

served it on the Official Administrator, the matter should then have been dealt with in chambers, and if the defendant failed to show cause why letters should be granted to her, then the plaintiff should present a petition to the court praying that letters be granted to him. But in the present case that procedure has not been followed. The plaintiff chose to proceed by originating summons and objection was not taken by the defendant.

The determination of the questions raised in the originating summons is:

1. With reference to the estate of Jabez Benjamin Luke (deceased), the matter has been improperly brought before the court. The Official Administrator, as such, cannot make such an application for the reasons already given and no answer can be given to that part of the question.

2. With reference to the estates of Sarian Virginia Luke (deceased) and Jemima Lucretia Luke (deceased), letters of administration of their respective estates should be granted to the defendant.

Costs of both parties are to be paid out of the estates of Jabez Benjamin Luke, Sarian Virginia Luke and Jemima Lucretia Luke (deceased) in equal shares. Costs are to be taxed as between solicitor and client.

*Order accordingly.*

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CHOITHRAM v. CYPRUS WINE AND SPIRITS COMPANY LIMITED

SUPREME COURT (Boston, Ag.J.): March 15th, 1954  
(Civil Case No. 497/53)

[1] Trade Marks, Trade Names and Designs—identical or similar trade marks—extent of similarity—marks consisting merely of words must be judged by their look and sound: Where trade marks to be compared consist merely of words, the court must judge them by their look and sound (page 361, lines 35–36).

[2] Trade Marks, Trade Names and Designs—identical or similar trade marks—extent of similarity—marks consisting of similar designs but different words must be considered as whole: Where trade marks have similar designs but different words, the court must consider their similarity as a whole (page 362, lines 9–13).

[3] Trade Marks, Trade Names and Designs—identical or similar trade marks—extent of similarity—possibility of confusion by imperfect

**recollection to be considered:** In considering the similarity of trade marks, the question to be decided is not whether there would be a possibility of confusion if a person looked at the two marks side by side; the question is whether the person who sees the proposed trade mark in the absence of the other one, and in view of his general recollection of the nature of the other mark, is liable to be deceived and to think the mark before him is the same as the one of which he has a general recollection (page 362, lines 15-22).

- [4] **Trade Marks, Trade Names and Designs—identical or similar trade marks—extent of similarity—rules for comparison by court:** In comparing trade marks for the purpose of registration, the court should take account of all the circumstances of the case, including the nature of the goods to which the marks are to be applied and the kind of customer (having special regard to his literacy) likely to buy them, and consider whether as a whole the applicant's mark is substantially different from his opponent's (page 361, line 29—page 362; line 7; page 363, lines 26-39).

- [5] **Trade Marks, Trade Names and Designs—registration—considerations for registration—rules for comparison by court:** See [4] above.

The applicant sought registration of his trade mark under class 43 of the register, and the respondent opposed registration.

Both the applicant and the respondent company sold wines under trade marks unregistered for a number of years. The respondent used two marks, one of which was registered in 1950 and the other in 1953, though the application for the latter's registration was preceded by that of the applicant. The respondent opposed registration of the applicant's mark.

The Supreme Court considered what principles and rules applied in considering whether one trade mark so closely resembled another as to be calculated to deceive.

#### Cases referred to:

- (1) *In re Christiansen's Trade Mark* (1886), 3 R.P.C. 54; 2 T.L.R. 317, *dictum* of Lord Esher, M.R. applied.
- (2) *In re Farrow's Application* (1890), 63 L.T. 233; 6 T.L.R. 319, observations of Stirling, J. applied.
- (3) *Johnston v. Orr Ewing* (1882), 7 App. Cas. 219; 46 L.T. 216, *dictum* of Lord Selborne, L.C. applied.
- (4) *In re Pianotist Co.'s Application* (1906), 23 R.P.C. 774, *dictum* of Parker, J. applied.
- (5) *In re Sandow Ltd.'s Application* (1914), 31 R.P.C. 196; 30 T.L.R. 394, *dictum* of Sargant, J. applied.

**Legislation construed:**

Trade Marks Ordinance (Laws of Sierra Leone, 1946, *cap.* 239), s.14(1):

5        "Any person may, within three months, or such further time,  
not exceeding nine months in all, as the Registrar may allow, from  
the date of the advertisement of the application, give notice to the  
Registrar of opposition to such registration."

*Edmondson* for the applicant;  
*Dobbs* for the respondent.

10        BOSTON, Ag.J.:

On January 20th, 1953, the applicant, T. Choithram, through  
his solicitor, submitted an application to the Registrar of Trade  
Marks for the registration of a trade mark in the form of a label  
under class 43 in respect of wines. Copies of the labels were also  
15        sent with the application. The registrar, in compliance with the  
Trade Marks Ordinance (*cap.* 239), published the application in a  
supplement to the *Sierra Leone Royal Gazette*, No. 4467 of February  
19th, 1953. A block of the label was also reproduced in the  
supplement.

20        M. Jourdan & Co. of Freetown, attorneys for the Cyprus Wine  
& Spirits Co. Ltd. of Limassol, Cyprus, gave to the Registrar a  
notice dated April 5th, 1953 opposing the registration of the said  
trade marks.

25        The grounds for opposition are twofold: first, that the applicant's  
trade mark bears such resemblance to the trade mark of the  
opponent, No. 3313 registered in class 43, for the same goods for  
which the applicant is applying for registration that its use is likely  
to deceive the trade and the public into the belief that the applicant's  
goods bearing his said mark are the goods of the opponent; and  
30        secondly, that the applicant's said trade mark bears such resemblance  
to the trade mark belonging to the opponent, of which the main  
words are "Keo Cyprus Vermouth," that its use is likely to deceive  
the trade and the public into the belief that the applicant's goods  
are the goods of the opponent.

35        The applicant in a counter-statement denied the allegations in  
the opponent's grounds of opposition.

The application was heard by the court on March 11th, 1954  
in accordance with the provisions of the Trade Marks Ordinance.

40        At the hearing Edmond Laugier, a witness for the opponent,  
gave evidence on the facts stated in the grounds of objection and  
on points of similarity between the trade marks of the opponent's

label, for which they had applied for registration and which were put in evidence marked Exhibits A and B. It was also given in evidence that the opponent's trade mark had been registered without opposition in October 1953. The supplement to the *Gazette* containing the registration of the opponent's trade mark was put in evidence and marked Exhibit G. The supplement to the *Gazette* containing the advertisement of the applicant's application for registration of his trade mark was put in evidence and marked Exhibit F. A loose copy of the label was put in evidence and marked Exhibit C. 5

It was admitted by both sides that these trade marks had been in use for some years before applications were made for their registration. It was also admitted that the applicant's application for the registration of Exhibit C was prior in time to the application of the opponent for registration of Exhibit A, but that the latter application was not opposed and the trade mark was duly registered in October 1953. 10 15

The opponent gave notice of opposition under s.14(1) of the Ordinance. Under that section it is immaterial whether the opponent's trade mark has been registered or not. As a matter of fact one of them, Exhibit A, was not yet registered at the date of the notice of opposition, though it has since been registered. 20

The point to be decided is whether the trade mark of the applicant, Exhibit C, so closely resembles the two trade marks of the opponent as to be calculated to deceive. If I find that it does, then his application for registration would be refused. 25

It is difficult to formulate principles and rules which will apply in all cases in considering whether two trade marks so resemble each other for the purposes of registration, but decided cases will throw some light on the matter. In comparing the marks account should be taken of all the circumstances of the case, and one must consider whether, *as a whole*, the applicant's mark is substantially different from the opponent's. In the case of *In re Pianotist Co.'s Application* (4), a case involving the comparison of two words, Parker, J. said (23 R.P.C. at 777): 30

"You must take these 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. 35

In fact, you must consider all the surrounding circumstances." Again, in *Johnston v. Orr Ewing* (3), where both marks consisted of tickets bearing pictures of two elephants with a banner between 40

them, the figures being differently arranged, Lord Selborne, L.C. said (7 App. Cas. at 225):

5        "But although the mere appearance of these two tickets could not lead anyone to mistake one of them for the other, it might easily happen that they might both be taken by natives of Aden or of India unable to read and understand the English language, as equally symbolical of the plaintiffs' goods." [These words do not appear in the report of the case at 46 L.T. 216.]

10       In *In re Christiansen's Trade Mark* (1), a case where two trade marks had similar designs but different words and where it was held the marks were similar, Lord Esher, M.R. said (3 R.P.C. at 61; 2 T.L.R. at 318): "The trade mark is the whole thing, the whole picture on each." Again, in *In re Sandow Ltd.'s Application* (5), Sargant, J. said (31 R.P.C. at 205; 30 T.L.R. at 395):

15       "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  
20       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."

      In *Farrow's* case (2), both the applicant and the opponent were mustard merchants and both used square boxes covered with yellow  
25       labels printed in black and red, for these boxes were common to the trade. The applicant placed upon his labels a picture of a charging buffalo and the opponent a picture of a bull's head. Both pictures were contained within silver rings and these rings were also common to the trade. Stirling, J. said that the buffalo and  
30       bull's head, as printed, were very different; but when they were placed upon the coloured labels, the applicant's label too closely resembled that of the opponent to be admitted to the register.

      With these observations in mind I will now consider the respective trade marks. I will take first the applicant's trade mark,  
35       Exhibit C, with that of the opponent, Exhibit B, which was registered in 1950 before the notice of objection was lodged. Roughly the applicant's trade mark is a label with a design of grape leaves on both sides and the top. Hanging from the middle of the top is a bunch of grapes and underneath the bunch is written  
40       the word "Krio" in fairly large letters, "Cyprus Vermouth" under that, and some other words under these with the name and address

of the applicant. The opponent's trade mark is a label, a bunch of grapes and some grape leaves on a plain ground, no borders, and the word "Keo" written on a shield superimposed on the bunch of grapes more to the top. There is no writing underneath the bunch of grapes and no other writing on the label.

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Applying all the tests of resemblance I have indicated above, and the decisions of eminent judges, it cannot be said that the applicant's label so closely resembles that of the opponent as to be calculated to deceive or to lead to confusion. In fact in his address counsel for the opponent did not press this point. I hold therefore that as far as the opponent's trade mark No. 3313 is concerned, the applicant's trade mark could be passed for registration.

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I will now consider the applicant's trade mark with the other trade mark of the opponent, Exhibit A. Both are edged on both sides and at the top with grape leaves, both have a bunch of grapes hanging at the middle on the top edge, and in the case of the opponent's the bunch of grapes in its trade mark No. 3313 has a shield superimposed on the grapes on which is written the word "Keo." Both have a word written under the bunch of grapes—in the case of the applicant it is "Krio" and in the case of the opponent it is "Keo"—and both have "Cyprus Vermouth" written underneath with some other writings in small letters at the bottom. Both labels are used in connection with their sale of wine in bottles. It was contended by counsel for the applicant that the words are different—one is "Krio" and the other "Keo," so no one could be deceived by them. But, in considering similarity, account should be taken of the market for the goods and the class of people who are potential buyers. There is evidence that this type of wine is bought by the common people who are mostly illiterate, and to them the two words would mean little—they are more concerned with the general set-up of the label. Consideration should be given more to the label as a whole than to small points of difference. Even with a literate man, if the two labels are placed in front of him side by side, he may be able to detect the points of difference. But if he sees only one it will be difficult for him to focus his mind back and visualise the other label to decide whether it is similar or not to the one before him. The process will bring some confusion in his mind. *A fortiori* it will be more difficult for an illiterate man to do so. The outstanding features in the label are the leaves bordering it on three sides and the bunch of grapes hanging from the top border with some writings in the space enclosed by the bordering.

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Both labels are printed in the same colour, green, on a white background. An average man, seeing the bunch of grapes hanging under the top border, associates the label with wine. He knows the opponent sells its wine with a label having that bunch of grapes and the leaves on three sides, with some words written within the border, all done up in green on a white background. He knows the opponent's label on its wine bottles has all these features. Whether the word written is "Krio" or "Keo" is of less consequence to him; he will not without some justification conclude, on seeing the applicant's label on a bottle of wine, that the bottle bearing that label contains the opponent's wine. Again, as regards the pronunciation of the words "Krio" and "Keo," a man wanting the opponent's wine which has the word "Keo" written on its label could be supplied with "Krio," which would be the applicant's brand of wine. The pronunciation of the words is so similar.

I hold that the applicant's trade mark, Exhibit C, so closely resembles the trade mark of the opponent, Exhibit A, as is calculated to deceive and to lead to confusion, and as such it should not be admitted to registration. Considering all the circumstances of the case, including the fact that the opponent failed in respect of its trade mark No. 3313, I order that each party pays his own costs. I also order that the amount of £15 deposited by the opponent as security for costs be refunded by the registrar.

*Order accordingly.*

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WRIGHT v. ELDER DEMPSTER LINES LIMITED

SUPREME COURT (Boston, Ag.J.): April 2nd, 1954  
(Civil Case No. 349/53)

[1] Shipping—carriage of goods—unloading—delivery to consignee—special stipulations or custom as to mode of delivery—when delivery effected so as to discharge shipowner's liability: While a shipowner is under an obligation to deliver goods correctly to the consignee, and so remains responsible for the goods until such delivery, this liability may be limited by the express terms of the contract and the custom at the port of discharge; and therefore where the bill of lading states that the shipowner's responsibility ends when the goods leave the ship's deck at the port of discharge, but the custom of that port is for the goods to be taken out of the ship into lighters and tallied before landing on the quay for storage, delivery to the