5 ta' Frar, 1952 Imballef :

L-Onor. Dr. W. Harding, B.Litt., LL.D. Onor Walter Salomone ne. versus Giorgio Borg ne.

"Trade Mark" — Registrazzjoni — Oppożizzjoni.

II-kwistjani jekk ghandhier tiği attiza l-vypozizzioni ghar-reģistrazzjoni tu' Trade Mark, fuq il-motir li duk it-Trade Mark jista' jŷib konfuzjoni ma' Trade Mark tu' hadd iehor li jopponi dik ir-registrazzjoni, hija mpernjata fuq il-principju ta' l-idea dominanti taz-zewog marki, indipendentement mid-dettulji li jkunu jakkompanjaw dik l-idea dominanti.

Jekk l-idea dominanti taż żewy marki in kontestazzjoni thalli impressjoni tali li tista ygib il-konfużjoni bejniethom, l-oppożizzjoni

ghar-registrazzioni hija gustifikata.

Il-prodotti li ghalihom ikun irid jiği applikat il-markju li tieghu tintalab ir-reğistrazzioni mu hemmu bisonu ikunu identici ghal dawk tal-parti opposta, imma huwa bissejjed li jkunu "of the same description".

Il-Qorti - Rat l-att tac-citazzjoni li bili l-attur nomine ppremetta li l-konvenut, fil-kwalità tieghu fuq indikata, talab ir-registrazzjoni hawn Malta tal-marka (Trade Mark) konsistenti f'ras ta' bulldog bejn il-kelmiet "Bulldog" u "Brand", u dana riferibilment ghall-anisette, whisky, liquers, rum, gin, brandy, port u sherry (Trade Mark no. 4869), u riferibilineut ghal "syrups" biex isiru xorb (non-alcoholic), u "squashes" (Trade Mark no. 4870), prodotti mill-istess ditta konvenuta. kif jirrižulta mill-avviži publikatį fil-Gazzetta tal-Gvern tal-14 û tas-17 ta' Novembru 1950 rispettivament (dok. A u B); illi fit-12 ta' Januar 1951 hu ghamel formali oppozizzjoni gharreģistrazzjoni tat-Trade Mark fuq imsemmija, ghar-raģuni li 1-"marks" huma kwazi identici ghat-Trade Mark tad-ditta attrići debitament registrat hawn Malta bin-numru 2261 (dokti. C. D. u E.), u sejrin jigu adottati mid-ditta konvenuta ghal prodotti affini ghal dawk protetti bit-trade mark fuq imsemmi tad-ditta attrici, u ghalhekk ir-reģistrazzjoni tat-'trade marks' mitluba mid-ditta konvenuta, jekk tiģi milqugha, iģģib konfuzioni fis-suq ta' Malta; u li l-konvenut nomine, fit-2 ta' Erar 1951, ippreženta kontro-dikjarazzjoni tar-raģunijiet tieghu kontra l-imsemmija oppozizzjoni ta' l-instanti nomine (dok. F); u talab li, prevja d-dikjarazzjoni, jekk ikun hemm bżonn, illi l-oppozizzjoni fuq imsemmija, maghmula mid-ditta attrici ghall-imsemmija talba tal-konvenut nomine hija valida u legali, u moghtija kull dikjarazzjoni ohra nečessarja u kull provvediment opportun, konsegwentement tiģi rifjutata r-reģistrazzjoni tat-''trade marks'' fuq imsemmija, mitluba mid-ditta konvenuta. Bl-ispejiež kontra l-konvenut nomine, li ghandu jidher ghas-subizzjoni. Ghall-fini ta' l-art. 91 (3) tal-Kapitolu 48 tal-Liģijiet ta' Malta (Edizzjoni Riveduta) l-attur nomine joffri l-infraskritta malleverija ghall-ispejjež kollha tal-ģudizzju;

Omissis.

Trattata l-kawža, ikkunsidrat;

Lattur nomine kien ghamel oppožizzjoni formali gharreģistrazzjoni tat-"trade marks" li talab il-konvenut nomine, u issa, b'din l-azzjoni, qieghed jitlob li dik l-oppožizzjoni tieghu tiģi dikjarata valida, u r-reģistrazzjoni mitluba mill-konvenut nomine tiģi mičiuda;

Lattur nomine huwa l-possessur tal-marka fol. 10, debitament reģistrata skond ić-čertifikat fol. 9, raftiguranti bulldog. Il-Qorti qieghda tirriferixxi ghal din il-marka ta' l-attur nomine, u mhux ghal dik markata "M" fol. 18, ežibita mill-konvenut nomine; ghaliex f'din ta' l-abhar m'hemmx il-kliem "Bulldog Brand" li hemm fl-ežemplari fol. 10, mentri fil-verità dawn il-kliem "Bulldog Brand" jiffurmaw parti mir-reģistrazzjoni tal-markju ta' l-attur nomine, kif hemm fiċ-čertifikat fol. 9:

Il-marka li taghha qieghda tintalab ir-registrazzjoni mill-konvenut nomine hi dik li tidher riprodotta fol. 7 u fol. 8, raffiguranti ras ta' bulldog;

Is-soluzzjoni ta' dan il-każ hi impernjata, fil-fehma ta' l-Imballef sedenti, fuq principju pacifikament stabbilit fil-gurisprudenza u dottrina ingliża u kontinentali f'din il-materja. Meta, fl-Ingilterra, Lord Herschell's Committee gie biex jikkunsidra r-"rules of comparison" ta' żewg marki ta' fabbrika, wiehed mill-principji propunjati kien appuntu dak li ghandha tigi kunsidrata "the idea of the mark". Intgal infatti (ara estratt riportat fil-Kerly, "On Trade Marks", p. 238):— "Two marks, when placed side by side, may exhibit many and various differences, yet the main idea left on the mind by both may be the same; so that a person acquainted with the mark first registered, and not having the two side by side for comparison, might well be deceived, if the goods are allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted. Take, for example, a mark representing a game of football; another mark may show players in a different dress and in very different positions; and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trade marked goods, and relying, as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing";

L-istess ighid is-Sebastian (The Law on Trade Marks Registration, p. 28):— "If the same idea is suggested by both marks, deception may be probable though the words differ in

appearance....;

L-istess koncett hu espost mill-Bosio (Trattato dei Marchi e Segni Distintivi di Commercio, p. 424 u 425), meta, wara li jsemmi dak li jissejjah "il coefficiente essenziale del marchio", ighaddi biex jghid li l-imitazzjoni tista tkun anki parzjali, "semprecche la parte che viene usurpata sia quella essenziale

ed integrante del marchio.....;

F'każijiet numerużi l-gurisprudenza affermat dan il-principju ta' l-idea dominanti tal-markju, indipendentement minn differenza fid-dettalji—każijiet li s-semplići citazzjoni taghhom taddita s-soluzzjoni ta' dan il-każ, li fih l-idea dominanti tal-markju ma hemmx dubju li hi dik ta' bull-dog. Hekk, per eżempju, il-Qorti ta' Palermo, f'deciżjoni riportata mill-Bosio, op. cit. pag. 438, fejn hemm ir-riproduzzjoni fotografika tal-markju, irriteniet bhala imitazzjoni r-riproduzzjoni ta' marki tad-ditta "Bertelli" (Pillole di Catramina), avvolja kien hemm differenzi sensibili fis-singoli parti tal-marki, iżda kien hemm

riprodotta l-kelma "Catramina" li kienet tikkostitwixxi l-idea dominanti. Hekk, fil-każ Jonston vs. Orr Ewing, App. C. 219 (1882), iż-żewġ marki kellhom żewġ iljunfanti, u ġiet affermata l-imitazzjoni ghaliex, kif qal Lord Selbourne (p. 225), għalkenm kien henim "difference of ornamentation, posture, and other accessories", eppure dak li kien "the distinctive and characteristic symbol" kien l-istess fiż-żewġ marki. Hekk ukoll, f'kawża ohra (Baschiera's Tm. 33 Sol. J. 469, T.L.R. 480 (1889), integal illi "the dominating portion of each mark was a lion, and the goods were designated by the prevailing feature according to the custom of the trade". Hekk ukoll, fil-kawża Farrow's Tm. 7 R.P.C. 260, 63 L.T. 233 (1890), Stirling J., l-oppozizzjoni ghar-registrazzjoni giet sostnuta ghalkeum minn ried ir-registrazzjoni kellu fil-markju "a charging buffalo", u min oppona "a bull's head". Il-Kerly jghid ukoll, opcit, p. 243:— "A good illustration of the principle that the idea of the marks must be considered is afforded by Currie & Co's Application (13 R P.C. 681—1896). There the registered Co's Application (13 R.P.C. 681-1896). There the registered mark included the words 'The Cock o' the North' with the picture of a cock in a defiant position, and the applicant's mark also included a somewhat similar cock, both marks being for Scotch whisky. They contained other prominent features which were different in the two marks; but Kekewich J. held that the Comptroller was justified in refusing registration of the applicant's mark, as it included in a central position the thing which caught the eve in a registered mark";

Issa, ma jistax jiği rağjonevolment negat li, f'dan il-kaz, l-idea dominanti tal-markju hi l-"bull-dog". Dik hi l-impressjoni li tibqa'. Tant li l-attur nomine rreğistra anki l-kliem "Bull-Dog Brand" (fol. 9), u l-konvenut nomine talab li jiğu anki reğistrati l-kliem "Bulldog Brand" (fol. 7 u 8). Hu veru illi fil-markju ta' l-attur il-bulldog hu riprodott shih, mentri fil-markju tal-konvenut nomine hemm biss ir-riproduzzjoni tar-ras tal-bulldog; u jista' jkun ukoll li hemm id-differenza fil-kuluri u fid-dettalji l-ohra murija fol. 8. Izda l-idea dominanti tibqa' l-istess—"a critical comparison of two marks might disclose numerous points of difference, and yet the idea which would remain with any person seeing them apart at different times might be the same" (Rep. Herschell Committee, Kerly, loc.

čit, p. 239). H-kumpratur ma įkollux iž-zewg markį f'idejn meta jixtri, imma įkollu biss fil-menti tieghu l-idea dominanti ta' markju wiched u įkollu quddienių l-markju l-iehor. Inghad dıfatti fis-sentenza fil-kawża Seixo vs. Provezende, 1866, L.R. 1 Ch. p. 196:— "The proper test in making the comparison is not to look at the two marks side by side, when differences may become apparent, but to consider the effect which will be produced by the defendant's mark on a purchaser who has the plaintiff's mark in his mind, but not actually before him";
U l-gurisprudenza qatt ma ezitat li ssib il-vjolazzjoni, av-

volja f'markju wiehed il-figura kienet kollha u fl-iehor kienet in parti biss. Hekk, fil-każ Anglo-Swiss Condensed Milk Co. vs. Metcall, 31 C.D. 454, 3 R.P.C. 28, f'markju wiehed kien hemm 'a full-length figure of a milk-maid carrying two pails', mentri fl-iehor kien hemm 'a half-length figure of a milk-maid". Hekk ukoll, fil-kaz Boord & Son vs. Huddart, 21 R.P.C. 149, f'markju wiehed kien hemm qattus shih qieghed fuq kartell, fl-iehor kien hemm ras ta' qattus u l-parti ta' quddiem hierga minu kartell; eppure giet affermata l-vjolazzjoni. Hu facili li wiehed jifhem li fis-suq lokali, kif xehed l-attur fol. 22, il-marka ta' l-attur hi konoxxuta bhala "tal-Bulldog", u dik l-idea dominanti tinsab fil-markju li tieghu l-konvenut gieghed jitlob ir-registrazzjoni;
Dr. Xuereb, difensur tal-konvenut, issottometta wkoll,

fil-kors ta' l-argumenti, illi x-xorta ta' prodotti li ghalihom hu relativ il-markju wiehed u l-iehor ma hijiex l-istess. Issa, kif idher mill-fol. 7, 8 u 9, il-markju ta' l-attor hu relativ ghall-birra u "cider". Il-konvenut jipproponi li japplika lghall-bitra u "cider". H-konvenut pipproponi n jappinka i-markju tieghu ghall-anisette, whisky, liquers, rum, gin, brandy, port u sherry, v ghal xiroppi non-alkoolici u "squashes". Din l-oğgezzjoni però ma treggix. Infatti hu pacifiku f'din il-materja illi biżżejjed li l-prodotti jkunu "of the same description", u mhux necessarju li jkunu identici;

Hekk, fil-"The Australian Wine Importers' Case" (41 C.D. p. 291, 6 R.P.C. 311 (1899), "wines" u "spirits" gew

ritenuti "of the same description". Hekk ukoll, fil-każ Turney & Sons Tm.. 11 R.P.C. 37, 10 T.L.R. 175 (1893), I-Imhallef North sab illi birra u rum ghandhom jitqiesu "of the same description" ghall-finijiet ta' oppozizzjoni ghar-re-

gistrazzjoni. Hekk ukoll, fil-każ "Eno vs. Dunn, 10 R.P.C. 261, 1893, gier rifjutata r-registrazzjoni ta' Fruit Salt deskritt bhala "Fruit Salt Baking Powder", minhabba użu precedenti tal-markju "Eno's Fruit Salt" li hu medicinali. "Lubricating Oil' u "Petrol Spirits" gew ukoll ritenuti ta' l-is-tess "desc iption" mill-Imhallef Warrington fil-każ "Compa-gnie Industrielle des Petroles" (1907) 2 Ch. 435. L-awtur Pearce, fil-ktich "Passing-Off, The Law as to Imitation and Deception in Trade", p. 20, jiččita kaž li fih min oppona kien ispačća "tyres" ta' motor-cycles bl-isem "Warwick", u min ried likkummerčja taht dak l-isem kien ibiegh "tyres" ta' cars. F'dan il-każ l-Imhallef Neville "strongly disapproved' mili-argument tad-difensur illi kien hemm bżonn li l-og-getti įkunu identici. Is-Sebastian, imbaghad, jippresta kri-terja importanti fuq dan il-pont, cjoè il-probabilità li ż-żewż xorta ta' oğğetti jinbieghu fl-istess hanut, kif inhi hağa probabili illi fl-istess hanut jinbieghu xi xorb spiritus jew "squash. es' tal-konvenut u jinbieghu birra jew "cider" ta' l-attur. "In considering whether different goods are nevertheless goods of the same description, all the circumstances of the trade must be considered, the use to which the goods are put, and the probability of their being sold in the same shop or department" (op. cit., p. 70, fejn jićčita gurisprudenza kopjuža fun dan il-pont);

Ghalhekk il-Qorti ma thossx u biu illi bir-registrazzjoni tul-markju tal-konvenut jigi illi dan jipprofitta ruhu kontra l-ligi mill-konoxxenza li l-publiku ga ghandu tal-markju ta

l-attur nomine;

Ghal dawn il-motivi:

Tiddecidi adeživament ghat-talba; bl-ispejjež kontra t-konvenut nomine