 361); *J. B. Williams, Ltd. v. Bronnley & Co., Ltd.*, and *J. B. Williams, Ltd. v. J. H. Williams* (26 R.P.C. 481 and 765). In several of these the views of the Judge

in the first instance as to whether there had been a passing-off or not were over-ruled. In this connection I can also refer to the judgment of SOLOMON, J., in *Pasquali Cigarette Co. v. Diaconicolos & Another* (1905, T.S., p. 472), following *Lever v. Bedingfield*.

These cases make it quite clear that a trader has no monopoly in the "get-up" of his goods. However great the advantage and merits of his "get-up" may be over that of his rivals; however much money, time and thought he may have expended over the designing of the particulars, when once he has used and published them they do not become his property but are common property, which can be appropriated by his rivals provided they do not mislead the public but make it perfectly clear that the goods in the "get up" are not his but theirs.

When once this principle is clearly borne in mind much confusion is, I think, avoided which in many cases of "passing-off" arises. Assuming that there has been no infringement of the trade mark, the question in "passing-off" actions is whether the respondent, where he has imitated the applicant's "get up," has sufficiently differentiated his goods from those of the applicant. Under such circumstances the respondent is bound to make it perfectly clear that although he has adopted the applicant's "get up," the goods are his and not those of the applicant. If he succeeds in doing this then no liability rests upon him and no legal right of the applicant's has been invaded.

Coming now to the particulars of the present case, I have already dealt with the oval label and stated that the differences are more marked than the resemblances and that the respondents on the label conspicuously printed the name of their distiller "Blankenheym" and his "Key Brand," and that is not conceivable that any purchaser could be misled by the superficial impression of resemblance made by a glance at the oval labels and could imagine that "Blankenheym's Gin" was Rynbende's White Label Gin.

The white capsule does not take the matter any further. The applicant's white capsule is marked by two parallel black lines which are not reproduced on the capsule of the respondents who replace them by the representation of the key with the rings. On the top of the capsule where a purchaser is not likely to look, the applicants impress their name and the respondents impress the name of their distiller "Blankenheym and Nolet."

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The other labels, except the fact that they are there present, have nothing on them which invites comparison. They contain printed matter in small type which the ordinary purchaser would not read or look at and bear the signature of the rival distillers.

In my opinion what is distinctive of the applicants' goods is the name "Rynbende" and the description "White Label Gin," which appear on the oval label, and no purchaser who wanted this article would be deceived if he were given the bottle with the respondents' labels. He would see at once on looking at the bottle that he had not received what he asked for, but that he had been given gin distilled by Blankenheym and of the Key Brand.

As LORD JUSTICE ROMER points out in *Payton & Co., Ltd. v. Snelling, Lampard & Co.* (17 R.P.C. 48) the kind of purchaser or customer that the Court has to consider is not the ignorant customer who knows nothing about the different kinds of gin, or who has no particular predilection for one kind of gin above the other, but the customer who knows the distinguishing characteristics of the applicants' goods—the characteristics which distinguish their goods from other goods in the market as far as relates to general characteristics,—who seeks the applicant's goods and is deceived by being given the respondents' goods owing to the latter having imitated the appearance of the applicants' goods.

Looking at the two "get-ups" I think they resemble except where they ought to be different, and where they ought to be different, they are different. I do not think deception is possible. No evidence of actual deception has been given and it is not even suggested that the respondents have been guilty of any fraudulent conduct. Their conduct is perfectly explained by the supposition that they took advice and were told that they could legitimately adopt and imitate the advantageous "get-up" first launched on the public by the applicants, provided that they were careful to distinguish their goods from those of the applicants. I am satisfied that the respondents have sufficiently distinguished their goods from those of the applicants. I do not see what more they could have done. They might have taken a square label or they might have dispensed with the two extra labels. Whether this would interfere with the artistic appearance of the bottles I am not able to say, but I do not think the respondents were bound to do these things. What they were bound to do was to make it perfectly obvious to the public that Blankenheym's Gin was not Rynbende's, and that they have

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done this I think sufficiently appears. It would be going too far to say because your rival has an oblong label, you must take an oval one, or because your rival has three labels, you must either restrict yourself to two or take four.

It is admitted that the shape of the bottle is common to the trade, and is the customary shape used in the gin trade. There is no evidence as to whether oval labels or white capsules are or are not common to the trade, but it may safely be assumed that they are and that no trade has a monopoly in respect of them. Under these circumstances the trader who prominently puts his name on his goods, as was done in this case, meets the requirements of the law and in a case like the present prevents the "passing-off" with which alone the law is concerned.

The application is refused with costs.

Applicants' Attorneys: *Baumann & Gilfillan*; Respondents' Attorneys: *Steytler, Grimmer & Murray*.

[Reported by *G. Wille, Esq.*, Advocate.]

NATIONAL BANK OF SOUTH AFRICA, LTD., v. LEON
LEVSON STUDIOS, LTD.

1912. December 31. 1913. January 14. GREGOROWSKI, J.

Landlord and tenant.—Payment of rent.—Due date.—Sunday.—Public holiday.

In terms of a lease rent was payable at a particular bank on the 1st of each month or within fifteen days thereafter. The 1st and 15th of a certain month were Sundays and the 16th was a public holiday when the bank was closed:—*Held*, that the fifteen days expired on the 16th, but as that day was a public holiday the rent was payable on the 17th notwithstanding that there were clerks in the bank on the 16th to whom payment might have been made.

Application for an order cancelling a lease and ejecting the respondent company from the leased premises. The rent was payable monthly in advance at the Pritchard Street Branch of the applicant bank. Clause 10 of the lease provided that, "should the