

whether a notary can draw up a bond for his own security for money advanced. Neither in *Tennant* nor in *Lybrechts* is anything laid down forbidding any such transaction. Here is a mortgage-bond in favour of a certain firm Cooper & Scholtz, and Scholtz, as notary (being a member of the firm), passed the bond. It is an acknowledgment of debt on defendant's part, and gives a *prima facie* right to provisional sentence. It throws upon defendant the duty of showing in the principal case if so advised that anything objectionable has taken place in connection with the mortgage-bond.

Kleyn, for defendant: The document cannot stand as a notarial act, for it is altogether in favour of the notary. If this practice be allowed, fraud would be the certain consequence (cf. *Holland Consult.*, vol. iii., *Rotterdam*, p. 688, *Consult.* 337; *Fruin Notariaat*, art. 22, chap. 3).

KOTZÉ, C.J.: The Court considers the document a liquid one and sufficient admission of indebtedness, signed by defendant, and it is unnecessary to inquire whether it can or can not stand as a mortgage-bond. There must therefore be provisional sentence for £640, less £47 14s. 1d., with interest at 12½ per cent. and costs. Property bonded declared executable.

1891.
Aug. 4.
Celliers vs.
Hamman.

ROSE & CO. vs. MILLER.

Trademark.—Protection from infringement of, under common law.

Where, in an action for a perpetual interdict restraining M: from using a colourable imitation of the label and trademark of R. it was pleaded that the trademark was not registered in this country, and that the Local Law gave no protection for trademarks, the Court held that a common law right existed to be protected from such misrepresentation as was calculated to mislead the public and cause damage and inconvenience to the manufacturer, and granted the interdict.

1890.
Feb. 1.
" 28.
1891.
June 5.
" 17.
Aug. 5.
Rose & Co. vs.
Miller.

In this case the plaintiffs prayed for an interdict restraining defendant from selling a certain limejuice cordial in bottles of the same characteristic shape as that of the plaintiffs, and bearing a label similar to the one used by the plaintiffs. Rose and Co. were the manufacturers of a certain limejuice cordial well known upon the market. It appeared that the defendant Miller, of Johannesburg, made limejuice and sold it in bottles of Rose & Co., and in others similar in shape, and labelled these with an almost exact imitation of plaintiffs' label. On it appeared, however, the words *Rosen & Co.'s* instead of *Rose & Co.*, and a small representation of a windmill took the place of a lime twig in the original. Evidence was led of several persons who testified that they had bought Miller's limejuice by mistake, intending to buy and believing that they were buying that of Rose & Co. Miller's limejuice was said to be quite distinct in taste, and its taste was compared in Court to that of tartaric acid. An interim interdict pending action had, on February 28th, been granted by the Court (KOTZÉ, C.J., and DE KORTE, J.).

Postea, June 17th, 1891.

Leonard, for plaintiffs Rose & Co. : Messrs. L. Rose & Co. have an exclusive right to their business reputation, and any person infringing such right may be interdicted. This is a principle of Common Law (*cf. Joyce on Injunctions*, vol. 1. pp. 311, 313, 320, 331-2, 337). *Joyce*, page 328, is directly applicable to the present case, for the label is so dexterously imitated, that the public may very easily be misled (*cf. Gouws vs. De Kock* and *Combrinck & Co. vs. De Kock*, 5 *Juta*, p. 405). This Court will always protect property and interdict fraud, and a friendly alien is also entitled to protection. See per Wood V.C., *Collins & Co. vs. Brown*. *Joyce*, pp. 324-5, and p. 343. *Joyce*, p. 349, shows that the same doctrine is also followed in America.

Kleijn, with him *Cloete*, for defendant Miller : We deny that there is any right of property in a trademark according to principles of general jurisprudence. We must then see what the local law is. Here no trademark is recognised. No trademark has been registered, and no one can claim a trademark as conferring an exclusive right here. Consequently plaintiffs are not entitled to an injunction or any

other protection. In this country every one is entitled to do as he pleases unless his actions are interfered with or forbidden by the Legislature of the country. There is no protection in this country for trademarks. Cited judgment of the High Court of Germany, March 1st, 1888. There is absolutely no proof of damage and this is admitted by Rose himself in his evidence *de bene esse*.

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Cloete, on the same side : Cited *Lee vs. Haley*, 5 L. R. Court of App. There is no property in a trademark. There has been no proof of fraud in this case (*cf. Cope vs. Graves*, 18 Equity Cases, Law Reports, p. 188).

Cur. adv. vult.

Postea, August 5th, 1891.

KOTZÉ, C.J. : I am of opinion that Rose & Co. have an exclusive right to the use of a certain label for the sale of "Limejuice Cordial," and that Miller has infringed such right by imitating the label of Rose & Co. in such a way that the public may easily be deceived thereby to the damage and inconvenience of Messrs. Rose & Co. To allow such a practice is to countenance a fraud both on Rose & Co. and the public. It is a case of *injuria* or infringement of right. A perpetual interdict must be granted against Miller, with costs.

DE KORTE, J., concurred.

Vide Cape Law Journal, vol. ix., p. 127. The following Roman-Dutch authorities upon the subject of Trademarks may be consulted :—*Van der Berg's Nederlandsch Advijsboek*, vol. i., cons. 68, p. 161 ; *Zurck Codex Batavus*, *sub voc. Wapenen*, § 4, note 1, and as regards the criminal aspects of the subject ; *Zurck*, *sub voc. Falsiteit*, § 10 ; *Garen*, § 1 ; *Messen*, § 5 ; *Papieren*, § 2 ; *Thes*, § 1 ; *Carpzovius, Praxis Rer. Crim.*, 2, 93, 89, and 90 ; *Voet*, 48, 10, 6 ; Commentators on *Digest*, 48, 10, 30 ; *De Bruyn's Opinions of Grotius*, *sub voce* "Trade Marks."
