

another counsel, when in addition to the letter, the depositions of two witnesses taken at the II. trial, who were not members of the family, were put in without the consent of or objection on the part of the prisoner's counsel.

Held, that even assuming that the consent in the letter, which seemed to be a concession for the proposed postponement of the trial, was wide enough to authorize the admission of the specified depositions, the depositions of the two witnesses, not members of the family were improperly received and a new trial was granted.

Cartwright, K.C., for Crown. *Johnston, K.C.*, for prisoner.

HIGH COURT OF JUSTICE.

Mulock, C.J., Ex.] KERSTEIN v. COHEN. [Feb. 16.
Trade mark—Infringement—Coined word—Similarity—Colourable imitation—Costs.

The coined word "Sta-Zon," adopted by the defendants as a trade mark or name for their eye glasses, is not so similar to the coined word "Sur-On," adopted by the plaintiffs and registered as a trade mark to distinguish their eye glasses of very similar appearance, as to mislead ordinary persons, exercising ordinary caution, into purchasing the defendants' goods by mistake for those of the plaintiffs.

There can be no infringement unless the similarity is so close as to give rise to a reasonable probability of deception.

Where there is no reliable evidence of persons having been actually misled, it is for the Court to determine the question by consideration of the words themselves.

The plaintiffs in advertising their goods used in connection with the word "Sur-On" such words as "On to stay on," "An eye glass that stays on," etc.

Held, that, although the defendants had adopted the trade mark "Sta-Zon" because of the plaintiffs having so described their goods, and with the object of acquiring the benefit of the market which the plaintiffs had developed, the plaintiffs had acquired no exclusive right in the words used in their advertisements other than "Sur-On"; but on account of the defendants' conduct, the dismissal of the plaintiffs' action for infringement should be without costs.

J. A. Macintosh, for plaintiffs. *J. H. Moss*, for defendants.