

All ER Reprints/[1914-15] All ER Rep /AG Spalding Brothers v AW Gamage, Ltd - [1914-15] All ER Rep 147

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[1914-15] All ER Rep 147

Also reported 84 LJ Ch 449; 113 LT 198; 31 TLR 328

HOUSE OF LORDS

Viscount Haldane LC, Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor

5, 9 FEBRUARY 1915

23 MARCH 1915

Passing-Off - Misdescription of another trader's goods - Inferior goods of other trader represented to be superior goods of that trader.

No person has a right to sell, or offer for sale, goods of another trader of an inferior or different class or quality under conditions calculated to represent such goods as goods of that trader of a superior and distinctive class. If this is done, an actionable wrong is committed, irrespective of motive or fraud. A plaintiff who establishes a case of this character is entitled to an injunction, and, if necessary, to an inquiry into damages.

Notes

Considered: *Draper v Trist*, [1939] 3 All ER 513; *Jaques (John) & Son, Ltd v Chess*, [1939] 3 All ER 227; *Bollinger (J) v Costa Brava Wine Co*, [1959] 3 All ER 800. Referred: *Illustrated Newspapers, Ltd v Publicity Services (London) Ltd*, [1938] 1 All ER 321; *Saville Perfumery, Ltd v June Perfect, Ltd and Woolworth & Co Ltd* (1941) 58 RPC 147; *Gor-Ray, Ltd v Gilroy Skirts, Ltd and Garment Industries, Ltd* (1952) 69 RPC 99; *Electrolux, Ltd v Electrix, Ltd* (1953) 71 RPC 23; *Reuter (R J) Co v Mulhens (Ferd)* [1953] 2 All ER 1160; *Harker Stagg Ltd's Trade Mark* (1954) 71 RPC 136; *Wilts United Dairies, Ltd v Thomas Robinson Sons & Co*, [1958] RPC 94; *Brestian v Try*, [1958] RPC 161V; *Sim v H J Heinz Co, Ltd*, [1959] 1 All ER 547.

As to passing off, see 32 HALSBURY'S LAWS (2nd Edn) 614 of seq; and for cases see 43 DIGEST 264 et seq.

Cases referred to:

(1) *Burgess v Burgess* (1853) 3 De GM & G 896; 22 LJ Ch 675; 21 LTOS 53; 17 Jur 292; 43 ER 351, LJJ; 43 Digest 286, 1155.

(2) *Reddaway v Banham*, [1896] AC 199; 65 LJQB 381; 74 LT 289; 44 WR 638; 12 TLR 295; 13 RPC 218, HL; 43 Digest 277, 1098.

(3) *Edelsten v Edelsten* (1863) 1 De GJ & Sm 185; 7 LT 768; 9 Jur NS 479; 11 WR 328; 46 ER 72, LC; 43 Digest 217, 614.

(4) *Iron-Ox Remedy Co, Ltd v Co-operative Wholesale Society, Ltd* (1907) 24 RPC 425; 43 Digest 300, 1248.

(5) *Blofeld v Payne* (1833) 4 B & Ad 410; 1 Nev & MKB 353; 2 LJKB 68; 110 ER 509; 43 Digest 334, 1555.

(6) *Burberry's v Cording & Co Ltd* (1909) 100 LT 985; 25 TLR 576; 26 RPC 693; 43 Digest 304, 1280.

(7) *Payton & Co v Snelling, Lampard & Co*, [1901] AC 308; 70 LJ Ch 644; 85 LT 287; 17 RPC 628; HL; 43 Digest 308, 1310.

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Appeal by the plaintiffs in the action from an order of the Court of Appeal (LORD COZENS-HARDY, MR, BUCKLEY and PHILLIMORE, LJJ) reversing a judgment of SARGANT, J, in favour of the plaintiffs.

For about three years previous to 1910 the plaintiffs advertised and sold a novel kind of football under the name of the "Orb" or "Improved Orb" football, the outer cover of which was moulded instead of sewn. In 1910, defects having been found in the making of the balls, the plaintiffs discarded a large number of them as unsatisfactory, and sold them as waste rubber to a firm who re-sold them to the defendants. In 1912 the plaintiffs brought out a new ball, which they advertised as the "Improved Sewn Orb," "Improved Orb," or "Specially Tested Orb," "patent 15,168," at 10s 6d each. In August 1912, the defendants advertised the old "Orb" balls for sale at 4s 9d each, under the description of "Improved Orb" footballs. "Patent No 15,168." On August 29 the plaintiffs pointed out to the defendants that the advertisements were not justified, and on the next day they issued the writ in the present action. On the following day they received a letter from the defendants, who said that they did not wish to describe their footballs under the description complained of, that the advertisement was due to a stupid mistake, and that they had taken steps to stop the advertisement, and they offered an apology. Notwithstanding this letter the plaintiffs proceeded with the action.

By the statement of claim the plaintiffs claimed an injunction to restrain the defendants from selling or advertising footballs other than the plaintiffs' "Improved Orb" or "Specially Tested Orb" footballs as and for the plaintiffs' "Improved Orb" or "Specially Tested Orb" footballs, and an inquiry as to damages and costs. By their defence the defendants relied on the letter already referred to, and said that they had stopped all advertisements such as were complained of as soon as their attention was called to the mistake, and had posted notices in their shops, saying that they did not stock the "Improved Orb" but only sold the original pattern of "Orb." The defendants subsequently issued advertisements which were held at the trial to be innocuous in themselves, but which contained no reference to the mistake which had been made in the earlier advertisements. On an application for an Interim injunction, the defendants undertook not to sell, advertise, or offer for sale, or supply footballs other than the plaintiffs' "Improved Orb" or "Specially Tested Orb" footballs as or for the plaintiffs' balls of those descriptions, and they offered a perpetual undertaking not to sell any balls other than the plaintiffs' "Improved Orb" or "Specially Tested Orb" football under those descriptions. The plaintiffs, however, proceeded to trial. SARGANT, J, granted an injunction and inquiry as to damages. The Court of Appeal, however, were of opinion that the plaintiffs were not entitled to an injunction or to an inquiry as to damages. An action of this sort was analogous to a quia timet action, and even where passing off was threatened the plaintiff could only recover nominal damages. If actual passing off was proved, substantial damages no doubt might be recovered. But here, after the issue of the writ, there was no threat or claim of right to repeat the advertisements complained of, and there was nothing upon which to found an inquiry as to damages. Accordingly the appeal was allowed and the action dismissed. The plaintiffs

appealed.

Sir Robert Finlay, KC, Martelli, KC, and AF Topham, for the appellants. AJ Walter, KC, and Kerly, KC, for the respondents.

The House took time for consideration.

23 Mar 1915. The following opinions were read.

LORD DUNEDIN:

At the request of my noble and learned friend LORD PARKER OF WADDINGTON, I am about to read his judgment, and I have to state that the LORD CHANCELLOR agrees with it.

LORD PARKER OF WADDINGTON:

The action in which this appeal arises is what is known as a passing-off action, and having regard to the arguments

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which have been addressed to your Lordships, I think it well to say a few words as to the principle on which such actions are founded. This principle is stated by TURNER, LJ, in *Burgess v Burgess* (1) (3 De GM & G at pp 904, 905) and by LORD HALSBURY in *Reddaway v Banham* (2) ([1896] AC at p 204) in the proposition that nobody has any right to represent his goods as the goods of somebody else. It is also sometimes stated in the proposition that nobody has the right to pass off his goods as the goods of somebody else. I prefer the former statement, for whatever doubts may be suggested in the earlier authorities, it has long been settled that actual passing off of the defendant's goods for the plaintiff's need not be proved as a condition precedent to relief in equity either by way of an injunction or an inquiry as to profits or damages: *Edelsten v Edelsten (g) and Iron-Ox Remedy Co, Ltd v Co-operative Wholesale Society, Ltd* (4). Nor need the representation be fraudulently made. It is enough that it has in fact been made, whether fraudulently or otherwise, and that damages may probably ensue, though the complete innocence of the party making it may be a reason for limiting the account of profits to the period subsequent to the date at which he becomes aware of the true facts. The representation is in fact treated as the invasion of a right giving rise at any rate to nominal damages, the inquiry being granted at the plaintiff's risk if he might probably have suffered more than nominal damages. The view taken by the common law courts was somewhat different. The plaintiff's remedy is said to have been in the nature of an action for deceit, but it only resembled the action for deceit in the fact that the misrepresentation relied on must have been fraudulently made. In all other respects it differed from an action for deceit. For example, the plaintiff was not the party deceived, and even if it were necessary to prove that someone had been deceived, nominal damage could be obtained though no actual damage was proved. Thus in *Blofeld v Payne* (5) the defendants had sold their own hones in the plaintiff's wrappers as and for the plaintiff's, but there was no evidence that any purchasers had been actually deceived. Further, though special damage was alleged in the declaration, no actual damage was proved. On motion for a non-suit it was held in the King's Bench that the plaintiff was entitled to nominal damages. The action was, in fact, treated as one founded on the invasion of a right.

The proposition that no one has a right to represent his goods as the goods of somebody else must, I think, as has been assumed in this case, involve as a corollary the further proposition that no one who has in his hands the goods of another of a particular class or quality has a right to represent these goods to be the

goods of that other of a different quality or belonging to a different class. Possibly, therefore, the principle ought to be restated as follows: "A cannot, without infringing the rights of B, represent goods which are not B's goods or B's goods of a particular class or quality to be B's goods or B's goods of that particular class or quality." The wrong for which the relief is sought in a passing-off action consists in every case of a representation of this nature. The basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such cases the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up is calculated to deceive. It would, however, be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on.

[1914-15] All ER Rep 147 at 150

There appears to be considerable diversity of opinion as to the nature of the right, the invasion of which is the subject of what are known as passing-off actions. The more general opinion appears to be that the right is a right of property. This view naturally demands an answer to the question, property in what? Some authorities say property in the mark, name, or get-up improperly used by the defendant. Others say property in the business or goodwill likely to be injured by the misrepresentation. LORD HERSCHELL, in *Reddaway v Banham* (2) expressly dissents from the former view, and if the right invaded is a right of property at all, there are, I think, strong reasons for preferring the latter view. In the first place, cases of misrepresentation by the use of a mark, name, or get-up do not exhaust all possible cases of misrepresentation. If A says falsely, "These goods I am selling are B's goods," there is no mark, name, or get-up infringed unless it be B's name, and if he falsely says, "These are B's goods of a particular quality," where the goods are in fact B's goods, there is no name that is infringed at all. Further, it is extremely difficult to see how a man can be said to have property in descriptive words, such as "camel hair" in the case of *Reddaway v Banham* (2) where every trader is entitled to use the words, provided he only uses them in such a way as not to be calculated to deceive. Even in the case of what are sometimes referred to as common law trade marks the property, if any, of the so-called owner is in its nature transitory, and only exists so long as the mark is distinctive of his own goods in the eyes of the public or a class of the public. Indeed, the necessity of proving this distinctiveness in each case as a step in the proof of the false representation relied on was one of the evils sought to be remedied by the Trade Marks Registration Act, 1875, repealed by Patents, Designs and Trade Marks Act, 1883, which confers a real right of property on the owner of a registered mark. I had to consider the matter in the case of *Burberrys v Cording & Co, Ltd* (6) and I came to the same conclusion.

The facts of this case may be stated as follows: The appellants are dealers in footballs, and supply both the trade and the public. They have for some years described their footballs as "Orb" footballs, and there can be no doubt that the word "Orb" is distinctive of their goods of this description. In 1910 they catalogued and were selling three varieties - the "Special Bramble Pattern Orb," the "Improved 1910 Orb," and the "Improved 1910 Rugby Orb." In 1911 they were cataloguing and selling also three varieties - the "Special Bramble Pattern Orb," the "Improved Orb," and the "Improved Rugby Orb." All these balls are referred to as "improved and strengthened balls" placed on the market in this year. All the 1910 and 1911 varieties were moulded, as opposed to sewn footballs. For the year 1912 they catalogued an "Improved Sewn Orb" football, stating that this ball was a "great improvement on the old moulded ball," but not otherwise referring to moulded balls. The facts were that in 1910 complaints had been made of the moulded balls, and towards the end of that year the appellants, in consequence, ceased to manufacture them, and began to manufacture the ball subsequently catalogued as the "Improved Sewn Orb." They also withdrew from sale such part of their stock of moulded balls as they thought to be unsatisfactory. The moulded balls so withdrawn appear to have consisted partly of the 1910 and partly of the 1911 ball. The moulded balls catalogued and sold in 1911 consisted of that part of the stock which they thought was free from the defects complained of. In 1912 they determined to put their "Improved Sewn Orb" on the market instead of moulded balls, and in April or May 1912, they sold the balls they considered defective to Mellis, Schein & Co, who are waste rubber merchants, one lot being sold as old

moulded balls and the other as new moulded balls. Unfortunately, they did nothing to prevent these balls being put on the market as Orb" footballs, and Messrs Mellis, Schein and Co appear to have sold them to the respondents. Mr Parker, the respondents' manager, instructed Mr Webber to advertise these balls for the firm's August males. Mr Webber cut out of the appellant's 1912 catalogue the description there contained

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of the plaintiff's "Improved Sewn Orb," and gave it to Mr Glasspole to work upon as the basis of an advertisement for the balls in question, and Mr Glasspole, working on this basis, produced the advertisements. The question your Lordships have to decide is whether these advertisements in fact represent that the balls purchased by the respondents from the waste rubber manufacturers were the same balls as those referred to in the appellants' 1912 catalogue and being sold by the appellants as the "Improved Sewn Orbs." In order to arrive at a conclusion on this point it is necessary to compare these advertisements with the appellants' 1912 catalogue. In that catalogue they refer to the "Improved Sewn Orb" as made under the patent No 15,168 - the real number should be 15,163, but this is not very material. The ball is referred to as "a great improvement on the old moulded ball," which means, of course, any moulded ball theretofore sold by them. It is also stated to be "undoubtedly the best ball on the market for schools and junior clubs." The catalogue contains a picture of the ball stamped not only with the word "Orb," but with the words "specially tested," and the ball is said after repeated tests to have been passed by certain clubs. The price is stated to be 10s 6d. Turning now to the respondents' advertisements, the first is an advertisement of the "Improved Orb" football, and this ball is stated to have been made under the patent No 15,168, a statement which was entirely untrue. It is stated to be the best on the market for schools and junior clubs. It is stated to have been passed by all the clubs referred to in the appellants' catalogue, and the advertisement contains precisely the same picture as appeared in the appellants' 1912 catalogue, with the same stamp. The defendants' price is stated to be 4s 9d, in contrast with the "usual price" of 10s 6d. The second advertisement is of the "Celebrated Orb" football, stated to be "specially tested." It is stated to be a "serviceable ball" for schools and junior clubs, and to have been passed by all the clubs referred to in the plaintiffs' catalogue. Its price is stated as 4s 9d, as opposed to the usual price of 10s 6d. The advertisement contains precisely the same picture as appeared in the appellants' 1912 catalogue with the same stamp. In the third advertisement there appear in large letters the words "10s 6d. football for 4s 9d. Carnegie's Bargain," and in smaller letters, "We have secured the whole stock of the Orb footballs illustrated here, and in accordance with our rule we offer our customers the benefit of this fortunate purchase, thus enabling you to get a 10s 6d. football for 4s 9d - a bargain indeed." Again the illustration is that which appears in the appellants' 1912 catalogue, and is similarly stamped. The advertisement then refers to the ball advertised for sale as "the Improved Orb football, Patent No 15,168," stating that it "is a great improvement on the old moulded ball," and proceeds, "after repeated tests this ball has been passed by the Football Association and the Amateur Football Association," being two of the clubs referred to in the appellants' 1912 catalogue.

It appears to me to be quite certain that anyone comparing any of these advertisements with the catalogue, or anyone with a knowledge of the catalogue and seeing the advertisements, would be led to conclude that the respondents were offering for sale at 4s 9d the identical ball catalogued by the appellants in their 1912 catalogue at 10s 6d. Indeed, I find it difficult to imagine that the advertisements were not deliberately framed so as to convey this impression. The respondents' counsel sought to justify the advertisements on the ground that the statements therein contained were only a repetition of what the appellants had themselves said in former catalogues of the moulded ball described as the "Improved 1910 Orb," or the "Improved Orb," but this, unfortunately, is not so. No ball had been theretofore catalogued by the plaintiffs as made under patent No 15,168. No ball had in any preceding catalogue of the plaintiffs been illustrated as stamped with the words "Specially tested." Even when we come to the words "better than the old moulded ball," I can find no justification for their use in the advertisements. The appellants in their catalogue were contrasting the new sewn variety with the old moulded variety theretofore sold by them.

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Even if the respondents say that they intended to contrast one moulded ball with another their statement would be untrue, for the balls they were selling were old moulded balls of the 1910 and 1911 varieties. But, after all, the question whether any particular statement was true or otherwise is not a pertinent question; the really pertinent question is whether the advertisements as a whole were calculated to deceive, and it seems

to me that they were so calculated.

It was also contended that the question whether the advertisements were calculated to deceive was not one which your Lordships could yourselves determine by considering the purport of the advertisements themselves, having regard to the surrounding circumstances, but was one which your Lordships were bound to determine upon evidence directed to the question itself. I do not take this view of the law. There may, of course, be cases of so doubtful a nature that a judge cannot properly come to a conclusion without evidence directed to the point, but there can be no doubt that in a passing-off action the question whether the matter complained of is calculated to deceive, in other words, whether it amounts to a misrepresentation, is a matter for the judge, who, looking at the documents and evidence before him, comes to his own conclusion, and, to use the words of LORD MACNAGHTEN in *Payton & Co v Snelling, Lampard & Co* (7) ([1901] AC at p 311) "must not surrender his own independent judgment to any witness whatever."

If, however, any evidence is required, your Lordships have in this case the evidence of Mr Ritson, who was actually misled by the advertisement in question into thinking that the balls advertised were the "Improved Sewn Orbs" mentioned in the appellants' 1912 catalogue. Mr Ritson was a retail dealer, and had already stocked some of the appellants' 1912 balls, and was in possession of this catalogue. Seeing one of the respondents' advertisements, he thought they were selling the same ball for 4s 9d., and as he had given the appellants their wholesale price of 8s 4d for the balls stocked by him, and, therefore, could not afford to sell below this price, he was naturally alarmed, and wrote a letter of complaint to them.

In my opinion, therefore, the misrepresentation on which the appellants rely may be taken as fully established. Further, the misrepresentation so established was, in my opinion, of such a nature as to give rise to a strong probability of actual damage to the appellants in both their retail and wholesale trade. I refrain, however, from amplifying this point so as not to prejudice any question which may arise on any inquiry as to damages which your Lordships may direct. It is sufficient to say that the misrepresentation being established, and being in its nature calculated to produce damage, the appellants are *primâ facie* entitled both to an injunction and to an inquiry as to damage, the inquiry, of course, being at their own risk in respect of costs. The respondents, however, seek to displace this *primâ facie* right to relief on the part of the plaintiffs under the following circumstances. Immediately after the appellants' attention was called to the advertisements in question, Mr Cox, their manager, had an interview with Mr Parker. Mr Parker treated the matter somewhat lightly, and did not offer any undertaking or make any proposal which Mr Cox could reasonably accept. This occurred on 29 August 1912, and on August 30 the appellants issued their writ in this action. The appellants at the issue of the writ, and, indeed, subsequently, at any rate till after the close of the pleadings, were not aware that the balls advertised by the respondents, were the balls which they had sold to the waste rubber merchants. This is, in my opinion, only material with regard to the frame of the writ and the statement of claim, and cannot affect the appellants' right to relief. On August 31 Mr Parker, having apparently consulted his solicitors, wrote to the appellants the letter of that date, which in effect contains a promise not to advertise the respondents' balls as made under patent No 15,168 or as "specially tested." Inasmuch as the gist of the appellants' complaint was not any particular statement in the advertisements, but a misrepresentation suggested by the advertisements as a whole, this offer seems to me totally inadequate,

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and the appellants, in my opinion, were justified in continuing the action. Upon an interlocutory motion the respondents gave an undertaking which might have been adequate, but it was only given until the trial. In their defence they state that they undertake perpetually in the words of the undertaking given on the interlocutory motion, but they do not offer this undertaking to the court, nor do they offer to submit to an inquiry as to damages or to pay the costs. In my opinion, therefore, nothing that took place after 29 August 1912, can operate to displace the appellants' *primâ facie* right to relief.

Some discussion took place before your Lordships as to the subsequent advertisements issued by the respondents, it being admitted that these advertisements were not such that, taken alone, would have given

rise to a right of action on the part of the appellants. This may well be so, but taken in connection with the previous advertisements, I cannot help thinking that SARGANT, J, was right in his conclusion that they were hardly consistent with fair or honest trade. The effect of a misleading advertisement is a continuing effect, and it might reasonably be expected that a fair and honest trader, having his attention called to the fact that big advertisements were misleading, would do all in his power to counteract their effect. There is nothing in the subsequent advertisements pointing to a desire on the part of the respondents to undo the harm they had done by their first advertisements. Indeed, I am not sure that the subsequent advertisements are not so framed as to strengthen a belief induced by the first that the respondents were selling for 4s. 9d., or some less price, the same ball as the appellants had catalogued at 10s 6d, whereas, under the circumstances, they ought in common fairness to have been so framed as to counteract such belief. My conclusion, therefore, is that the appeal ought to be allowed and the judgment of SARGANT, J, restored.

LORD ATKINSON:

I have had the pleasure and advantage of reading the opinion that has just been delivered. I concur in it entirely and have nothing to add.

LORD SUMNER:

I concur. I am in entire agreement with the statement of the law just made by my noble and learned friend, LORD PARKER OF WADDINGTON and I should not trouble your Lordships with any observations except out of respect for the Court of Appeal and in order to explain why I venture to differ from their conclusion.

The Court of Appeal seem to have thought that there was little resemblance between the respondents' first advertisements and the appellants' catalogue. They attached capital importance to the word "sewn," which was absent in the one and present in the other, and, as I gather, little or none to the identical picture of the football. All comparisons of pictures or designs must be matters of individual opinion, in which argument helps but little, and each must judge for himself. I differ from them, as do your Lordships, in thinking that the advertisement, to which this picture gives point, is calculated, and in no small degree through the picture itself, to confuse in the public mind that which the respondents had to sell with that which the appellants advertised in their catalogue of 1912 in association with that picture. Further, on August 30 the witness Ritson, whose evidence was accepted by SARGANT, J, and indeed was not contradicted, already knew the respondents' advertisement, the appellants' catalogue containing the picture and description of their 1912 football, and the ball itself, of which he had bought one or more specimens. I think the fair effect of his evidence is that he regarded the advertisement as putting forward such distinguishing characteristics of the appellants' 1912 ball and the appellants' specific description of it as led him, a person in the trade, to take the ball offered by the respondents to be the appellants' 1912 ball. If he did not specifically say what he considered those distinguishing characteristics to be, it was only because he was not particularly questioned about it.

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From this initial difference of opinion most, if not all, the other differences follow. The writ, instead of being blameworthy as hastily directed to an erroneous supposition of the facts, appears to have been necessary in order to vindicate the appellants' rights. The difference of time, albeit only some twenty-four hours, between the issue of the writ and the receipt of Messrs Gamage's letter of regret, gives the appellants an advantage of which they should not be deprived. When it was issued they had no assurance at all that the respondents would not continue the course of action to which they had rightly objected, and the interview with Messrs Gamage's manager on August 30 had not encouraged any hope that they would not. What might fairly be required of the respondents in regard to subsequent advertisements was not that they should "advertise their

penitence," but that, in their own interests as well as in those of the appellants and the public, they should recognise that the effect even of an evening newspaper is not exhausted on the day of its publication, and that persons familiar with the advertisements issued before the writ might well continue to be misled by those issued after it, unless the latter series contained, as they did not, some disclaimer or correction of the former. I agree with SARGANT, J, in thinking that this suffices to support a claim for an injunction under the circumstances. Though the respondents gave no new offence they took their chance of profiting by the offence already given to the continuing detriment of the appellants. Though they were careful to do no new mischief they left the old mischief to work. As to the interim injunction, it protected the appellants only until trial, and would have fallen to the ground if they had abandoned the action. The disclaimer in the defence is less efficacious than an offer to undertake to the court, and the respondents took their own course in this regard at their peril. I think, therefore, that nothing occurred to disentitle the appellants to an injunction, which was strictly the appropriate remedy, and that the evidence of the effect of the advertisements on the trade, slight though it is, suffices to justify an inquiry as to damages. The costs of such inquiry and the measure of damages to be applied are, of course, not in any way governed by your Lordships' decision. It cannot be affirmed that no damage, or even that only nominal damage, has been sustained by a series of misleading advertisements in widely circulated newspapers at the beginning of the football season. Again, I think that Mr Ritson's evidence supports this view. It is true that, although a good deal of time had elapsed before the trial came on, the appellants had only been able to collect an inconsiderable amount of evidence relating to actual damage, but that is not sufficient to deprive them of the usual inquiry at their own risk as to costs. The improbability of their proving much is not the same thing as the legal certainty that they can prove nothing.

LORD PARMOOR:

I concur in the opinion of LORD PARKER, and I only express my opinion out of respect to the Court of Appeal. The decision in this case depends upon the questions of fact, and I agree in the conclusions of SARGANT J No person has a right to offer for sale, or sell, goods of another trader of an inferior or different class, under conditions calculated to represent such goods as goods of the same trader of a superior and distinctive class. If any person offers to sell, or sells, the goods under such a representation, he commits an actionable wrong quite irrespective of motive or fraud. The plaintiff who establishes a case of this character is entitled to an injunction and, if necessary, to an inquiry into damages.

There is no satisfactory evidence that the respondents sold footballs of an inferior or different class as though they were the goods of the appellants of a superior and distinctive class. The real issue is, did the respondents in offering for sale the footballs described in the advertisements, to which objection is taken, make representations calculated to lead to the belief that these footballs were the "Improved Sewn Orb Football," Patent No 15,168, of the appellants, as advertised in the appellants' catalogue for 1912. The appellants issued their catalogue

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for 1912, and included therein the Improved Sewn Orb Football, Patent No 15,168. In August 1912, the respondents advertised in certain papers the Improved Orb Football, Patent No 15,168. It is not necessary to compare in detail the terms of the advertisements with the terms of the catalogue, since it is admitted that the catalogue of the appellants was used as the basis from which to draw up the advertisements. This is said to have been a mistake. The court has to decide whether, apart from any sinister motive, the advertisements, or any of them, are reasonably calculated to deceive the public. In order to form a conclusion each advertisement must be considered as a whole in its entirety. I agree with the argument of counsel for the respondents that it is important to see whether the distinctive features associated with the superior class of goods of the appellants have been taken by the respondents in their advertisements. Taking this test, I think that the advertisements are calculated to represent that the respondents were offering for sale the same footballs as the appellants had catalogued in the catalogue for 1912. The advertisement which appeared in the "Regiment" of 31 August 1912, carries the representation further than any other, but the series of advertisements attached to the case all point in the same direction. This advertisement contains the words,

"The Improved Orb Football (Patent No 15,168) is a great deal better than the old moulded form," and these words, taken in connection with the whole get-up of the advertisement, appear to me to suggest in plain terms that the football offered for sale by the respondents is the same article as the football of the appellants catalogued in the appellants' catalogue for 1912. After an interview between the respective managers of the appellants and respondents, the appellants issued their writ. Subsequently thereto the respondents wrote a letter which is set out in the statement of defence. The Court of Appeal treated this letter as contemporaneous with the issue of the writ, but I accept the view of SARGANT, J, and the letter, in my opinion, does not affect the right to a perpetual injunction, if, at the date of the issue of the writ, the appellants were entitled to such injunction.

It was argued on behalf of the respondents that there was no evidence beyond a comparison of the documents to show that the conduct of the respondents was calculated to deceive any member of the public. I think that there was some relevant oral evidence, but there is no necessity for such evidence if the court is satisfied, on the comparison of the documents before it, which it is for the court to construe, that the respondents did issue an advertisement calculated to represent that they were offering for sale the "Improved Sewn Orb Footballs" of the appellants included in their catalogue for 1912, whereas in fact the footballs so offered for sale were of a different and inferior class. Subsequently to the issue of the writ the respondents issued further advertisements. These advertisements, taken in connection with those already issued, appear to me, so far as they are relevant, to aggravate the original offence, and there is evidence that they deceived one of the witnesses, Ritson.

The amount of damages recoverable from the respondents is not before your Lordships, but I desire to express my concurrence with the view of SARGANT, J, that a tort having been committed, the plaintiffs are entitled to such damages as naturally flow from their unlawful act, and that there is no artificial limitation in the case of a passing-off action. I agree that the appeal should be allowed with costs.

Lawrence, Webster, Messer, & Nicholls; Ward, Perks & Terry.

Reported by WE REID, ESQ, Barrister-at-Law.