

BETWEEN:

THE BRITISH DRUG HOUSES, LIM-  
ITED .....

} PETITIONER,

1944  
Sept. 25 & 26.  
Oct. 25.

AND

BATTLE PHARMACEUTICALS ..... RESPONDENT.

*Trade Marks—The Unfair Competition Act, 1932, Sec. 2, pars. (k) and (l), 26 ss. (1) par. (f)—Similar wares—Similar marks—Evidence as to likelihood of confusion—Maintenance of the purity of the register in the public interest—Tests of similarity of trade marks—Marks not to be compared side by side—Marks not to be broken up into elements but to be considered in their totality.*

The petitioner registered the word mark "Multivite" in March, 1926, for use in association with a preparation for medicinal use of the vitamins A, D, C and the "B" complex. In May, 1943, the respondent obtained the registration of a word mark "Multivims" for use in association with a multiple vitamin and mineral tablet. The petitioner moved for an order expunging the registration of the respondent's mark on the ground that it was similar within the meaning of The Unfair Competition Act, 1932, to the petitioner's mark already registered.

(1) 17 R.L., 558.  
(2) 20 L.C.J., 141.

(3) M.L.R., 6 C.S., 370.  
(4) 5 R. de J., 320.

(5) 40 R. de J., 467

1944

THE BRITISH  
DRUG  
HOUSES,  
LTD.  
v.  
BATTLE  
PHARMACEU-  
TICALS.

*Held:* That the wares of the parties are similar within the meaning of the Act.

2. That in a dispute as to whether two trade marks are similar within the meaning of The Unfair Competition Act, 1932, while a witness may give evidence as to the effect the use of the mark in dispute would have on his own mind, he may not state his opinion of the effect it would have or be likely to have on the mind of some one else. Such evidence should be rejected as inadmissible, for whether there is a likelihood of confusion in the minds of dealers or users as a result of the use of the mark is a matter upon which the opinion of the Court is required.
3. That in determining whether the registration of a trade mark should be expunged on the ground of its similarity to a mark already registered for use in connection with similar wares it is not a correct approach to solution of the problem to lay the two marks side by side and make a careful comparison of them with a view to observing the differences between them. They should not be subjected to careful analysis; the Court should rather seek to put itself in the position of a person who has only a general and not a precise recollection of the earlier mark and then sees the later mark by itself; if such a person would be likely to think that the goods on which the later mark appears are put out by the same people as the goods sold under the mark of which he has only such a recollection, the Court may properly conclude that the marks are similar. *Sandow Ltd's Application*, (1914) 31 R.P.C. 196, followed.
4. That when trade marks consist of a combination of elements, it is not a proper approach to the determination of whether they are similar to break them up into their elements, concentrate attention upon the elements that are different and conclude that, because there are differences in such elements, the marks as a whole are different. Trade marks may be similar when looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitutes the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered. *Re Christiansen's Trade Mark*, (1886) 3 R.P.C. 54, followed.
5. That the respondent's trade mark "Multivims" is similar within the meaning of The Unfair Competition Act, 1932, to the registered trade mark "Multivite" and its registration must be expunged.

PETITION by Petitioner to have respondent's trade mark expunged from the Register of Trade Marks.

The petition was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

*Christopher Robinson* for petitioner.

*Rutledge C. Greig* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (October 25, 1944) delivered the following judgment:

1944  
 THE BRITISH  
 DRUG  
 HOUSES,  
 LTD.  
 v.  
 BATTLE  
 PHARMACEU-  
 TICALS.  
 ———  
 THORSON J.  
 ———

This is a motion under The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, to expunge the registration of the respondent's trade mark "Multivims" on the ground that it is similar to the petitioner's trade mark "Multivite". The petitioner's mark was first used on January 3, 1936, and was registered in the Trade Marks Office on March 26, 1936, Register No. 23, Folio N.S. 6592, for use in association with wares specified as "A Preparation for Medicinal use of the Vitamins A, D, C and the 'B' complex". The respondent's mark was first used on February 6, 1943, and was registered on May 7, 1943, Register No. 67, Folio N.S. 17526, for use in association with wares specified as "A multiple vitamin and mineral tablet". The petitioner's application for registration shows use of the mark principally in the United Kingdom, Irish Free State and Canada. In Canada the sales of its preparation have, since 1936, been made through an associated company, The British Drug Houses (Canada) Limited, and have been quite extensive. The respondent's use of its mark, according to its application for registration, has been principally in Canada. Its tablets have been on sale for only a short period of time and there is no evidence as to the extent of its sales.

The case is governed by section 26 of The Unfair Competition Act, 1932, the relevant portion reading as follows:

26. (1) Subject as otherwise provided in this Act, a word mark shall be registrable if it (f) is not similar to, or to a possible translation into English or French of, some other word mark already registered for use in connection with similar wares;

If the marks are similar and are used in connection with similar wares, the later mark was not properly registered and the owner of the first registered mark has the right to have its registration expunged.

The first question that arises is whether the two trade marks, in each case a word mark, are used in connection with similar wares. The Act defines "similar" in relation to wares as follows:

2. In this Act, unless the context otherwise requires:—

(1) "Similar", in relation to wares, describes categories of wares which, by reason of their common characteristics or of the correspondence

1944  
 THE BRITISH  
 DRUG  
 HOUSES,  
 LTD.  
 v.  
 BATTLE  
 PHARMACEU-  
 TICALS.  
 Thorson J.

of the classes of persons by whom they are ordinarily dealt in or used, or of the manner or circumstances of their use, would, if in the same area they contemporaneously bore the trade mark or presented the distinguishing guise in question, be likely to be so associated with each other by dealers in and/or users of them as to cause such dealers and/or users to infer that the same person assumed responsibility for their character or quality, for the condition under which or the class of persons by whom they were produced, or for their place of origin;

The definition specifies three conditions of similarity of wares, namely, their common characteristics, or the correspondence of the classes of persons by whom they are ordinarily dealt in or used, or the manner or circumstances of their use. There is, I think, no doubt that in the present case the wares of the parties are similar. The pellets of the petitioner and the tablets of the respondent have common characteristics; one contains minerals as well as vitamins but both are essentially multiple vitamin preparations. The presence of any one of the conditions of similarity required by the definition is sufficient and the condition of common characteristics of the wares is clearly complied with. A second condition of similarity is also present in that the manner or circumstances of the use of the wares is the same for both are used by persons who are, or think they are, deficient in vitamins. Furthermore, while there is no evidence that the two preparations have been dealt with by the same druggists, they are both sold by druggists. I find that wares of the parties are similar within the meaning of the Act.

The real question of controversy is whether the two marks are similar. The Act defines "similar" in relation to marks by section 2 (*k*). The definition, so far as relevant here, reads as follows:

2. (*k*) "Similar", in relation to trade marks, \* \* \* describes marks, \* \* \* so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, \* \* \*

The issue is whether there would be likelihood of confusion in the minds of dealers in and/or users of the wares as to the person responsible for their character or quality, if both marks were used at the same time and in the same area. If the multiple vitamin preparations in the present case were both offered for sale at the same time and in the

same area, one under the mark "Multivite" and the other under the mark "Multivims" and dealers in or users of such preparations or both would be likely to think that they were both put out by the same person, then the marks are similar. If such confusion is likely to arise, the registration of the mark responsible for such likelihood of confusion must be expunged.

Some comment is desirable with regard to one aspect of the evidence. In several affidavits of druggists filed in support of the motion the affiant stated his opinion that the use of the name "Multivims" on a vitamin preparation by any one other than the petitioner would probably cause confusion in the trade and would be likely to cause purchasers to think that the vitamin preparation sold under that name was put out by the petitioner. On the other hand, in affidavits of druggists filed on behalf of the respondent the affiant stated that, as a druggist, he did not consider there was any confusion or likelihood of confusion on the part of the public as to the two marks. Kerley on Trade Marks, 6th Edition, at page 290, makes the statement that the evidence of persons who are well acquainted with the trade concerned was formerly constantly tendered by the parties to show that in the opinion of such persons, as experts, the alleged resemblance between the contrasted marks was, or was not, calculated to deceive, and it was constantly admitted, but that, since the decision of the House of Lords in *The North Cheshire and Manchester Brewery Company Limited v. The Manchester Brewery Company Limited* (1), such evidence has frequently been disallowed. In that case, Lord Halsbury L.C. said, at page 85:

upon the one question which your Lordships have to decide, whether the one name is so nearly resembling another as to be calculated to deceive, I am of opinion that no witness would be entitled to say that, and for this reason: that that is the very question which your Lordships have to decide.

The affidavits filed on the petitioner's behalf also contained the statement of the affiant that he had never heard of the preparation sold under the name "Multivims" but if he had heard of such a preparation and had no information as to its origin he might have inferred that it was a

1944  
 THE BRITISH  
 DRUG  
 HOUSES,  
 LTD.  
 v.  
 BATTLE  
 PHARMACEU-  
 TICALS.  
 THORSON J.

1944  
 THE BRITISH  
 DRUG  
 HOUSES,  
 LTD.  
 v.  
 BATTLE  
 PHARMACEU-  
 TICALS.  
 ———  
 Thorson J.  
 ———

product of the petitioner. In some cases the affiant used the word "should" instead of "might". There can be no objection to such evidence. It is, I think, sound in principle and in accord with authority to hold that, in a dispute as to whether two trade marks are similar within the meaning of The Unfair Competition Act, 1932, while a witness may give evidence as to the effect the use of the mark in dispute would have on his own mind, he may not state his opinion of the effect it would have or be likely to have on the mind of some one else. Such evidence should be rejected as inadmissible, for whether there is a likelihood of confusion in the minds of dealers or users as a result of the use of the mark is a matter upon which the opinion of the Court is required.

There is no evidence of actual confusion as the result of the use of the two marks. While such evidence would be helpful in determining whether there would be likelihood of confusion, it is not necessary that there should be such evidence on a motion to expunge, where the issue is not whether there has been confusion but whether confusion is likely to occur. It is true, of course, that, if the mark in dispute has been in use for a long time and there is no evidence of actual confusion as a result of such use, that fact may be taken into account, but no inference should be drawn from the lack of evidence of actual confusion in a case such as this where the mark complained of has only recently come into use.

Whether confusion in the minds of dealers or users will be likely to result from the use of the marks under review in connection with multiple vitamin tablets may be said to be a question of fact. It would, I think, be more nearly correct to say that it is a matter on which the Court must form an opinion. In the conclusion to which it comes, there cannot be that objectivity of determination that is desirable and frequently possible when the Court is called upon to find facts, for, in the formation of its opinion as to the likelihood of confusion or otherwise in the minds of dealers or users, the Court cannot hold itself completely free from a subjective attitude to the problem. While the judge must seek to put himself in the position of dealers in or users of the wares and try to ascertain what

inference such persons would be likely to draw from the use of the marks on them, he cannot entirely dismiss from his mind the inference that he himself would draw from such use.

The Courts have realized the difficulty involved when a judge seeks to project himself into the minds of other persons in order to ascertain what the effect of certain circumstances would be likely to have on them and, with a view to reducing the extent of the subjective attitude to a given problem of this kind, have laid down certain principles, both general and specific, as guides to be followed. Cases in which trade marks have been held to be similar are numerous and lists of such similar marks are to be found in such text books as Kerley on Trade Marks, 6th Edition, at pp. 295-304, and Fox on Canadian Law of Trade Marks and Industrial Designs, at pp. 80-88. Such cases are not helpful except so far as they express or illustrate guiding principles, for each case is peculiar to itself so far as the actual trade marks involved in it are concerned. This view, frequently expressed in the authorities, was recently clearly stated by the Judicial Committee of the Privy Council in *Coca-Cola Company of Canada Limited v. Pepsi-Cola Company of Canada Limited* (1), where Lord Russell said:

except when some general principle is laid down, little assistance is derived from authorities in which the question of infringement is discussed in relation to other marks and other circumstances.

The general approach to the solution of a problem of this kind was stated by Parker J. in *The Pianotist Company Ltd's Application* (2), as follows:

You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion—that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods—then you may refuse the registration, or rather you must refuse the registration in that case.

(1) (1942) 2 D.L.R. 657 at 661.

(2) (1906) 23 R.P.C. 774 at 777.

1944  
 THE BRITISH  
 DRUG  
 HOUSES,  
 LTD.  
 v.  
 BATTLE  
 PHARMACEU-  
 TICALS.  
 —  
 Thorson J.  
 —

This statement was quoted with approval by Davis J. in the *Pepsi-Cola v. Coca-Cola Case* (supra) (1). ✓

From this statement it follows, I think, that the Court must not allow its consideration of the main issue, namely, whether there is a likelihood of confusion in the minds of dealers or users as a result of the use of the mark in dispute, to be deflected by taking irrelevant matters into account. The respondent filed samples of the bottles in which the respective preparations of the parties are sold. These differ somewhat in shape and there are differences in the labels. The Court is not concerned with the bottles in which the preparations are sold or the labels on them but with the trade marks under which they are put out. It is the effect of the trade marks, and not of the bottles or labels, that must be considered. If the use of the marks on the wares is likely to result in confusion as to the wares, differences in the bottles or labels might serve to lessen the confusion but do not eliminate it. Differences in the bottles or labels cannot turn similar trade marks into dissimilar ones. Such differences have nothing to do with the issue before the Court, for there is no reason why either party should continue the use of the present bottles or labels and nothing to prevent either of them from changing the present shape of the bottles or form of the labels. Neither the bottle nor the label is part of the trade mark. The protection given by the registration extends to any normal use of the trade mark and is not confined to any particular use of it such as its use with a particular shape of bottle or on a particular form of label. This is well established by the case of *In re Worthington & Co's Trade Mark* (2).

✓ The same case also establishes that it is not necessary to show any attempt on the part of the respondent to deceive or create confusion and thus get the benefit of the petitioner's mark. There is no evidence of any such attempt in the present case, but no such evidence is necessary on a motion to expunge. The issue before the Court is the same whether the respondent knew of the petitioner's mark or not. Indeed, the Court should, on such a motion, proceed on the assumption that the second mark was registered in

(1) (1940) S.C.R. 17 at 32.

(2) (1880) 14 Ch. D. 8.



ignorance of the earlier one. In the case just cited, Brett L.J. dealt with both of the matters referred to. At page 15, he said:

1944  
 THE BRITISH  
 DRUG  
 HOUSES,  
 LTD.  
 v.  
 BATTLE  
 PHARMACEU-  
 TICALS.  
 ———  
 THORSON J.  
 ———

there is nothing in the statute to prevent the trade-mark which is registered from being used in any colour. Therefore, it seems to me that the proper construction is that where a trade-mark is registered, it is not merely the outline or design as printed in the advertisement in black, or black and white, which is to be protected, but that which is to be protected is the trade-mark as it may be used or will be used in the ordinary course of trade, that is, in any colour.

It follows from this statement that the mark must be divorced from any particular use that may be made of it and should be considered in relation to any normal and ordinary use. Just as the use of the mark in any particular colour should not be a governing consideration, so the use of the mark with any particular shape of bottle or on any particular form of label should not be taken into account. Then Brett L.J. proceeded to eliminate from consideration the question of intent to deceive or mislead or create confusion. He continued as follows:

That being so, it seems to me that the proper test is this: assume both trade-marks to be registered, and let it be supposed that each person registering is ignorant of the other's trade-mark, would any fair use of the second be calculated to deceive?

It should be noted that Brett L.J. was dealing with the terms of a section which forbade the registration of a trade mark "so nearly resembling a trade mark already on the register as to be calculated to deceive". It is settled law that the phrase "calculated to deceive" does not mean "intended to deceive". In *Maeder's Application* (1), Sargant J. thought the phrase "so nearly resembling as to be calculated to deceive" meant "so nearly identical as to be confusing", and in *McDowell's Application* (2) the matter was put beyond dispute by the House of Lords. There Viscount Cave L.C. said that the words "calculated to deceive" did not mean "intended to deceive" but "likely (or reasonably likely) to deceive or mislead the trade or the public". It is, therefore, clearly established that whether the respondent had any particular motive or intent when it adopted its trade mark is entirely irrelevant to the issue before the Court. There is sound reason for such a conclusion on a motion to expunge, since on

(1) (1916) 33 R.P.C. 77 at 81.

(2) (1927) 44 R.P.C. 335 at 341.

1944  
 THE BRITISH  
 DRUG  
 HOUSES,  
 LTD.  
 v.  
 BATTLE  
 PHARMACEU-  
 TICALS.  
 THORSON J.

such a motion it is the maintenance of the purity of the register so that the public will not be confused by the use of similar marks on similar wares that is the governing consideration. The issue is not whether one party may gain and the other lose through the confusion resulting from the use of the two marks but whether the public will be confused. Dealers and users are entitled to be protected against the likelihood of any such confusion. *Vide Eno v. Dunn* (1); *In re Boots Pure Drug Co. Ltd's Trade Mark "Livron"* (2).

Having thus eliminated from consideration these irrelevant questions, the Court must proceed to consider the effect which the use of the trade mark "Multivims" in connection with the tablets sold by the respondent would be likely to have on the minds of dealers in or users of multiple vitamin preparations who were acquainted with the tablets sold by the petitioner under the trade mark "Multivite". Fortunately, there are to be found in the authorities specific guides which will assist the Court in forming its opinion and substantially reduce the extent of the subjectivity involved in it. The guides indicate not only what the Court should not do in arriving at its conclusion but also what are the positive tests that should be applied.

In determining whether the registration of a trade mark should be expunged on the ground of its similarity to a mark already registered for use in connection with similar wares it is not a correct approach to solution of the problem to lay the two marks side by side and make a careful comparison of them with a view to observing the differences between them. They should not be subjected to careful analysis; the Court should rather seek to put itself in the position of a person who has only a general and not a precise recollection of the earlier mark and then sees the later mark by itself; if such a person would be likely to think that the goods on which the later mark appears are put out by the same people as the goods sold under the mark of which he has only such a recollection, the Court may properly conclude that the marks are similar. The reasons for this guiding rule are sound. Similar marks are

(1) (1890) 15 A.C. 252 at 264.

(2) (1937) 54 R.P.C. 327 at 336.

not identical marks and similarity of marks implies some difference between them, for without any difference they would be identical. A careful analysis of the marks with a view to ascertaining differences fails to observe this important distinction. Moreover, it is the likely effect of the use of the later mark on the minds of ordinary dealers or users generally that must be considered and people as a rule have only a general recollection of a particular thing, rather than a precise memory of it. This negation of careful analysis of the marks side by side together with the necessity of assuming only a general recollection of the earlier mark when the later one is seen by itself was clearly laid down in *Sandow Ltd's Application* (1). In that case the mark proposed for registration consisted of the letter "S" twined round the figure of a female, described as a cottage worker, the whole being surrounded by a circular laurel wreath. The registration was opposed by a company which had a registered mark consisting of the letter "S" twined round the figure of a jay bird and surrounded by an oval, not a laurel, device. The two marks are reproduced in the report and the differences between them when compared with one another are obvious. The Comptroller General, acting as Registrar of Trade Marks, in allowing the registration said, at page 200:

1944  
 THE BRITISH  
 DRUG  
 HOUSES,  
 LTD.  
 v.  
 BATTLE  
 PHARMACEU-  
 TICALS.  
 ———  
 Thorson J.  
 ———

After carefully comparing these marks, I cannot think that there is any reasonable probability of deception to the ordinary man who would take care and trouble in examining the marks. It is no doubt stated in the evidence by the members of many distinguished firms that they might themselves be deceived. I cannot think that this statement can mean that, if the marks are carefully compared, there will be any possibility of deception; I think it can only be taken to mean that, where no careful comparison is made and attention is fixed upon the letter "S" alone, there might be some possibility of confusion.

On an appeal from this decision it was held by Sargant J. that this test of careful comparison was not a true one. At page 205, he said:

The question is not whether if a person is looking at two Trade Marks side by side there would be a possibility of confusion; the question is whether the person who sees the proposed Trade Mark in the absence of the other Trade Mark, and in view only of his general recollection of what the nature of the other Trade Mark was, would be liable to be deceived and to think that the Trade Mark before him is the same as the other, of which he has a general recollection.

(1) (1914) 31 R.P.C. 196.

1944  
 THE BRITISH  
 DRUG  
 HOUSES,  
 LTD.  
 v.  
 BATTLE  
 PHARMACEU-  
 TICALS.  
 ———  
 THORSON J.  
 ———

The same case lays down a further test of the similarity of trade marks when they consist of more than one element. It is the totality of the mark that must be considered. The Comptroller General in giving his decision had said, at page 200:

Having regard, however, to the conclusion I have come to that the Opponents cannot obtain any monopoly rights in the letter "S", I do not think that the other features are so similar as to be likely to cause deception or confusion to reasonable people, or in the ordinary course of trade.

But Sargant J. held that he had erred in eliminating the "S" and concentrating on the other features of the marks. At page 205, he said:

The true test is whether the totality of the proposed Trade Mark is such that it is likely to cause mistake or deception, or confusion, in the minds of persons accustomed to the existing Trade Mark.

This has been recognized as a cardinal principle ever since the case of *Re Christiansen's Trade Mark* (1). In that case a new trade mark for matches was registered on behalf of C. Later an old trade mark for matches was registered by N. N's mark, as registered, contained pictures of prize medals. C's mark, as registered, had two blanks, but, as used on matches, the blanks were filled with pictures of medals. Both marks contained much that was common to the trade, such as the word "Taendstikker". C's mark had the word "Medals" at the top and N's mark the word "Nitedals". N. moved to rectify the register by striking off C's mark. Chitty J. took the view that the distinguishing feature in the marks was the word "Medals" in the one and the word "Nitedals" in the other, and that there was sufficient distinction between the two marks to prevent C's mark from being calculated to deceive and refused the motion to expunge. The Court of Appeal unanimously reversed this decision and ordered C's mark to be expunged. At page 61, the Master of the Rolls said:

We are to consider whether the one trade mark is so like the other trade mark that it is calculated to deceive. What is the trade mark? The trade mark is not the distinguishing feature of the trade mark. The trade mark is not one part of the matter. The trade mark is not in the one case "Medals" and in the other case "Nitedals". That is not the trade mark. If you say that, you strike out all the rest. The trade mark is the whole thing, the whole picture on each. You have, therefore, to consider the whole.

and went on to point out the fallacy involved in the contention that because there was a distinction between the trade marks in respect of some features, the trade marks as a whole were different. His view was that the distinction between the two marks was not sufficient to prevent confusion, when they were looked at as a whole by ordinary people in the ordinary way. Lindley L.J. was of the same view. He thought the resemblances between the two marks were so great that, although there were differences between them, the differences were not so obvious as to make the wholes dissimilar, and his conclusion was that the trade marks as a whole were similar, notwithstanding the dissimilarities that could be found in them. Lopes L.J. agreed that the combination of the elements in the mark as a whole was the thing to be considered. It is, I think, firmly established that, when trade marks consist of a combination of elements, it is not a proper approach to the determination of whether they are similar to break them up into their elements, concentrate attention upon the elements that are different and conclude that, because there are differences in such elements, the marks as a whole are different. Trade marks may be similar when looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitutes the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered.

Affidavit evidence on behalf of the respondent was given that the name "Multivims" was coined from an abbreviation of parts of the words, "multi", "vitamins" and "minerals"; that many trade names have appeared on the market covering vitamin tablets, some with the prefix "multi" or "mult" and others with the suffix "vims" or "ims"; that it has become a practice in the drug trade to use the prefix "multi" or "mult" to denote strength; and that the use of such prefix has become common to the trade and in respect of vitamin preparations usually denotes that the same contains all or many of the vitamins. Counsel for the respondent sought to give the ending "vite" in the petitioner's mark the meaning of

1944  
 THE BRITISH  
 DRUG  
 HOUSES,  
 LTD.  
 v.  
 BATTLE  
 PHARMACEU-  
 TICALS.  
 ———  
 THORSON J.  
 ———

1944  
 THE BRITISH  
 DRUG  
 HOUSES,  
 LTD.  
 v.  
 BATTLE  
 PHARMACEU-  
 TICALS.  
 ———  
 THORSON J.  
 ———

"life" and the ending "vims" in the respondent's mark the meaning of "strength" or "force", and argued that these endings after the common prefix of "multi", with the differing meanings he assigned to them made the marks different. I might point out that this argument is not consistent with the evidence that the mark "Multivims" came from abbreviations of the words, "multi", "vitamins", and "minerals", but even if he were right in assigning these different meanings to the suffixes, which I do not think he was, he has fallen into the same kind of fallacy as was pointed out in *Sandow Ld's Application (supra)* and *Re Christiansen's Trade Mark (supra)*.

While I agree with counsel for the respondent that there can be no monopoly in the use of such a common prefix as "multi", the danger of any such monopoly does not exist in the present case, since the Court is not concerned exclusively with the prefix. Nor is it concerned with the terminations of the two trade marks separately. It is the combination of the prefix and the termination which makes the trade mark. There is not, in my opinion, in the terminations of the two marks that degree of difference that is so obvious as to make the two marks as a whole dissimilar, to use the language of Lindley L.J. in *Re Christiansen's Trade Mark (supra)*. The two marks, when used at the same time and at the same place in connection with similar wares, namely, multiple vitamin tablets, would not, I think, be distinguished in the minds of ordinary users of multiple vitamin preparations; both marks would be likely to connote the same thing in the minds of such persons, that is, a kind of mark that is used in connection with multiple vitamin preparations; the difference in the endings would be lost in the general similarity of connotation which the two marks would convey, when heard or seen as a whole, separately and apart from each other.

Following the guides indicated in *Sandow Ld's Application (supra)* and *Re Christiansen's Trade Mark (supra)*, I have come to the conclusion that ordinary users of multiple vitamin preparations accustomed to the petitioner's trade mark "Multivite" in connection with the multiple vitamin tablets put out by the petitioner, would, on seeing the trade mark "multivims" by itself, used in

connection with multiple vitamin tablets, and having only a general recollection of the petitioner's trade mark as a whole, be quite likely to think that the multiple vitamin tablets of the respondent offered under the name "Multivims" were put out by the petitioner and to buy them in the mistaken belief that they were getting the petitioner's products with which they were acquainted. There would, I think, result from the contemporaneous use of the marks in the same area in association with the respective wares of the parties that likelihood of confusion in the minds of users of the wares as to the person responsible for their character or quality, which in the interests of the public, the Act is designed to prevent. I find, therefore, that the trade marks under review in this case are similar within the meaning of the Act. That being so, the respondent's trade mark "Multivims" should not have been registered and the petitioner's application for an order expunging its registration is granted with costs.

1944  
 THE BRITISH  
 DRUG  
 HOUSES,  
 LTD.  
 v.  
 BATTLE  
 PHARMACEU-  
 TICALS.  
 THORSON J

*Judgment accordingly.*