

ROBERT CREAN AND COMPANY, }
 LIMITED (OBJECTING PARTY) }

APPELLANT; *Nov. 18, 19.

1929

1930

*Feb. 4.

AND

DOBBS AND COMPANY (PETITIONER) . . . RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-mark—Trade-Mark and Design Act, R.S.C., 1927, c. 201—“Person aggrieved” by registration of mark (s. 45)—Resemblance of registered mark to mark in prior use—Expunging—Application for registration of mark in Canada—Misrepresentation in use of mark, acquiesced in by owner—Mark used on goods manufactured and sold by person not owner of the mark—Inability of applicant truthfully to make declaration required by s. 13—Essentials for right of registration in Canada—Use of, and “property” in, trade-mark.

In 1908 the members of C. & K. Co., a Connecticut company, hat manufacturers, along with one Dobbs who took a qualifying share, formed the respondent company, of New York, with Dobbs as president. Respondent sold hats in stores in New York city, adopting a trade-mark of which the prominent feature was the word “Dobbs.” It also contained the words “Fifth Avenue, New York,” and other features. The hats were manufactured by C. & K. Co., which also placed the trade-mark on all hats which it manufactured and sold to its various representatives or agencies. From 1913, C. & K. Co. sold hats, manufactured by it and bearing the “Dobbs” trade-mark, to representatives in Canada. In 1923 respondent procured registration of its trade-mark in the United States. By an agreement in 1924, respondent, in consideration of royalties to be paid to it, granted to C. & K. Co. the exclusive licence to sell hats bearing as a trade-mark the word “Dobbs,” either alone or with other words, to customers outside of New York city. In 1922 or early in 1923, appellant, a hat manufacturer in Toronto, Canada, adopted a trade-mark having as a prominent feature the words “Dan Dobbs” (a name not borne by any member of the company) and in 1923 procured registration of its trade-mark in Canada; and it did a considerable business in Canada under it. In 1925 respondent applied to have the word “Dobbs” registered in Canada as a specific trade-mark. This was refused because of appellant’s registered mark. On petition by respondent in the Exchequer Court, Audette J. ([1929] Ex. C.R. 164) ordered that appellant’s mark be expunged, and that respondent be at liberty to renew or proceed with its application for registration. On appeal:

Held (1) Respondent was a “person aggrieved,” within s. 45 of the *Trade-Mark and Design Act*, R.S.C., 1927, c. 201, by registration of appellant’s mark, and entitled to sue for its expunging (“person aggrieved” discussed; reference to 27 Halsbury, p. 714; *In re “Vulcan” Trade-Mark*, 51 Can. S.C.R. 411, at p. 413, and other cases).

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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- (2) Appellant's mark was improperly placed on the register and should be expunged; its resemblance to respondent's mark, under which hats had been sold in Canada for years before appellant's mark was adopted, was such as to confuse and deceive the public.
- (3) Respondent should not be allowed to proceed with its application for registration. The hats sold in Canada bearing its mark were manufactured, owned and sold by C. & K. Co. It never was intended that C. & K. Co. should sell anywhere products of respondent; on the contrary, the principal object of the founders of respondent company in its formation was the acquisition of a business on Fifth Ave., New York, under the mark of which they could represent to the public, in cities and towns outside of New York, that the hats manufactured by C. & K. Co. were the product of Fifth Ave., New York; in that scheme of misrepresentation respondent acquiesced. To sell an article stamped with a false label is *pro tanto* an imposition on the public, and acquiescence by the owner of the stamp leaves representor and owner *in pari delicto* (see *Leather Cloth Co. v. American Leather Cloth Co.*, 4 DeG. J. & S., 137; 11 H.L.C., 523). On this ground alone registration should be refused (*Bowden Wire Ltd. v. Bowden Brake Co. Ltd.*, 30 R.P.C., 580, at p. 590). There were other grounds for refusal: Respondent could not truthfully make the declaration, required by s. 13 of the Act, that the mark was not in use to its knowledge by any other person than itself at the time of its adoption (i.e., adoption in Canada) thereof; there was no adoption of it as a trade-mark in Canada by respondent; it did no business in hats in Canada and it knew that, from 1913 to 1924, the mark was being used in Canada in connection with the sale of hats by C. & K. Co. An applicant for registration of a trade-mark in Canada must shew that he is the proprietor thereof. Respondent had not acquired in Canada any property in the mark. There can be no property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed; the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good-will against the sale of another's products as his (*Hanover Star Milling Co. v. Metcalfe*, 240 U.S. Rep. 403, at p. 412; *Bayer Co. v. American Druggists Syndicate*, [1924] Can. S.C.R. 558, at p. 569). The right to registration in Canada of a trade-mark belongs to him who first uses it there to designate as his the goods to which it is attached; and respondent did not come within this condition.

Judgment of Audette J. (*supra*) varied.

APPEAL from the judgment of Audette J., of the Exchequer Court of Canada (1), ordering that the appellant's trade-mark registered in the Register of Trade-Marks of the Dominion of Canada be expunged, and that the respondent be at liberty to renew or proceed with its application for registration of its own trade-mark.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed as to the expunging from the register of the appellant's trade-mark. The appeal was allowed as to the leave given to the respondent to continue its application for the registration of its trade-mark. Success being about evenly divided, no costs were given on the appeal.

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A. W. Anglin K.C. and *C. A. Thompson* for the appellant.

Harold G. Fox for the respondent.

The judgment of the court was delivered by

LAMONT J.—The short history of this case appears to be as follows: Prior to 1908 the Crofut & Knapp Company, a corporation organized under the laws of the State of Connecticut, and having its head office and factory in that state, was manufacturing, in a large way, hats and caps for both men and women. These it sold at wholesale throughout the United States and other parts of the world. The policy of the company was to sell to one agent or representative only, in each city or town. In 1908 the company, being desirous of putting on the market in cities and towns other than New York, an agency hat bearing a Fifth Avenue, New York, label, and being desirous also of selling its goods by retail in the city of New York, obtained the services of a Mr. Dobbs, the manager of an exclusive hat store on Fifth Avenue, and, with him as president, organized, under the laws of the State of New York, a new company called Dobbs & Co. All the stock of the new corporation was owned by the members of the Crofut & Knapp Company, except the qualifying share of Mr. Dobbs. Dobbs & Co. opened a retail store on Fifth Avenue, selling hats and caps for men. In connection with these articles that company adopted as a trade-mark the word "Dobbs" in large type, and the words "Fifth Avenue, New York" in smaller type, but, apart from the trade-mark, no claim was made to the words "Fifth Avenue New York." There were also the words "The Knapp-Felt Shops" in small type, together with a coat of arms. Of this mark the really prominent feature—the thing which would catch the eye—was the word "Dobbs." This mark was affixed to

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the silk lining which covered the crown of the hat on the inside and, in addition, the word "Dobbs" was stamped on the leather sweat band. Not only was this trade-mark placed on all hats and caps sold by Dobbs & Co., but it was placed by the Crofut & Knapp Company on all hats and caps manufactured by them and sold to their various representatives or agencies, including Dobbs & Co. Both companies have continued to use the mark since 1908. Dobbs & Co. has never manufactured any hats or caps, nor has it ever sold any, except by retail in the city of New York and, for a short period, at Palm Beach, Florida, and at Southampton, Long Island. All the "Dobbs" hats and caps sold by it were manufactured by the Crofut & Knapp Company. Dobbs & Co. has not now, and never had, any place of business in Canada, nor has it sold any hats or caps in this country. This was made clear in the cross-examination of Mr. Wilmot, vice-president and secretary of both companies. Mr. Wilmot at first testified that the hats sold in Canada bearing the "Dobbs" trade-mark were the hats of Dobbs & Co., but subsequently explained his statement by saying that the two companies were owned by the same people. As to the actual ownership of the hats, he testified as follows:—

Q. And I say Dobbs & Company have never sold a hat in Canada?
A. Dobbs & Company's selling agents have, yes.

HIS LORDSHIP: Make it clear, ask him, did Dobbs & Company sell themselves, direct, a hat in Canada?

THE WITNESS: No.

HIS LORDSHIP: Then you contend that they have sold in Canada, you mean they have sold through agents or licensees. Is that what you mean?

A. Yes, my lord.

MR. THOMPSON: Whose goods have Dobbs & Company sold in Canada through agents, who manufactured the goods?

A. Made by Crofut & Knapp Company.

Q. The goods were manufactured by Crofut & Knapp?

A. Right.

Q. Were sold by Crofut & Knapp?

A. Sold through Crofut & Knapp, I would not say they were sold by Crofut & Knapp.

HIS LORDSHIP: Has the petitioner a factory besides the factory of Crofut & Knapp?

A. No.

MR. THOMPSON: As a matter of fact Dobbs & Co. do not manufacture men's hats at all do they?

A. No.

Q. They sell in the retail stores in New York hats manufactured by Crofut & Knapp?

A. True.

Q. And Crofut & Knapp sell in Canada hats manufactured by themselves under the Dobbs name?

A. Under a licence agreement.

Q. So that Dobbs & Co., neither manufacture nor sell any hats that are sold in Canada or the United States, except the ones in the retail stores?

A. True.

* * * * *

Q. And since Dobbs & Company has been incorporated the only actual business that Dobbs & Company has done has been a retail business in two or three retail stores in the United States?

A. Five.

Q. But that is all the business that Dobbs & Co. has actually done?

A. As the Dobbs Corporation, yes.

Q. Of course Dobbs & Co. has never done any wholesale business?

A. Not Dobbs & Co., actually itself.

HIS LORDSHIP: Dobbs & Co. were selling locally as retailers?

A. Retailers.

From 1913 to the present time the Crofut & Knapp Company has, every year, sold hats and caps, of its own manufacture but bearing the "Dobbs" trade-mark, to Max Beauvais, Limited, Montreal, Canada. These annual sales have increased from 25 dozen in 1913 to 60 dozen in 1928. Sales were also made to other representatives in Canada: some were made to Richardson & Potts, Vancouver, but, apparently, not since 1921; one or two small orders were sold, some ten years ago, to Holt, Renfrew & Co., also one order to a firm in Edmonton, and a few shipments were made to Eaton & Co., Winnipeg. Within the last two or three years sales have been made to Eaton & Co., Toronto. All these hats shipped to Canada bore the mark of Dobbs & Co., and were manufactured by the Crofut & Knapp Company at their factory in Connecticut, and sold by their own salesmen. In February, 1923, Dobbs & Co. applied to have their trade-mark registered in the United States to be used in connection with sales of hats and caps and other wearing apparel for men, women and children, and it was registered there on October 23, 1923. On or about November 1, 1924, the Crofut & Knapp Company and Dobbs & Co. entered into an agreement in writing whereby, in consideration of certain royalties to be paid to it, Dobbs & Co. granted to the Crofut & Knapp Company the exclusive licence and right to sell hats, caps and wearing apparel for

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men, women and children, bearing as a trade-mark the word "Dobbs", used either alone or with other words, to customers for resale at retail at their places of business for the sale of such merchandise, outside of the city of New York.

In the latter part of 1922 or early in 1923, Robert Crean & Company, Limited, who had for many years been manufacturing hats and caps in Toronto, in the province of Ontario, adopted as its trade-mark the words "Dan Dobbs" with a triangle above containing the words "Deerskin Finish" and one below containing the words "Character Hats." In April, 1923, Crean & Company applied to have their trade-mark registered in Canada, to be used in connection with the sale of men's felt and straw hats, and the same was registered on May 1, 1923. After its registration the company did a considerable business in Canada under its trade-mark.

In June, 1925, Dobbs & Co. applied to have the word "Dobbs" registered in Canada as a specific trade-mark in connection with the sale of hats and caps. The application was refused by reason of the existence on the register of the prior registration of the words "Dan Dobbs" in favour of Robert Crean & Company. Dobbs & Co. then filed a petition in the Exchequer Court praying for an order: (1) directing that the registered trade-mark "Dan Dobbs" be expunged from the register, and (2) directing that the petitioner's trade-mark consisting of the word "Dobbs" might be registered as a specific trade-mark to be used in connection with the manufacture and sale of hat and caps. The petition was objected to by Robert Crean & Company. The learned judge of the Exchequer Court, before whom the petition came for adjudication, held that "Dan Dobbs" and "Dobbs" were words which, as applied to articles of the same kind, might readily be confused and which would tend to deceive the ordinary purchaser; and that hats bearing the word "Dobbs" had been on sale in Canada prior to the registration of the trade-mark "Dan Dobbs." He also held that in the light of the evidence it was impossible to credit the statements of the objecting party's manager who had invented the trade-mark "Dan Dobbs" that he was unaware of the existence on the Canadian market of hats bearing the mark

"Dobbs", and that he was not influenced, in adopting his trade-mark, by a desire to benefit by the reputation which the petitioner's hats had acquired in the trade. He therefore ordered that the entry of the objecting party's specific trade-mark in the Canada Trade-Mark Register (No. 147, fol. 33279) be expunged therefrom. He further declared that the petitioner be at liberty to renew or proceed with the application for the registration of his own trade-mark. From that order Crean & Co. now appeal to this court.

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Section 45 of the *Act respecting Trade-Marks and Industrial Designs* (R.S.C., 1927, c. 201) reads as follows:—

45. The Exchequer Court of Canada may, on the information of the Attorney-General, or at the suit of any person aggrieved by any omission, without sufficient cause, to make any entry in the register of trade-marks or in the register of industrial designs, or by any entry made without sufficient cause in any such register, make such order for making, expunging or varying any entry in any such register as the Court thinks fit; or the Court may refuse the application.

The first question therefore is, can it properly be said that the respondent is "a person aggrieved" by the registration of the appellant's trade-mark "Dan Dobbs"?

The construction placed upon the words "any person aggrieved" by the decisions under the English Act, and by those under our Act, is the same. Under the English decisions the words are construed to mean, as set out in 27 Halsbury, 714:—

Any person who is in any way hampered in his trade by the presence of the marks or who can shew any real interest in having them removed. *In Re Rivière's Trade-Mark* (1); *In Re Apolonaris Company's Trade-Marks* (2); *Powell v. Birmingham Vinegar Brewery Company* (3).

In *In re "Vulcan" Trade-Mark* (4), Davies J. construed "any person aggrieved," under our Act, to include, any one who may possibly be injured by the continuance of the mark on the register in the form and to the extent it is so registered.

See also *Crothers Co. v. Williamson Candy Co.* (5).

As long as the appellant's registered mark remains on the register the appellant would have the right to prevent the respondent or its licensee from registering the "Dobbs" trade-mark in Canada or from continuing to carry on in Canada the sale of hats and caps under the "Dobbs" mark.

(1) (1884) 26 Ch. D. 48.

(3) [1894] A.C. 8, at p. 10.

(2) [1891] 2 Ch. 186.

(4) (1915) 51 Can. S.C.R. 411, at p. 413.

(5) [1925] Can. S.C.R. 377.

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If the right were exercised, it would injure the respondent in respect of the royalties to be paid on sales made in this country. The respondent, therefore, in my opinion, is a "person aggrieved" within the meaning of the statute.

Then is the appellant's mark calculated to deceive the unwary or to cause those not skilled in the hat business to think they are purchasing a "Dobbs" hat when they buy one having the appellant's mark thereon? The general principle adopted by the court is to consider the impression produced by the mark as a whole. A new mark is calculated to deceive if it suggests the article known by the old mark, or if, in its essential particulars, it resembles those of the old. Although the two marks in question are different in certain respects the prominent feature of each is the name. The respondent's hat was known as the "Dobbs" hat, and the evidence shews that customers would ask for it by that name. The word "Dobbs" along with the words "Fifth Avenue, New York" indicates primarily the origin or ownership of the hat to which the mark is applied. A customer desiring to purchase a "Dobbs" hat, and not having the respondent's mark before him, might very easily, it seems to me, be confused. No one has a right to use a mark by which another's goods are known for the purpose of passing off his goods as the goods of the other and, even when he is innocent of that purpose, he must not use it in any way calculated to deceive, or aid in deceiving, the public. The evidence, in my opinion, fully supports the finding of the trial judge that purchasers of hats would likely be misled and deceived by the general resemblance of the two marks in question. The name "Dobbs" the trial judge found was adopted in good faith by the respondent company because it was the surname of its president. The appellant admits that no member of its organization bears the name Dobbs. The name "Dan Dobbs" as a mark for hats and caps was evolved by the appellant's manager in Montreal during a conversation between him and one Harry Samuels, one of the appellant's Montreal customers who had just organized a company to sell hats and caps at wholesale. On cross-examination, the appellant's manager was asked:—

Q. What led you to adopt the word "Dobbs"?

A. I cannot tell you, it came from the blue sky.

In *Burgess v. Burgess* (1), Lord Justice Turner said:—

Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses.

In view of all the facts and circumstances of this case: the reputation which the "Dobbs" hat had acquired in the United States as a high class hat of superior quality; the sale of these hats in Montreal and the considerable advertising of them there for ten years by Max Beauvais, Limited; the extensive advertising of them in the United States in publications which found their way across the border, and the inability of the appellant to give any reasonable explanation of how it came to adopt the mark, the fair inference to be drawn, in my opinion, is that the appellant's mark was designed with the object of approaching as closely to the respondent's mark as the designer thought he could with safety, in order to obtain a trade benefit from the reputation of the respondent's hats. The appellant's mark being only a colourable variation of the mark under which hats had been sold in Canada for years, I agree with the learned trial judge that such mark was improperly placed upon the register and should be expunged therefrom.

The learned trial judge not only expunged the appellant's trade-mark from the register but also directed that the respondent be at liberty to proceed with its application for the registration of its own trade-mark. It is with this part of the judgment of the learned judge that I find myself not in accord. His conclusion was based upon the following findings:—

It has been abundantly established, by conclusive evidence, that the petitioner, as far back as 1913, to the present day, sold and is selling in Montreal, Canada, his hats with his trade-mark thereon and he further sold them in Vancouver, B.C., in 1917 and during some time subsequent thereto.

* * * * *

These goods have been sold in Canada under the Licence (filed as exhibit No. 13) and were so sold under that name as per such licence. *Qui facit per alium facit per se.*

From these quotations I take it that the learned judge was of opinion that the hats sold in Canada from the year 1913 to the present day were the hats of Dobbs & Co., sold by it through its licensee the Crofut & Knapp Company.

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I do not so read the evidence. It is true that all hats sold in Canada by the Crofut & Knapp Company bore the respondent's mark, but that did not make them the respondent's hats. They were the property of the Crofut & Knapp Company and were sold as such. The fact that the respondent was a subsidiary company organized and owned by the Crofut & Knapp Company does not make the two companies identical. In law each company is a separate and distinct entity, and the rights of each are separate and distinct. It was stated by Mr. Wilmot that the Crofut & Knapp Company sold hats in Canada bearing the respondent's mark, under licence from the respondent. That is true since November, 1924, only. There is no evidence of any licence having been granted before that date. As the Crofut & Knapp people owned practically all the stock of the respondent company, it could, without doubt, have obtained a licence at any time, but there is no evidence that it did so. Neither is there any evidence that from 1908 until 1924 there was any actual agreement between the two companies that the Crofut & Knapp Company could use the respondent's trade-mark. Such an agreement was doubtless considered unnecessary since both companies were owned by the same group of shareholders. The evidence, however, establishes clearly that when hats were sold in Canada bearing the "Dobbs" mark, they were hats manufactured and sold by the Crofut & Knapp Company and not by the respondent. They were not the respondent's hats sold by the respondent's agents or licensees. It never was the intention of anyone, from 1908 to the present time, that the Crofut & Knapp Company should put on the market, either in Canada or elsewhere, the products of the respondent. On the contrary, the principal object which the founders of the respondent company had in view in its formation, according to the evidence of Mr. Wilmot, was the acquisition of a business on Fifth Avenue, under the mark of which they could represent to the public, in cities and towns outside of New York, that their own Connecticut manufactured hats were the product of Fifth Avenue, New York. In that scheme of misrepresentation the respondent, with full knowledge thereof, acquiesced. To sell an article stamped with a false statement is *pro tanto* an imposition on the public, and an acquiescence

therein by the owner of the stamp, in my opinion leaves representor and owner *in pari delicto*. See *The Leather Cloth Co. v. The American Leather Cloth Co.* (1). On this ground alone the registration of the respondent's mark should be refused, for, as Vaughan-Williams L.J., said in *Bowden Wire, Limited v. Bowden Brake Co., Limited* (2):

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The whole object (of the Trade-Mark Act) is that by registering a trade-mark you should be able to represent to the public: "You may rely upon it that all goods which bear this registered trade-mark are the goods manufactured or sold by me, the registered proprietor of the mark."

* * * * *

The moment that you show that there is a plain case of an arrangement in respect of a trade-mark which is calculated to mislead in the sense that it will cause goods which had not been manufactured by the proprietor of the registered trade-mark to look as if they were so manufactured, that will cause people or customers to be deceived.

There is, however, another consideration which, in my opinion, must be equally fatal to the respondent's application.

To be entitled to register a trade-mark the applicant must be the proprietor thereof (s. 9), and he must make a declaration that the mark was not in use to his knowledge by any other person than himself at the time of his adoption thereof (s. 13). If the Minister is not satisfied that the applicant is undoubtedly entitled to the exclusive use of the mark, he may refuse to register it (s. 11a). Once it is registered, however, the proprietor has, under the Act, the exclusive right to use the trade-mark to designate articles manufactured or sold by him (s. 13 (2)).

The right to registration in Canada of a trade-mark belongs to him who first uses it there to designate as his the goods to which it is attached. Before an applicant can have a mark registered he must establish that he is the proprietor thereof—that he has a property in the mark. There is, however, no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good-will against the sale of another's products as his. *Hanover Star Milling Co. v. Metcalfe* (1).

(1) (1863) 4 DeG. J. & S. 137; 11 H.L.C. 523.

(2) (1913) 30 R.P.C. 580, at p. 590.

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In *The Bayer Co. v. American Druggists Syndicate* (2), my brother Duff said:—

It is sufficiently clear that a trade-mark, in order to be registrable under the Act, must be something which the applicant is entitled to adopt as distinguishing the articles to which it is applied as his own;

* * * * *

Adoption by the applicant for the purpose of distinguishing his goods is the ruling condition. There must, moreover, be adoption for use as a distinguishing mark implying a present *bona fide* intention to use the mark for such purposes; and indeed the affidavit in the form prescribed by the rules could hardly be made by an applicant who has not, in however limited a degree, actually made use of the mark in respect of which the application is made.

The business in Canada since 1913 in connection with which the mark has been employed has been the business of the Crofut & Knapp Company, which business, until 1924, was carried on, so far as the evidence discloses, without any relation to the business of the respondent beyond the acquiescence of the latter in the use by the former of the trade-mark. Mere acquiescence by the owner of a foreign trade-mark to its use in Canada by another, does not give property in the trade-mark in Canada to the foreign owner thereof, unless the goods in connection with which it is used in Canada are put on the market as the goods of the owner of the foreign trade-mark, or sold under his name. *Re Elaine Inescourt Trade-Mark* (3).

It is difficult, therefore, to see how the respondent could have acquired in Canada any property in the trade-mark. Furthermore, to be entitled to registration in Canada the respondent must be able truthfully to make the declaration required by s. 13. In its application to the Minister for registration the respondent declared as follows:—

We hereby declare that the said Specific Trade-Mark was not, to our knowledge, in use by any person other than ourselves at the time of our adoption thereof.

“Adoption” here means adoption in Canada. There was no adoption of it as a trade-mark in Canada by the respondent. The respondent did no business in hats in Canada and it knew that, from 1913 to 1924, the mark was being used in Canada in connection with the sale of hats by the Crofut & Knapp Company. It could not, therefore,

(1) (1916) 240 U.S. Rep. 403, at p. 412. (2) [1924] Can. S.C.R. 558, at p. 569.

(3) (1928) 46 R.P.C. 13.

in my opinion, truthfully make the declaration required by the statute. Its application for registration should, on this ground also, be refused.

The appeal, therefore, will be dismissed as to the expunging from the register of the appellant's trade-mark, and allowed as to the leave given to the respondent to continue its application for the registration of its mark. As success has been about equally divided, there will be no costs.

Appeal allowed in part.

Solicitors for the appellant: *Aylesworth, Thompson, Garden & Stuart.*

Solicitors for the respondent: *Fetherstonhaugh & Fox.*

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