

(1924) 12 BOM CK 0003

Bombay High Court

Case No: None

A.J. Von Wulfing

APPELLANT

Vs

D.H. Jivandas and Co.

RESPONDENT

Date of Decision: Dec. 19, 1924**Acts Referred:**

- Trade Marks Act, 1905 - Section 45

Citation: AIR 1926 Bom 200**Hon'ble Judges:** Taraporewala, J**Bench:** Division Bench

Judgement

Taraporewala, J.

In this case the plaintiffs allege that for several years prior to 1914, they had manufactured and sold under the names of "Sanatogen" and "Formamint" certain chemical compounds for use in medicine and pharmacy, that within a short time the said compounds sold under the name of Sanatogen and Formamint acquired a very high reputation throughout India and the sales thereof were large and profitable and the names of Sanatogen and Formamint had come to mean chemical compounds of the plaintiff's manufacture. They further allege that on the outbreak of the War the said compounds were imported into India by the plaintiff's London firm until the property and assets of the plaintiffs' London firm were sold in June 1917 by the controller appointed under the Trading with the Enemy (Amendment) Act 1916 to Genatosan Limited, that from and after June 1917, the said Genatosan Limited imported the said compounds under the names of Sanatogen and Formamint, that on the termination of the War the plaintiffs started importing Sanatogen and Formamint from Berlin, and that their original exclusive right to the use of the said names was by the terms of Treaty of Peace of Versailles restored to the plaintiffs. The plaintiffs further allege that at the end of October 1923, the defendants imported into Bombay two consignments of some substances under the names of Sanatogen and Formamint and were selling the same at a much lower rate

than the plaintiffs' goods. The plaintiffs charge that the object of "the defendants in importing and selling the said goods was to deceive the public and lead them to believe that in purchasing the inferior compounds offered for sale they were buying the genuine articles of the plaintiffs' manufacture; and further say that the general make up, marking and appearance of the defendants' packages, apart from the use of the names Sanatogen and Formamint, was made to closely resemble the plaintiffs' packages. The plaintiffs pray for an injunction restraining the defendants from passing off or attempting to pass off or from enabling others to pass off chemical compounds not of the plaintiffs' manufacture as the goods of the plaintiffs by use of the names Sanatogen or Formamint and other consequential reliefs.

2. By their written statement the defendants deny that the names Sanatogen and Formamint came to mean chemical compounds of the plaintiffs' manufacture as alleged by the plaintiffs. They further contend that the trade marks of Sanatogen and Formamint were avoided and removed from the Register of Trade Marks in October 1916, by and under the order made by the Board of Trade and under rules made under the Patents, Designs and Trade Marks Temporary Rules Act 1914 Amendment Act and that thereupon the said marks and names became public property both in England and India. They further contend that Sanatogen and Formamint were from 1917 to 1923 imported into India by Genatosan Limited and also by various other persons and that the said names and marks have become public property by reason of common use. The defendants further deny that the plaintiffs had the original exclusive right to the use of the said names or that such right is restored to the plaintiffs by the Treaty of Peace. The defendants admit that they had imported twenty-two cases of Sanatogen and a consignment of Formamint, but deny that it was inferior to the plaintiffs' compounds or that their object in importing the said goods was to deceive the public as alleged. They further deny that the general make up, marking and appearance of the packages closely resemble the plaintiff's packages, and allege that the make up of their packages was of a description common to the trade. The defendants further allege that the plaintiffs have no right to the exclusive use of either the names Sanatogen and Formamint or to the use of the said get-up. (His Lordship then considered some evidence as to the plaintiffs' exclusive right to the use of the names Sanatogen and Formamint and proceeded further.) In respect of rights in trade marks and trade names any rights acquired by the parties in England have no effect on the rights of the parties in India. The rights of industrial property in India are governed by the laws of India and are in no way affected by the laws of (England or by the action of parties in England. There is not yet any Registration Act in India for the protection of rights in trade marks. The trader or manufacturer in India has still to depend upon his common law right for the protection of his trade mark. It was tried to be argued on behalf of the defendants that the common law right to a trade mark is not a right to industrial property in the same sense as a right in a registered trade mark is in countries where registration of trade marks gives right of property in the trade

mark. But if the evolution of the law in England as to the rights in trade marks and protection of such, rights is considered, one finds that before the Registration Acts the Equity Courts had by their decisions created a right of property in trade marks in a trader who had acquired a reputation in respect of goods on which he had used the trade mark. This point is well brought out by Kerly in his *Law of Trade Marks and Trade Names*, 5th Edition, page 4, as follows:

An important step was taken in 1838, by the decision of Lord Cottenham in *Millington v. Fox* that an injunction could be obtained to restrain infringement of a trade mark, even though the infringement was due to ignorance, and was without fraudulent intent. This decision led, by an obvious deduction, to the establishment of a right of property in trade marks; and, although the nature of this right gave rise to much discussion, and was defined in different terms by Chancery Judges in subsequent cases, it soon became firmly established, and the protection of trade marks in equity was expressly based upon it.

3. Mr. Kerly further goes on to say on the same page:

The trade mark cases, however, were so much the more numerous and important, that, as already stated, a definite property-right in the use of a trade mark was set up, and the action for infringement became a specialized and distinct form of the more general action to restrain, or to obtain damages for "passing off." The litigation of trade mark cases was, however, found to be extremely costly, and otherwise unsatisfactory. The essence of a trade mark right being the reputed association in the market of the symbol in question with the goods of the plaintiff, it was often necessary to call a large number of witnesses to give evidence of the reputation, especially if the defendant alleged that the pretended trade mark was either mere descriptive matter, or was, on any other grounds, a mark common to the trade; and, as infringers were usually persons of no substance, it was often impossible to recover the costs after the plaintiff had conducted his action to a successful issue. Moreover, success against one infringer did not relieve the owner of a trade mark from the necessity of proving his title afresh if in any action against another infringer, the defendant chose to dispute, it.

4. With a view to mitigate those evils, the Trade Mark Registration Act, 1875, was enacted in England and the object of the Act, as stated by Kerly, at page 6, was twofold:

It was directed, on the one hand to diminish the difficulty and costs of, or to remove altogether the necessity for, the proof of title by use and reputation, which had cast so great a burden upon the owners of trade marks in proceedings to restrain infringement; and on the other, to secure the publication of marks which had been appropriated as trade marks, and to define the rights of their proprietors, for the information of traders and, further, to limit the classes of marks which should be capable of being so appropriated.

5. Further amending Acts were passed, and the Act now in force is the Trade Marks Act, 1909, as amended by the Trade Marks Act of 1919. There were prohibitory sections in the said Acts which purported to make registration a condition precedent to a right of action to restrain or to obtain damages for infringement of trade marks. Unregistered trade marks, notwithstanding the prohibitory sections of the Acts, are in company cases protected by the Courts in England in the "passing off" actions. Section 45 of the Trade Marks Act, 1905, expressly provides that nothing in the Act shall be deemed to affect rights of action against any person for passing off goods as those of another person or the remedies in respect thereof. In India there being no Registration Act giving a right of property in trade marks by registration, the only right of action a trader or manufacturer has is the common law right of action which entitles him to an injunction restraining the use of a trade mark belonging to him if such use is calculated to pass off the defendant's goods as the goods of the plaintiff. (His Lordship then found in evidence that there was no doubt that the public in India knew and believed that the compounds sold under the names of Sanatogen and Formamint were the manufacture of one particular manufacturer and when they bought the said compounds under the said names they expected to get the compounds manufactured by the said manufacturer, and there was no doubt the said manufacturers were the plaintiffs.)

6. The sole ground on which, therefore, the defendants could claim to sell their compounds under the names of Sanatogen and Formamint would be the determination of the said trade mark rights of the plaintiffs.

The right of the proprietor of a mark (subject to the rights of other proprietors, if any, of the same mark) to the exclusive use of it upon the goods of the kind in respect of which the right existed is determined:

(1) When the mark so used ceases to be distinctive;

(2) when the proprietor is no longer able to use it in the business in connexion with which the right was acquired;

(3) when he has abandoned it;

(4) when he has forfeited his claim, to protection of his right by using the mark deceptively or in a fraudulent trade; and

(5) in the case of the name of an article or substance manufactured under any patent when the patent expires or determines." (See Kerly on Trade Marks, page 430. (His Lordship then discussed the evidence and held that the name Sanatogen is still identified in the mind of the public with the manufacture of the plaintiffs and has not become a common name of the compound, In respect of Formamint, the evidence of sale of Formamint of other manufacture in India, between 1917 and 1923, is equally insufficient. There is the evidence of the dealers : no customers are called. For the last year or so, there is no other Formamint in the Indian market

excepting the plaintiffs. That chemical has also acquired a "great reputation in the Indian market as admitted by the defendants, and up to 1914 the name Formamint was identified with the, manufacture of the plaintiffs. The plaintiffs are as much entitled to the use of that name as their trade mark as in the case of Sanatogen. In my opinion the defendants have failed to prove that the word For mamint became a common name of the compound in the mind of the Indian public.

7. The question as to when a trade mark or a name which is distinctive, becomes public juris, is considered in *Ford v. Foster* [1872] L.R. 7 Ch. 611. The test is laid down very clearly by Mellish, L. J., at page 628, as follows:

For the reasons given by the Lord Justice James, which I do not repeat, I am clearly of opinion that originally, at any rate, the plaintiff was entitled to be protected against the use of the word "Eureka" by the shirt-makers as a violation of his trade mark. Then the question is, Has it become publici juris? As there is no doubt, I think, that a word which was originally a trade mark to the exclusive use of which a particular trader, or his successors in trade, may have been entitled, may subsequently become publici juris, as in the case which has been cited, of Harvey's Sauce. It was admitted that although that originally had been the name of a sauce made by a particular individual, it had become, publici juris, and that all the world were entitled to call the sauce they made Harvey's Sauce if they pleased. Then what is the test by which a decision is to be arrived at whether a word which was originally a trade mark has become publici juris? I think the test must be, whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to present the trader, from being cheated by other persons" goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone.

8. It appears from these observations of Lord Justice Mellish that the Court would require very strong evidence, which would show conclusively that the mark had come to be so public that nobody could be deceived by the use of it and could be induced from the use of it to believe that he was buying the goods of the original trader, for refusing protection to the trader who was entitled to the use of the trade mark.

9. Another case on the point, to which I would refer, is the judgment of the Privy Council in *National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co.* [1894] A.C. 275 . Lord Ashbourne observes as follows:

Other firms besides the appellants and respondents used the word "Maizena" in Australia between 1864 and 1889. From 1867 until shortly before the commencement of this suit no claim was ever made by the appellants to the exclusive use of the word "Maizena" in New South Wales. The present question could not have arisen if the appellants had more promptly availed themselves of the Act of 1865. They did not do so until the year 1889, and the first substantial question in this case is, whether during the twenty-four years which elapsed between 1865 and 1889 the word had been so used in the colony as to make it no longer registrable as the appellants' trade mark. If during the period in question the word was only used in the colony for the fraudulent purpose of counterfeiting their goods, the right of the appellants to register it as their trade-mark would not be impaired. If, on the contrary, it was used and understood before 1889 as a term descriptive of the article, as a product of maize, and did not denote such product to be of the manufacture or the merchandize of a particular person, that it must be regarded as having become, in the sense of law publici juris, and was no longer registrable by the appellants as their trade mark.

10. Then further on he says, (p 280):

No full or exhaustive definition can be given of the circumstances which will make a word or name publici juris, and each case must depend upon its own facts. In considering the question, it is important to bear in mind that the appellants do not claim any special right to the manufacture of "Maizena", or any exceptional method in making their "Maizena", and that the respondents and all other people have just as much right as the appellants have to manufacture the thing - no matter whether it is called "Maizena", corn flour, or any other name. Having regard to all the facts and evidence in the case it is impossible to resist the conclusion that in December, 1889, the date of registration, and for many years previously, the word "Maizena" had become publici juris, and their Lordships are, therefore, clearly of opinion that it was at the date specified not registrable by the appellants as their trade mark.

11. In this case the user by other was extended over a very long time and the Court came to the conclusion that the word "Maizena" in New South Wales was the common name of an article and not a name distinctive of the manufacture of the appellants in that case:

In all cases of trade mark, no doubt the Court has to judge on the facts before it, and the decision in another case, based on the facts of that case, can be of little value in arriving at a conclusion on the facts of the particular case before the Court. But the principles laid down as to the appreciation of the facts are of the same importance and of the same value in all those cases, and applying the principles as laid down in *Ford v. Foster* [1872] L.R. 7 Ch. 611 to the facts of the case, and considering that the onus of proving that the trade mark Sanatogon, in which the plaintiffs had admittedly acquired a reputation up to the outbreak of war in 1914, had ceased to be distinctive of the plaintiffs' manufacture and had become publici

juris, is on the defendants, I cannot hold on the evidence before me that the defendants have proved to the satisfaction of the Court that the name Sanatogen has come to be so public and in such universal use that nobody can be deceived by the use of it and can be induced from the use of it to believe that he is buying the goods of the plaintiffs. To my mind the evidence, as it is shows that notwithstanding the sales of Sanatogen which, on the face of the packets, was shown to have been manufactured not in Germany but in England and America either by the plaintiffs or by the Genatosan Limited, the public bought it merely as a substitute for the genuine article even where they knew that it was not German stuff they were buying, and that in the mind of the public the word "Sanatogen" did not indicate the name of a compound which might be manufactured by any manufacturer but indicated the distinctive manufacture of the plaintiffs.

12. On the evidence there is no doubt, in my mind, that the defendants, seeing that a very largo and lucrative business was carried on by the plaintiffs in Sanatogen, and that there was no other competitor in the field, and finding that in England various other manufacturers did manufacture and sell the compound in that name, sought to take advantage of the reputation acquired by the plaintiffs and they got it manufactured in England for sale in India. The whole conduct of the defendants, as disclosed in the evidence, shows the dishonesty of their intention.

13. Mr. Binning, for the plaintiffs, did not press the point of get up as, in his opinion, the use of the words "Sanatogen " and "Formamint" was the most important factor in the case, and what the plaintiff's are seeking in this suit is to prevent the use of those names and therefore the question of the get-up, although taken in their plaint, has not been pressed before the Court at the hearing. To my mind however the question of the get-up is important from this point of view that whatever be the belief of the defendants as to the name Sanatogen being a common name and not distinctive of the plaintiffs' manufacture, the defendants did, by the get-up of their stuff, try to sell their stuff as the stuff of the plaintiffs. The differences are childish. The name Sanatogen is printed on the packets and on the bottle of the plaintiffs in a different style. The defendants have merely changed the position of these names. The style of the words used on the packets of the plaintiffs is the style of the words on the bottle of the defendants, and the style of the words used on the plaintiff's bottle is the style of the words on the packet of the defendants. No doubt, the name of the supposed manufacturer in England, which the defendant had to admit in his evidence, was an imaginary name, is printed on the bottle and packet, but, as observed in so many cases, the public are not, therefore, less likely to be deceived in buying the defendants' goods as the goods of the plaintiffs.

14. Even if the word "Sanatogen" had ceased to be distinctive, there is no doubt in my mind that the way the defendants have tried to sell the goods is indicative of their intention to pass off their goods as the goods of the plaintiffs and, in any event, the plaintiffs would be entitled to an injunction restraining the defendants

from passing-off the goods as the goods of the plaintiffs.

15. Assuming that the defendants are right in their contention that the names have ceased to be distinctive of plaintiffs' manufacture by reason of the sales of the compounds manufactured by other manufacturers under those names between 1917 and 1923, the next question arises, namely, whether under the Peace Treaty the fact of the user of the names by others should be eliminated from consideration and the case considered as if the right of the plaintiffs, as it was at the outbreak of the War, was restored to them on the conclusion of the Peace Treaty. This question has been the main question argued before me by counsel on both sides. I have given a very careful consideration to this point, more particularly as there are no reported cases thereon. The point has arisen in South Africa before and been decided by the Registrar of Trade Marks where rights to trade marks are protected by registration under law similar to Registration Acts in England, Mr. Binning has used that judgment as part of his argument on my invitation to him to do so, and I must say that I have derived some assistance from it.

16. Coming to the relevant articles of the Peace Treaty of Versailles, Article 306 provides as follows:

Subject to the stipulations of the present treaty, rights of industrial, literary and artistic property, as such property is defined by the International Conventions of Paris and Berne mentioned in Article 286, shall be re-established or restored, as from the coming into force of the present treaty, in the territories of the High Contracting Parties, in favour of the persons entitled to the benefit of them at the moment when the state of war commenced or their legal representatives....,

17. Then there is a proviso that:

Nevertheless, all acts done by virtue of the special measures taken during the war under legislative, executive or administrative authority of any allied or Associated Powers in regard to the rights of German nationals in industrial, literary or artistic property shall remain in force and shall continue to maintain their full effect.

18. Under Article 307 it is provided as follows:

A minimum of one year after the coming into force of the present Treaty shall be accorded to the nationals of the High Contracting parties, without extension fees or other penalty, in order to enable such persons to accomplish any act, fulfil any formality, pay any fees, and generally satisfy any obligation prescribed by the laws or regulations of the respective States relating to the obtaining, preserving, or opposing rights to, or in respect of, industrial property either acquired before August 1, 1914, or which, except for the War, might have been acquired since that date as a result of an application made before the war or during its continuance.

All rights in, or in respect of, such property which may have lapsed by reason of any failure to accomplish any act, fulfil any formality, or make any payment, shall revive.

The period from August 1, 1914, until the coming into force of the present Treaty shall be excluded in considering the time within which a patent should be worked or a trade mark or design used and it is further agreed that no patent, registered trade mark or design in force on August 1, 1914, shall be subject to revocation or cancellation by reason only of the failure to work such patent or use such trade mark or design for two years after the coming into force of the present Treaty.

19. Article 309 provides:

No action shall be brought and no claim made by persons residing or carrying on business within the territories of Germany on the one part and of the Allied or Associated Powers on the other or persons who are nationals of such Powers respectively, or by any one deriving title during the war from such persons, by reason of any action which has taken place within the territory of the other party between the date of the declaration of war and that of the coming into force of the present Treaty, which might constitute an infringement of the rights of industrial property or rights of literary and artistic property, either existing at any time during the war or revived under the provisions of Articles 307 and 308.

20. These articles of the Peace Treaty, no doubt, purport to re-establish and restore, as from coming into force of the Treaty, the rights of industrial property as such property is defined by the International Conventions of Paris and Berne.

21. Article 286 provides that the International Convention of Paris of March 20, 1883, for the protection of industrial property, revised at Washington on June 2, 1911, will again come into effect as from the coming into force of the present Treaty in so far as they are not affected or modified by the exceptions and restrictions resulting therefrom.

22. "Industrial property " is defined in the International Convention of Paris, as revised at Washington, in the final Protocol to Article 1 of the Convention, as follows:

The words "industrial property" are to be taken in their broadest sense; they extend to all productions of the agricultural industries (wines, corn, fruits, cattle, etc.) and of the mining industries (minerals, mineral waters, etc.).

23. Article 2 of the Convention provides as follows:

The subjects or citizens of each of the contracting countries shall in all the other countries of the Union, as regards patents, utility models, industrial designs or models trade-marks, and trade names, indications of origin, and the suppression of unfair competition, enjoy the advantages that their respective laws now grant, or may hereafter grant, to their own subjects or citizens. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided they observe the conditions and formalities imposed on native subjects or citizens. No obligation as to the possession of a domicile or establishment in the country where protection is claimed shall be

imposed on those who enjoy the benefits of the Union.

24. Article 6 provides specifically for trademarks:

Every trade mark duly registered in the country of origin shall be admitted for registration and protected in the form originally registered in the other countries of the Union.

25. Articles 7 and 8 further provide for registration of the trade-marks. Article 8 provides:

A trade name shall be protected in all the countries of the Union without necessity of registration, whether it forms part or not of a trade-mark.

26. Article 10 bis provides as follows:

All the contracting countries undertake to assure to those who enjoy the benefit of the Union effective protection against unfair trade competition.

27. The explanation to Article 1 as given by the Protocol and Article 2 indicate that industrial rights, in their broadest sense, are sought to be protected by the Convention. The articles, however which deal in detail with the protection of these rights, show that, so far as trademarks are concerned, only rights acquired by registration are considered, and in the case of trade names, it is specifically provided that registration shall not be necessary for the protection of trade names. The question then arises as to whether by reason of the specific provision for protection of registered trademarks, the definition as given in the explanation to Article 1 and the rights which are sought to be protected by Article 2 can be construed as circumscribed by the said specific provision. At one time I thought that that would be a reasonable construction. Probably, the registration of trade-marks being in force in most of the civilized countries, the signatories of the Convention did not contemplate or provide for rights in trademarks which are not acquired by registration. But, on a full consideration, I am inclined to the opinion that the object of the signatories being the protection of industrial rights in trade-marks as are recognized by a country, the Court by putting a restrictive meaning on the provisions of the article, would be frustrating the very object with which the Convention was made, and, in a country like India, would deny to a foreigner the right to acquire in India rights in respect of trade-mark by user which a citizen of the British Empire could acquire therein. It would mean that where the law of registration of trade-marks does not prevail, a foreign national cannot acquire the rights in trade marks as the national of that country can acquire. It may be that where the law of registration prevails every one would be cognizant of the rights of property in the trade-marks, which are registered. But the fact that a common law right to a trade-mark may not be so well known, unless and until it is contested in a Court of law, ought not, to my mind, to preclude a foreign national from acquiring and maintaining such a right in a country which is a party to the said Convention,

just as a national of that country would be entitled to do. Moreover, the right to a trade mark is, to my mind, not affected by the method by which it is acquired. The right of industrial property consists in the right to the user of a particular trade mark. In India there being no Registration Acts, the right to a trade mark can be acquired only by user. There is no doubt in my mind that the right so acquired in India is a right to industrial property, and it is for that reason that I have cited the observations of Kerly in the beginning of my judgment as to the nature of the right acquired in England before the passing of the Registration Acts. The right to a trade mark, in whatever way acquired in a British country, is a right of industrial property coming under the Conventions of Paris and Berne. If that is so, the rights which the plaintiffs admittedly had to these trade-marks, at the out-break of the War, must be restored to them under the Peace Treaty, unless there is an Act of Government which deprives them of the right. In England there has been such an Act of Government, In India no such action has been taken by Government. So the only thing in the way of the plaintiffs, in the exercise of their rights of trade-marks, is the sale of Sanatogen and Formamint, manufactured by others and sold under those names in infringement of the right of the plaintiffs from the year 1917 to 1923, during the time when the plaintiffs, by reason of the War, could not possibly prevent such infringement. The Peace Treaty expressly provides that any such infringement during the War shall not be taken into consideration and the parties shall be restored to their original position as it existed at the outbreak of the War.

28. At one time I was very much oppressed by the argument that the common law right to a trade-mark is originally based on the deception of the public and that, if in fact, the public are not deceived, the owner of the mark should not be entitled to a restoration of a right where the very basis of the right is gone. In the case of registration the right is acquired independently of any reputation of the article by the mere fact of the registration of the trade-mark. Such a right, if infringed during the War, may very well be restored by the action of the Government who are parties to the Peace Treaty, but in the case of a common law right, where the article has come to be *publici juris*, by reason of its sale by other manufacturers, how could the original position be restored? But, on a careful consideration of the Peace Treaty and of the Convention of Paris as revised at Washington, the object of the Peace Treaty appears to me to be clear, namely, to restore the traders to the same position as they occupied at the out-break of the War in respect of the rights acquired by them. On further consideration, I think, the same argument can be advanced in respect of the restoration of a right to a registered trade-mark. For instance, a trade-mark cannot be registered unless the word is a fancy word. If all manufacturers use it, it remains no longer a fancy word. But by the Peace Treaty the owner of the trade-mark is restored to his rights, that is to say, the word is to be considered to be a fancy word in spite of the infringement which makes it a common name. To my mind it appears that I would not be giving full effect to the clauses of the Peace Treaty if I construed the definition of "industrial property" in

the narrow sense in which I am asked to do by the defendants in this case.

29. I hold that the plaintiffs are entitled to the rights in the said trade marks as possessed by them at the out-break of the War, and that sale by the defendants of their compounds, under the names Sanatogen and Formamint, is an infringement of the plaintiffs' said rights.

30. I have already pointed out how the get-up of the defendants' Sanatogen and Formamint is very similar to the get-up of the plaintiffs' Sanatogen and Pormamint and how it is likely to deceive the public into buying the defendants' goods as the plaintiff's goods. In any event, I am of opinion, that the defendants cannot be allowed to sell their goods under that get-up and that they should be restrained by an injunction from doing so. The mere publication of the name of Gibbon Sons and Co., as manufacturers, on the defendants' goods is not sufficient to distinguish them from the plaintiffs' goods. Even if the defendants are entitled to use the words "Sanatogen" and "Formamint" on the goods sold by them, they must change the get-up of the goods in a manner as not to deceive the public into believing that they are the goods of the plaintiffs.

31. Decree for the plaintiffs in terms of prayers A and B of the plaint.

32. The defendants to submit accounts of importation and sale of goods, as per prayer C, to the plaintiffs solicitors on or before January 31, 1925.

33. Plaintiff's to be at liberty to make an application to refer accounts to the commissioner.

34. Defendants to pay the costs of the plaintiffs.