

PEPSI-COLA COMPANY OF CANADA,
LIMITED (DEFENDANT)

APPELLANT;

AND

THE COCA-COLA COMPANY OF
CANADA, LIMITED (PLAINTIFF)...

RESPONDENT.

1939

* Mar. 27, 28,
29, 30, 31.
* April 3.
* Dec. 9.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade mark—Alleged infringement of trade mark “Coca-Cola” by use of trade mark “Pepsi-Cola”—Counterclaim against registrations of “Coca-Cola”—Delay and acquiescence—Burden with regard to confusion—Tests by comparison—Joining of descriptive words into compound word.

Plaintiff, The Coca-Cola Company of Canada, Ltd., and defendant, Pepsi-Cola Company of Canada Ltd., were each incorporated under the *Dominion Companies Act*, plaintiff in 1923, defendant in 1934. Plaintiff claimed to be the owner of the trade mark “Coca-Cola,” to be applied to the sale of non-alcoholic beverages and syrup for the preparation thereof, which was registered in Canada, in distinctive script form, in 1905, registration being renewed in 1930, and was

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

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further registered in Canada, not in distinctive script but in ordinary typewritten form, in 1932. (In argument in this Court it was sought to support this latter registration by s. 28 (1) (b) of *The Unfair Competition Act, 1932*, a position not taken on the pleadings). Defendant claimed to be the owner of the trade mark "Pepsi-Cola," to be applied to the sale of a non-alcoholic beverage, which was registered in Canada, in distinctive script form, in 1906, and renewed in 1931. Plaintiff in 1936 brought action against defendant, claiming infringement of its trade mark by the use of defendant's trade mark. Defendant attacked the validity of plaintiff's trade mark and by counterclaim sought cancellation of the registrations thereof.

Held: Plaintiff's action for infringement should be dismissed (judgment of Maclean J., [1938] Ex. C.R. 263, reversed). Defendant's attack against plaintiff's trade mark fails, except that this Court makes no order on defendant's counterclaim in respect of plaintiff's registration in 1932; subject to that, the counterclaim is dismissed.

Per The Chief Justice and Rinfret, Davis and Hudson JJ.: Though "coca" and "cola" is each a descriptive word, it does not follow that a trader cannot join them into a compound which, written in a peculiar script, constitutes a proper trade mark. (*In re Crosfield*, [1910] 1 Ch. 130, at 145-6, and other cases, cited). If there ever was any legitimate ground for impeaching the 1905 registration of "coca-cola," there has been such long delay and acquiescence that any doubt must now be resolved in its favour. It would be a matter of grave commercial injustice to cancel the registration which has stood since 1905 and become widely used by plaintiff. As to defendant's contention that one of plaintiff's courses of dealing—selling its syrup to some 80 different bottling concerns throughout Canada who add carbonated water according to standard instructions and then bottle the beverage and sell it as coca-cola to retail dealers—constitutes a public use of the word "coca-cola" as the name of a particular beverage and an abandonment of the word as a trade mark for the product of a particular manufacturer:—There may be some force in that contention, but the evidence at the trial was not developed sufficiently on this branch of the case to show explicitly how these bottling concerns or the retail dealers who purchased from them actually sold the beverage, and if said course of dealing were to be relied upon as an abandonment by plaintiff of its trade mark, the facts should have been plainly established.

Plaintiff had not established a claim for infringement from defendant's use of the trade mark "Pepsi-Cola." In the general attitude taken by plaintiff, its objection really went to the registration by any other person of the word "cola" in any combination, for a soft drink; and if such objection were allowed, then plaintiff would virtually become the possessor of an exclusive proprietary right in relation to the word "cola"; and to this it was not entitled. (In this connection it was held that 30 certificates of registration of trade names or trade marks in which the word "cola" or "kola" in some form was used were admissible as some evidence of the general adoption of the word in names for different beverages or tonics.) It cannot be said by tests of sight and sound that "Pepsi-Cola" bears so close a resemblance to "Coca-Cola" as to be likely to cause confusion in the trade or among the purchasing public. Each

case depends upon its own facts. In the present case further circumstances that might be taken into account were: that "Pepsi-Cola" as a registered trade mark in Canada had stood unimpeached since 1906, and the evidence disclosed that pepsin and cola flavour actually formed part of the ingredients of the beverage manufactured and sold by defendant as pepsi-cola; that no application in objection to defendant's corporate name was made by plaintiff following upon defendant's incorporation; that there was no evidence that anyone had been misled, and where a defendant's trade is of some standing the absence of any instance of actual confusion may be considered as some evidence that interference is unnecessary. Under all the circumstances of the case, commercial injustice would follow the injunction sought by plaintiff against defendant's use of the mark "Pepsi-Cola."

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While the rules of comparison for testing an alleged infringement of a registered mark resemble those rules by which the question of similarity on an application for registration is tested, it is necessary to establish a closer likeness in order to make out an actual infringement than would justify the refusal of an application to register; the burden on a plaintiff in an infringement action is to show reasonable probability of confusion, while an applicant for registration must establish, if challenged, the absence of all reasonable prospect of confusion.

Cases cited with regard to principles applicable to the use of trade marks included: *In re Crosfield*, etc., [1910] 1 Ch. 130, at 145-6; the *Reddaway* case, [1927] A.C. 406, at 413; *Hall v. Barrows*, 33 L.J. (N.S.) Ch. 204, at 207-8; the *Payton* case, 17 R.P.C. 628, at 634; the *Pianotist* case, 23 R.P.C. 774, at 777; the "*Peps*" and "*Pan-Pep*" case, 40 R.P.C. 219, at 223, 224.

Per Kerwin J.: A comparison of the words "Coca-Cola" and "Pepsi-Cola," their appearance in script, and their sound as pronounced and as likely to be pronounced by dealers and users of the wares of the parties, do not indicate that they are "similar" within the definition in s. 2 (k) of *The Unfair Competition Act, 1932*, (c. 38). The question in each case is one of fact (*Johnston v. Orr Ewing*, 7 App. Cas. 219, 220, cited), and in this case that question must be answered adversely to plaintiff's claim. Defendant's counterclaim against the 1905 registration of "Coca-Cola" should be dismissed, but solely on the ground that there is no evidence that would warrant the court declaring that it was not registrable or ordering that the registration be cancelled. In view of s. 28 (1) (b) of said Act (without determining its precise meaning) and of the course that the trial took, neither party should be precluded in a properly framed action from litigating the question whether under s. 28 (1) or otherwise plaintiff could apply for and secure registration of the compound word "Coca-Cola," although the same compound word in script form had already been registered by it as a trade mark; the judgment at trial dismissing the counterclaim's attack against the 1932 registration, should be set aside, and it should be declared that this Court makes no order with respect to it.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada

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(1), holding that the plaintiff's trade mark "Coca-Cola" had been infringed by the use by the defendant of the trade mark "Pepsi-Cola" and granting to plaintiff injunctions and other relief, and dismissing defendant's counterclaim for an order that the trade mark "Coca-Cola" was not registrable and for cancellation of registrations thereof.

The material facts and circumstances of the case are sufficiently stated in the reasons for judgment given in this Court, now reported.

By the judgment of this Court, the defendant's appeal was allowed (with regard to plaintiff's claim) and the action dismissed; as to defendant's counterclaim, the plaintiff (respondent) was entitled to succeed except that this Court did not see fit to make any order in respect of the registration of 1932 (discussed in the reasons for judgment); subject to that, the counterclaim was dismissed; appellant (defendant) to have its costs of the appeal and the action, and respondent (plaintiff) its costs of the counterclaim.

W. D. Herridge K.C., J. J. Creelman K.C., and J. C. Osborne for the appellant.

R. S. Smart K.C. and A. W. Langmuir K.C. for the respondent.

(*J. L. Ralston K.C.*, by special leave, spoke on behalf of certain clients, not parties to the action, with regard to certain observations in the reasons for judgment at trial).

The judgment of the Chief Justice and Rinfret, Davis and Hudson JJ. was delivered by

DAVIS J.—Both parties to this trade mark litigation, which was commenced in the Exchequer Court of Canada, manufacture and sell in Canada in competition with each other a low priced (five cents) non-alcoholic beverage. The plaintiff (respondent) uses as a trade mark the compound word "Coca-Cola" and the defendant (appellant) uses as a trade mark the word "Pepsi-Cola." Both parties are limited companies incorporated under the *Dominion Companies Act*; the plaintiff on September 29th, 1923, with the corporate name "The Coca-Cola Company

of Canada Limited," and the defendant on May 29th, 1934, with the corporate name "Pepsi-Cola Company of Canada Limited." Neither party has disclosed the formula from which its product is made. The plaintiff commenced this action against the defendant on May 30th, 1936, alleging that it was the duly recorded owner of the registered trade mark "Coca-Cola" for non-alcoholic, soft drink beverages and syrup for the preparation thereof and that the said trade mark had been registered in the Canadian Patent Office on November 11th, 1905, and renewed on April 15th, 1930. A further registration on September 29th, 1932, to which special reference will have to be made later, was also set up. The plaintiff then alleged that the defendant was adopting and using the designation "Pepsi-Cola" with its beverage, which it alleged "was and always has been so arbitrarily similar in colour and appearance to plaintiff's 'Coca-Cola' as to be virtually indistinguishable therefrom by the purchasing public," and that the corporate name of the defendant was "confusingly similar to" the corporate name and trade mark of the plaintiff, and that it was obviously done with the object that the defendant in competition with the plaintiff would benefit by the good will which had been built up by the plaintiff and its predecessors in title; and that the designation "Pepsi-Cola" whenever applied to that beverage was "in script form closely and confusingly similar to the distinctive script form in which the trade mark 'Coca-Cola' had been used by the plaintiff and its predecessors in title." The plaintiff alleged that all acts aforesaid of the defendant had been knowingly done in contravention of the provisions and prohibitions of *The Unfair Competition Act* (22-23 Geo. V, (1932) ch. 38) "and by way of infringement of the plaintiff's trade mark 'Coca-Cola'." The plaintiff claimed the usual relief in an infringement action.

The defendant in its defence admitted that the plaintiff was "registered as the proprietor of the registered trade mark 'Coca-Cola'," but denied that the registrations were in force or effect. The defendant alleged that the registration of November 11th, 1905, had been abandoned, or, in the alternative, that the registration of September 29th, 1932, is not distinguishable from the first registration, or if distinguishable, at no time has there been user or

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intended user of the last registered trade mark. The defendant alleged that it was the owner (by assignment) of a trade mark "Pepsi-Cola," to be applied to the sale of a non-alcoholic beverage, which was registered in Canada on November 30th, 1906, and that the same is in full force and effect, and that its predecessors in title had carried on in the United States for many years prior to the incorporation of the defendant an extensive business, and in Canada for a short period of years, a limited business in the manufacture and sale of soft drink beverages and syrups used in the preparation thereof under the trade mark "Pepsi-Cola" used in the distinctive form set out in the certificate of registration thereof, and that the defendant had upon its incorporation commenced and had since continued the manufacture and sale of its soft beverages, and the syrups used in the preparation thereof, and distributed the same under the said trade mark "Pepsi-Cola." After setting up the usual defence pleadings in an infringement action, the defendant specifically attacked the validity of the registration in 1905 of "Coca-Cola" upon the ground that the words "were descriptive and not properly registrable as a valid trade mark" and by way of counterclaim the defendant sought cancellation of the registrations of the said mark relied upon by the plaintiff.

It is plain then that this is not a passing off action but an infringement action upon a registered trade mark, the validity of which is directly put in issue.

When the action came on for trial, counsel for the plaintiff merely filed the certificates of the registration of "Coca-Cola" of November 11th, 1905, and of September 29th, 1932; read into the record a few questions and answers from the examination for discovery of the Manager of the defendant company; and filed as exhibits a sample bottle of Pepsi-Cola and photographs showing the markings on cases in which the defendant shipped its beverage in bottles. No evidence was tendered in support of paragraphs 3, 4, 5 or 6 of the statement of claim (all of which had been denied by the statement of defence) which had alleged long years of manufacture and sale, the expenditure of large sums in advertising, the extent of the plaintiff's business in Canada, and the acquisition by the plaintiff of all of the business and good will in and through-

out Canada in connection with which the trade mark "Coca-Cola" had been used by the plaintiff's predecessors in title including the trade mark "Coca-Cola."

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Counsel for the defendant moved for a non-suit, upon the ground that there was no proof that the plaintiff had acquired the good will or was the assignee of the original proprietor of the trade mark "Coca-Cola." The motion was reserved by the learned trial judge and the defence then called only one witness, Guth, the General Manager of the American Pepsi-Cola Company, which, he said, owns all the capital stock of the defendant company; filed the examination for discovery of the Secretary-Treasurer of the plaintiff, the certificate of registration of Pepsi-Cola of November 30th, 1906, and an assignment, a certificate of the registration of the design of the bottle in which Coca-Cola is marketed, and, subject to objection, 30 certificates of registration of trade marks which contain the word "cola" or "kola" or some similar word. The plaintiff gave no evidence in reply.

Each party attacked the title of the other to its trade mark and if the evidence were to be closely examined it may be that neither party has strictly established its own right to the trade mark it claims. The evidence on both sides is at least not satisfactory. In the case of "Coca-Cola" the application in 1905 was filed by a United States company, the Coca-Cola Company of Georgia. A notation attached to the certified copy of the registration states that the mark was assigned in 1922 by the Georgia company to a Delaware company. A further notation appears on the registration that "a document purporting to be an assignment" of the trade mark between the Delaware company and the plaintiff had been registered. But there was no proof of the assignments. Counsel for the plaintiff relied upon the pleadings and sec. 18 of *The Unfair Competition Act, 1932*, but the admission in the statement of defence is only "that the plaintiff is registered as the proprietor of" the trade mark "Coca-Cola", "as set out in paragraph 2 of the Statement of Claim." The defendant is in an even less favourable position on the question of title. The word "Pepsi-Cola" had been registered on November 30th, 1906, by a North Carolina company and it does not appear by whom its renewal on November 30th, 1931, was obtained. The defendant did

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not become incorporated until May 29th, 1934, and it is admitted that it did not succeed to the business of any other company in Canada, though it produced to the Trade Mark Office and caused to be recorded what purported to be an assignment, dated May 11th, 1936, made by a United States company which was described as a Delaware corporation and "successor" to the North Carolina company. There is no proof of any assignment or succession between the North Carolina company and the Delaware company. It may be on a strict view of the evidence that neither party has proved a legal right to the trade mark it claims. But we prefer to deal with the appeal from a broader point of view having regard to the substantial and important questions raised and the exhaustive and helpful arguments submitted to us by counsel for both parties. For that purpose we shall assume the title of each party is established until it becomes necessary, if it does, to determine that question.

It may be convenient at this point to refer to the plaintiff's registration of "Coca-Cola" of September 29th, 1932. This new registration (application for which was filed August 11th, 1932) was a specific trade mark

to be applied to the sale of beverages and syrups to be used in the manufacture of such beverages, and which consists of the compound word: "Coca-Cola," in any and every form or kind or representation; as per the annexed pattern and application.

The application made by the plaintiff stated that "we verily believe" the specific trade mark

is ours on account of our having acquired the same from the Coca-Cola Company, a corporation of the State of Delaware, United States of America, which last mentioned company in its turn acquired the same from the Coca-Cola Company, a corporation of the State of Georgia, United States of America,

and

We hereby declare that the said specific trade mark was not in use to our knowledge by any other person than ourselves at the time of our adoption thereof.

The application continued:

The said specific trade mark consists of the compound word "Coca-Cola" in any and every form or kind of representation. A drawing of the said specific trade mark is hereunto annexed.

In the earlier registration of the same words in 1905, the words were written in a very distinctive script and it is in that form that the mark has actually been used by the

plaintiff. We find it a little difficult to understand the purpose or effect of this registration, though obviously it was with a view to obtaining some advantage under *The Unfair Competition Act* which was passed by the Dominion Parliament on May 13th, 1932, and came into force on September 1st, 1932, which statute, by sec. 61, repealed the provisions of the *Trade Mark and Design Act*, R.S.C., 1927, ch. 201, in so far as trade marks are concerned. The application was not based upon the words having acquired any secondary meaning and no such claim is made in this action in respect of the registration.

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It was almost unbelievable that the 1932 registration consists merely of the words Coca-Cola in ordinary type-written form, as shown on the certified copy filed. We have examined the original document, in the Registrar's Office and, as we might have expected, the certified copy before the Court is exactly the same as the original document—a foolscap sheet of plain paper with nothing on it but the compound word Coca-Cola typewritten in the centre of the page. The application refers to this as “a drawing” and the certificate of registration refers to it as the “annexed pattern.” Registration was granted for the use of the compound word “in any and every form or kind or representation.” The words are the same hyphenated words that appear in the original registration of 1905 in the well known characteristic script. During the opening of the case the learned trial judge said to Mr. Smart, counsel for the plaintiff:

The whole question is, you say, as to whether the words Pepsi-Cola infringe Coca-Cola?

Mr. Smart: Yes, in the way it is written. The “Coca-Cola” is, as your Lordship may have seen, always displayed in characteristic form. The first letter has a scroll extending below the first word, and the second word has a scroll extending above.

When Mr. Smart was filing proof of the 1932 registration, he said:

* * * it consists of a compound word “Coca-Cola” again, but it is not shown in the characteristic form. This is a word-mark in itself.

His Lordship: Why was it renewed,—does the statute require it?

Mr. Smart: It is the second registration. That was just before *The Unfair Competition Act* was passed, dividing trade marks into word marks and design marks. And, as the original registration showed not only the word but a special form, it was presumably thought that some additional protection would be obtained by registering it without showing the particular form. As a matter of fact, that drops out of sight now, in view

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of *The Unfair Competition Act*, which provided that marks registered before that Act, under the *Trade Mark and Design Act*, should be treated, if they were in distinctive form, as a word mark for the word and a design mark for the design. So that by reason of *The Unfair Competition Act*, the first registration is the equivalent of two registrations, one on the word "Coca-Cola," and one on the special and distinctive and characteristic form of that word.

The only evidence touching this registration is that of the Secretary-Treasurer of the plaintiff on his examination for discovery:

Q. Do you make any distinction in point of use between these two registered trade marks?

A. No, sir.

Q. Do you know whether or not there is any distinction made in the use of these two trade marks?

A. Not to my knowledge, no.

Q. You use them indifferently for the same purpose?

A. Yes.

Q. Do you use the trade mark Coca-Cola in any form but the script form?

A. Yes.

Q. In what other form do you use it?

A. It is typed out and may be in block letters.

Q. How do you use it in relation to the product in a form other than the script form?

A. We generally use it in script form in our advertising.

Q. But sometimes you use it in block letter form?

A. Not in our advertising. In our advertising it is used in script form.

Q. Then how is it used in block letter form?

A. In the typing of a letter, for instance.

Q. Is that all?

A. It may appear in block letters in, for instance, a newspaper. Anyone writing the word Coca-Cola in a newspaper article might do that.

Q. But apart from the user of it in block letters where it is not convenient to use it in script, you do not use it in any other way?

A. That is not exactly correct.

Q. Will you state just how you do use it?

A. In a pamphlet, for instance, where you are using a certain form of type, particularly where the lettering is small, it is difficult to make the Coca-Cola trade mark small in distinctive script.

All that the trial judge says about this registration is:

In 1932, the plaintiff also registered the mark "Coca-Cola," for the same use, "in any and every form or kind or representation," but that registration may here be disregarded.

But the registration was specifically pleaded in the statement of claim and its validity specifically denied in the statement of defence and the counterclaim asked for its cancellation. The plaintiff in its supplemental factum takes the position that the registration may be super-

fluous under the old Act but seeks to support it under sec. 28 (1) (b) of the new Act, a position which was not taken on the pleadings. In the circumstances we do not think it advisable to make any order on the counterclaim in respect of the 1932 registration. But that registration does show that the plaintiff was plainly asserting a claim to the use of the words themselves in any shape or form.

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The defendant's main attack was against the 1905 registration of Coca-Cola upon the ground that the two words were common English words of merely descriptive character and were not distinctive. It was said that "cola" (kola) is a word with a very common meaning, being a genus of trees native to western tropical Africa which had been introduced into the West Indies and Brazil, whose seed, called cola-nut or cola-seed, about the size of a chestnut, brownish and bitter, is largely used for chewing as a condiment and digestive and the extract used as a tonic drink, and that the available literature, much of which we were referred to, shows that the word "cola" was well known and in the widest use to describe beverages containing cola extract long before the registration in 1905 of the mark "Coca-Cola"; further, that coca is a common word describing a South American shrub from the leaves of which cocaine, among other substances, is obtained and that the use by the natives of its leaves for their supposed stimulating properties had long been known. It was contended that long before 1887 extracts from coca leaves and from cola nuts had found a place in the pharmacopoeia. We were referred to the case of *Nashville Syrup Co. v. Coca Cola Co.* (1), where it is stated at p. 528 that

In 1887 Pemberton, an Atlanta (Georgia) druggist, registered in the Patent Office a label for what he called "Coca Cola Syrup and Extract."

The Coca Cola Company, in the *Nashville* case (1), was organized as a corporation in 1892 and acquired Pemberton's formula and label, according to the report of that case.

In *United States v. Coca Cola Company of Atlanta* (2), the Food and Drugs authorities of the United States filed a libel against the Coca Cola Company (Georgia) charging that its beverage was adulterated and misbranded.

(1) (1914) 215 Federal Reporter 527. (2) (1916) 241 U.S. 265.

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The Coca Cola Company denied the charge of misbranding and averred that its product contained "certain elements or substances derived from coca leaves and cola nuts." Mr. Justice Hughes (the present Chief Justice of the United States) in his opinion at p. 289 said:

In the present case we are of opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged. Nor is there basis for the conclusion that the designation had attained a secondary meaning as the name of a compound from which either coca or cola ingredients were known to be absent; the claimant has always insisted, and now insists, that its product contains both.

And at p. 288:

Nor would it be controlling that at the time of the adoption of the name the coca plant was known only to foreigners and scientists, for if the name had appropriate reference to that plant and to substances derived therefrom, its use would primarily be taken in that sense by those who did know or who took pains to inform themselves of its meaning. Mere ignorance on the part of others as to the nature of the composition would not change the descriptive character of the designation.

It is not without its own significance that there is no evidence in the case now before us that an extract or ingredient from either cola nuts or coca leaves forms any part of the formula from which the plaintiff's beverage is made. We doubt if the public who buy and consume the beverage ever think in terms of either coca leaves or cola nuts. We should think it not unreasonable to presume that the ordinary consumer thinks of "coca" as a mere corruption of the word "cocoa" or "cacao" and might not unreasonably expect that the beverage contained something of the product we all know as cocoa. Mr. Herridge made a powerful attack upon the registration of the words "coca" and "cola" as the basis of an exclusive trade mark for a beverage. No doubt each of the words is a descriptive word but we are not prepared to say that a trader cannot join the words into a compound which, written in a peculiar script, constitutes a proper trade mark.

In *In re Joseph Crosfield & Sons Ltd. and other cases* (1) (an application case), Lord Justice Fletcher Moulton said, at pp. 145 and 146:

Much of the argument before us on the part of the opponents and the Board of Trade was based on an assumption that there is a natural and innate antagonism between distinctive and descriptive as applied to

words, and that if you can shew that a word is descriptive you have proved that it cannot be distinctive. To my mind this is a fallacy. Descriptive names may be distinctive and vice versa. * * * There is therefore no natural or necessary incompatibility between distinctiveness and descriptiveness in the case of words used as trade marks. The notion that there is such an incompatibility is confined to lawyers, and is, in my opinion, due to the influence of the earlier Trade Marks Acts.

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These observations were referred to with approval by Lord Maugham (then Maugham, L.J.) in *Bale and Church Ltd. v. Sutton Parsons & Sutton and Astrah Products* (1) and by Lord Wright in the "Sheen" case, *In re J. & P. Coats, Ltd.* (2).

Viscount Dunedin in the *Reddaway* case (3) said:

* * * it seems to me that to settle whether a trade mark is distinctive or not * * * is a practical question, and a question that can only be settled by considering the whole of the circumstances of the case.

The compound word "Coca-Cola" was registered in Canada as early as 1905 and has been used by the plaintiff as its trade name and trade mark in connection with the sale of its beverage (whatever its ingredients may be), and the defendant's claim to have the registration of 1905 declared invalid and cancelled was not made until 1936. If there ever was any legitimate ground for impeaching the 1905 registration of Coca-Cola, there has been such long delay and acquiescence that any doubt must now be resolved in its favour. It would be a matter of grave commercial injustice to cancel the registration that has stood since 1905 and which admittedly has become widely used by the plaintiff.

The evidence is that the plaintiff manufactures the syrup and from it the beverage is made by adding carbonated water in some proportions not disclosed. In some cases the plaintiff itself adds the carbonated water and bottles and sells direct to the retailers; it has some 20 bottling plants of its own. In other cases the plaintiff sells the syrup to jobbers who in turn sell it to soda fountain owners who in turn add the carbonated water to it, before selling to the consumer. But it is also shown that the plaintiff sells the syrup to some 80 different bottling concerns throughout Canada who add carbonated

(1) (1934) 51 R.P.C. 129, at 144. (2) (1936) 53 R.P.C. 355, at 378.

(3) *George Banham & Co. Ltd. et al. v. F. Reddaway & Co. Ltd. et al.*, [1927] A.C. 406, at 413.

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water according to standard instructions and then bottle and sell the beverage to retail dealers. The evidence of Duncan, secretary-treasurer of the plaintiff, was this:

Q. Do these independent bottling plants bottle Coca-Cola alone or do they bottle other beverages as well?

A. Practically all of them bottle other products as well.

Q. What would be the nature of those products?

A. A general line of sodas.

There can be no doubt upon the evidence that the plaintiff's beverage is merchandized in Canada to a large extent through these independent bottling concerns. What is said against the plaintiff is that this method of doing business—selling its product in syrup to some 80 different concerns throughout Canada who in turn add a certain quantity of carbonated water to it in accordance with standard instructions and then sell the bottled drink to the public as Coca-Cola—constitutes a public use of the word Coca-Cola as the name of a particular beverage and an abandonment of the word as a trade mark for the product of a particular manufacturer. There may be some force in that contention but the evidence at the trial was not developed sufficiently on this branch of the case to show explicitly how these bottling concerns, or the retail dealers who purchased from them, actually sold the beverage. It would seem to be a fair inference from the evidence that it was sold under the name Coca-Cola but if the plaintiff's course of dealing with the syrup and the sales to the public of the beverage made from the syrup were to be relied upon as an abandonment by the plaintiff of its trade mark, the facts should have been plainly established.

The defendant's counterclaim for cancellation of the registration of Coca-Cola must fail.

We now come to the attack against Pepsi-Cola. The question is whether or not the names are so similar and confusing as likely to mislead the consuming public. It is not a passing off action; and there is no evidence that anyone has been misled. Where a defendant's trade is of some standing, the absence of any instance of actual confusion may be considered as some evidence that interference is unnecessary. What is said is that the designation "Pepsi-Cola" is "confusingly similar to" the trade mark "Coca-Cola" and that its use by the defendant constitutes an infringement of the plaintiff's trade mark.

Lord Westbury said in *Hall v. Barrows* (1):

* * * the property in a trade mark consists in the exclusive right to the use of that mark as applied to some particular manufacture. Nor is it correct to say that the right to relief is founded on the fraud of the defendant, as appears from the case of *Millington v. Fox* (2), already referred to. Imposition on the public is indeed necessary for the plaintiff's title, but in this way only, that it is the test of the invasion by the defendant of the plaintiff's right of property; for there is no injury done to the plaintiff if the mark used by the defendant be not such as may be mistaken, or is likely to be mistaken, by the public for the mark of the plaintiff. But the true ground of the Court's jurisdiction is property.

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Each case depends upon its own facts. We were referred to a great many authorities and while they contain statements of much value on general principles, they all deal with the particular facts of the particular cases. The actual decisions in cases of words of such similarity as "Kleenoff" and "Kleenup" (3), "Coalite" and "Ucolite" (4), "Ustikon" and "Justickon" (5), "Harvino" and "Vyno" or "Vino" (6), do not assist us in this particular case. While the *Payton* case in the House of Lords (7) was an action to restrain passing off, the words of Lord Macnaghten (at p. 634) may well be recalled:

Now, when a person comes forward to restrain a colourable imitation of this sort in a case like this, and when he cannot prove that the defendants have tried to steal his trade, he has to make out beyond all question that the goods are so got up as to be calculated to deceive. The principle is perfectly clear—no man is entitled to sell his goods as the goods of another person. The difficulty lies in the application, and when it is a case of colourable imitation I think it is very desirable to bear in mind what Lord Cranworth said on one occasion—that no general rule can be laid down as to what is a colourable imitation or not. You must deal with each case as it arises and have regard to the circumstances of the particular case.

Lord Parker, then Parker, J., said in another application case, the *Pianotist* case (8):

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| (1) (1863) 33 L.J. (N.S.) Ch. 204, at 207-208. | (5) <i>Davis v. Sussex Rubber Co. Ltd.</i> (1927) 44 R.P.C. 412. |
| (2) (1838) 3 Myl. & Cr. 338. | (6) <i>In re applications by Wheatley Akeroyd & Co. Ltd.</i> , (1920) 37 R.P.C. 137. |
| (3) <i>Bale and Church Ltd., v. Sutton Parsons & Sutton and Astrah Products</i> , (1934) 51 R.P.C. 129. | (7) <i>Payton & Co., Ltd. v. Snelting, Lampard & Co., Ltd.</i> , (1900) 17 R.P.C. 628. |
| (4) <i>In re an application by Magdalena Securities, Ltd.</i> , (1931) 48 R.P.C. 477. | (8) <i>In re an Application by the Pianotist Co. Ltd.</i> , (1906) 23 R.P.C. 774, at 777. |

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You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion—that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods—then you may refuse the registration, or rather you must refuse the registration in that case.

The authorities are plain, we think, that the rules of comparison for testing an alleged infringement of a registered mark resemble those rules by which the question of similarity on an application for registration is tested but that it is necessary to establish a closer likeness in order to make out an actual infringement than would justify the refusal of an application to register. The burden on a plaintiff in an infringement action is to show reasonable probability of confusion, while an applicant for registration must establish, if challenged, the absence of all reasonable prospect of confusion.

What is protected by law is the whole mark as registered but a part of a mark may be so taken and used as to amount to a substantial taking of the whole. The only similarity between the two compound words here in question lies in the inclusion of the word “cola” in both marks. The plaintiff does not, and of course could not, claim any proprietary right in the word “cola” standing alone. None the less it is plain that the objection of the plaintiff really goes to the registration by any other person of the word “cola” in any combination, for a soft drink. If such objection is allowed, then the plaintiff virtually becomes the possessor of an exclusive proprietary right in relation to the word “cola.” The general attitude of the plaintiff finds expression in the evidence of Duncan, the secretary-treasurer of the plaintiff, whose connection with the parent company goes back to 1920, when he said in answer to a question on this examination for discovery: “But cola to me means coca-cola.” The defendant’s factum set out a list of actions pending in the Exchequer Court at the present time brought by the plaintiff against other parties for using the word “cola” in connection with their beverages.

Suit No. 17042 vs. E. Denis, to restrain the use of the mark "Denis cola."	1939
Suit No. 17057 vs. Eskimo Bottling Works, to restrain the use of the marks "Eskimo cola" and "Texacola."	PEPSI-COLA CO. OF CANADA, LTD.
Suit No. 17048 vs. Frisco Soda Water Co. Ltd., to restrain the use of the mark "Sunshine cola."	v. COCA-COLA CO. OF CANADA, LTD.
Suit No. 17036 vs. Girouard Ltd., to restrain the use of the mark "Hero-Cola."	Davis J.
Suit No. 17056 vs. Canadian Aerated Waters, Ltd., to restrain the use of the mark "Soda-Kola."	—

No objection was taken to this statement. The thirty Canadian registrations of trade names or trade marks in which the word "cola" in some form was used were in our opinion admissible as some evidence of the general adoption of the word in names for different beverages or tonics:

Date of Registration	Trade Mark	Product	Page number in Record
June 11, 1896	Bromo-Kola	Medicine	78
April 7, 1898	Clarke's Kola Compound for Asthma	Medicine	80
Mar. 11, 1901	Laxakola	Tonic Beverage	82
Nov. 22, 1902	Kola Tonic Wine	Tonic Beverage	85
Nov. 11, 1905	Coca-Cola	Beverage	87
June 28, 1906	Noxie-Kola	Tonic Beverage	91
Oct. 3, 1906	Tona-Cola	Tonic Beverage	92
Nov. 30, 1906	Pepsi-Cola	Beverage	95
April 9, 1907	La-Kola	Beverage	98
April 25, 1907	Cola-Claret	Beverage	100
Feb. 17, 1910	Kola-Cardinette	Medicine	102
July 23, 1912	Cocktail Kola	Tonic Beverage	104
Oct. 18, 1915	Mint-Kola	Beverage	107
Oct. 29, 1915	Kel-Ola	Beverage	108
April 20, 1918	Kelo	Tonic Beverage	111
Nov. 21, 1919	Kuna Kola	Beverage	113
July 11, 1921	Kola Astier	Medicine	115
Sept. 1, 1922	Rose Cola	Beverage	117
Nov. 2, 1922	Orange Kola	Beverage	119
Nov. 17, 1922	O'Keefe's Cola	Beverage	121
Aug. 31, 1925	Smith's O'Kola	Beverage	123
Feb. 19, 1926	Fruta-Kola	Beverage	124
Mar. 9, 1926	Kola-Fiz	Beverage	127
June 17, 1927	Ketra-Kola	Beverage	128
Oct. 15, 1927	Royal Cola	Beverage	130
June 25, 1928	Kali Kola	Beverage	132
July 3, 1930	Celery-Kola	Beverage	137
Aug. 27, 1930	Mexicola	Beverage	139
Oct. 27, 1930	Klair-Kola	Beverage	140
Nov. 20, 1930	Oxola	Beverage	142
July 7, 1934	Kolade	Medicine	146
Oct. 15, 1936	Vita-Kola	Beverage	148

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It will be observed that Coca-Cola is the fifth and Pepsi-Cola the eighth in the given list of registrations.

The United States case of *The Coca-Cola Company v. The Koke Company of America et al.* (1) was relied upon by the respondent. In that case the Supreme Court of the United States granted an injunction but both courts below had agreed that, subject to one question in respect of which a writ of *certiorari* was granted by the Supreme Court, the plaintiff had on the facts a right to equitable relief. It had been found that the defendant's mixture was made and sold "as and for the plaintiff's goods." Mr. Justice Holmes, who wrote the judgment in the Supreme Court, referred to the defendant's conduct there as "a palpable fraud." Nothing of that sort is proved or seriously suggested in the case before us. The question which the Supreme Court of the United States considered was whether the plaintiff had there been guilty itself of such representations to the public of its own beverage as would disentitle it to equitable relief.

The plaintiff obviously seeks to eliminate the word "Pepsi-Cola" from the trade, in whatever form it is written. This is plain from its demand that even the use of the corporate name of the defendant be restrained. The real basis of the plaintiff's claim is not against the style of script lettering in which the Pepsi-Cola mark as registered or used by the defendant is written; the basis of the claim is the use of the compound word in any form, obviously because it contains the word "cola." The registration of September, 1932, as we have seen, is not in script but in ordinary type and its use is claimed "in any and every form or kind of representation." In the "Peps" and "Pan-Pep" case (2), Eve J. pointed out that

One must be careful in determining the issue that the claim put forward by the owners of the mark shall not develop into a claim calculated greatly to restrict the use in the particular business of an affix or a prefix extremely common in the trade.

Here the plaintiff is really attempting to secure a monopoly in the word "cola."

Both companies were incorporated under the Dominion *Companies Act*. Under sec. 7 a proposed corporate name

(1) (1920) 254 U.S. 143.

(2) *In re a Trade Mark of the United Chemists' Associations Ltd.*,
 (1923) 40 R.P.C. 219, at 223.

shall not be a name liable to be confounded with the name of any other company, and sec. 23 provides for a change of corporate name if it is made to appear to the satisfaction of the Secretary of State that the name of a company is so similar to the name of an existing company "as to be liable to be confounded therewith." *The Companies Act*, R.S.C., 1927, chap. 27, secs. 7 (a) and 23, as amended by 20-21 Geo. V (1930), chap. 9, secs. 4 and 10. No such application appears to have been made by the plaintiff following upon the incorporation of the defendant. It is one of the circumstances that may be taken into account.

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We cannot say by tests of sight and sound that the compound word "Pepsi-Cola" bears so close a resemblance to "Coca-Cola" as to be likely to cause confusion in the trade or among the purchasing public. The difference between the two compound words is apparent. If the sound test is applied, the difference is sharply accentuated; if the sight test is applied, the first word "Pepsi," written in any form, at once distinguishes the compound words. The general impression on the mind of the ordinary person, we think, made by sight and sound of the two marks would be one of contrast, rather than of similarity. Moreover, it must be borne in mind that "Pepsi-Cola" as a registered trade mark in Canada has stood unimpeached since 1906 and that the evidence in the case discloses that pepsin and cola flavour actually form part of the ingredients of the beverage manufactured and sold by the defendant as Pepsi-Cola. To refer again to certain language of Eve J. in the "Peps" case (1):

* * * I feel satisfied that, if confusion had in fact arisen, or, if in fact there had been reason to believe that confusion was likely to arise in the near future, it would not have been impossible to produce evidence of some retailer of the circumstances in which confusion had either been created or was apprehended.

While this is not decisive of the matter, it is of considerable weight.

Considering all the circumstances of the case, the same commercial injustice which we spoke of in connection with the defendant's attempt to cancel the registration of "Coca-Cola" would follow, though perhaps to a lesser extent, the

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injunction sought by the plaintiff against the use of the mark "Pepsi-Cola" by the defendant. We are satisfied the plaintiff has not established its claim for infringement.

The learned trial judge, the President of the Exchequer Court, found infringement and gave judgment in favour of the plaintiff, restraining the defendant not only from selling or distributing its beverage in association with the compound word "Pepsi-Cola" but also from using the word "Pepsi-Cola" in or as part of its corporate name, ordering the delivery up of all labels, advertising matter, price lists and other material in the possession or under the control of the defendant which bear the compound word "Pepsi-Cola," and awarding such damages as may be ascertained on a reference. The counterclaim was dismissed. It is plain from the reasons for judgment of the learned Judge that he concluded that there was a system of deception and fraud practised by the defendant against the plaintiff and that his view of the whole case was much influenced by certain findings of fraud and deception that had been made in a judgment in an American case (Delaware) introduced into the evidence of the present case and referred to by the learned Judge in his reasons for judgment. Neither of the parties to this action was a party in the foreign action and it is sufficient to say, with the greatest respect, that the findings of fact in that case have nothing whatever to do with this case and were clearly inadmissible.

At the opening of the appeal we heard Mr. Ralston, by special leave, who said he represented several other "Cola" companies who feared their rights might be prejudicially affected by certain rather extended observations in the trial judgment to which he called our attention, relating to the number of other registrations and the use of trade names containing the word "cola" in some form. It is only necessary for us to say that our judgment is solely concerned with the rights of the parties to this litigation and nothing in this case can alter or prejudicially affect the rights of other parties.

We would allow the appeal with costs. Both the action and the counterclaim should be dismissed with costs, except that there shall be no order under the counterclaim in respect of the 1932 registration.

KERWIN J.—The defendant, Pepsi-Cola Company of Canada, Limited, appeals from a judgment of the Exchequer Court whereby, at the instance of the plaintiff-respondent (The Coca-Cola Company of Canada, Limited), the appellant, its servants, agents and workmen were perpetually restrained

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from selling or distributing any beverage not of the plaintiff's manufacture in association with the compound word "Pepsi-Cola" or any other word or words so similar to the plaintiff's trade mark "Coca-Cola" as to be calculated to cause confusion between the defendant's beverage and that the plaintiff.

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The judgment perpetually restrained the appellant from using the compound word "Pepsi-Cola" in or as part of its corporate name, or any word or words therein so similar to the plaintiff's trade mark "Coca-Cola" as to be calculated to cause confusion between the plaintiff and the defendant;
and also perpetually restrained the appellant, its servants, agents and workmen

from distributing any beverage not of the plaintiff's manufacture in association with any word or words in script form of a kind calculated to cause confusion between the defendant's beverage and that of the plaintiff.

The judgment contained an order for the delivery up by the appellant to the respondent of all labels, advertising matter, etc.; directed a reference to determine the damages suffered by the respondent by reason of the infringement complained of in the statement of claim or alternatively as the plaintiff might elect to take an account of profits; and dismissed the appellant's counterclaim for an order that the trade mark "Coca-Cola" was not registrable and for the cancellation of the registrations of the respondent.

At the trial the respondent filed a certificate of registration of trade mark dated November 11th, 1905, a certificate of another trade mark registered September 29th, 1932, a sample bottle of Pepsi-Cola, two photographs showing markings on cases of Pepsi-Cola, and a sample bottle of Coca-Cola. In addition to filing these exhibits, the respondent read certain questions and answers from the examination for discovery of Donald S. Hawkes, General Manager of the appellant company, which merely showed that the deponent and some of his predecessors in the position occupied by him had been at various times connected with the respondent company and with some other company which may be referred to as the Coca-Cola Com-

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pany. There is also a statement that the appellant company did not take over the Canadian business of any other company, to the deponent's knowledge, but in the view I take of the matter, the effect of that answer need not be considered. The respondent then rested its case and after a motion for non-suit had been refused, certain evidence was led and certain exhibits filed on behalf of the appellant. It appears that the appellant registered the name "Pepsi-Cola," in the form shown in its application, as a trade mark to be applied to the sale of beverages and particularly to a non-alcoholic beverage on November 30th, 1906.

Whatever may have been proved in other actions brought by the respondent or its parent company against other individuals or companies cannot, of course, be considered, and it is unnecessary, in my opinion, to define the precise effect of section 18 of *The Unfair Competition Act, 1932*, chapter 38. The respondent undoubtedly appears to be the owner of the trade mark and the word mark "Coca-Cola," and by section 3 of the Act the appellant is prohibited from knowingly adopting for use in Canada in connection with beverages and syrup for the manufacture of such beverages the respondent's trade mark or any distinguishing guise which is similar to it. By section 2 (k):—

"Similar," in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin;

In the present case the only admissible relevant evidence consists of the two names, the forms in which they respectively appear and the fact that they are used in the same areas in Canada in connection with similar wares, i.e., "soft" drinks. Facsimiles of the respective trade marks are reproduced in the judgment of the President of the Exchequer Court (1). A comparison of the two hyphenated words, their appearance in script, and their sound as pronounced and as likely to be pronounced by dealers

and users of the wares of the parties do not indicate that they so resemble each other or so clearly suggest the idea conveyed by each other that they fall within the definition of section 2 (k).

Numerous judgments were cited at bar to show that in other cases certain words or expressions were calculated to cause the goods of one party to be taken by purchasers for the goods of the other party but the question in each case is one of fact. "How (asks Lord Watson in *Johnston v. Orr Ewing* (1)) can observations of judges upon other and quite different facts bear upon the present case, in which the only question is what is the result of the evidence?" Lord Blackburn in the same case states (2): "The question to be determined is a question of fact." In the present case that question must, in my opinion be answered adversely to the respondent.

As to the counterclaim, I find myself unable to agree with all the reasons given by the learned President. I would affirm its dismissal in so far as respondent's trade mark registered as No. 43/10433 is concerned, but solely on the ground that there is no evidence that would warrant the Court declaring that it was not registrable or ordering that the registration be cancelled. I would set aside the judgment *a quo*, in so far as it dismisses that part of the counterclaim which asks for a declaration that respondent's trade mark registered as No. 257/55268 was not registrable and for an order cancelling the registration.

The parties having been permitted to file supplementary factums, it appears from that submitted on behalf of the respondent that the position now taken by it with respect to the second trade mark differs from that advanced by it at the trial. Our attention has been drawn to section 28 (1) (b) of *The Unfair Competition Act, 1932*:—

28. (1) Notwithstanding anything hereinbefore contained:—* * *

(b) similar marks shall be registrable for similar wares if the applicant is the owner of all such marks, which shall be known as associated marks, * * *

I am not prepared, at the moment, to determine the precise meaning of that provision but in view of it and

(1) (1882) 7 App. Cas. 219, at 219-220.

(2) at 220.

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of the course that the trial took, I am not disposed to preclude either party in a properly framed action litigating the question whether under section 28 (1) or otherwise respondent could apply for and secure registration of the compound word "Coca-Cola" although the same compound word in script form had already been registered by it as a trade mark. The judgment on the counterclaim should, therefore, declare that with respect to the respondent's second trade mark, the Court does not see fit to make any order.

The appellant should have its costs of the appeal and of the action, and the respondent its costs of the counterclaim.

Appeal allowed in part.

Solicitors for the appellant: *Creelman, Edmison & Beullac.*

Solicitors for the respondent: *Osler, Hoskin & Harcourt*
