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BETWEEN:

MAGAZINE REPEATING RAZOR CO. OF CANADA LIMITED, AND MAGAZINE REPEATING RAZOR COMPANY ..... PLAINTIFFS;

AND

SCHICK SHAVER LTD. ..... DEFENDANT.

Trade mark—Infringement—Licence to use name as trade mark—Obligation on part of licensee to surrender any rights acquired under the licence upon termination thereof—Acquiescence in use of mark—Amendment of registered trade mark.

The action is for infringement of a trade mark, consisting of the word "Schick," registered by the Magazine Repeating Razor Company, in August, 1927, to apply to safety razors of all kinds, razor blades . . . "shaving machines" . . . and other articles. The defendant by counter-claim, asks that the trade mark registration be modified so as to exclude therefrom any reference to "shaving machines."

Plaintiffs' razors are sold under the name of "Schick Injector Razor" and "Schick Repeating Razor"; the defendant uses the word "Schick" in connection with what it calls "shaving machines," an electrically operated dry shaving apparatus which is sold under the name of "Schick Shaver."

By certain agreements made in March, 1925, and in May, 1927, one, Jacob Schick, agreed to transfer to the plaintiff, Magazine Repeating Razor Company, or its predecessor, Sharp Manufacturing Company, a patent owned by him and several pending patent applications, and the exclusive right to manufacture and sell throughout the world the safety razors and blades covered by the patent and patent applications, and also certain inventions and discoveries he had made in connection with razors or blades, or machinery or processes for manufacturing the same. Schick agreed that the Corporation might use the word "Schick" in connection with the razors, blades and other articles and that such razors, blades or other articles might be marked or associated with the name of "Schick." He also agreed, by paragraph XI of the agreement of May, 1927, that if, during the life of that agreement, he should "make any invention or discovery relating to the art of shaving, other than inventions or discoveries relating to razors or blades or machinery or process for the manufacture thereof," he would disclose the same to the company and make application for letters patent thereon and assign the same to the company.

By an agreement entered into on January 1, 1929, the company released Schick from his obligations under paragraph XI of the 1927 agreement in so far as that paragraph applied to "shaving machines." By a licence agreement dated January 1, 1929, Schick, then the owner of letters patent relating to "shaving machines" which had been named "Schick Dry Shavers," licensed the company to manufacture and sell in the United States, and foreign countries, under the name "Schick," the shaving machines described and disclosed

in his patents or patent applications relative to the same. The licensee agreed that all shaving machines which it or its agents might manufacture, would be marked with the name "Schick," and would be advertised, offered for sale, and sold, under the name "Schick." The company later terminated the licensing argeement effective as of July 1, 1930, by an agreement entered into in May, 1930; certain mutual releases were agreed upon, and the company agreed that "all rights relative to Schick Dry Shavers and Shaving Machines . . . heretofore granted to it by Schick under said agreement dated January 1, 1929, is now terminated and at an end." Schick then organized a company in the United States, known as Schick Dry Shavers Inc. to manufacture the shaving machine and sell it in the United States and other countries, which article became widely known and was widely advertised as "Schick Shaver." The Magazine Repeating Razor Company continued to sell and advertise its safety razor under the name of "Schick Injector Razor" and "Schick Repeating Razor." The Razor Company, in 1938, brought this action against defendant company.

Held: That by the agreement of May, 1927, the Magazine Repeating Razor Company was to have the right to use the name of Schick only in connection with the safety razors and blades covered by the Schick patents and patent applications referred to in that agreement.

2. That the compulsory use of the name "Schick" in connection with dry shavers, in the licensing agreement of January 1, 1929, was a condition imposed by Schick, and the acceptance of that condition was an admission that Schick had a right to use his own name, on his dry shaver, if he chose so to do.

3. That if the owner of a patent licenses another to make his invention, and requires as a term of the licence that the inventor's name be marked on the article invented, which condition the licensee accepts, and the licensee later terminates the licence and surrenders back to the licensor all rights acquired under the licence, then the licensor is free to make and sell his invention with his name marked thereon.

4. That the Magazine Repeating Razor Company had not the right to register or maintain on the register the trade mark "Schick" in connection with "shaving machinery."

5. That the plaintiffs acquiesced in the use of the word mark "Schick" by the defendant in connection with its dry shavers.

6. That any confusion resulting from the use of the name "Schick" is a consequence of the agreement and understanding of the parties and the plaintiffs must accept any inconvenience resulting from a situation which they helped to create.

ACTION by plaintiffs asking for an injunction restraining defendant from infringing plaintiffs' trade mark rights.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

R. S. Smart, K.C. and *M. B. Gordon* for plaintiffs.

J. D. Kearney, K.C., E. G. Gowling and *R. de W. MacKay* for defendant.

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The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (February 7, 1939) delivered the following judgment:

This action is one for infringement of a trade mark, consisting of the word "Schick," registered by the second-named plaintiff, in August, 1927, pursuant to the terms of the Trade Mark and Design Act which was then in force, as applied to the sale of razors of all kinds, safety razors of all kinds, razor blades and blade holders, and many other articles, including "shaving machines," the latter of which enters largely into the debate here. The plaintiffs' razors are sold under the name of Schick Injector Razor, and Schick Repeating Razor, and perhaps under another name. The defendant uses the word "Schick" in connection with what it calls "shaving machines," otherwise an electrically operated dry shaving apparatus, and which frequently will be referred to as a "dry shaver," and sometimes as "Schick Dry Shaver." It is sold under the name of "Schick Shaver," the first word being the name of its inventor, but, so far as I know, those words are not registered in Canada, as a trade mark.

The first named plaintiff is a Canadian corporation having its principal office at Niagara Falls, Ontario, the other plaintiff being a corporation incorporated in the United States, and which owns or controls the Canadian corporation. The defendant is a company incorporated under the Companies Act of the Bahamas Islands, its head office being in Nassau, Bahama Islands, and it is licensed to do business in the Province of Quebec, its principal place of business in such province being at St. Johns. One, Jacob Schick, was the founder of this company, and any of its Canadian predecessors, and of a United States company, Schick Dry Shaver Inc., the shares of the latter being now wholly owned by the defendant company here, and it is his name that figures so prominently in this case. Schick is now deceased, and his interest in such companies is now owned by his widow, with the exception of qualifying shares. The facts of this case are, in many respects, somewhat unusual, and I shall at once endeavour to state the most prominent of them.

About 1920 Schick directed his mind towards the invention of safety razors, and blades for use therein, for which he or his assignees later obtained letters patent. There came a time when a syndicate was organized for the purpose of exploiting such inventions as Schick had then made, and later, doubtless for the same purpose, there was incorporated in the United States a company under the name of Sharp Manufacturing Corporation, the name of which corporation was subsequently changed to Magazine Repeating Razor Company, the second named plaintiff in this proceeding, hereafter to be referred to as "the Razor Company." By 1925 Schick had become the owner of one United States patent, and had pending in the United States Patent Office several applications for other patents of invention, all relating to a certain safety razor and blades to be used therein, and that year saw the beginning of transactions between Schick and the Razor Company, the latter being still known as Sharp Manufacturing Corporation, which ultimately gave rise to this litigation, and to that I now turn.

In March, 1925, an agreement was entered into between Schick and Sharp Manufacturing Corporation wherein Schick agreed to transfer to Sharp Manufacturing Corporation the patent which he then owned, and his several pending patent applications, the consideration being the payment of stated sums of money and certain royalties. The Sharp Manufacturing Corporation was to have the exclusive right to manufacture and sell throughout the world the safety razors and blades covered by the said patent and patent applications. By this agreement Schick also granted to Sharp Manufacturing Corporation all "trade marks, trade names and all other privileges relating to said safety razors and blades." In point of fact, Schick does not appear to have had at this time any registered or unregistered trade marks, or trade names, and it is unlikely that he, or any one on his behalf, was manufacturing or selling any safety razor, but that in any event is not of importance. In the event of default by the Sharp Manufacturing Corporation in respect of the conditions of the agreement that corporation was to convey and deliver back to Schick any patents and patent applications, and any and all rights, which it had acquired in virtue of this agreement.

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In May, 1927, a second agreement, supplemental to that of 1925, was entered into between Schick and the Razor Company, formerly Sharp Manufacturing Corporation, wherein Schick agreed to transfer to the Razor Company further applications for patents of inventions which he had made since the date of the first agreement, and which related to safety razors and their blades, and also certain inventions and discoveries he had made in connection with razors or blades, or machinery or processes for manufacturing the same, and for which he had not yet filed applications for letters patent in the United States. One important term of that agreement was the following:

> Schick agrees that the Corporation may use the name "Schick" in connection with the razors, blades and other articles, on the sale of which royalties are payable under the provisions of this paragraph IV, and that such razors, blades or other articles may be marked or associated with the name of "Schick."

The agreement also provided that in the event of any default in the payment of royalties or of any deficiency under paragraphs IV or V of the agreement, Schick had the right, upon giving a written notice of such default, and if the default continued for a stated period, to terminate the agreement, in which event the Razor Company obligated itself, *inter alia,* to assign and transfer back to Schick all letters patent and applications for letters patent, acquired from Schick under this agreement and the agreement of 1925, " and also the right to use the name 'Schick' in connection with the manufacture and sale of razors, blades and other articles."

Schick also agreed, in paragraph XI of the agreement, that if, during the life of the argeement, he should "make any invention or discovery relating to the art of shaving, other than inventions or discoveries relating to razors or blades or machinery or process for the manufacture thereof," he would disclose the same to the Razor Company, and make and file applications for letters patent thereon in the United States and such foreign countries as he deemed advisable, and would assign such applications for letters patent to the Razor Company, upon terms to be reached in the manner provided by the agreement. This provision probably was inserted in the agreement because Schick was then engaged in developing his shaving machine, reducing it to practice as they say in the United States, and which the plaintiffs claim is the offending

instrument in this cause. The next agreement to which I am about to refer rather affirms this.

On January 1, 1929, two agreements were entered into between Schick and the Razor Company, in one of which the Razor Company released Schick from his obligations under paragraph XI of the agreement of 1927, the paragraph to which I have just above referred, in so far as that parargaph applied to "shaving machines," which term for the first time appears in the argeements. Shaving machines, as there used, had reference to Schick's dry shaver, and both parties seemed to be in agreement that "shaving machines" properly described this invention of Schick, and that they were to be distinguished from the safety razors, the earlier of Schick's inventions. The other agreement of the same date is designated as a "licence agreement." At this time Schick was the owner of the letters patent relating to "shaving machines," and he had also applications for patents pending, covering the same subject-matter. This shaving machine had been given the name of "Schick Dry Shavers," and the licensing agreement states that the expression, "Schick Dry Shavers," was used to designate "shaving machines," and a brief description is given of such a shaving machine. Schick licensed the Razor Company to manufacture and sell, in the United States, and foreign countries, under the name of "Schick," the shaving machines disclosed in his patents or patent applications relative to the same. The licensee, the Razor Company, agreed that all shaving machines which it or its agents might manufacture, would be marked with the name of "Schick," and they were to be advertised, offered for sale, and sold, under the name of "Schick," and this is a very important point in the dispute here. It was an obligation imposed upon the licensee by Schick, the licensor. If the Razor Company defaulted in its covenants under the licensing agreement, Schick might terminate the licence, after notice of such default as prescribed by the licensing agreement, and the Razor Company on written notice might also terminate the licensing agreement at either of several dates therein specified. If the licensee terminated the licensing agreement, the Razor Company obligated itself to transfer and deliver back to Schick the entire business or businesses of manufacturing and selling shaving machines then con-

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ducted by it, or any of its agents, the good will thereof, and all "trade marks and trade names used exclusively in connection therewith, the exclusive right to use the name of 'Schick' upon or in connection with shaving machines . . ."

The Razor Company embarked upon the manufacture of Schick's Dry Shavers, experimentally only, and for reasons which I need not pause to state, it terminated the licensing agreement effective as of July 1, 1930. In May, 1930, another agreement was entered into between the same parties, whereby certain mutual releases were agreed upon, and it is therein stated that the Razor Company agrees that any and "all rights relative to Schick Dry Shavers and shaving machines, . . . heretofore granted to it by Schick under said agreement dated January 1, 1929, is now terminated and at an end."

A few words might conveniently here be said in reference to the trade mark here said to be infringed. In March, 1927, the Razor Company applied for the registration of the word "Schick," in Canada, under the Trade Mark and Design Act then in force, as a specific trade mark. The mark was to apply to safety razors of all kinds, razor blades, . . . "shaving machines" and a wide range of other articles such as shaving brushes, pharmaceutical products, toilet preparations and perfumery. At the time of this registration the Razor Company was not manufacturing or selling shaving machines, in Canada or elsewhere, and in fact none had ever yet been made by anybody so far as I know, but Schick was no doubt then developing and perfecting his shaving machine, or dry shaver, and probably this had been disclosed to the Razor Company. By the licensing agreement of 1929, to which I have already referred, it will be remembered that Schick licensed the Razor Company to manufacture and sell his shaving machine, but the licensee shortly afterwards terminated the licence and never in fact manufactured, unless experimentally, what was then known as a shaving machine, or as Schick Dry Shaver. By way of counter-claim the defendant asks that the trade mark registration of the Razor Company be modified so as to exclude therefrom any reference to "shaving machines." It does not appear whether Schick in his lifetime was informed of the Canadian registration of the mark in

question, but apparently the defendant company became aware of that reigstration only in 1938, the year in which this action was launched.

When the Razor Company terminated its licence to manufacture and sell the Schick dry shaver, or shaving machine, Schick proceeded to organize a company in the United States, known as Schick Dry Shavers Inc., to manufacture this article for sale in the United States and other countries, and the article in the course of time became widely known, and was widely advertised, as "Schick Shaver." In the meanwhile the Razor Company was selling and advertising its safety razor under the name of "Schick Injector Razor" and "Schick Repeating Razor." This all resulted in leaving the impression among a number of people in Canada and the United States that both the electric dry shaver and the safety razor were manufactured by the Razor Company. At one stage the Razor Company was in receipt of many inquiries addressed to it respecting Schick's dry shaver. These communications at one time were quite numerous and may have caused some inconvenience to the Razor Company, but as both concerns were then in friendly relations, the Razor Company would at once forward the same to Schick's own company. Schick and his company appear to have been willing and anxious to do everything possible to abate this inconvenience or confusion, which, I am satisfied, has gradually diminished and is of small proportions to-day. From time to time complaint would be made by the Razor Company over the form which certain advertising of Schick's Dry Shaver Inc. was taking,—possibly, at times with some cause—and which it was claimed was calculated to cause confusion in the public mind as to the origin of the respective articles. But it would seem that any differences arising from such or other causes would be composed quickly, and for a long time friendly relations between the two companies continued; in fact some persons were shareholders in both companies, and all concerned seemed anxious that any confusion arising from the use of the word "Schick" by both companies should be avoided or reduced to a minimum. It is fairly clear that when Schick's dry shaver came on the market neither party suspected that any confusion could or would arise by reason of the use of the word "Schick," each having in

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mind no doubt the dissimilarity between the two articles in question. It was not till June, 1937, that a definite breach occurred and then Schick Dry Shaver Inc. was advised that its use of the word "Schick" was a direct infringement of the Razor Company's trade mark, and that it would take such steps as were deemed necessary to protect its rights under such mark, culminating in this action in Canada, and, I understand, a corresponding action in the United States. These observations have reference largely to the situation as it developed in the United States, and that, for our purposes here, reflects the Canadian situation, and any particular facts distinguishing the one from the other I need not pause to relate.

Closely related to what I have just stated is some documentary evidence which might be referred to here even though this might more appropriately be done elsewhere. In a letter from the solicitor of the Razor Company to the solicitor of Schick, while the question of "confusion" was more or less active, it was stated that the use of the name Schick by the Razor Company was on the solicitation and with the approval of Schick. It was with his approval certainly, but whether it was on his solicitation is apparently in dispute. There is in evidence a letter from Schick to the solicitor of the Razor Company which might be quoted because it, in my opinion, affords an accurate explanation of what occurred, in connection with the dry shaver at least. This letter is dated February 5, 1932, and apparently was occasioned by some opposition on the part of the Razor Company to the registration in the United States of some mark which Schick had applied for, presumably in connection with his dry shaver, and in it Schick gives his view of the cause of any confusion that had arisen, and he explains why, in the licensing agreement, he required the use of the name Schick in connection with the licence to manufacture and sell his dry shaver. The letter reads as follows:

> While you state that confusion in the trade has become very evident and is constantly increasing because of the use of the name Schick by the Magazine Repeating Razor Company and by Schick Dry Shaver, Inc., this is not very apparent to us, at least not to cause any practical difficulty. Whatever confusion there may be is due to the fact that the Magazine Company had the right to manufacture the dry shaver for a period of one year, during which time articles appeared in various publications that the company planned to market an electric shaver. As time goes on however, I believe it will become more evident

that the dry shaver will be associated only with Schick Dry Shaver, Inc. As a matter of fact, in our national advertising we are specifically calling attention that the shaver has no connection with the Magazine Company.

The use of the name Schick by the Razor Company was not of my solicitation, but rather on the earnest solicitation of the Company for a period of three or more months, and my aversion to its use was only finally overcome by representation that the name would lend a personal story for advertising purposes.

My intention from the outset, upon taking over the development and manufacture of the dry shaver, was to associate my name with the product, and we intend to continue such use of it. In contracting with the Magazine Company I was especially solicitous in being assured, as you may recall, that the use of the name Schick went with the right to sell and manufacture the dry shaver. This was done. While documentary evidence can therefore be presented to the patent office for the registration of the trade mark to Schick Dry Shaver, Inc., I nevertheless asked Mr. Summer to ask the Magazine Company to consent to this registration, in order to expedite matters and make it unnecessary to send an attorney to Washington. I sincerely hope that upon further consideration, you will advise the Magazine Company to grant such consent.

Earlier I made an extended reference to the several agreements because, in my opinion, they, in themselves, furnish a ground upon which this case may be disposed of, though there are other grounds to be considered. Now what emerges from these agreements? It is perfectly clear that throughout the parties concerned were in agreement that a distinction was to be drawn between the Schick "safety razor" and the Schick "shaving machine," between a safety razor and an electrically operated dry shaver, that the one did not comprise or mean the other, and consequently they were the subject of separate agreements. It was agreed that the expression "Schick's Dry Shaver" was used to designate shaving machines. The licensing agreement makes it clear that a "shaving machine," in the minds of both parties, had reference to Schick's dry shaver. Schick authorized the use of his name in connection with the safety razors and blades, and the 1927 agreement states that the name "may be marked or associated with the name of 'Schick'." It is not lightly to be assumed that Schick, in 1927, contemplated anything else than that the Razor Company might mark its safety razors and blades, and nothing else, with his name. It is hardly believable that he then intended to surrender the use of his name as a mark, for his dry shaver, when he had fully developed it, and if it came upon the market. It is impossible to read into the 1927

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agreement anything more than that the Razor Company was to have the right to use the name of Schick in connection with the safety razors and blades covered by the Schick patents and patent applications referred to in that agreement, and so long as the Razor Company made and sold the same under the terms of that agreement. However, the Razor Company later acquired outright Schick's patents and patent applications covering such safety razors and blades, and the right to use the name "Schick" thereon is no longer in question, and in fact that right is conceded by the defendant.

When it came to the licensing of Schick's patented dry shaver in 1929, Schick granted a licence to the Razor Company to manufacture and sell that invention on the condition that it be marked with his name, a proper precaution for a licensor to take in many instances. The compulsory use of the name "Schick" in connection with dry shavers was a condition imposed by Schick, and the acceptance of that condition was an admission, and virtually an agreement, that Schick had a right to use his own name, on his dry shaver, if he so chose to do. If the licence were terminated by the licensee, as it was, the Razor Company agreed to surrender back to Schick any rights it acquired under the licence, and this it did. Now if the owner of a patent licenses another to make his invention, and requires as a term of the licence that the inventor's name be marked on the article invented, and which condition the licensee accepts, and the licensee later terminates the licence and surrenders back to the licensor all rights acquired under the licence, surely the licensor is free to make and sell his invention, with his name marked thereon. How could it be said that the licensor, in that state of facts, would be infringing any mark of the licensee?

I think the agreements are to be construed as meaning that Schick gave the Razor Company the right to use his name only in connection with the safety razors and blades covered by the agreement of 1927, and that he licensed the Razor Company to manufacture and sell his dry shaver upon terms, one of which was that the dry shaver should carry the mark of his name, so long as the same was manufactured and sold by that licensee. But the licence was terminated by the Razor Company, and accordingly its obligation or right to use the name of

Schick in connection with shaving machines concurrently terminated, and the licensor's right to use his own name thereon was restored to him. The Razor Company had not, in my opinion, the right to register, or maintain on the register, the trade mark "Schick" in connection with "shaving machinery."

Further, it is the contention of the defendant that the plaintiffs, for several years, had knowledge of Schick's use of his name as a mark for his dry shaver, and that this affords a defence to this action because it constitutes acquiescence in the infringement, if any. From the date of the termination of the licensing agreement, July 1, 1930, and for a period of six or seven years thereafter, the plaintiffs were aware that the Schick dry shaver was being manufactured, sold and advertised, by some authorized company or companies, in Canada and the United States, under the name of Schick Dry Shaver or Schick Shaver, without seriously asserting infringement. This conduct is the more fatal because in all that time the word "Schick" was registered in Canada, as a trade mark in connection with "shaving machinery," and yet the plaintiffs stood by and permitted Schick, or the corporations which he controlled, to build up an extensive business in the manufacture and sale of the Schick dry shavers, which involved very substantial capital expenditures. In all the circumstances here I do not think the plaintiffs should be permitted to stand by and allow Schick to put his article on the market, under his own name, in a large way, at great expense, and to acquire a wide reputation for his dry shaver, and now come in and successfully assert infringement, and restrain the defendant from using the word mark "Schick" on its dry shavers, or as part of its corporate name. I doubt if the plaintiffs seriously considered, for several years at least, that Schick, or any one of his companies, was infringing their trade mark. The idea of infringement probably had its birth in other causes. This acquiescence in itself is, I think, a complete defence to this action, and this, together with the agreements, seem to me to make an unanswerable defence for the defendant company. I do not think it necessary in this case to refer to any authorities relating to the doctrine of estoppel.

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Moreover, I doubt if it has been established that the mark "Schick" is liable to cause confusion, in the legal sense, as between the goods of the defendant and those of the plaintiffs. There is no evidence of any one selling or buying the goods of one as that of the other, and there is no evidence of deception or unfair dealing in this connection, on the part of any person. It is difficult to understand how any person could be so deceived as to purchase or accept Schick's dry shaver if intending to purchase a Schick safety razor. Their appearance, cost and mode of operation, are so in contrast that I cannot think it possible that one of the parties here would lose sales at the expense of the other. There may have been caused inconvenience and annoyance, and conceivably momentary confusion, but this would be a consequence of the agreement and understanding of the parties that each might use the word "Schick," and they will have to put up with what ensues from the use of the word "Schick" by each of them. If any confusion is liable to occur it will have been brought about by the action of the parties themselves, and, in my opinion, the complainants here must accept whatever inconvenience or confusion emerges from a situation which they assisted in creating.

My conclusion is, therefore, that the action of the plaintiffs must be dismissed, and that the registered trade mark of the first named plaintiff should be amended by striking out from the registration any words having reference to "shaving machines," as claimed by the defendant. I am in doubt as to whether I have power to direct that the defendant's mark be modified, because it is not a registered mark. While I am of the opinion that there is no infringement here, yet I think that the defendant's mark as now used, should be altered in some way. As I am in doubt as to my power to make any direction in this connection I reserve any definite expression of opinion upon the matter until the settlement of the minutes of judgment, when I shall hear counsel upon the point. If, after hearing counsel, I conclude that I have power to make any direction in the matter I shall do so, and this will be notice to counsel of my intention so to act.

Subject to what I have just said the action is dismissed and with costs to the defendant.

Judgment accordingly.