

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Exchequer Court.]

[Jan. 15]

DEKUYPER v. VANDULKEN.

VANDULKEN v. DEKUYPER.

Trade mark—Jurisdiction of court to restrain infringement—Effect of—Rectification of register.

In the certificate of registration the plaintiffs' trade mark was described as consisting of "the representation of an anchor with the letters 'J.D.K. & Z.,' or the words 'John DeKuyper, Son & Co., Rotterdam,' as per the annexed drawings and application." In the application, the trade mark was claimed to consist of a device or representation of an anchor inclined from right to left, in combination with the letters "J.D.K. & Z.," or the words "John DeKuyper, etc., Rotterdam," which, it was stated, might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels, and other packages containing geneva sold by plaintiff. It was also stated in the application that on bottles was to be affixed a printed label, a copy or *facsimile* of which was attached to the application, but there was no express claim of the label itself as a trade mark. This label was white and in the shape of a heart, with an ornamental border of the same shape, and on the label was printed the device or representation of the anchor, with the letters "J.D.K. & Z." and the words "John DeKuyper & Son, Rotterdam," and also the words "Genuine Hollands Geneva," which, it was admitted, were common to the trade.

The defendants' trade mark was, in the certificate of registration, described as consisting of an eagle, having at the feet "V.D.W. & Co.," above the eagle being written the words, "Finest Hollands Geneva"; on each side are the two faces of a medal, underneath on a scroll the name of the firm, "VanDulken, Weiland & Co.," and the word "Schiedam," and lastly, at the bottom, the two faces of a third medal, the whole on a label in the shape of a heart (*le tout sur une étiquette en forme de cœur*). The colour of the label was white.

Held, affirming the judgment of the Exchequer Court, that the label did not form an essential feature of the plaintiffs' trade mark as registered, but that, in view of the plaintiffs' prior use of the white heart-shaped label in Canada, the defendants' had no exclusive right to the use of the said label, and that the entry of registration of their trade mark should be so rectified as to make it clear that the heart-shaped label formed no part of such trade mark. TASCHEREAU and GWYNNE, JJ., dissenting on the ground that the white heart-shaped label with the scroll and its constituents was the trade mark which was protected by registration, and that defendants' trade mark was an infringement of such trade mark.

Appeal dismissed with costs.

Abbott, Q.C., and Campbell for the appellants.

Ferguson, Q.C., and Merrill for the respondents.