

When it is contended that the Judge must regard the case from the standpoint of the public, that contention means that he must put himself as far as possible in the position of an ordinary purchaser; not in that of a man going in to purchase goods with the aid of a microscope, but of one doing business as it is ordinarily done. A person having, from advertisement or otherwise, acquired an impression that a particular article is a desirable one, goes into a shop expecting fair, honest, and candid dealing on the part of the salesman; he does not expect to be deceived; and therefore he is not called upon, I think, to examine the trade marks critically, but only in a casual way. If this view be correct, it may be admitted that the ordinary purchaser in so purchasing may be deceived, although by a more critical examination he would have been able to distinguish between the respective trade marks. It is a not unusual thing for a person of even more than ordinary care and intelligence to be mistaken or deceived, often only discovering the mistake or deception after it has occurred and when something has called his attention to it.

If defendants were desirous of changing their trade mark "B. S. Co." to some other, how comes it that of all the other designs which ingenuity could have applied they hit upon a letter of the alphabet nearest in appearance and in sound to that of plaintiffs? Is it a coincidence, or were defendants endeavouring to substantially copy plaintiffs' trade mark, with such a slight variation as would enable them to evade the legal consequences of infringement, and thus secure to themselves the benefit of the confusion in the public mind? I would have thought that if defendants had an honest explanation to give, one of them would have gone into the witness box and offered it. He has not done so.

Now, what are the elements in reference to this button which would be likely to deceive or lead to mistake? I do not agree with Mr. Jones that the test is simply as to whether the letter "B" may be confounded with the letter "D." The case is not limited to that bald question. It was not necessary, I would think, if defendants were anxious to avoid confusion, for them to have selected, as they seem to have done, a button precisely like that of plaintiffs, upon which to engrave the letter. It is the same as that of plaintiffs' in shape, in material, in design, in colour, in position. I do not say that defendants could have used the letter "B"