

MACPHERSON v. BROWN & Co.

1906.

January 15.

P. C., Colombo, 95,955.

(THE GANDY BELTING CASE.)

False trade mark—Application—Oral description—Price lists—Merchandise Marks Ordinances, No. 13 of 1888 and No. 14 of 1892, ss. 3 (1) (d), 3 (2), and 4 (1) (b).

The provisions of section 3 (1) (d) and of section 3 (2) of the Merchandise Marks Ordinances, No. 13 of 1888 and No. 14 of 1892, which make it an offence to sell goods to which a false trade description is applied, do not apply where the description is entirely oral.

The complainant asked a salesman in the accused's shop for Gandy's belting pointing to an illustration in the accused's price list, which indicated that the belting came from Seacombe, Cheshire. The salesman delivered to the complainant Gandy's belting made in America, and at the same time handed to the complainant a cash sale memorandum, which was as follows:—

	Rs.	c.
41½ ft., 4 in. by 4 ply, Gandy's belting	48	60
Less commission	4	86
	43	74

Held (affirming the judgment of the Magistrate), that there was no "application" of a false trade description within the meaning of the Ordinance.

A PPEAL from an acquittal. The facts are fully set forth in the judgment of Wēndt, J.

Dornhorst, K.C. (H. J. C. Pereira and Elliott with him), for complainant, appellant.

Walter Pereira, K.C. (H. Jayewardene with him), for accused, respondent.

Cur. adv. vult.

15th January, 1906. WENDT, J.—

The defendants, are who a company limited by shares, were charged with having sold to the complainant certain machine belting to which a false trade mark description was applied, described as an offence punishable under section 3 (1) (d) and section 3 (2) of "The Merchandise Marks Ordinances, 1888 and 1892." The Magistrate acquitted them, and the complainant with the sanction of the Attorney-General, has appealed.

1906. The facts, shortly stated, are these:—The prosecutor is the Chairman and Managing Director of the Gandy Belt Manufacturing Company, Ltd., of Seacombe in the County of Cheshire, England, who manufacture machine belting out of cotton. There is an American company formed some years after the English company, and known as the Gandy Belting Co., carrying on business at Baltimore, United States of America, who also manufacture such belting. For a number of years ending with 1903 the defendants had been agents in Ceylon for the English company's belting and had stocked and sold that make exclusively. Up to that time the American company's belting was unknown in Ceylon, while complainant's goods enjoyed a fairly large sale and were well known as Gandy belting. In 1903 the defendants began, while still holding large stocks of the English belting, to import the American make, but the latter was never mentioned in their price lists, and were never advertised until after the institution of this prosecution, whereas the complainant's goods were prominently specified and described in the price lists by illustrated advertisements. At the date of the alleged offence the defendants still held an unsold balance of the English belting stocked in 1903, but not the particular size which was asked for by complainant. On the 11th November, 1905, the complainant went into defendant's shop and asked a salesman, named Wink, whether they stocked Gandy's belting and was answered in the affirmative. He then asked to see defendant's catalogue and was given the "General Price List" (marked B). He turned up page 111 and said that was what he wanted, and asked for $41\frac{1}{2}$ feet of 4 inch by 4 ply of that belting, at the same time putting a pencil mark against the printed item specifying that particular size and its price. The salesman had the belting, which complainant did not then examine, wrapped up and put in complainant's rickshaw, and having received payment handed to complainant the bill A, which in its material part was as follows:—

Cash Sale Memo.

Colombo, November 11, 1905.

To Brown & Co., Ltd., General Merchants and Importers.

	Rs.	c.
41½ ft., 4 in. by 4 ply, Gandy's belting	...	48 60
Less commission	...	4 86
		<hr/>
	Rs.	43 47
		<hr/>

Paid.—J. WINK.

The complainant then left the shop, and on reaching the hotel examined the belting and found that it was after American make. 1906. January 15.

WENDT, J.

There being no question of the sale of this piece of belting to the complainant, the only question is whether there was a false trade description "applied to it." The prosecution alleges that there was applied to it the description printed on page 111 of defendant's price list. There can be no doubt that that description was a "trade description" within the meaning of the Ordinance, for it contained, in the words "Works, Seacombe, Cheshire," an "indication" as to the place in which the goods were made [section 4 (1) (b)]. There is equally no doubt that that description was false. Was it then applied to the belting sold? In deciding this question great assistance is to be derived from the decisions in England under "The Merchandise Marks Act, 1887" (50 and 51 Vict. C. 29) which is substantially re-enacted in our Ordinances. It is now well settled that a *mere* oral description cannot amount to a "trade description" under the Act. *Coppen v. Moore* (67 L. J. Q. B. 690; (1898) 2 Q. B. 300). It has, however, been ruled that a false trade description contained in a bill or invoice delivered with the goods sold may be regarded as applied to those goods. In the present case it is conceded that the bill A contains no false trade description, and reliance is placed solely on the price list, but the cases regarding invoices and bills lay down principles which equally apply to the circumstances we are considering, and I shall therefore proceed to examine these cases in the order of their decision.

In *Budd v. Lucas* (60 L. J. M. C. 95; (1891) 1 Q. B. 480) a customer ordered the defendant, a brewer, six barrels of beer, and in pursuance of the order the defendant's drayman delivered six casks of beer and at the same time left at the customer's house an invoice in which the casks were described as "barrels." This was a false trade description, inasmuch as a "barrel" in the beer trade contained 36 gallons, whereas one of the casks contained only 34. The Justices held that there had been no "application" of the description to that cask. Upon a case stated, Pollock, B., and Charles, J., held that a physical application was not necessary to constitute an "application" under the Act. Pollock, B., said: "No doubt the description must be used in connection with goods, but I think we should be cutting down the intention of the Act if we were to hold that the delivery of an invoice or other description of goods at the time of or immediately after the delivery of the goods themselves was not a use in connection with the goods within the meaning of the section," and Charles, J., added. "I think that the delivery of the invoice with the goods might be a use of a false trade description of the goods delivered." Observe

1906. that the invoice was prepared for the purpose of the sale, and the
January 15. description in it was a description of the goods the subject of the
 WENDT, J. sale, the goods being actually delivered with it.

In *Coppen v. Moore*, already referred to, the purchaser asked for an English ham, and on being shown certain hams and told they were "Scotch" hams, said they would have one. The invoice made out and delivered with the ham described it as "Scotch," whereas in truth it was an American ham. The Magistrates having convicted the vendor of having sold goods to which a false trade description had been applied, the Queen's Bench Division held that the Act did not apply to trade descriptions purely verbal, but that the word "Scotch" in the invoice made the description employed more than a verbal one, and (upon the authority of *Budd. v. Lucas*) that that description had been "applied" to the goods sold.

In *Cameron v. Wiggin* (1901) 1 K. B. 1, the invoice delivered with the goods to the purchaser of certain mutton described it as "N. M.," which at the time was explained to the purchaser as meaning "New Zealand mutton," which was what he had asked for. "N.M." was not a description known to the trade, but it was nevertheless held to come under the definition of a "trade description" in the Act. The earlier cases having settled that the description in the invoice might be regarded as applied to the mutton, the question was whether parol evidence was admissible to show the meaning attributed by the salesman to the letter "N. M.," and the Court held that it was admissible.

In the present case the description relied upon by the prosecution was not prepared for the purpose of the sale, which is the subject of the charge, nor was it a description of the particular article sold. For this the price list (a quarto volume of 250 pages) was not like an invoice or bill, a document usually delivered with the goods to the customer. It was a general advertisement of all the defendant company's wares. An invoice was actually made out at the time of sale and delivered with the goods. The complainant on entering the shop had asked for Gandy's belting, and the invoice specified only Gandy's belting. That was the only written description which was applied to the goods the subject of sale, and that is admittedly not a false description.

In *Cameron v. Wiggin* the vendor had issued a handbill advertising, among other description of meat, Canterbury New Zealand mutton and lamb of the very best quality, and the customer had produced this handbill and asked for the New Zealand mutton; yet the case seems to proceed upon the footing that that would not have been enough to rest upon the insertion at the

purchaser's request of the letters "N. M." in the invoice in order to indicate the fact that the mutton was New Zealand.

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In the present case the complainant might have asked for the addition to his bill of words or signs indicating that the belting came from Seacombe or was made in England, as the purchaser did in *Copper v. Moore* and *Cameron v. Wiggin*. He did not do so, and there was therefore no false trade description applied to the belting, inasmuch as I hold with the Police Magistrate that the printed description in the price list was not "applied" to the subject of sale within the meaning of the Ordinance.

I therefore dismiss the appeal.
