

<p>JOSEPH BARSALOU, <i>et al.</i>..... APPELLANTS ;</p>	<p>1881</p>
<p>AND</p>	
<p>DAVID DARLING, <i>et al.</i>..... RESPONDENTS ;</p> <p style="text-align: center;"><i>Trade Mark—Infringement—Injunction.</i></p>	<p>*Nov. 15, 16.</p> <p>1882</p> <p>*Mar. 28.</p>

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR  
LOWER CANADA (APPEAL SIDE).

*B. et al.* manufactured and sold cakes of soap, having stamped thereon a registered trade mark, described as follows:—A horse's head, above which were the words "The Imperial;" the words "Trade Mark," one on each side thereof; and underneath it the words "Laundry Bar." "*J. Barsalou & Co., Montreal,*" was stamped on the reverse side. *D. et al.*, manufactured cakes of soap similar in shape and general appearance to *B. et al.*, having stamped thereon an imperfect unicorn's head, being a horse's head with a stroke on the forehead to represent a horn. The words "Very Best" were stamped, one on each side of the head, and the words "*A. Bonin, 115 St. Dominique St.,*" and "Laundry" over and under the head. At the trial the evidence was contradictory, but it was shown that the appellants' soap was known, asked for and purchased by a great number of illiterate persons as the "horse's head soap."

\*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Taschereau, JJ.

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*Held*, (Henry, J., dissenting), reversing the judgment of the Queen's Bench (appeal side) and restoring the judgment of the Superior Court, that there was such an imitation of the *B. et al.*'s trade mark as to mislead the public, and that they were therefore entitled to damages, and to an injunction to restrain *D. et al.* from using the device adopted by them.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) reversing the judgment of the Superior Court, sitting at *Montreal*

This action was instituted before the Superior Court, at *Montreal*, for the purpose of restraining the defendants (respondents) from making use of a trade-mark belonging to the plaintiffs (appellants) and for the recovery of damages thereby occasioned to the latter.

The plaintiffs alleged,—

“That at *Montreal*, in the district of *Montreal*, on the 5th December, 1877, and for a long time before, the plaintiffs manufactured and sold, at *Montreal* and elsewhere, in large quantities, a soap stamped with a horse's head, such as that upon the cake of soap filed by plaintiffs as exhibit No. 1 ;

“That after the plaintiffs had begun to manufacture the said soap, and had long used as trade-mark for the sale thereof the stamp of a horse's head aforesaid, they sought and obtained from the Minister of Agriculture of *Canada*, at *Ottawa*, on the 5th December, 1877, the registration according to law, for the Dominion of *Canada*, of their said trade-mark, as appears by the certificate filed as exhibit No. 2 ;

“That the plaintiffs were, at the said times, the sole manufacturers of the said soap bearing the said trade-mark or stamp of a horse's head ; that they had and still have the exclusive right to employ the said trade-mark ; and that their said soap, largely sought after by tradesmen and consumers in the Province of *Quebec* and elsewhere, was universally known by the said stamp of a horse's head.

“That during the month of August, 1878, or thereabouts, the defendants, well knowing the foregoing facts, had, in fraudulent violation of plaintiffs’ rights to the exclusive use of the said trade-mark, manufactured, sold and caused to be sold in large quantities, at *Montreal* and elsewhere, a soap bearing a stamp made in imitation of plaintiffs’ said trade-mark, to wit, the stamp borne by the cake of soap filed as plaintiffs’ exhibit No. 3 :

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“That this stamp, which defendants have employed for the sale of their soap as aforesaid, is a fraudulent imitation of plaintiffs’ trade-mark, and that defendants used the same with intent to deceive the public, and to induce purchasers to buy their soap for that of plaintiffs, and to profit by the custom which plaintiffs had succeeded in gaining for their soap ;

“That the defendants, in so using their imitation of plaintiffs’ trade-mark had sold and caused to be sold a large quantity of their soap to persons who intended to buy plaintiffs’ soap, the whole to the great prejudice of the latter ;

“That on or about the 28th August, 1878, plaintiffs notified defendants that proceedings would be taken against them for the illegal use they had made and were making of the said fraudulent imitation of their said trade-mark ; but that notwithstanding this notice, the defendants have since continued and still continue to use the said fraudulent imitation of plaintiffs’ trade-mark ;

“That the defendants, by reason of the above mentioned facts, have caused to plaintiffs, who own and operate at *Montreal* a large soap manufactory, damage to the extent of at least two thousand dollars ;”

And the plaintiffs prayed that by the judgment to be rendered, it be declared that defendants had, illegally and without any right, made use of a fraudu-

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lent imitation of the plaintiffs' trade-mark; that they be enjoined to cease using the same or any imitation of plaintiffs' said trade mark and selling or causing to be sold soap bearing such imitation; and that, for the causes aforesaid, the defendants be condemned jointly and severally to pay to plaintiffs a sum of two thousand dollars currency, by way of damages, with costs.

To this action the defendants, now respondents, pleaded,—

“That the soap manufactured and sold by the defendants does not bear the plaintiffs' trade-mark, nor any fraudulent imitation, nor any imitation whatever thereof; that their soap bears the stamp of a unicorn's head and not of a horse's head; that there is no resemblance between the words printed upon the soaps manufactured by the plaintiffs and the defendants; that the soaps have no resemblance, either in size, color or otherwise, and that the one could not be taken for the other;

“That the soap manufactured by the defendants was manufactured only for one *A. Bonin*, and that in small quantities, and that in manufacturing their soap, the defendants had no intention of imitating, and have not in fact imitated, plaintiffs' trade mark.”

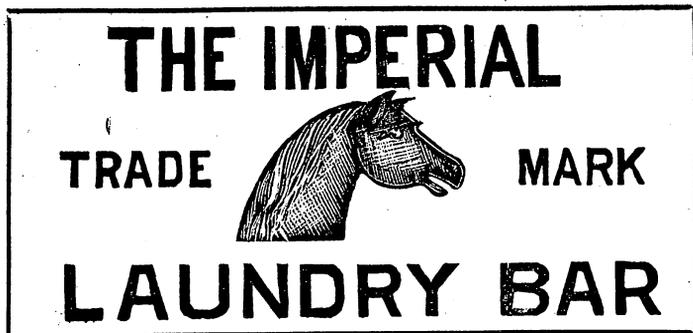
There was also a plea of general denial.

The plaintiffs answered generally, and after proof judgment was rendered in the Superior Court, condemning the defendants to pay plaintiffs \$100 damages

The defendants appealed from this judgment and had it reversed in the Court of Queen's Bench, by whose judgment plaintiff's action was dismissed.

The facts of the case and the evidence bearing on the case are reviewed at length in the judgments hereinafter given; the following will show the stamps used on the cakes of soap sold by the appellants and respondents respectively.

## Plaintiff's Stamp.



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## Defendant's Stamp.



On the reverse side of the plaintiff's stamp are the words "J. Barsalou & Co., Montreal."

Mr. *Beique* and Mr. *Geoffrion*, for appellants, and Mr. *Pagnuelo*, Q.C., and Mr. *Cruikshank*, for respondents.

The points relied on and cases cited are referred to in the judgments.

RITCHIE, C. J. :—

I think that the first judgment in this case was correct. I think that there was an infringement of the plaintiffs' trade mark. This appeal should be allowed and the judgment of the court below confirmed, with an injunction.

STRONG, J., was of opinion that the appeal should be allowed.

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Les appelants ont poursuivi les intimés devant la Cour Supérieure à *Montréal* pour infraction à leur droit à l'usage exclusif de la marque de commerce imprimée sur chaque morceau de savon sortant de leur manufacture. Cette marque consiste principalement dans une tête de cheval d'un côté et de l'autre dans l'arrangement de certains mots tel qu'il appert par les échantillons produits comme exhibits en cette cause. Les appelants se sont assurés le privilège de faire usage de cette marque par l'enregistrement conformément à la loi concernant les marques de commerce.

Les intimés, qui sont aussi manufacturiers de savon, ont adopté, comme marque distinctive de leur savon, un certain emblème qu'ils appellent une tête de licorne. Ils n'ont point pris d'enregistrement pour cette marque. Les appelants se plaignent que cette prétendue marque n'est qu'une imitation frauduleuse de leur propre marque de commerce ; qu'elle constitue une infraction au droit à l'usage exclusif que leur assure l'enregistrement et leur cause des dommages. Ils ont pris les conclusions suivantes :

A ces causes les Demandeurs concluent à ce que par le jugement à intervenir, il soit déclaré que les Défendeurs ont illégalement et sans droit aucun, fait usage d'une imitation frauduleuse de la susdite marque de commerce des Demandeurs, à ce qu'il leur soit enjoint de cesser de faire usage de toute imitation de la dite marque de commerce des Demandeurs et de vendre ou faire vendre du savon portant telle imitation, et à ce que pour les causes susdites les Défendeurs soient condamnés conjointement et solidairement à payer aux Demandeurs une somme de deux mille dollars courant à titre de dommages-intérêts ; le tout avec dépens aux soussignés.

Le plaidoyer des intimés peut se résumer en une dénégation générale. L'imitation et l'intention de fraude sont spécialement niées. Pour justifier l'usage d'une tête de licorne, les défendeurs ont donné dans leur plaidoyer le détail des circonstances dans lesquelles ils ont adopté cette marque.

De nombreux témoins ont été entendus d'une part, par les appelants, dans le but d'établir la ressemblance entre les deux marques ; et de l'autre, par les intimés pour faire voir que la différence entre elles est telle qu'un acheteur ordinaire ne pourrait les confondre. La question à décider se borne donc à l'appréciation de cette preuve. S'il y a eu réellement imitation, qu'elle soit ou non accompagnée d'intention frauduleuse, les droits des appelants doivent être protégés.

Avant la signification de l'action, les intimés ont été requis d'avoir à se désister de l'usage de la tête de licorne parce qu'elle était une imitation de la marque des appelants. Nonobstant cette demande ils ont continué à en faire usage, ainsi qu'il est prouvé par le témoignage de *Brody*, l'un des intimés. Celui-ci reconnaît aussi que lorsqu'ils ont commencé à fabriquer à la demande de *Bonin* le savon portant la marque dont il s'agit, ils savaient que les appelants vendaient un savon portant comme marque de commerce l'empreinte d'une tête de cheval. Ils en avaient des échantillons dans leur établissement.

Le député ministre de l'agriculture, *M. J. C. Taché*, dont une des non moins importantes fonctions est celle de juger les contestations de cette nature, est le seul expert compétent qui ait été examiné sur cette délicate question de la ressemblance des deux marques en question, et sur ce qui peut constituer une imitation suffisante pour être contraire aux dispositions de la loi. Il s'exprime comme suit à ce sujet :

La principale partie de la marque de commerce des Demandeurs comme question pratique est constituée par l'emblème qui représente une tête de cheval et l'arrangement des mots qui entourent l'emblème font aussi partie de l'apparence générale de cette marque de commerce.

A la question qui lui est particulièrement faite sur la similitude qu'il y a entre les deux marques, il fait la réponse suivante ;

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R.—Je trouve que l'une de ces empreintes constitue une imitation de l'autre ; les mots diffèrent mais leur arrangement est à peu près le même. L'emblème qui caractérise l'une de ces marques de commerce étant une tête de cheval et l'autre une tête de licorne, la seule différence qui existe dans l'emblème n'est constituée que par l'addition d'un simple trait placé au front de la tête de cheval.

Interrogé pour savoir si après l'enregistrement de la marque des appelants il eût accordé aux intimés une marque de commerce semblable à celle qu'ils réclame en cette cause, il dit entre autres choses en réponse à cette question :

Je crois cependant d'après mon impression d'aujourd'hui, que si on eût fourni avec la description les deux pièces de savon qui sont ici produites et marquées exhibits Nos. 1 et 3, portant l'empreinte exhibée, nous aurions refusé le second enregistrement ou plutôt nous aurions notifié les deux parties d'avoir à procéder à la preuve de priorité d'usage, d'après la clause sixième de l'acte des marques de commerce de 1868.

A la question de savoir si la priorité d'usage eût suffi pour refuser l'enregistrement de la marque des intimés, il donne la réponse suivante :

Le cas eût été difficile si on avait eu pour se guider seulement la description technique des deux marques de commerce ; mais la production de l'empreinte telle qu'elle se montre sur chacune des pièces de savon produites me paraît prouver clairement l'imitation. J'ai fait faire une recherche dans nos livres par le commis chargé de la besogne des marques de commerce et il m'a dit ne rien exister qui ait trait à la marque de commerce des Défendeurs.

Après avoir donné en réponse aux transquestions une description des deux marques de commerce, il déclare dans une de ses réponses :

There is a difference in the depth of the impression, but I have no hesitation in stating that the two emblems are made in such a manner that ordinary purchasers may take one for the other.

Les autres témoins des appelants ont fait la même preuve. *Barcelo* trouve beaucoup de ressemblance entre les deux marques ;

Je trouve, dit-il, qu'en général il a (le savon des intimés) la même apparence et que c'est une très bonne imitation.

Il considère qu'il pouvait vendre l'un pour l'autre. Le témoin *Corbeil* trouve aussi que c'est une belle contrefaçon.

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Réellement, ajoute-t-il, les gens peuvent se tromper bien souvent, surtout les acheteurs ordinaires, et prendre un savon pour l'autre.

Lui-même s'y était d'abord mépris. Dans ses trans-questions il reconnaît comme suit qu'il y a une certaine différence.

Of course, there is a difference between the two soaps, and I find a difference when I look at it sharp. The greatest difference between this kind of unicorn's head on *Bonnin's* soap and the horse's head on the plaintiff's soap is the kind of horns on *Bonnin's* soap.

*Hilaire Brais* dit *Desrochers* prouve que le nommé *Aldéric Payette* a voulu lui vendre le savon fabriqué par les intimés pour celui des appelants. *Urgèle Perreault*, à la question s'il trouve de la ressemblance entre les deux savons, répond :—

R.—Oui, il y a beaucoup de ressemblance avec le savon des Demandeurs, et ce qui me frappe davantage dans cette ressemblance, c'est la tête de cheval, car je trouve moi, que les deux morceaux portent la tête de cheval, il m'est même arrivé à moi-même de m'y tromper ; j'ai eu occasion, il y a quelque temps, d'aller dans une grocerie chez un marchand en gros, je crois que c'était chez *M. Cusson*, mais je n'en suis pas sûr, et malgré que je vendais le savon des demandeurs depuis longtemps, j'ai d'abord pris celui de *M. Bonnin* pour celui des demandeurs. Ce n'est qu'en y regardant de plus près que je me suis aperçu de l'erreur que je faisais, et le marchand chez qui j'étais m'a aussi fait remarquer que c'était en effet le savon de *M. Bonnin*, et non celui des demandeurs. Je suis convaincu que je puis vendre tous les jours ce savon *Bonnin* pour celui des Demandeurs à ceux qui demandent du savon à tête de cheval, et je suis certain aussi qu'un grand nombre des acheteurs en useraient sans s'en apercevoir.

*Lockerby*, marchand en gros d'épicerie, interrogé sur la ressemblance des échantillons de savon, dit :—

A.—Well, this soap at the first glance a person would take Mr.

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*Bonnin's* soap for Mr. *Barsalou's* soap and to the consumer who couldn't read the lettering on them he would take the soap of *Bonnin* for that of *Barsalou's* the Plaintiffs.

If the two soaps were not side by side and no name on *Bonnin's* soap with this head as it appears here on the bar of soap, I could be led to believe that it was Mr. *Barsalou's* soap on account of the ressemblance of the head and the general appearance of the goods.

*Riendeau*, commis, parlant de la ressemblance des marques, dit :—

Je considère par la marque de commerce, que le savon *Bonnin*, produit en cette cause, est une contrefaçon de celui des Demandeurs. Jetrouve assez de ressemblance entre les deux têtes pour que ce savon soit pris l'un pour l'autre en fait de marque de commerce, et je considère que les acheteurs peuvent s'y tromper facilement s'ils n'examinent pas les écritures.

A ces témoignages si positifs établissant l'imitation de la marque des appelants, les intimés en ont opposé d'autres pour faire voir qu'il existe entre cette marque et la leur des différences si caractéristiques qu'un acheteur ordinaire ne saurait les prendre l'une pour l'autre. Je n'en donnerai que quelques extraits, car la plupart de ces témoins, comme ceux des appelants, s'expriment, quoi qu'en sens contraire, à peu près dans les mêmes termes pour faire ressortir la différence des deux marques.

*Alfred Bonnin*, le premier témoin des intimés, que l'on peut considérer comme l'auteur de la difficulté entre les parties, nous donne l'origine de la marque des intimés. Voulant, dit-il, avoir un aussi bon savon que celui de *Strachan* ou des appelants, il a engagé les intimés à fabriquer pour lui un savon de cette qualité. S'étant assuré qu'il conviendrait à son commerce, il a demandé aux intimés quel emblème il conviendrait de mettre sur ce savon avec son adresse. *M. Darling*, fils de l'un des intimés et leur teneur de livre, fit le dessin de la marque en question. L'ayant montrée à *Bonnin*, celui-ci s'en déclara satisfait et ordonna d'en faire faire

un modèle. A l'époque où il a ordonné ce savon chez les intimés, il avait cessé de vendre celui des appelants qu'il vendait depuis environ six mois et en assez grande quantité. Ce qui paraît l'avoir décidé à faire fabriquer le savon portant son nom, c'est le refus qu'il avait essayé de la part des appelants de lui donner un escompte qui n'est accordé qu'aux marchands en gros. Il leur a dit alors qu'il pouvait faire faire un savon et l'introduire comme le sien. Il nie avoir dit qu'il allait faire faire une imitation du savon des appelants. Il considère que cette tête de licorne ne lui est pas beaucoup utile, qu'une autre aurait fait aussi bien, mais que vu que cette tête lui a été montrée sur le dessin, il l'a acceptée pensant qu'il était le seul qui avait cette tête de licorne. Il prétend que le savon des intimés est plus connu par le mot impérial qui est, dit-il, plus facile à dire pour les dames que tête de cheval. A la question suivante : "Pensez-vous par exemple que pour les personnes qui ne savent pas lire le mot impérial frappe plus les yeux que la tête de cheval ? Il répond :

Tant qu'à cela, le mot impérial est connu et cela prend un homme expert pour juger si c'est une tête de cheval ou une autre tête.

Il ajoute que la tête de licorne sur son savon ressemble, dans sa façon, autant à la tête de licorne que la marque de commerce des demandeurs ressemble à une tête de cheval. Il y a une différence sur le papier et sur le savon. En transquestion, il dit :

I always have found a great deal of difference between the two as also in the size.

I believe that no ordinary purchaser could be deceived in these two soaps; during five months that I have had my soap, no person has ever mistaken my soap for the Plaintiffs'.

Malgré le caractère positif de cette déclaration, il est difficile de croire à la sincérité de *Bonnin*.

L'idée de faire fabriquer un savon portant sa marque ne lui est venue qu'après le refus des appelants de lui

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accorder l'escompte qu'il voulait avoir. Le choix qu'il a fait de sa marque indique le désir de faire concurrence aux appelants. *Darling*, fils, lui montre plusieurs échantillons de savon empreints de diverses marques ; aucune ne peut le satisfaire, pas même la marque d'une tête de licorne fort bien imitée, que les intimes avaient autrefois employée comme leur propre marque et qu'ils étaient prêts à lui donner. Cette tête de licorne ne pouvait remplir son but, parce qu'elle ne rassemblait pas assez à la tête de cheval sur le savon des appelants.

*J. M. Darling*, teneur de livres des intimes, le témoin qui a fait des esquisses d'emblème pour *Bonnin*, déclare qu'un acheteur ordinaire ne pourrait être trompé par la ressemblance des deux marques. Je suis assez porté à croire que cela serait vrai si la tête de licorne sur le savon de *Bonnin* ressemblait tant soit peu à la description qu'il donne d'une tête de licorne :

The head of a unicorn is surmounted with a horn which a horse has not and that a unicorn's head, in my consideration, is smaller and features sharper, and on the whole a very distinct animal.

Au lieu de cela les échantillons nous font voir que la prétendue tête de licorne n'est qu'une servile copie de la tête de cheval du savon des appelants, à laquelle on a simplement ajouté pour dissimuler l'imitation un trait qui est supposé figurer une corne. Un autre témoin des intimes, *M. Adams*, dit qu'en ne regardant que la tête seule, on peut prendre cette prétendue tête de licorne pour une tête de cheval. Il croit que la classe des consommateurs pauvres pourraient prendre l'une pour l'autre, surtout s'ils avaient la garantie ou la parole du vendeur. Dans ses transquestions, il dit que cette tête peut être tout aussi bien prise pour une tête d'âne que pour une tête de cheval. *Cunningham* tout en déclarant qu'un acheteur ordinaire ne pourrait confondre les deux marques, dit en transquestions que si on lui montrait l'emblème du savon des intimes sans le trait sur le

front, qu'il ne pourrait le prendre pour la tête d'aucun animal. Comment concilier cela avec les déclarations si positives qu'il n'est pas possible de confondre les deux marques. *A. W. Hoods* après avoir dit qu'il y a une grande différence entre les deux emblèmes, ajoute en transquestions que s'il n'y avait pas de corne, que très probablement il prendrait l'emblème sur le savon de *Bonnin* pour une tête de cheval.

Quoiqu'en général les témoins des intimés s'accordent à constater entre les deux marques de commerce des différences telles qu'un acheteur ordinaire ne pourrait s'y tromper, un bon nombre d'entre eux admettent aussi qu'en supprimant le trait qui simule la corne dans la tête de la licorne, cette tête ressemble à une tête de cheval. *Foster*, lui-même, le graveur qui a fait l'emblème en question, et qui est si intéressé à nier l'imitation, ne peut s'empêcher d'avouer que s'il n'y avait pas de corne sur la tête, il y aurait une petite ressemblance avec une tête de cheval; qu'elle pourrait être prise, s'il n'y avait pas de corne, pour une tête de zèbre ou "même de cheval ou pour celle de tout autre animal de l'espèce chevaline." Même pour l'artiste qui a fait cet emblème il y a ressemblance, à plus forte raison doit-elle exister pour les acheteurs ordinaires au point de les induire en erreur. Il me semble qu'il n'y a pas d'autres conclusions à tirer de toute la preuve que celle qu'il y a eu imitation de la marque des appelants. Si l'appréciation de la preuve pouvait offrir quelques difficultés, l'examen des échantillons les feraient disparaître. Je partage entièrement, sur ce rapport, l'opinion de *M. J. C. Taché*, député-ministre de l'agriculture, lorsqu'il dit : "Mais la production de l'empreinte telle qu'elle se montre sur chacune des pièces de savon produites me paraît prouver clairement l'imitation."

Bien que *Bonnin* soit le premier auteur de l'infraction qui a été commise au droit exclusif que les

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appelants avaient à l'usage de leur marque, les intimés n'en sont pas moins responsables que lui. Ce sont eux qui ont fait faire l'emblème d'après leurs instructions. Ils étaient alors en possession d'échantillons du savon des appelants. Il leur était facile de donner ou d'éviter la ressemblance. Avant d'avoir été poursuivi, ils ont été invités par les appelants à se désister de l'usage de la marque en question. Malgré cette intimation ils ont persisté à manufacturer du savon portant la même marque. C'est donc en parfaite connaissance du tort qu'ils faisaient aux appelants qu'ils ont continué l'imitation de leur marque et ils doivent en supporter les conséquences. Faisant application des autorités citées dans le factum des appelants à cette appréciation des faits, j'en suis venu à la conclusion que l'appel doit être accordé avec dépens.

HENRY, J. :—

This is an action brought by the appellants to recover from the respondents damages for infringing a trade-mark registered and used to distinguish an article of laundry soap which they manufactured. Their trade mark consists of a horse's head, over which are the words "The Imperial" and under it the words "Trade-Mark"—the first of the two latter words being on the left side of the horse's head and the other on the right, with the words "Laundry Bar" in a third line beneath. On the reverse side are the words "*J. Barsalou & Co.*", and beneath them the word "*Montreal.*" An injunction was also sought to restrain the respondents from using a trade-mark they adopted upon soap of something of a similar kind, which they manufacture, as being like the trade-mark of the appellants. No judgment was given by the court of original jurisdiction as to the latter and none by the Court of Appeal, and it was not asked for at the argument. The question is not therefore before

this court. The allegation as to the similarity of the two trade-marks is denied; and the respondents contend that the one used by them is no imitation of that of the appellants, and that there is no probability, with the exercise of ordinary observation and intelligence, of the one article being taken for the other.

A great many witnesses were examined on both sides as to the probability of the one being taken for the other. The proof of the issue was on the appellants and great latitude was given to the witnesses, but no evidence was given that any one person had been induced to buy soap manufactured by the respondents for that manufactured by the appellants. The appellants have a large factory and were making their soap for upwards of seven years before the commencement of their action. The respondents, too, have a large factory and have manufactured several kinds of soap for upwards of thirty years, and similar in shape and general appearance, but somewhat different in color compared with the cakes of soap made by the appellants.

They used various devices on the cakes of soap manufactured by them, and, about a year before the institution of the present proceedings, commenced to use one with the head of a unicorn.

Before doing so, they were applied to by one *Alfred Bonnin*, a grocer, of 115 St. *Dominique* Street, to manufacture for him a superior article of soap, with his address impressed thereon, so as to serve him as a means of advertising his business. *Bonnin* proposed as a device a female head, but a clerk in the respondent's establishment suggested, amongst others, the head of a unicorn, which was agreed upon. It was also agreed to have the inscription "*A. Bonnin, 115 St. Dominique Street, Very Best Laundry.*" disposed in four lines to surround the device, with no device or inscription on the obverse side. Thus the respondents' inscriptions were in

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four lines whilst the appellants' were in three, and many of the letters of the former were cut longer and much finer than the respondents'. On the latter the words were all one side—the other being smooth and plain—the two cakes presenting a strikingly different appearance, even to the eye of illiterate persons. With the difference indicated by the “horn,” most conspicuously appearing on the head of the unicorn, the difference altogether is most apparent. Taking, then, the two, in view of the law as applicable to such cases, can we arrive at the conclusion that the trademark of the respondents is an infringement of that of the appellants' ? Is the one a literal copy of the other, or is it a colorable one, so as to deceive persons of ordinary intelligence when using ordinary care, so that when purchasing the one they would think they were purchasing the other? It must be remembered that no evidence was given that any person had been so deceived when purchasing ; that the evidence of the appellants went no further than as a matter of opinion that parties might be deceived, the principal reason given being that the soap of the appellants was sometimes asked for as the “horse head soap,” and that the head of the unicorn being so much like that of the horse, illiterate people and children might be deceived. This is the strength of the appellants' case. It is freely and fully admitted that, taking the whole of the marks together, no intelligent person, who took the trouble to use ordinary observation, could be deceived. It is said that this soap is largely used by illiterate people who cannot read, but the same might be said of a great variety of articles—patent medicines, so called, included. Suppose a medicine, called by any particular name, were put up with the same colored labels, wrappers on the bottles, the same kind of printing, the same kind of bottles as those used by another previously ;

one, however, has the device of a church and the other that of some other building, alike in general appearance; but the latter has also the figure of a tower or steeple; each has the name of the manufacturer on it; could it be properly said the one was an infringement of the other, because ignorant people did not know that the tower or steeple was an important distinguishing feature, and that, being illiterate, they could not read, and profit by, the different manufacturer's names being printed on the bottles?

It is well known that illiterate people are often more instinctive in the practical knowledge they possess; and, in the purchase of articles of constant daily consumption, they are generally harder to deceive than their more intelligent and educated neighbors. Besides, if they cannot read, they can see; and if one accustomed to purchase and use the cakes of soap of the appellants, even if not held to be bound to see the horn on the head, would be bound, in my judgment, by the fact that those cakes had plainly indented marks *on both sides*, while the respondents' cakes had all the marks on *one* side, the reverse side being wholly smooth. I am of opinion that the mere fact of the appellants' soap being called by some the "horse head soap," should have little weight in the consideration of this case, particularly when one of the appellants' witnesses, who sold quantities of both soaps, swears it was not known or asked for as such, as customers asked for "seven cent soap or *Barsalou's* soap," and called it "Imperial," that when they wanted "*Bonnin's* soap they asked for the six cent soap, and some for *Bonnin's*"; and it is strange in this connection to find the appellants calling it "Our Imperial Laundry Soap."

We are to be governed solely by the two trade-marks as I feel satisfied, from the evidence, there was no intention

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of infringing the appellant's trade mark, for it is distinctly shown how the device was adopted, and if it were otherwise, why should the address of *Bonnin* have been stamped on the cakes? That would frustrate any object to sell it, as the appellants'. It was suggested that it was he who proposed and adopted the trade-mark, because the appellants would not ameliorate the terms upon which they had previously been supplying him; but the evidence negatives that suggestion, and by the whole evidence it is shown that *Bonnin* received from the respondents and sold all the cakes of soap so marked, and that he did not sell them as the manufacture of the appellants, but as his own. Samples of the two kinds of cakes were exhibited in the case, and inspected by the members of this court. I found no difficulty in ascertaining the difference in the two devices, and I cannot see how any other person, knowing the appellants' trade-mark, with reasonable diligence and ordinary eyesight, could find any, unless, indeed, they lived in a country where horses were found to have a horn in the centre of their foreheads. But, under any circumstances, the reverse side of one being wholly smooth while the other had words indented upon it, was a sufficient indication of difference to the most illiterate.

The appellants in their declaration allege that the respondents fraudulently imitated the horse's head, which is alone stated to be their trade-mark—leaving out the words "Imperial laundry bar" and "trade-mark." It appears to me that the words "Imperial laundry bar," at least constitute a part of it, and that the trade-mark is improperly described in the declaration, but which defect is cured, I think, by the reference to the appellants' registry, as shown by their exhibit No. 2. That document shows the trade-mark to include the

other words I have just stated, and also to include the name of the appellants, &c., on the reverse side.

To such a trade-mark the respondent pleaded, and denied all the allegations in the declaration as to their having fraudulently imitated it. It is alleged in the declaration that the appellants' soap was universally recognized by the said imprint or horse's head, but several of the witnesses who sold large quantities of it say that it was not so known, but as the "Imperial Laundry."

It is further alleged that the impression that the respondents used for the sale of their soap, is a fraudulent imitation of the appellants' trade-mark, and that the respondents used it with the intention of deceiving the public, and to make sale of their own soap for that of the appellants, and to profit by the custom secured, or by the reputation that the appellants had the knowledge to acquire for their soap, and that the respondents had sold and caused to be sold a large quantity of their soap to persons who intended to purchase the soap of the appellants.

It is not necessary to show a fraudulent imitation of a trade-mark, where one is an actual imitation, because in the absence of evidence, that would be generally assumed, but it might be shown not to have been fraudulently done. The owner of the trade-mark would in that case be entitled to an injunction, and also to recover at least nominal damages. When the complaint is made of a colorable infringement it is founded on a charge of fraud. That is not, however, what is here charged against the respondents. They are charged with using the exact trade-mark of the appellants, and that is the issue raised, and the only one; and according to long and well-established rules of pleading, they should succeed or fail according to the proofs offered as to that sole

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issue. Were the charge for a colorable imitation, they should have set out in their declaration what the nature of it was. Both trade-marks should have been set out and described. In the English precedents that I have been enabled to consult, and in the American also, such is the practice; and it is done so that, by a comparison of them, the court can ascertain whether in law it is such a colorable imitation as could possibly mislead, or where any doubt existed, so to direct a jury that they can find whether such charge is sustained. Suppose the respondents in this case had pleaded only a general denial of the appellants' allegations, and on the trial the appellants put in evidence the trade-mark of the respondents, there would have then appeared, in my opinion, an important and fatal variance. That is an important issue, and if found—as it unquestionably should be—for the respondents, they would be entitled to judgment in their favor. But it may be said that in another plea the respondents set out their trade-mark. To succeed they need not have done so, and inasmuch as no colorable imitation is charged, the appellants could not recover, as such a remedy would be for a cause of complaint not alleged.

But, had such been the complaint, the charge of a colorable imitation, such as arises in this case must necessarily include a charge of fraud. In fact the word colorable necessarily implies a charge of fraud. From all the principles laid down in reported cases and by text writers on the subject in *England* and the *United States*, the action for a colorable imitation necessarily implies that the defendant was aware of the plaintiff's trade-mark, and fraudulently made such a change of a part or parts of it as would vary it; but still retain such parts as would leave the general aspect and appearance materially untouched. Some cases are reported in which it was decided that the change of the christian name

only, where both surnames were alike, was insufficient to authorize the use of the trade-mark of another, and the same, in others where the change was made by adding or leaving out one or more words, but the general appearance not materially altered.

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I have referred to the charge of a colorable imitation involving necessarily a charge of fraudulent intention, and it was held by Lord *Chelmsford* in *Wotherspoon v. Currie* (1), that where the two marks are not identical proof of a fraudulent intention on the part of the defendant must be given to entitle the plaintiff to relief.

It is said by Mr. *Adams* in his treatise on the law of trade-marks (2), that :

The main thing to be taken into consideration is whether such an inspection of the defendant's mark taken as a whole, and having regard also to the mode of affixing it to the goods, and to all the circumstances attending its use, as a purchaser of ordinary intelligence exercising a proper amount of caution might be expected to bestow upon it, would lead him to suppose he was buying the manufacture of the plaintiff.

On this point I will quote the language of Lord *Cranworth* in *The Leather Cloth Company v. American Leather Cloth Company*, (3) and hereinafter pretty fully recited, when saying, that in such cases :

The maxim *vigilantibus non dormientibus leges subserviunt* is not to be lost sight of, and even an unwary and incautious person must be expected to bestow some attention upon the mark when purchasing an article.

In the same case Lord *Cranworth* says :

The gist of the complaint in all these cases is that the defendants, by placing the plaintiffs' trade-mark on goods manufactured by the defendants, have induced persons to purchase them, relying on the trade-mark as showing them to be of the plaintiffs' manufacture. This necessarily supposes some familiarity with the plaintiffs' trade-mark.

When referring to the want of any evidence to show

(1) 5 H. L. 519.

(2) P. 107.

(3) 11 Jur. p. 517.

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that any purchaser had been deceived, I did not intend to assert that such evidence was absolutely required, but referred to the fact, to establish the position that the case of the appellants is therefore weaker, and it is wanting in another important feature, which is, that none of the witnesses on the part of the appellants assert that, taking the whole of each trade-mark as presented by the impressions on the cakes of soap, ordinary purchasers would be liable to be deceived. Some of them say that by looking only at the figure of the horse's head in the one case, and of the unicorn's in the other, they or others might be deceived, but that I hold, in view of the principles laid down and acted on in the case just cited, should not be the test.

The question, in the case of a complaint for a colorable imitation, in a common law court, that the fraud of the defendant is a necessary ingredient, may be considered as judicially settled. It has been ruled and decided that the imitation must appear as fraudulent. In *Crawshay v. Thompson* (1), Chief Justice *Tindal* left the matter of the intention of the defendant in using the trade-mark to the jury "because it seemed to him that unless there was a fraudulent intention existing (at least before notice) the defendant would not be liable." The jury found a verdict for the defendants, and there was a motion for a new trial, but the court held the direction right. In that case an attempt was made to make the defendant liable for the use of trade-marks without reference to his intention, but it was thoroughly canvassed and rejected by the whole bench. See *Browne on Trade Marks* (2).

In the Treatise on the Law of Trade Marks in *England* (1877) of *Ludlow and Jenkins*, the authors on this point say :

But although in the opinion of the authors the view that the

(1) 4 Man. & Gr. 357.

(2) P. 395.

action depends on fraud is incorrect, still, as it has long maintained its ground, and has never in the common law courts been judicially abandoned, it is necessary for the practitioner to be acquainted with it.

According to the view which we are now considering, it becomes necessary therefore in an action for the infringement of a trade-mark to show.

1. That the defendant asserted that which was false as by selling his manufactures as and for the manufactures of the plaintiff.
2. That the defendant did this knowingly, that is, with the intention to pass them off as the plaintiffs manufactures.
3. That the plaintiff has been injured.

Every case of putting another trade-mark on one's own goods is not actionable. It must be put on with the intention to deceive.

In *Edelston v. Edelston* (1), Lord Chancellor *Westbury*, when giving judgment, said :

At law, the proper remedy is by an action on the case for deceit ; and proof of fraud on the part of the defendant is of the essence of the action. But this court will act on the principle of protecting property alone, and it is not necessary for the injunction to prove fraud in the defendant.

In equity the rule is different in this respect from that of the Common Law Courts. This is essentially an action brought in a common law court irrespective of equity jurisdiction, and must be so dealt with.

The Dominion statute 31 *Vic.* ch. 55, which provides for the registry of "Trade Marks," imposes penalties for the use of another person's trade mark, and for the close imitation of it so as to deceive ordinary purchasers. In a succeeding section is reserved the right of action by the proprietor of a trade-mark "against any person using his registered trade-mark or any fraudulent imitation thereof, or selling articles bearing such trade-mark or any such imitation thereof."

To sustain an action under the statute for using a trade mark, a fraudulent intention is not required to be shown, but no action for an imitation lies under it, unless it is found to have been done fraudulently

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(1) 1 DeG. J. & S. 199.

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The statute is therefore but an affirmance of the common law on the subject. In all the cases in the Common Law Courts, I have had an opportunity of seeing where the complaint was not for the use of a trade-mark, but for a simulated imitation of one, fraud was charged, and in all the cases where the plaintiffs were successful, it was found.

If, then, such be the state of the law, we must consider the circumstances under which the respondents adopted and used their trade-mark. They did not manufacture the particular kind of soap when applied to by *Bonnin*, but, having been applied to, they agreed to make the article for him. They adopted the trade-mark, as is proved by one of the partners, called as a witness by the appellants, without any reference to that of the appellants. That statement is fully sustained by *Bonnin*, another witness called by the appellants, and also by the son of one of the defendants; and their statements being uncontradicted should be received as true. That position is, also, sustained by *Bonnin*, who states that he never intended to, or did, sell any of the soap as that made by the appellants; and also by the fact that no evidence was given to show that any person bought *Bonnin's* soap for that of the appellants. It is admitted the respondents and *Bonnin* knew the appellant's trade-mark; but, from all the surrounding circumstances as furnished by the evidence, I have no difficulty in concluding that in adopting the trade-mark neither the respondents, nor *Bonnin* had any intention of making fraudulently a simulated imitation of that of the appellants. If fraud is necessary to be established and the authorities show that it is, I am clearly of the opinion that the evidence calls for a finding, that it did not exist on the part of the defendants in this case.

But admitting that the rule in equity should

govern in the common law courts, we must next decide whether there was really such a similitude between the two trade-marks as would make the respondents liable. *Browne* in his treatise on trade-marks, says : (1)

It is frequently a difficult matter to determine what is an infringement. The two marks which are supposed by the plaintiff in a case to conflict may resemble each other and yet be different. The question then arises, is the difference only colorable? No general rule can be laid down as to what is, or what is not a mere colorable variation. All that can be done is to ascertain in every case as it occurs, whether there is such a resemblance as to deceive an ordinary purchaser, using ordinary caution.

See for his authority Lord *Cranworth* (2).

According to that authority, the rule, which is always applied, is in substance that the resemblance must be such as to deceive an ordinary purchaser using ordinary caution. Evidence on the part of the appellants was given by witnesses, all of whom, I think, could read; and, although saying they would not themselves be deceived, gave it as their opinion that parties who could not read might be. As some intimacy with the trade-mark said to have been imitated is necessarily assumed, I have already shown two important features by which illiterate persons who could not read could frustrate an attempt to deceive them in regard to the soap of the appellants, the one the horn conspicuously shown on the unicorn's head, and the other, that in the case of *Bonnin's* soap the trade-mark is all on one side of the cake.

In the treatise last cited (3) the author says :—

Now, although a court will hold any imitation colorable which requires a careful inspection to distinguish its marks and appearances from those of the manufacture imitated, it is certainly not bound to interfere when ordinary attention may enable a purchaser to discriminate. And again, it does not suffice to show that persons incapable of reading the labels bearing the mark, might be deceived

(1) At p. 24.

(2) 11 Jur. 513.

(3) See p. 387.

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by the resemblance. It must appear that the mass of ordinary purchasers paying that attention that such persons usually do in buying the article would be deceived, *Partridge v. Menck*. (1)

The latter I hold to be the true interpretation of the law in the case to which it refers, and if so, there is not the slightest evidence to sustain the case of the appellants. Its main strength consisted of evidence, (not of experts or illiterate parties themselves), given by persons who said they would not have been deceived, but that persons unable to read were likely to be. In none of the English or American cases that I have found is such a position taken; nor can I think it could in any case be properly allowed to influence a decision. In this case, however, the testimony of the appellants' witnesses is more than neutralised by that of about double the number on the other side, who state that there would be no likelihood of any one using ordinary caution being deceived.

The weight of evidence strongly preponderates on this important point in favor of the respondents.

I will hereafter cite, at some length, as bearing upon this case, the judgment in the House of Lords, in what is called "the case of the Leather Companies," before referred to (2)—the decision in which was against the plaintiff—because the trade-marks of the two parties in that case were in their general character and features relatively to each other more like those in this case than in any other case I could find. The proceedings in that case were in equity for an injunction. The Vice-Chancellor decided in favor of the plaintiff, but the Lord Chancellor reversed the judgment, and the case was taken on appeal to the House of Lords. See also the case of *Denis & Mounier Vignier, Dodart & Co.*, cited in *Browne on Trade Marks* (3), and referred to by Mr. Justice *Cross* in his judgment.

(1) 2 Sand. Ch. R. 622.

(2) 11 Jur. 513.

(3) P. 174.

## Lord Cranworth :

The defendant's trade mark is certainly not the same as that used by the appellants. But it is only colourably different? I think it is so different as to make it impossible to say that it is substantially the same. No general rule can be laid down as to what is or is not a mere colourable variation. All which can be done is to ascertain in every case as it occurs, whether there is such a resemblance as to deceive a purchaser using ordinary caution. Here the differences are so palpable that no one can be deceived. In the first place, the shape is different. The plaintiff's trade-mark, if trade-mark it is to be called, is contained in a circle. The design of the defendants' is a semi-circle mounted on a parallelogram. It is said that the defendants' goods may be so rolled as to expose only the semi-circle. and so lead to the belief that the device in its integrity is a circle, I answer *vigilantibus non dormientibus, leges subserviunt*. There might, however, be some force in the observation if the upper half was the same as, or even if it closely resembled, the upper half of the plaintiff's device. But this is not so. The name of the company is different. The word "Crockett" is prominently exhibited twice in the plaintiff's upper half; not once in the defendants. No one taking the trouble to read the two can say that he would be deceived.

The gist of the complaint in all these cases is, that the defendants, by placing the plaintiff's trade-mark on goods manufactured by the defendants, have induced persons to purchase them, relying on the trade-mark as proving them to be of the plaintiff's manufacture. This necessarily supposes some familiarity with the trade mark. But to any one at all acquainted with the plaintiff's trade-mark in this case, I can hardly think that, even on the most cursory glance, there could be any deception.

Each of the trade-marks, it is true, as well that of the plaintiffs as that of the defendants, contain within its periphery an eagle, or that which we suppose was meant to represent an eagle, but not at all resembling each other. The rest of the device, if it is to be called a device, consists merely of words intended to indicate the nature or quality of the article, the place of its manufacture, and the names of the manufacturers. No one reading the two could fail to see that they differ in all these particulars. The letters are all printed in very large type, and the diameter of the circle which contains them is above six inches, so that there can be no difficulty in deciphering what is stamped.

I mention this because, if, instead of occupying the large space, the whole had been engraved on a stamp of the size of a sixpence or

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a shilling, so as not to be capable of being read without a magnifying glass, or even without close examination, the case might have been different. A person purchasing leather cloth so stamped might perhaps fairly say, "I did not attempt to decipher what was stamped on the article which I bought. I saw it had on it what appeared to be, and what I could not discover not to be, the plaintiff's stamp, and I therefore took it for granted, it was the produce of his manufactory." But this cannot apply to a case like that now before us, where that which is called a trade-mark is, in truth, an announcement of the names of the manufacturer, the style of the firm, and the place of the manufacture, in large letters, not only capable of being easily read but intended to be read by all to whom the goods are exposed for sale.

The object of the plaintiffs in the use of their device was to announce (I do not say unfairly or dishonestly to announce) to purchasers that they were buying goods manufactured at what was the original International Leather Cloth Company, at *West Ham*, carried on by Messrs. *Crockett*. I do not think that a firm using device by way of trade-mark can say that a rival manufacturer is guilty of an infringement when he has adopted a device differing in shape, and announcing in letters equally large and legible, the name of a different firm manufacturing goods at a different place. On this short ground, I think that the appeal ought to be dismissed with costs.

Lord *Kingsdown* says :

My lords, there are two questions to be decided in this case: first, whether the plaintiffs, the present appellants, have proved their allegation that their right to the exclusive use of what is called their trade-mark has been violated by the defendants; secondly, if that fact be established, whether there are such mis-representations made by the plaintiffs in their trade-mark as to disentitle them to protection in a court of equity. The rules of law applicable to both questions are sufficiently clear and simple, though some difference of opinion seems to prevail as to the precise principles on which they rest; and great difficulty is often found in applying (in this as in other matters) known rules to the facts of particular cases.

The fundamental rule is, that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore (in the language of Lord *Langdale*, in the case of *Perry v. Truefit* (1), be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person." A man may mark his

(1) 6 Beav. 73.

own manufacture, either by his name, or by using for the purpose any symbol or emblem which comes by use to be recognized in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar description. This is what I apprehend is usually meant by a trade-mark, just as the broad-arrow has been adopted to mark Government stores; a mark having no meaning in itself, but adopted by and appropriated to the Government.

The plaintiffs' trade-mark, or what they call such, is of a different description, and, under the second question for consideration, the difference may be material, but for the first question it does not seem to me to be so.

In dealing with this point, it may be useful to consider, first, what representations, the defendants had a right to make, and next, what representations they actually have made. The leather cloth, of which the manufacture was first invented or introduced into this country by the *Crocketts*, was not the subject of any patent. The defendants had a right to manufacture the same article, and to represent it as the same with the article manufactured by *Crocketts*. And if the article had acquired in the market the name of *Crockett's* leather-cloth, not as expressing the maker of the particular specimen, but as describing the nature of the article by whomsoever made, they had a right in that sense to manufacture *Crockett's* leather-cloth, and to sell it by that name. On the other hand, they had no right, directly or indirectly, to represent that the article which they sold was manufactured by *Crocketts*, or by any person to whom *Crocketts* had assigned their business or their rights. They had no right to do this, either by positive statement or by adopting the trade-mark of *Crocketts & Co.*, or of the plaintiffs to whom *Crocketts* had assigned it, or by using a trade-mark so nearly resembling that of the plaintiffs as to be calculated to mislead incautious purchasers.

These being, as I conceive the rights of the defendants, and the limits of those rights, what is it that they have actually done, and in what respect have they infringed the rights of the plaintiffs?

That depends upon the question, how far the defendants' trade-mark bears such a resemblance to that of the plaintiffs' as to be calculated to deceive incautious purchasers. If we compare the statements of the two trade-marks, there is no statement in the one which can be considered as identical with, or indeed as resembling, the other, except this, that both profess to sell leather-cloth,—a profession which both have a right to make.

The defendants describe their articles as "Leather cloth, manu-

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factured by their manager, late with *J. R. & C. P. Crockett & Co.*," clearly showing that they do not pretend that their cloth is manufactured by that firm, or by any persons who have succeeded in business to that firm. The plaintiffs, on the other hand, describe their article as "*Crockett & Co's*. tanned leather-cloth, patented 24th January, 1856. *J. R. & C. P. Crockett* manufacturers.

Neither in the description of the article to be sold nor of the makers is there anything to be found which could induce any person of common sense to suppose, that in buying the defendant's goods he was buying what had been manufactured by the plaintiffs. But it is said that, in the form of the stamp, the adoption of the American Eagle as an emblem and the collocation of the words "*J. R. & C. P. Crockett & Co.*," there is an obvious imitation of the plaintiff's mark, likely to lead to a mistake of the defendants' goods for the goods of the plaintiffs.

On comparing the two stamps, there does not appear to me to be any such general resemblance as is relied on, nor do I think that there was, in truth, any intention to produce such result, though the intention is immaterial if the result be produced.

I think that the object of the defendants was of another kind; that their object was not to represent their company as the plaintiff's company or their goods as the plaintiffs goods, or to produce any confusion between the two, but to represent themselves as a rival company, manufacturing and selling the same article with the plaintiff's, viz., the leather cloth invented or supposed to have been invented by *Crockett's*, in *America*, and which they desire to recommend to customers, holding out that it is manufactured, not by *Crockett's*, but by persons who, having been in the employment of *Cockett's*, may be supposed to have acquired complete knowledge of their process. Now, these representations are no infringement of the plaintiffs rights; and the purpose which I have supposed, accounts for the similarity, as far as there can be said to be any similarity between the trade-marks of the two companies. The defendants wish to represent that their business consists in manufacturing and selling, not merely leather cloth, but the particular leather cloth invented in *America* by *Crockett & Co.*, and they, therefore, take the name of the *American* Leather Cloth Company. For the same reason they adopt the *American* Eagle as a badge, but their figure has not the smallest resemblance to the same emblem on the plaintiff's representation. For the same reason they refer, in prominent characters, to *J. R. & C. P. Crockett & Co.* for the purpose of shewing that they manufacture the same article which *Crockett's* manufactured, and have the means of using the same processes which

*Crocketts* used, by the employment of a person who was in the service of these gentlemen.

If this statement be true the defendants are justified in making it; but if it be untrue, however reprehensible the statement may be, it does not constitute a colorable imitation of the plaintiff's trade-mark or amount to an infringement of their rights. I think, therefore, that the plaintiffs have failed in proving the fact which forms the foundation of their case and in establishing any ground for the interference of the court; and that for this reason, if for no other, the appeal must be dismissed.

*Lord Chancellor* :—

My lords, what is here called by the appellants a "trade-mark," is, in reality, an advertisement of the character and quality of their goods; and dropping for a moment all reference to the incorrect and untrue statements contained in that advertisement, I will take only what is called the "trade-mark," of the plaintiffs and the rival or antagonistic trade-mark of the defendants, and compare them together, taking them as if they were simply, what in reality they are, two advertisements, each affixed by way of label to the articles manufactured by the parties respectively. Now, comparing them merely as advertisements, and taking them in that character alone, and we shall at once find that there are a variety of statements contained in the advertisement of the appellants which are not to be found in any form, direct or indirect, in the advertisement of the respondents.

My lords, this advertisement is the sole foundation of the plaintiff's case, and their allegations must be reduced, in substance to this—that, having advertised and described their goods in a particular manner, the defendants have borrowed their advertisements, and described their goods in substantially the same manner. Let us see, then, whether that is all correct. In the first place, the plaintiffs, in their advertisements, describe their manufacture as "*Crockett & Co.'s* Leather Cloth." The sole denomination applied by the advertisement of the defendants, is "Leather Cloth" (which was perfectly well known, independently of *Crockett & Co.'s* cloth). Further, the plaintiffs state, not only that they make and sell *Crockett & Co.'s* leather cloth, but that it is "tanned leather cloth,"—an allegation to which there is nothing whatever similar or corresponding in the advertisement of the defendants. Further, the appellants represent that their article is the manufacture of *J. R. & C. P. Crockett*, for they are described as the manufacturers. Not only is there nothing correspondent to that in the advertisement of the defendants, but what the defendants assert is simply, not that it is

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manufactured by *Crockett & Co.*, but that it is manufactured by their manager, who was formerly in the employ of *J. R. & C. P. Crockett & Co.* If, therefore, these are regarded as being what in reality they are, representations of two different articles, it is impossible to say that the representation which is contained in the advertisement of the one contains, either identically or substantially, the representations which are contained in the advertisement of the other; and if you drop the statement in words, and take only the symbols employed in the one case and in the other, it will be found that they differ entirely in their character and effect in the two cases. In the one case it will be seen that you have the eagle with the wings fully extended; in the other case you would have that which is called, I believe, in America, the "screaming eagle," armed with his talons, and perfectly different in character and shape from the other. There is also another, which seems to be intended to be a representation of a sparrowhawk, which, again, is very different from the others.

My Lords, I have added these few observations for the purpose of showing, not only that the ground which I took in the court below was a ground sufficient for my decision, but also that the grounds which have now been superadded by my noble and learned friends, and which I regret I did not more fully consider and adopt as the basis of my former judgment, would warrant the same conclusion, and would, perhaps, have tended still more in favor of the defendants. My Lords, I concur entirely in the motion that has been made, that this appeal be dismissed, with costs.

A *fac-simile* of each trade-mark is given in the report, and, comparing them with the exhibits of the cakes of soap in this case, the former are at once seen to bear a much stronger general resemblance to each other than do the latter to each other.

Looking at the trade-marks in this case in the light of the views entertained and expressed by Lord Chancellor *Westbury*, and the two other eminent and distinguished jurists, as above quoted, we should find that in this case there was no imitation of the appellants' trade-mark. Mr. Justice *Cross* very properly says:—

The inscription has no kind of resemblance to that on Mr. *Barsalou & Co.'s* soap, there being but the one word "Laundry" used in common, all the others being different.

In the case of the leather companies both trade-marks

included the figure of an eagle, but it was held that there was such a difference as to their appearance, as to require purchasers to discriminate. It was contended that being figures plainly of an eagle, parties might be deceived, but the three learned judges held there was a sufficient variation. The distinctive features were not, I hold, as great in that case, as would be apparent as between the horse's head and that of the unicorn's in this.

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As this is the first case that has come before this court on the subject of trade-marks, and as the matter is one of great importance in connection with the manufacturing and trading interests of the country, I have felt the obligation of dealing fully with the subject and have advisedly arrived at the conclusion that, by sustaining the claim of the appellants, we would put an unnecessary and improper restraint on the industry and trade of the country, and do injustice to the respondents.

I think the appeal should be dismissed and the judgment below affirmed with costs.

TASCHEREAU, J. :—

As well remarked by Mr. Justice *Cross*, in rendering the judgment of the *Quebec* Court of Appeal, "any difficulty in the case arises more from the appreciation and applicability of the evidence to the particular case than doubt as to the principles of law which should govern it."

If I do not misunderstand the reasons given by the learned judge, there can be no dissent from the law as laid down by him, viz., that the imitation of a trade-mark to be illegal must be such as to mislead the public into taking the one for the other. But it is in its application to the facts in evidence in this case, and in its determination that there is here no illegal imitation,

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that I feel constrained to dissent from the judgment appealed from and to adopt the conclusion of the learned judge who gave the judgment in the first instance.

The facts of the case have been summed up by my brother *Fournier*, and it is unnecessary for me to repeat them here. They, in my mind, clearly show that any ordinary purchaser, any one whose attention had not been drawn to the difference between the two soaps, any illiterate person who desired to buy the soap called the "Horse's Head Soap," and who did not know that there was a unicorn's head as well as horse's head soap, might very easily be deceived and take one for the other.

It is sufficient, says the *Cour Impériale* of *Paris*, (decision of March 21st, 1866, *Sirey* (1)), to consider an imitation of a mark or of a label fraudulent, that the imitation be of a nature to create confusion and to deceive the purchaser, even when there exist certain differences of detail, such as a modification in the denomination of the product, and of the indication of the maker's name.

In the former case there is an indication of the maker's name on the respondent's soap; but what difference is this for a person who cannot read, as is the case with a large number of those who buy these soaps

And as held in another case (2): "In order that there be a fraudulent imitation of a trade-mark . . . . . it is not necessary that the imitation be servile, it is sufficient that it be of a nature to deceive the purchaser."

I refer also to the following cases:—

*Blofield v. Payne* (3); *Seizo v. Provezenda* (4); *Singer's case* (5); *Orr-Ewing v. Johnston* (6); *Civil*

(1) Vol. of 1866, part 2, p. 263. (3) 4 B. & Ad. 410.

(2) *Sirey* Vol. of 1862, part 2, p. 826, (4) L. R. 1 Chy. 192.

(5) L. R. 3 App. Cas. 376.

(6) 13 Ch. Div. 434,

*Service v. Dean* (1); *MacRae v. Holdsworth* (2); *Hall v. Barrows* (3); *Edelston v. Edelston* (4); *Hall v. Barrow* (5); *Read v. Richardson* (6); *Barron v. Lomas* (7); *Crawford v. Shullock* (8)—a case as this one on trademarks in the manufacture of soap; *Davis v. Reid* (9).

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I am of opinion to allow the appeal, with costs, and to restore the judgment given by the Superior Court against the respondent—one hundred dollars, with costs of suit.

*Appeal allowed, with costs.*

Attorneys for appellants: *Beique & McGoun.*

Attorneys for respondents: *Cruickshank & Cruickshank.*

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