

her husband. That is what the applicant did in this case, but her doing so seems to have counted for nothing in deciding either the existence or the degree of her dependency. In the case of a widow wholly dependent upon the deceased, the statute provides a measure of compensation which involves no inquiry into her exact pecuniary loss, but in the case of one only partly dependent on him, the compensation, while not exceeding the amount payable in cases of total dependency, is to be "proportionate to the injury to the said dependant." Although the learned County Court Judge is said to have treated the applicant as a partial dependant, no one invited him, and he did not attempt, to proportion the compensation to her actual injury or loss. The whole question seems to have been treated as one of law rather than fact, and she was regarded as being entitled to compensation solely because of the legal presumption of dependency attaching to her status as wife. The money coming to a widow under the Act is not a present in consideration of her status; it is a payment by a third person to compensate her as a dependant for her actual pecuniary loss by her husband's death, and where her husband's death does not, in the circumstances of the particular case, involve any real detriment to her pecuniary position, there is no rule of law to prevent the arbitrator from finding that, though married to the deceased, the applicant was not in fact dependent on him. The judgments in the Court of Appeal in favour of the applicant were founded on the authority of certain decided cases.

Without going over the ground traversed by Lord Atkinson, I will refer briefly to the facts in the principal of those cases. In the case of *Coulthard v. Consett Iron Company* ([1905] 2 K.B. 899) the husband had left his wife and had ceased to contribute to her maintenance, so that she was thrown upon the charity of friends or the workhouse. At the time of his death she was expecting him back every day to provide a home. In *Stanland v. North-Eastern Steel Company*, reported in note to *Williams v. Ocean Coal Company Limited* ([1907] 2 K.B. 425), the deceased had left the applicant to look for work, but failed to return, and the applicant maintained herself and her children with occasional recourse to the workhouse. In *Williams v. Ocean Coal Company* ([1907] 2 K.B. 425) the husband left his wife in charge of his parents while he went to seek employment at sea. She afterwards went to her own parents. The husband found work as a miner, and though he did not give her a home, they had occasional intercourse, and there was nothing in the facts to suggest the conclusion that she had in fact given up her legal dependence upon him. In *Sneddon v. R. Addie & Sons' Collieries* (1904, 41 S.L.R. 826, 6 F. 992) the husband had deserted the wife, and she was thereafter supported by her mother and the charity of friends, being herself unable to work owing to bad health. In each of these

cases the widow was held, and I think rightly held, to be dependent on the husband at the time of his death. The dependence of the wife continued after the separation from her husband, though other persons, her parents, or friends, or the State, voluntarily and temporarily fulfilled the husband's obligation in his default. In such circumstances there was no adequate rebuttal of the presumption, or, as it may be better described, the probability, of dependency arising from her position as a married woman, whereas in the present case it would scarcely be possible to have such a rebuttal more clearly established. I think therefore that the appeal should be allowed.

Judgment appealed against reversed.

Counsel for Appellants—Scott Fox, K.C.—T. E. Ellison. Agents—Bell, Brodrick, & Gray, Solicitors.

Counsel for Respondent—Atkin, K.C.—R. A. Shepherd. Agents—Corbin, Greener, & Cook, Solicitors.

## HOUSE OF LORDS.

Friday, July 21, 1911.

(Before the Lord Chancellor (Loreburn), Lords Atkinson, Gorell, and Robson.)

EDGE & SONS, LIMITED *v.* NICCOLLS & SONS, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

*Trade-Name—Passing-off—Common Trade Article—Imitation of Get-up—Article Distinguished by Makers' Label—Revoked Patent.*

The plaintiffs had since 1884 manufactured washing-blue and sold it extensively in small bags with a wooden stick attached as a handle for use in washing. A patent was obtained for this method of wrapping the article, but was revoked in 1891. The bags were retailed without any maker's name attached. No other manufacturer of washing-blue used this get-up for his goods until in 1909 the respondents began to do so, imitating exactly the bags and the wooden handle, but attaching a label with their own name. The plaintiffs sought for an injunction.

*Held* that the imitation of the get-up of the plaintiffs' article amounted to a representation likely to deceive retail purchasers into believing they were buying the plaintiffs' manufacture, and that the attachment of the respondents' label was not a sufficient distinction, and injunction granted.

A manufacturing company sought, under the circumstances stated *supra* in rubric and in their Lordships' judgment, an injunction against another firm from passing off an imitation of the plaintiffs' manufactures. Judgment by Swinfen Eady, J.,

in favour of the plaintiffs was reversed by the Court of Appeal (COZENS-HARDY, M.R., FARWELL and KENNEDY, L.JJ.), and the plaintiffs appealed.

Their Lordships gave considered judgment as follows:—

LORD CHANCELLOR (LOREBURN)—I agree in the conclusion at which your Lordships have arrived in this case, and in the judgment which will be proposed.

LORD GORELL—In this case the plaintiffs moved to restrain the defendants from passing off their blues and tints as and for the goods of the plaintiffs, as they alleged that the defendants had done and threatened to continue to do. Swinfen Eady, J., before whom the motion came, granted an injunction, but his order was reversed by the Court of Appeal, from whose decision this appeal is brought to your Lordships' House. The facts are not in dispute to any material extent and may be stated shortly.

In November 1894 the plaintiff company were incorporated to take over a business previously carried on by Mr William Edge. In 1884 Mr Edge had begun to make and sell certain laundry blues got up in a particular manner, and in 1893 he began to make and sell tints got up in a similar manner. After they took over Mr Edge's business the plaintiffs continued this manufacture and sale. In 1884 Mr Edge took out a patent for what he seems to have regarded as an invention, and his claim was for "wrapping or parcelling up soluble or insoluble blue or other colours in a bag or cloth of fibrous substances, provided with the attachment of a handle substantially as and for the purposes herein set forth."

It seems to be perfectly clear that the patent was bad, and the letters-patent were revoked by an order on the 29th June 1891, before the formation of the plaintiff company. Mr Edge and his successors, the plaintiffs, however, continued the manufacture and sale of the blues and tints, wrapped up and parcelled in the manner described in the complete specification, and the particular feature of the article sold was that each was put up in a porous bag, the neck of which was tied round a small stick with a knob at each end, and thus the blue or tint could be dipped or dissolved in water without the hands of the person using it becoming wet. Until the defendants took the action complained of no one except the plaintiffs had sold or offered for sale blues and tints done up in the same way as the plaintiffs' articles, and the plaintiffs appear to have advertised their goods extensively and to have acquired a high reputation for these blues and tints. The manner in which the goods were done up has become associated in the minds of purchasers with the plaintiffs' goods, and the evidence shows that it has been relied upon by the public who use these goods as distinguishing the plaintiffs' goods from all others. The defendant company was incorporated in 1907, and took over a business previously established by Mr William Niccolls. He and his suc-

cessors, the defendants, before April 1910 made and sold tints and dyes done up in a different way from the plaintiffs' and with the name "Niccolls" labelled thereon, but without an appliance by which to hold the bag in the water. Shortly before this action was commenced the defendants adopted the same method of wrapping and parcelling as that used by the plaintiffs and as specified in the revoked letters-patent. The appearance of the defendants' goods was similar to that of the plaintiffs' goods, and the form and size of the stick used by the defendants were similar to the form and size of that used by the plaintiffs. The only difference which appeared between the two was that the defendants had a label on their goods on which the name of "Niccolls" appeared, whereas there was no label on the plaintiffs' goods. The defendants in November 1909 registered a design in substance identical with the design of the plaintiffs' goods, but the entry of this design has been expunged by order of Swinfen Eady, J. The complaint made by the plaintiffs was that the get-up of the defendants' goods so nearly resembled the get-up of the plaintiffs' goods as to be calculated to deceive, and to lead to the defendants' goods being passed off on persons who wished to buy the plaintiffs' goods.

The principle to be applied to a case of this kind has been repeatedly stated in the Courts and in your Lordships' House, and I will merely state it as it was expressed by Lord Halsbury, L.C., in the case of *Birmingham Vinegar Company v. Powell*, [1897] A.C. 710—"No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another." The real question in the case is one of fact, namely, whether the defendants' goods so resemble the plaintiffs' as to be calculated to deceive the persons who buy? There is no dispute that the plaintiffs have acquired a high reputation for their goods and have a very large sale thereof, nor that the method which they have adopted of packing the articles to be used with a stick of a certain kind and form has become associated and identified with the plaintiffs' goods, but the defendants maintain that they are not liable to be enjoined for several reasons. The first is that they have done nothing more than copy the description in the specification in the revoked patent; that they were entitled to do so; and that the plaintiffs cannot interfere, because, as the defendants assert, no one can be restrained from making an article which has been the subject of a patent after the patent has come to an end. It seems to me, however, that this point in no way meets the plaintiff's case. The patent was a thoroughly bad patent, and had been put an end to before the plaintiffs were incorporated. But afterwards no one except the plaintiffs made and sold these goods got up in the manner and with the appearance of theirs. Anyone could originally have

done what Mr Edge and the plaintiffs, his successors, did. They, however, gradually acquired the reputation aforesaid, and the public associated the form in which the blues and tints were put on the market with the plaintiffs' goods, even though the ultimate buyers may not have known the name of the plaintiff company. This has gone on for nearly twenty years, and the fact that there had been an old and useless patent seems to me to have no real bearing on the position which had thus developed. No authority was cited which in any way helped the defendants on this point, although it seems to have been the point which led them to adopt the course which they pursued.

The second point made by the defendants was that the plaintiffs were seeking to restrain them from selling an article of utility—that is to say, were trying to prevent the defendants from selling their blues and tints with a stick attached—and that they were not entitled to do so. It appears to me, however, that if ever this were the claim of the plaintiffs, it is not the way in which the case is now presented by them, and their counsel disclaimed the idea. When, however, one examines the affidavits filed by the plaintiffs, it looks to me as if there were some ground for contending at the outset that the plaintiffs were endeavouring to restrain the defendants from using any sticks with their goods, or that, at any rate, there was some ambiguity about their exact claim, and that sufficient distinction was not made between "the" stick and "a" stick. I do not read the judgment of Swinton Eady, J., as intended to prohibit the use of any stick, and I find the following statement in the appellants' case—"It was contended in the Court of Appeal by counsel on behalf of the respondents that the appellants were endeavouring to restrain the respondents from putting up bag blue or tints with any stick in it, and were endeavouring to obtain a monopoly. This was expressly disclaimed by counsel on behalf of the appellants, who stated that what was complained of was the exact imitation or copying by the respondents of the get-up which, for a period of eighteen years, since the revocation of the patent, had been exclusively used by the appellants in connection with their goods, and was relied upon by the public as distinguishing the appellants' goods. In accordance with this disclaimer, the appellants, by their counsel, offered to modify the form of the injunction if the Court of Appeal were of opinion that the order of Swinfen Eady, J., was too wide in its terms, and prevented the respondents from using any stick." The disclaimer and offer thus made were repeated in this House. I understand the complaint to be that the defendants imitated the get-up of the plaintiffs' goods so closely as to be calculated to deceive, when there was absolutely no necessity for doing so; and indeed it seems to me to be clear that the defendants, if they chose to use something to keep the hands of the user out of the water, could have done so

in many different ways, and that, if they chose to use a stick, they could use one of a different form or shape or size, so as not to be liable to produce deception. I do not think that this was or could be disputed. I now come to what appears to be the real point in the case, namely, whether what the defendants have done, and threaten to continue to do, was calculated to lead to their goods being mistaken for the plaintiffs'. I have pointed out already that the plaintiffs have acquired a high reputation for their goods on account of their excellent quality, and had a very large sale thereof, and that the form in which they were produced was associated with the goods being the goods of the plaintiffs, and in the affidavit of Mr William Niccolls, the managing director of the defendant company, he admits that, "for the purpose of this motion, blue or tints got up in bags with a stick in it, provided that the bag is without a label, would now be accepted by the trade and ultimate consumers as and for the well-known 'Dolly' blue and tints of the plaintiffs' manufacture." But it is said by the defendants that they have distinguished the goods which they sold sufficiently by a label with the name "Niccolls" upon it.

Now if the only question were how far the defendants' goods were likely to be mistaken for the plaintiffs' by the wholesale and retail dealers, I think that there would be a difficulty in suggesting that the defendants had not distinguished their goods sufficiently from those of the plaintiffs, for those connected with the trade have the trade knowledge requisite to protect them. Notwithstanding this, it may well be that purchasers from the retail trade—that is to say, the public buying over the counter—may be deceived. They have not the trade knowledge requisite to protect them, and in this case the ultimate purchasers are those who are of final importance to the plaintiffs. It seems clear that the mere fact of a label being upon the goods, with a name upon it, would not necessarily cause such persons as those last referred to to distinguish one set of goods from another, though it would be sufficient to inform the wholesale and retail traders of the difference, especially where, as in a case like this, the traders received the goods in boxes marked with names, and no doubt have the means of knowing, and are easily able to ascertain, which goods are the plaintiffs' and which goods are the defendants'. But the class of goods which are sold, and the circumstances in which they are sold, have to be taken into consideration. The goods in question are made up in penny packets, and are purchased over the counter chiefly by washerwomen, cottagers, and other persons in a humble station of life. No name or description appears upon the wrapper containing the plaintiffs' blues and tints, and to many of such persons the plaintiffs' name is unknown. The evidence seems to show that they relied upon the get-up of the plaintiffs' goods to obtain goods made by the manufacturer with whom

that get-up has become associated. The poorer classes who buy goods of this class do not seem to distinguish the goods by the label, but by the general appearance which the articles present. It is not necessary, in my opinion, for the plaintiffs to prove that the ultimate purchasers who are likely to be misled know the name of the plaintiffs' firm. Buyers of the plaintiffs' goods without any label at all might, if they bought the defendants' goods and noticed the label, still think, having regard to the appearance of the goods, that they were the goods which had been long on the market, and that the name of the manufacturer was now disclosed to those who did not previously know it. The language used by Lord Herschell in the case above cited is very appropriate in this case. He says—"I think that the fallacy of the appellants' argument rests on this, that it is assumed that one trader cannot be passing off his goods as the manufacture of another unless it be shown that the persons purchasing the goods know of the manufacturer by name, and have in their minds when they purchase the goods that they are made by a particular individual. It seems to me that one man may quite well pass off his goods as the goods of another if he passes them off to people who will accept them as the manufacture of another, though they do not know that other by name at all."

I think on the whole that when the undisputed facts of this case are considered the defendants have not sufficiently, having regard to the nature of the goods and the persons to whom they are sold, distinguished the goods sold by them in appearance from the goods sold by the plaintiffs. This view by no means suggests that the defendants are not at liberty to use a stick in the preparation of their goods, but that if they do so they must sufficiently distinguish the goods by the form of the stick or by other means from those which are sold by the plaintiffs. Although the question appears to be really for the consideration of the tribunal as to whether, having regard to the appearance of the goods and the class of people to whom they are sold, deception was likely to occur, it may be noticed that the view which I have expressed appears to accord with that which may be inferred from the body of evidence filed by the plaintiffs to show the likelihood of deception, and that no evidence from persons in the trade or others has been filed to meet this on the part of the defendants.

I think the case turns entirely upon a question of fact. If the plaintiffs were attempting to prevent the use of "a" stick, I should agree with the decision of the Court of Appeal, and I think that that Court regarded the disclaimer of counsel as an attempt to limit a claim which had not been and was not being effectively limited. But when it is admitted that the defendants have copied the appearance and arrangement of the plaintiffs' goods and distinguish theirs only by a label, and when it is perfectly possible to distinguish goods which contain similar

elements of utility in many other ways suggested, so that there should be no reasonable probability of mistake, it seems to me that the label alone in the particular circumstances is not, for the reasons which I have given, sufficient.

Some observations appear to have been made as to the conduct of the case, but it seems to me that both parties put their respective cases without exaggeration, and showed no material difference as to the facts, the plaintiffs relying on an acquired reputation and association of the get-up of the goods with their make, and the defendants relying mainly on the right which they claimed to make goods in accordance with the description in the revoked patent, and on the fact that they had distinguished their goods sufficiently by a label.

In my opinion the appeal should be allowed, but in order to avoid any difficulty, the injunction should be modified, and this may be done by omitting the words after "any other way" to the end of the sentence.

LORD ROBSON—In this case the appellants or their predecessors have since 1884 manufactured laundry blue, and sold it in small cylindrical blocks, each of which is wrapped up in a plain white calico bag, tied at the top so as to form a fringe. From the middle of this fringe there protrudes a short round stick terminating in a little knob at the top, and this stick serves as a handle, enabling the user to hold the bag in the washing water without staining her own fingers with the dissolving blue. These bags bore no manufacturers' name or other indication of origin. They were sold with the simple get-up above described, and were apparently identified by retail purchasers as "the blue with the stick in it." As such they are said to have acquired a good reputation. It is somewhat surprising to find that in 1884 the appellants obtained a patent for this plain method of wrapping up blue, which was not revoked till June 1891. The respondents are also manufacturers of blue, and they or their predecessors have carried on business since 1901. They used to sell their goods in bags like those used by the plaintiffs, but without the stick. Instead of the stick their bags had a fringe which was longer than that of the plaintiffs' bags, and this fringe served rather imperfectly the purpose of a handle. In, or soon after, November 1909 they altered the get-up of their goods so as to make them correspond in all material respects with those of the plaintiffs', except that they affixed to them a label bearing their own name. They thought themselves entitled thus to appropriate the plaintiffs' get-up because it was comprised in the patent, and they contended that whatever was comprised in the patent must be taken, on revocation, to be thrown open to the public. They also contended that, as far as differentiation might be necessary under such circumstances, the label with their name on it was sufficient.

I cannot accept the argument of the defendants on these two points.

I think that the position of the plaintiffs after their patent had been revoked was neither better nor worse in regard to the mere get-up of their goods than if the patent had not been granted. They made an attempt to patent as "an improved method" what in truth was only a "get-up," and therefore not patentable at all. They gained of course no proper title to any privilege by this proceeding, but I do not see on what ground they can be held to have forfeited the right which a trader has at all times of preventing his competitors from seeking to deceive the public by passing off their own goods as his. Any member of the public can avail himself of any device of utility disclosed by the abortive patent—for instance, he can affix a wooden handle or stick to the bag, not because that device was thrown open to the public by the publication or revocation of the patent, but because he has a good common law right to do so, of which no patent can deprive him. If, however, he proceeds to copy the plaintiffs' shape or kind of stick, together with the rest of the plaintiffs' "get-up," so as to mislead the public, he infringes a principle of law which is independent of the Patent Acts. The confusion which has arisen in the case is mainly due to the inconsistent contentions put forward by the plaintiffs themselves. In their patent they claimed the use of a stick, in any way described, as a device of utility. It was indeed the substance of their alleged invention. In their action, at the hearing before Swinfen Eady, J., they treated the stick apparently as mere "get-up"—that is to say, only as a means of distinguishing and identifying the goods. That was the footing on which Swinfen Eady, J., dealt with the case. Throughout his judgment he refers to the stick merely as a distinguishing feature in the appearance of the goods, and not in its aspect as a handle or device of utility. He granted an injunction in general terms, but it specifically restrained the defendants from supplying, or enabling others to supply, to persons asking for "blue with the stick in it," any blue not being goods of the plaintiffs. It does not, as the Master of the Rolls points out, contain the words usually found in such cases, "without sufficiently distinguishing the defendants' goods from the goods of the plaintiffs." I think that the effect of the injunction, especially when read with Swinfen Eady's, J., judgment, is to interfere seriously with the defendants in the making of bags with any stick or wooden handle in them. Such an injunction cannot, in my opinion, be supported in its present form. On the other hand, the Court of Appeal regarded the stick merely as a useful handle, and gave no effect to its shape or style as part of the get-up.

It is admitted that the defendants deliberately appropriated the complete get-up of the plaintiffs' goods, such as it was, with the addition only of their own label. They even registered the design as a new and

original design of their own, and on some of the labels which they affixed to the bags they asserted that "the design of this article with handle attached is the registered property of William Niccolls & Sons, Limited." No explanation of this remarkable proceeding is given in the evidence. The defendants evidently attached importance, not only to the stick as a device of utility, and as such open in one form or another to public use, but also to the design of the article as a whole, including the shape of the stick, and they copied it almost exactly. This was going too far. I agree that the get-up of the plaintiffs' bags was of such a simple and elementary character that it was perhaps the cheapest form possible, and any differentiation might possibly have involved some expense, but differentiation within reasonable and economical limits was undoubtedly possible, and was omitted because the defendants said that they were entitled to take, and certainly meant to take, and did take, the design as it stood. However, they urge that they put their name on the labels which were stuck on to the bags, and so differentiated their goods from those of the plaintiffs by the most direct and conclusive of all methods. In fact the attachment of their name to the plaintiffs' design or get-up amounted, in the circumstances of the case, to a deliberate appropriation of that get-up as their own. The bags of the plaintiffs had been unnamed. They were sold on their appearance and get-up alone, so that when the name of the defendants was put on them, with an intimation that the design by which the public were accustomed to identify them was their property and an indication of their goods, customers would naturally suppose that in buying them they were getting the same goods as they had previously bought in the unnamed bags. Instead of differentiating their goods from those of the plaintiffs, the name on the bags had the effect of making the customers believe that they were the same people as the plaintiffs. I think therefore that the plaintiffs are entitled to an injunction, though not in the form granted by Swinfen Eady, J., and that this appeal should be allowed.

LORD ATKINSON—I concur.

Judgment appealed from reversed.

Counsel for Appellants—Buckmaster, K.C.—Hon. Frank Russell, K.C.—J. G. Joseph. Agents—Ernest Salaman & Company, Solicitors.

Counsel for Respondents—Alexander Grant, K.C.—R. Frost. Agents—Haslam & Sanders, Solicitors.