

LEVER BROTHERS, LIMITED.....PLAINTIFF;

VS.

UMBERTO PIZZUTI ET AL.....DEFENDANTS.

1932
Feb. 24.
March. 30.

Trade-marks—Infringement—Expunging—Calculated to deceive

Plaintiff's trade-marks in this suit are the same as those described in the case of Lever Brothers v. Wilson printed herein at page 71. The defendant's mark consists of the word "Sunrise" used in connection with the sale of washing fluid.

Held, that even if the defendant's product could be said to belong to the same class of goods as that of the plaintiff, defendant's label being so different in appearance, colour, lettering and subject matter from that of plaintiff's label, and bearing on its face, in large type, the words "Sunrise Company, 711 Langlois Ave., Windsor, Ont.", it cannot be said to be "calculated to deceive," within the meaning of the Trade Mark and Design Act.

(1) (1912) U.S. Patent Office Gazette, Vol. 177, 1043. (2) (1931) Ex. C.R. 64, at p. 69.

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ACTION by the plaintiff to have the trade-mark of the defendants consisting of the word "Sunrise," etc., expunged.

The action was tried before the Honourable Mr. Justice Angers at Toronto.

R. S. Cassels, K.C., for plaintiff.

Ericksen Brown, K.C., and *J. P. E. Brown* for defendants.

The facts of this case are stated in the Reasons for Judgment.

ANGERS J., now (March 30, 1932), delivered the following judgment.

This is an action to expunge from the Trade Mark Register No. 238 a specific trade-mark registered on the 16th day of February, 1931, by the defendants, to be applied to the sale of a Washing Fluid and consisting of "the word 'Sunrise' and the representation of the Sun rising on the horizon with the rays of the Sun spread above it," on the ground that the said trade-mark is so similar to the plaintiff's registered trade-mark "Sunlight" as to be calculated to deceive the public.

The action is brought under the provisions of section 45 of the Trade Mark and Design Act (R.S.C., 1927, ch. 201). The plaintiff is an incorporated company having its head office in the City of Toronto. The defendants reside and carry on business in partnership in the City of Windsor, in the Province of Ontario.

In its statement of claim plaintiff sets out that it is the owner of two specific trade-marks: the first one registered on the 28th day of March, 1889, by Lever Brothers, of Warrington, England, subsequently assigned by the latter to Lever Brothers Limited, of Port Sunlight, England, and further assigned by Lever Brothers Limited to the plaintiff, the registration of the said trade-mark having been renewed for a period of 25 years from the 28th day of March, 1914; the second one registered on the 30th day of August, 1894, by Lever Brothers Limited, of Port Sunlight, England, and subsequently assigned by the latter to the plaintiff, the registration of the said trade-mark having been renewed for a period of 25 years from the 30th day of August, 1919. The first of plaintiff's trade-marks consists

merely of the word "Sunlight" to be applied to the sale of soap, detergents, starch, blue and other laundry goods, also fancy soaps, perfumery and other toilet preparations; the second one which is to apply to the same goods and, in addition, to candles and matches, is described as consisting of "a rectangular box-lid label bearing, essentially, the word 'Sunlight' together with scroll devices, floral spray and the representation of a maid carrying a basket of clothes in her right hand and holding in her left a prop supporting a clothes line on which an article of clothing is suspended."

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On the 16th day of February, 1931, the defendants caused to be registered a specific trade-mark to be applied to the sale of a washing fluid and consisting of "the word 'Sunrise' and the representation of the sun rising on the horizon with the rays of the sun spread above it."

The plaintiff alleges that it is aggrieved by the registration of the defendants' trade-mark by reason of the fact that the name "Sunrise" is so similar to the plaintiff's registered trade-mark "Sunlight" as to be calculated to deceive the public, and the plaintiff accordingly prays for an order expunging the registration of the defendants' trade mark containing the word "Sunrise."

The defendants, in their statement of defence, deny the main allegations of the plaintiff's statement of claim and aver that they did not infringe on the rights of the plaintiff and they pray for the dismissal of the action with costs.

By consent the examination in chief of John Millar, Secretary and Director of the plaintiff company, in the case of Lever Brothers Limited vs. Benjamin L. Wilson (Atlas Chemical Co.), No. 13436, heard before me on the same day as the present case, forms part of the evidence herein.

The evidence discloses the following facts.

Lever Brothers (the partnership) commenced to sell "Sunlight" soap in Canada in 1889. The Canadian Company, i.e., the plaintiff, was incorporated in 1899. From that date it has continuously sold "Sunlight" soap in Canada. "Sunlight" soap is a yellow laundry bar soap. Several thousand tons are sold every year throughout Canada.

Soap is sold largely in grocery stores, in some drug stores, in departmental stores and in chain stores; seventy to eighty per cent is sold in grocery stores or grocery depart-

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ments of departmental stores. Javel Water is sold in the same stores and in the same departments.

The name "Sunlight" is used by plaintiff solely in connection with the laundry bar soap.

A salesman in the employ of the plaintiff, named Glen, purchased two bottles of "Sunrise" washing fluid, the product of the defendants, in two grocery stores in the city of Windsor; the bottles were displayed in the vicinity of the soap section.

Innicello, one of the defendants, heard as a witness, states that he and his partner (Pizzuti) have sold "Sunrise" washing fluid since the beginning of February, 1931. The defendants' business is the manufacture of bleaching water. The witness did not know that the "Sunlight" trade-mark was registered when he applied for the registration of the mark "Sunrise."

For the reasons set out in the case of Lever Brothers Limited vs. Benjamin L. Wilson above referred to, which I need not repeat here, I have reached the conclusion that there is no likelihood of confusion.

Counsel for plaintiff pointed out that the defendants' product is called a washing fluid (and not Javel Water as in the case of Lever Brothers vs. Wilson) and that the label indicates that it is used for washing clothes and he draws the conclusion that this brings it within the same class of goods as soap. I cannot share this opinion; but even if the defendants' product could be said to belong to the same class of goods as the plaintiff's soap, the label is so different in appearance, colour, lettering and subject matter from the plaintiff's label that it cannot be considered as calculated to deceive. I may add that the defendants' label bears on its face, in large type, the following indication: "Sunrise Company, 711 Langlois Ave., Windsor, Ont." There is obviously no attempt whatever to deceive and there is no probability of deception.

There will be judgment dismissing plaintiff's action, with costs in favour of defendants.

Judgment accordingly.