

MASTEN, J.

DECEMBER 4TH, 1918.

RUBBERSET CO. LIMITED v. BOECKH BROTHERS CO.  
LIMITED.

*Trade Name — Infringement — "Passing-off" — Evidence — Deception — Reasonable Possibility of Deception.*

Action for infringement of a registered trade mark and for "passing-off" goods manufactured by the defendants as those of the plaintiffs.

The action was tried without a jury at Toronto.

R. S. Robertson and J. W. Pickup, for the plaintiffs.

A. W. Anglin, K.C., and S.W.McKeown, for the defendants.

MASTEN, J., in a written judgment, said that the original plaintiffs, the Rubberset Company Limited, carried on in Ontario the business of manufacturing and selling brushes; an American company, with a similar name, carrying on the like business in the United States, was added as a plaintiff at the trial. The defendants were brush manufacturers carrying on business in Ontario.

No evidence was adduced in support of the claim on the trade mark.

On the claim for passing-off two questions arose: (1) Had the word "Rubberset," as applied to brushes, acquired a secondary significance so as to mean to the public, and in the trade, brushes manufactured by the plaintiffs? (2) Had the defendants infringed the plaintiffs' right?

Dealing with the question of infringement, the learned Judge said that, in such an action as this, if an injunction be granted, it is granted to protect the property in the trade or goodwill of the plaintiff, which will be injured by its use by the defendant. If the use of a word or name be restrained, it can only be on the ground that such use involves misrepresentation, and that such misrepresentation has injured or is calculated to injure another in his trade or business.

Reference to *Burberrys v. J.C. Cording & Co. Limited* (1909), 26 R.P.C. 693, 701.

No case of actual deception was established or indeed put forward in the evidence; the claim was based solely on the ground that there was a reasonable probability of deception.

The outstanding facts made it difficult to establish a reasonable probability of deception; but, passing over such difficulties, there was no reasonable probability of the ordinary retail customer