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 June 24, 25,
 26, 27, 28, 30
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BETWEEN:

RENWAL MANUFACTURING
 COMPANY, INC..... } PLAINTIFF;

AND

RELIABLE TOY COMPANY,
 LIMITED and RELIABLE PLAS-
 TICS COMPANY, LIMITED..... } DEFENDANTS.

Trade Mark—Industrial designs—Trade Mark and Design Act, R.S.C. 1927, c. 71, ss. 31, 34, 35 and 39—Infringement—Passing-off—Article of manufacture may not be the subject of a registered design—Novelty and originality required to render valid registration of a design—Introduction of trade variations into old design cannot make it new or original—No passing-off unless a person with reasonable apprehension and proper eyesight would be deceived.

The action is one for infringement by defendant Reliable Plastics Company Limited, of plaintiff's registered industrial designs covering children's toys and kitchen utility houseware. Plaintiff alleges that defendant has manufactured and sold in Canada toys for which plaintiff holds registered industrial designs and has passed off these goods as the goods of the plaintiff. Denying infringement and passing-off the defendant also attacks the validity of plaintiff's industrial designs and asks that they be expunged from the register.

The Court found that each of the registrations and applications therefor was for the article of manufacture itself and not for the ornamenting of such articles; and that the designs in question lacked novelty in that they were not new or original. The Court also found that in shape, form or get-up, the various articles of the defendant are not imitations of the plaintiff's toys, nor do they closely resemble them.

Held: That an industrial design under the Trade Mark and Design Act was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing or engraving, applied to the ornamentation of an article of manufacture, which is protected, and not the article of manufacture itself.

2. That since the registered designs of plaintiff lacked novelty they were not registrable.
3. That the introduction of trade variations into an old design cannot make it new or original.
4. That in a passing-off action it is necessary for the plaintiff to establish that he has selected a novel design as a distinguishing feature of his goods and that such goods are known in the market and have acquired a reputation in the market by reason of that distinguishing feature and that the defendants' articles are like his and in the ordinary course of things a person with reasonable apprehension and with proper eyesight would be deceived.

ACTION for infringement of plaintiff's registered industrial designs and the passing-off by defendant of its goods for those of plaintiff. The action proceeded against Reliable Plastics Company, Limited, only.

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The action was tried before the Honourable Mr. Justice Cameron at Ottawa.

Cuthbert Scott for plaintiff.

Gordon F. Henderson for defendants.

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

CAMERON J. now (January 5, 1949) delivered the following judgment:

This is an action for an injunction, damages and consequential relief in which the plaintiff claims that the defendants have infringed plaintiff's registered industrial designs and have passed off their miniature plastic toys for those of the plaintiff. At the commencement of the trial, counsel for the plaintiff asked leave to discontinue the action as against Reliable Toy Company, Limited, the first named defendant. With the consent of counsel for the defendants, I therefore made an order discontinuing the action as against that company, reserving, however, the question of costs. Inasmuch as both defendants were represented by the same counsel throughout and did not file separate pleadings, and, taking into consideration all the circumstances of the case, I think that I should fix the costs of that defendant rather than direct that they should be taxed. I fix those costs at the sum of \$75, payable by the plaintiff to the defendant, Reliable Toy Company Limited.

Wherever reference is made hereafter to the defendant the reference will be only to the second defendant—Reliable Plastics Company, Limited.

The plaintiff is a New York corporation. Since 1939 it has been engaged in the manufacture and sale of children's toys and kitchen utility houseware. Its goods are manufactured in the United States and sold there, as well as in Canada and other countries. Irving Rosenbloom, president of the plaintiff company, registered in Canada certain

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	<i>Title</i>	<i>Registered No.</i>	<i>Date of Registration</i>
	BATHROOM SET		
	Plastic toy bathtub	14893/84	28th Sept., 1946
	Plastic toy washstand	14897/84	“ “
	Plastic toy water closet	14898/84	“ “
	Plastic toy hamper	14899/84	“ “
	KITCHEN SET		
	Toy oblong tub	195014/86	29th Nov., 1946
	Toy stove	15009/86	“ “
	Toy refrigerator	15013/86	“ “
	Toy sink	15015/86	“ “

All of the said registered designs were subsequently assigned to the plaintiff herein on November 19, 1946.

The defendant company was organized in 1941 with its head office at Toronto, Ontario, and its chief officers are Solomon Frank Samuels, Ben Samuels and Alec Samuels. These three brothers, or some of them, however, have been in the business of manufacturing and selling toys since 1920 and since then have continuously used the word “Reliable” in the name under which the business was from time to time operated. The company is a large and substantial one and sells its products to jobbers and departmental and general stores. It entered the field of plastic toys in 1941. Since 1946 it has manufactured and sold in Canada substantial quantities of plastic toys for doll house furniture, simulating household furniture, including bath, hamper, wash basin and toilet, and kitchen table, stove, refrigerator and sink, these being the toys for which the plaintiff holds registered industrial designs, as above mentioned. The plaintiff alleges that these articles of the defendant infringe its registered designs and also that the defendant by its conduct has passed off these goods and a kitchen chair (for which the plaintiff has no registered design in Canada) as the goods of the plaintiff.

The defendant denies infringement and passing off on grounds later to be referred to. It also attacks the validity of the plaintiff's registered industrial designs on several grounds and asks that they be expunged from the register. I shall consider first the question of the validity of the

plaintiff's registered industrial designs, for if it be found that these registrations are invalid there can be no infringement thereof by the defendant.

The defendant alleges that Irving Rosenbloom, the registrant of each of the eight industrial designs, was at no time the author or proprietor thereof and therefore could not validly register them in his own name. It is provided by section 30 of the Trade Mark and Design Act that the certificates of registration of the designs (all of which were filed as exhibits), in the absence of proof to the contrary, shall be sufficient evidence of the design, of the originality of the design, of the name of the proprietor, of the person named as proprietor being proprietor, of the commencement and term of registry, and of compliance with the provisions of this Act. The burden of proof on this point, therefore, is on the defendant.

Rosenbloom has been the president of the plaintiff company since its incorporation in 1939. As president of the plaintiff company it was one of his duties to create and style new ideas and inventions for his company to bring out. His first experience with plastic toys was about 1943 when his company made airplanes of that type. These toys proved to be successful. In the same year Rosenbloom conceived the idea of making plastic doll house furniture—to design and style such toys for five rooms, including the bathroom and kitchen pieces above enumerated. He then discussed the idea with an associate and also with the buyers of several large firms. Their reaction was favourable. His plan was to make the four pieces for the bathroom set (bath, toilet, hamper and sink) and for the kitchen set (one table, four chairs, stove, sink and refrigerator), as well as for the other three rooms. He says he proceeded with some sketches in a very crude way and then called in a free-lance artist—one Mermer—who proceeded to finish the sketches, with Rosenbloom, however, making suggestions from time to time as to proposed changes in the artist's sketches. These sketches were not made to any set scale. Rosenbloom decided that the toys should be made of plastic as there was nothing then in that market made in plastic except four pieces of the dining-room set sold by a competitor. He also decided that it was of paramount importance that the parts should

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be moulded in such a way as to require a minimum of assembly as that would result in a considerable saving of expense. He also considered that ivory would be the best colour for the toys. He further instructed the artist to place certain ribs in the back of the sink, refrigerator and stove, into which could be inserted a cardboard or plastic back,—cardboard eventually being chosen as it was cheaper. Finally these drawings, or sketches, when completed by the artist were taken to a model maker in early 1943 so that hand-made models could be produced as a necessary preliminary to the preparation of the dies to be used in manufacturing.

In cross-examination of Mr. Rosenbloom it was admitted that it was by his efforts, and those of the artist and model makers, that the ultimate designs were finally produced. Rosenbloom very rarely, if ever, made the entire sketch himself but merely put on paper the size of the units desired and the artist followed that. It is apparent from his own verbal admissions and the sketches which he was asked to draw, both on his examination for discovery and at the trial, that he was by no means capable of producing anything like a satisfactory sketch of the designs which were contemplated. I think the only satisfactory conclusion from his evidence is that he did nothing more than indicate in a very vague manner the size of each of the specific articles, and then left it entirely to the artist to actually make the designs which from time to time were checked and altered by him. That he had relatively little to do with the designing is apparent from his own admission that when he asked his patent attorney to apply for registration in the United States and Canada, he merely produced to him the various articles and told him nothing as to the features for which protection was desired, or for which he claimed novelty. After admitting at the trial that he had read the various applications prepared by his attorney prior to signing them, he could not give the descriptions of the designs as they appeared in his own applications, or indicate what was stated as novel in any of them.

In further cross-examination Rosenbloom admitted that he had no written contract with the plaintiff outlining his duties, that he was on salary, and that in preparing the sketches and in all his activities relating to the production

of the designs and articles in question, he was acting within the scope of his employment as president of the company; that everything he did was done on behalf of the company, in company time and with company materials. It is also established that the plaintiff company paid all expenses, including the charges of the artist and model makers and that the artist participated in the working out of the designs.

The Trade Mark and Design Act provides for registration of designs only by the proprietor thereof.

Section 35 is as follows:

The author of any design shall be considered the proprietor thereof unless he has executed the design for another person for a good or valuable consideration, in which case such other person shall be considered the proprietor.

Section 31 is as follows:

If the author of any design shall, for a good and valuable consideration, have executed the same for some other person, such other person shall *alone* be entitled to register.

The statute contains no definition of the word "author." While I am of the opinion that Rosenbloom did little more than communicate to the artist, Mermer, the nature or kind of designs that were wanted by him, and that the artist was the creator or inventor of the designs for all substantial purposes, I do not think it necessary to reach a definite conclusion on that point.

Assuming, therefore—but without deciding—that Rosenbloom was in fact the author of the designs, I still have to consider whether his registrations were valid. As I have stated above, only the proprietor of a design is entitled to register his design. By the provisions of section 35 (*supra*) the author shall be considered the proprietor unless he has executed the design for another person for a good or valuable consideration, in which case such other person shall be considered the proprietor. Then, by section 31 it is provided that if the author shall for good and valuable consideration have executed the design for some other person, such other person shall *alone* be entitled to register. It follows from the provisions of these two sections that if an author has executed the design for good and valuable considerations for another person, that the author cannot register the design in his own name, that right being reserved for "such other person."

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It is clear to me that under the circumstances previously referred to, the designs in question (and whether prepared by Rosenbloom alone or in concert with the artist) were executed for good and valuable consideration for the plaintiff company. I shall not repeat all the circumstances, it is sufficient to state that everything that Rosenbloom did in this connection was done for the plaintiff in the course of his duties for it, in the employer's time and at its expense, that the company paid out large sums of money to the artist and model makers, and that Rosenbloom incurred no expense whatever in connection therewith. The good and valuable consideration is found in the salary paid by the plaintiff to Rosenbloom, part of the duties which were paid for by his salary being the designing and styling of new articles.

Reference may be made to *Lazarus v. Charles* (1) in which Malins, V.C., said:

I take it that where a person is engaged in any ornamental business, and has a workman in his employ under him who makes a design which is new and original, that design would become the property of his master by virtue of the relation that exists between them.

The only Canadian case to which I have been referred on this point is *Equator Manufacturing Co., ex parte, Pendlebury* (2). In that case the application was made by the trustee of a bankrupt company for a declaration that he was entitled to the benefit of certain designs registered by the respondent in his own name, the latter having previously been in the employ of the bankrupt company. In that case Fisher, J., found: (a) that the designs in question were brought about by the work and skill of Pendlebury in the course of his employment, for the company, and that they were to his knowledge and consent adopted and used by the company without any claim whatever made by him for extra remuneration; (b) that all the expense in connection with the making of these designs was paid by or charged to the company, and the time of the company's employees was used in the completion of them.

Judgment in that case was given in favour of the trustee.

In the last-mentioned case reference was made to *re Rogers Trade Mark* (3). In this case, which concerned a

(1) (1873) 42, L.J. Ch. 507.

(3) (1895) 12 R.P.C. 149 at 156.

(2) (1926) 1 D.L.R. 1101.

trade mark, North, J., held that the mark in question belonged to the company. In dealing with the principles involved he said:

Supposing that the whole label had been designed by him, in the shape in which it is, for his masters who were employing him, and had been adopted by them, printed by them, and at their expense, and always used by them, that would not give him, their servant, any right whatever to use that mark as against the Company . . . he thinks that, having introduced it to the Company, it gives him some claim upon it now . . .

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It follows, I think, that Rosenbloom was not the proprietor of the designs at the time of his application and that his statement in each of the applications, "of which I am sole proprietor," was a false statement. The registrations were therefore invalid, *ab initio*. I have not overlooked the fact that in the cases which I have cited the disputes arose between employer and employee, but my finding as to invalidity on this ground is based on the sections of the Act which I have quoted and my finding thereunder that Rosenbloom was never the proprietor of the designs in question, and that only a proprietor could register the designs.

In view, however, of the fact that the designs in question were all assigned by Rosenbloom to the plaintiff company, I do not desire to rest my opinion on the question of validity solely on the somewhat technical finding which I have made.

Counsel for the defendant submits also that as the registered designs here in question are for the articles themselves—rather than for ornamentation of an article—they are invalid in that the Trade Mark and Design Act does not permit design registration of an article of manufacture itself, but merely "for the ornamentation of any article of manufacture." In my view each of the applications and registrations was for the article itself. For the kitchen furniture the applications read, "hereby request you to register in the name of Irving Rosenbloom an industrial design of a toy sink (or toy table, toy refrigerator, or toy stove, etc.) of which I am the sole proprietor," and the certificates of registration show that registrations were made for industrial designs of a toy stove, toy refrigerator, etc. In the case of the applications for bathroom pieces and the certificates thereof, the wording is the same except that in each case the word "plastic" precedes the name of

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each article. In all of the applications a description of the article is given and the wording is followed in the certificates of registration. After the words describing the article in each application there appear the words "a drawing of the said industrial design is hereunto annexed," and the drawings represent in each case the whole of the article. In each certificate appears the words "as per the annexed pattern and application."

There is considerable uncertainty as to whether a design for shape or configuration which can only be applied to a thing by making it in that shape comes within the Canadian Act. According to the statute the design must, it would seem, be something capable of application to any article of manufacture or other article "for the ornamentation thereof." The matter was discussed by the late President of this Court in *Clatworthy & Son v. Dale Display Fixtures Ltd.* (1), where Maclean, J., considered also the wording of the English Act in which "design" is defined so as to include pattern, shape or configuration, or for the ornament thereof. His judgment was affirmed in the Supreme Court of Canada, (1929) S.C.R. 429, but that point was not directly considered, the matter being decided on the question of anticipation.

The matter was also considered by Maclean, J., in *Canadian Wm. A. Rogers Ltd. v. International Silver Co. of Canada Ltd.* (2). In that case he said at p. 65:

I think the registered design must be expunged. In *Kaufman Rubber Co. Ltd. v. Miner Rubber Co. Ltd.* (1926) Ex. C.R. 26, I discussed the very meagre provisions of the Trade Mark and Design Act, referable to industrial designs, and in this case I expressed the opinion that an "industrial design," under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture, which is protected, and not the article of manufacture itself. In the earlier English Design Acts it was the ornamental design only that was protected and not the article of manufacture to which it was applied, the incorporeal copyright in the design being always considered a separate entity from the corporeal substance to which it was applied. In Canada, we seem to have adhered always to this principle, at least, that is my construction of the statute. The words "for the ornamentation of" before "any article of manufacture" were long ago omitted from the English Acts, but we have continued them. I have no reason for departing from the opinion expressed in the case just mentioned.

As I have said, the Canadian Act does not provide a definition of the word "design." A perusal of sections 34

(1) (1928) Ex. C.R. 159.

(2) (1932) Ex. C.R. 63.

and 39 would seem to support the contention of the defendants' counsel that a registrable design must be something which can be attached or applied as an ornamentation to an article of manufacture rather than the manufactured article itself. These sections are as follows:

34. During the existence of such exclusive right, whether of the entire or partial use of such design, no person shall without the license in writing of the registered proprietor, or, if assigned, of his assignee, apply for the purposes of sale such design or a fraudulent imitation thereof to the ornamenting of any article of manufacture or other article to which an industrial design may be applied or attached, or publish, sell or expose for sale or use, any such article as aforesaid to which such design or fraudulent imitation thereof has been applied.

39. Every person who, in violation of the provisions of this Part, during the existence of the exclusive right acquired for any industrial design by the registration of the same under this Part, whether of the entire or partial use of such design, without the license in writing of the registered proprietor, or, if assigned, of his assignee.

(a) for the purposes of sale, applies or attaches such design or a fraudulent imitation thereof to the ornamenting of any article of manufacture or other article to which an industrial design may be applied or attached; or

(b) publishes, sells or exposes for sale or for use, any article of manufacture or other article to which an industrial design may be applied or attached and to which such design or fraudulent imitation thereof has been applied or attached;

shall forfeit a sum not exceeding one hundred and twenty dollars and not less than twenty dollars to the proprietor of the design so applied or attached.

2. Such sum shall be recoverable with costs on summary conviction under the Criminal Code by the registered proprietor or assignee. R.S., c. 71, s. 36.

I have been unable to find in the Act anything which would indicate that the shape or configuration of an article of manufacture may itself be the subject of a registered design. As I have stated above, all the registered designs here in question are for the articles of manufacture themselves. It will be sufficient, I think, to pick as an example the certificate of registration of one of the eight articles, the others being substantially in the same form, the descriptions of the individual articles varying, of course, as required. The certificate of the toy sink is as follows:

THIS IS TO CERTIFY that this Industrial Design of a
TOY SINK

consisting of a toy representation of a sink and cabinet consisting of a base portion and a cabinet, the front of one side of which is a section consisting of a two door compartment above which is a section containing louvers as air vents for the sink which is represented by a depressed portion in the top directly above same, the other side of the front of the

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cabinet being a three drawer section with drawers of varying depths, the top of the cabinet over same being corrugated inside a frame section to represent a drain board, along the back of the cabinet is a narrow back board, from the base of which over the sink section is the representation of a single tap spigot with two valves; in the center of each drawer and the top central portions of the doors of the compartment are elongated curved portions representing handles, as per the annexed pattern and application,

has been registered in THE REGISTER OF INDUSTRIAL DESIGN No. 86, FOLIO 15015, in accordance with "THE TRADE MARK AND DESIGN ACT" by

IRVING ROSENBLOOM,

of the City of New York, State of New York, United States of America,
 ON THE 29th DAY OF NOVEMBER, A.D. 1946.

IN TESTIMONY WHEREOF

I have hereunto set my hand, and caused the Seal of the Patent and Copyright Office to be hereunto affixed at the City of Ottawa, in the Dominion of Canada, this twenty-ninth day of November, in the year of Our Lord one thousand nine hundred and forty-six.

(sgd) J. T. Mitchell

Commissioner of Patents.

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I think there can be no question whatever that the certificate in question was for "a toy sink," which is an article of manufacture, and not for any design for the ornamenting of a toy sink. The description of the toy sink contained in the certificate is a description of every part of the toy sink itself, and that description indicates the very shape or configuration of an article of manufacture. There is no suggestion of any particular ornamentation, decoration, pattern, engraving, or anything of that nature to be applied or attached "to the ornamenting of any article of manufacture."

I am in accord with the views expressed by Maclean, J., in the *Canadian Wm. A. Rogers* case, (*supra*), in which it was held:

that an "industrial design," under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture, which is protected, and not the article of manufacture itself.

I have, therefore, reached the conclusion that none of the eight designs of the plaintiff should have been registered.

To be entitled to registration the "design" must be original and in order to be original there must be the exercise of intellectual activity so as to originate, that is to say suggest for the first time, something which had not occurred to anyone before (*Clatworthy v. Dale, supra*). It is submitted by the defendant that in the case of the designs here in question no intellectual activity was displayed, that the "designs" were not original, all being miniatures or small replicas of the current well-known articles of household furniture which they simulated in the form of a toy for children. It is said that they are mere reductions of familiar adult items and that, therefore, they lacked originality.

It has been established to my complete satisfaction that for a great many years the basis of the toy industry has been to produce miniature articles which represent as faithfully as possible the full size items which they simulate. A. E. Sullivan, a witness for the defence, and who has been engaged in the sale and production of toys in a very large way for thirty-eight years and with some of the largest selling organizations in the United States, and is now assistant to the president of the Ideal Novelty & Toy Company, stated at p. 680 of the evidence:

A. Well, the very backbone of the very life blood of the industry is its ability to simulate, create or mimic, if I may use the word, the type of item that the youngster sees day in and day out in his everyday life.

Q. Why is that the basis? Have you any explanation as to why that constitutes the basis?

A. Well, a child wants to do what his daddy does, a girl wants to do what the mother may be doing. If I may elaborate for a moment, if daddy goes fishing the youngster wants a small miniature fishing pole, or his size of golf club if his daddy is a golfer; if mother is baking a pie the youngster likes a bit of dough on her size of pie plate, her size of rolling pin, so that she can do what mother is doing. It is that close association between parent and child.

Q. You said that you developed and created new ideas. What do you look to, you personally look to, when you develop and create new ideas—what would you do?

A. Well, if we want an idea to be successful, which we all do, we strive with every ounce of effort within our being to have a duplicate or to be as similar to the large items that we are trying to follow.

Q. How long has that been the practice in the toy art?

A. Long before my time.

Q. What would you say as to the practice during your time?

A. All during the thirty-five years that I have been in the toy business.

That evidence has not been challenged in any way.

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It is also established that the nature of the toys sold from time to time varies with changes made in the senior or adult articles which the toys simulate. On that point the witness Sullivan said at p. 681 of the evidence:

When we had the small miniature items that came into this—I refer to “this country,” Canada and the United States—from Germany, from France, from England and from other parts of the world and these manufacturers had copied the items that were used in those nations during that time; an old-fashioned German stove would have the brick appearance of the brick oven, the wash bowl and the pitcher would be the same as would be found in the homes of the day. The English would copy their type of architecture into the toy.

And on the same page, referring to certain German toys produced by Nerlich & Company in 1914 and 1915, he said:

They are styled in the particular era, the architecture, a type of architecture that was probably found in Germany during that period.

The evidence also indicates that for many years toy doll house furniture has been sold in individual pieces and in sets in cardboard boxes in the United States and Canada. Originally they were made of pewter, cardboard, steel, wood, pulp, etc., and in the main such toys were crude and less attractive than those now made of plastic by the injection moulding process. Except in the case of the more expensive toys they lacked the finish and detail which is now supplied by that process.

Rosenbloom endeavoured to establish that the designs here in question were not mere reproductions in miniature of well-known articles of household furniture. He stated that if the original articles were reduced to approximately the size of his toy articles, the result would not be his toys but that the proportions would be quite different. In no instance, however, could he state the dimensions of any of the standard or adult articles and he finally admitted that in making the statement that his toys were not made to the scale of the adult items, he was only guessing. I am fully satisfied that the general scheme was to simulate the adult articles to the greatest possible extent, consistent with the requirements of the moulding process. Rosenbloom finally admitted in cross-examination that it was probably correct to say that it is general practice in the toy trade to reduce an adult item into a toy item, that that is the backbone of the industry and that it has been the

practice for centuries for toy manufacturers to look for senior or adult items which a child would like to have in toy size.

There seems no question whatever that Rosenbloom endeavoured to follow what he finally admitted was standard practice. Exhibit p. 1 is the catalogue put out by the plaintiff company in 1946 after the actual articles went on sale. It is to be kept in mind that this catalogue was issued with the view of interesting the trade in the articles which his company was then producing, and, from the nature of the advertising, it is very evident that the objective was to simulate the senior article to the greatest possible extent. In connection with the kitchen set and kitchen pieces the catalogue says:

Here is sensational realism in plastic miniature furniture. Stove, refrigerator, sink, table and chair, each a child's dream.

In connection with the bathroom articles, all four of which are displayed in the catalogue, the following words are used:

Here are four ultra-realistic miniature bathroom pieces in glittering plastic with footings in contrasting colour.

Some of the articles, but not those in question in this action, are described as "Tru-scale."

Further evidence corroborating that of Sullivan as to the practice of toy manufacturers to follow faithfully the designs of adult articles may be found in the evidence of certain witnesses examined on behalf of the plaintiff on commission. B. H. Lambert is a buyer for the McCrory Stores Corporation and has had lengthy experience in the toy trade. He agreed with the suggestion of counsel for the defendants that, in the trade, if you make a small article you are anxious to make that small article as close to the real thing as possible; that is, if you want to make a small refrigerator you want to make it as much like a big refrigerator as you can.

Arthur C. McIntyre is a buyer for Kress & Company, operating 240 stores. Referring to the bathroom and kitchen sets made by the plaintiff, which his firm bought in very large quantities, he said that the most attractive feature of them was their imitation of real furniture items.

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He further said that in the toy trade the practice was to imitate the larger item and to put on detail which would closely imitate the larger item.

William Butler is the vice-president and buyer of M. H. Lamston Inc., a general store organization with nine outlets. He stated in regard to the plaintiff's toys that they were outstanding as to detail, and by that he meant that the articles were close counter-parts of the original pieces and that these articles were reductions in size of the larger items and that that made them more attractive.

O. B. Jillson has been a toy buyer for twenty-six years, now with the S. S. Kresge Company having over 600 retail stores in the United States and Canada. His firm made very substantial purchases from the plaintiff company of the articles in question. He said that these were of beautiful design and colour and that by that statement he meant that they looked like the larger items which they simulate—they were miniatures of the larger items reduced in size.

Similar evidence was given by witnesses for the defendant. One of the plaintiff's witnesses, Lambert, a buyer for McCrory Stores Corporation, suggested to Rosenbloom the making of doll house furniture in plastic because the advantage of plastic is that one can get on more detail on the item, and by "more detail" I take it that he meant a more complete reproduction of the senior item than would be possible with other substances such as wood.

On the whole of the evidence I am satisfied that in the case of all of the "designs" here in question the objective was to reproduce in miniature the very appearance and shape of each of the senior articles, limited only by the requirements of the injection moulding technique and the desirability of producing a toy in as few parts as possible so as to minimize the cost of assembling the parts.

And it must be found that the objective of Mr. Rosenbloom was achieved in the results that he obtained. Each of the eight designs which he registered is in form and outline a reproduction in miniature of senior articles in everyday use, with, in some cases, very minor and immaterial alterations.

The requirements as to novelty and originality were considered in *Simmons v. Mathieson & Co. Ltd.* (1). In that case the plaintiff had registered a design for the shape

and pattern of the body of a children's carriage. The defendant denied infringement and pleaded anticipation. Among the prior publications cited was a landau, marked A.P. At p. 491 Buckley, L.J. said in the Court of Appeal:

In order to render valid the registration of a Design under the Patents and Designs Act, 1907, there must be novelty and originality, it must be a new or original Design. To my mind, that means that there must be a mental conception expressed in a physical form which has not existed before, but has originated in the constructive brain of its proprietor, and that must not be in a trivial or infinitesimal degree, but in some substantial degree. The intention of the Act is to protect a person who has conceived and expressed in a physical form, the idea of something which is new or original as a Design. I am quite satisfied that Mr. Simmons has done nothing of the sort. It appears to me that the mental conception expressed in this physical form is one which has existed for many years, and has been used over and over again.

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And Fletcher Moulton, L.J., stated at p. 489:

The registration of a Design cannot give any rights unless that Design is new or original. It was never intended that persons in their trade, in which they are not only justified in using but bound to use the skill, which they have acquired during years of practice, in making variations of the shape of the articles they produce, should be harassed by persons claiming a monopoly in Designs if those are really matters that are open to the public. You must have something new before the law will allow you to get any monopoly at all. In this case we are dealing with perambulators in which there is a foot-well, which is intended in certain circumstances to act as a foot-well for two children sitting at opposite ends of the perambulator. It therefore is a carriage which has, in a small way, to fulfil exactly the same functions as double-seated carriages, such as landaus, have to do on a much bigger scale, and I unhesitatingly say that there is nothing new or original in taking that which has been done in landaus and proposing to do it on the smaller scale suitable to perambulators. That is a matter of law, but I am confirmed in my view by some of the evidence given in the course of the case, which showed to the learned Judge's satisfaction that the Defendants' designer took this Design from the memory he had of a landau that he had made, or that he had seen some time before, thus showing that the similarity of usage is patent to people engaged in the trade, and that they recognize that there is a close analogy between the use of a particular shape for the body of a landau and the use of that particular shape for the body of a double perambulator

That being so, I look at the registered Design and I ask myself what is new or original in it, and I confess I cannot find anything. The panels are different to a certain extent from what I see in "A.P." I should gather that there were similar panels in the carriage which the Plaintiff had in his mind when he drew that picture, but, for the reasons I have given, I do not think that that is of any importance. The rest seem to me to be substantially the reproduction of "A.P." on a smaller scale. I am therefore of opinion that the Design was not new or original, and that the registration is invalid. But now I will suppose, in order to give the Plaintiff's case every chance, that the differences though small may be held to constitute something which is new or original. Then if very small

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differences are to make a thing new or original, very small differences must take you out of the ambit of the registration, because if you were to give a broad ambit to the registration, it would certainly include such a body as is shown in "A.P.," that is, it would include something that was old, and that would make the registration bad. The only possible way in which this registration could be good would be to magnify the importance of minute details so as to give it novelty or originality, and then, if you magnify the importance of small details for that purpose, you must also keep them on that scale for the purpose of deciding whether there is an infringement.

I have reached the conclusion that the eight designs in question lacked novelty in that each was merely a miniature reproduction of a design which had been in common use in ordinary household articles long before Rosenbloom conceived them as designs for plastic toys. There is nothing new or original in taking that which had been done in the larger article and applying it on a smaller scale in the construction of a toy article.

There is still another reason why the designs of the plaintiff lack that novelty which is required to make them registrable. The undisputed evidence is that doll house furniture has been in use for many years and is reproduced in miniature from the senior articles then in common use to the fullest extent then possible. Some articles of plastic doll house furniture, namely those of the New York Merchandise Company and Wolverine Toys, anticipated those of the plaintiff. All that Rosenbloom did was to make his designs to represent the articles of household furniture of the day, in plastic. That was merely a trade variation of what had long been the practice; and the introduction of trade variations into an old design cannot make it new or original (*Clatworthy v. Dale* (1)).

My conclusion, therefore, is that the eight registered designs of the plaintiff company lacked registrability in that they lacked novelty and that they were for articles of manufacture rather than ornamental designs to be applied to an article of manufacture. As prayed for by the defendants these registrations will, therefore, be expunged from the register. Inasmuch as the registrations are found to be invalid the plaintiff fails on the claim of infringement, which will be dismissed.

The plaintiff also alleges that by copying and appropriating the design and shapes and individual and collective

appearance of plaintiff's toys the defendants have attempted to pass off, and have passed off, their toys for those of the plaintiff, and they have adopted business practices contrary to honest industrial and commercial usage. It is alleged that by such acts of the defendant the plaintiff's business and goodwill have been damaged.

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A statement of the principle to be followed in passing off cases is found in *Macleans, Ld. v. Lightbown and Sons, Ld.* (1).

No trader can complain of honest competition, but no trader is entitled to steal the property of his rival by endeavouring to attract to his goods members of the public by inducing them to believe that the goods that are being offered for sale are the goods of a rival firm.

The plaintiff alleges that the defendant had prior knowledge of the plaintiff's doll house toys prior to the time when the defendant commenced the manufacture of its toys. It should be noted that in its claim of passing off the plaintiff company refers not only to the eight toys for which it had registered designs, but also to a kitchen table, the design for which, apparently through inadvertence, was not registered.

Rosenbloom first turned his attention to the making of plastic doll house furniture early in 1943. After he and the artist had completed the drawings of the designs, hand-made models were ordered for each of the toys and the evidence establishes that these were all delivered to the company prior to September 13, 1943. Due to war conditions there was some delay in procuring the dies or moulds to be used in the injection moulding processes. All the dies, however, were completed and delivered in 1944 and 1945. The bathroom toys were first assembled in December 1945, or January 1946, and the kitchen toys in December 1945. It had been decided not to make any sales of these toys until all of the pieces for five rooms were complete. Samples were shown to buyers in December 1945 or January 1946, and the first orders were taken in February 1946. The response was very favourable and large orders were taken. The first shipment was made in March 1946. Substantial advertising was done by way of catalogues and in trade journals and throw-away circulars. Catalogues were sent to chain and department stores in Canada. The room sets were also on display in chain and

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departmental store windows in New York and elsewhere. They were also on display at the New York Toy Show in March 1946.

It is established that S. F. Samuels, an officer of the defendant company, had full knowledge of the bathroom and kitchen sets made by the plaintiff company. He stated that it was common practice for his company to purchase and examine articles made by other toy manufacturers for purposes of comparison. In March 1946 he was in New York City and purchased each of the plaintiff's articles here in question (as well as toys made by other companies), took them to Toronto, examined them and took them apart. In answer to a question as to what he did with them on his return he said: "Just used it for comparative purposes to see our stuff doesn't look like theirs. There is no point in using the same thing. We have to have a different design and made sure we had that."

The plaintiff endeavoured to establish that the defendant first conceived the idea of making these toys after seeing and examining those of the plaintiff and then copied them. I think he has failed to establish that as a fact. The defendant has been manufacturing toys for a great many years. The idea of making plastic doll house furniture first arose about 1941 or 1942, following a discussion with the witness Sullivan. In 1943 hand-made models of a radio, piano and bench and lamp were made. Progress was slow due to war conditions. Some of these articles were made and sold in 1945. Hand-made models of all the toys in question (that is, the kitchen and bathroom pieces) were made late in 1944 and were shown to Mr. Sullivan about January 1945. Mr. Sullivan confirmed the fact that he had been shown these models by one of the Samuels brothers at the defendant's plant in January 1945. Five of such hand-made models were produced and filed as Exhibit R58, although it was not clearly established that these were the original models. The evidence of Mr. H. O. Marshall, a buyer and manager of the Toy Department of Robert Simpson Company Ltd., of Toronto (Mail Order Division), and who has been associated with that firm for twenty-three years, has completely satisfied me that the development by the defendant company of the manufacture of plastic doll house furniture was practically concurrent with

that of the plaintiff company. Mr. Marshall is a completely disinterested witness and I accept his evidence throughout without question. About 1941 he also suggested to the Samuels, shortly after they entered the plastic business, that they make the kitchen and bathroom articles for doll house furniture in plastic. From time to time the discussions were continued, as it was the practice of department stores to suggest to manufacturers lines which would meet a public demand. He stated that in February 1945, before he had ever heard of the similar Renwal products, he had seen hand-made samples of the kitchen and bathroom pieces made by the defendant company at its office in Toronto, similar to the ones in issue. He remembers specifically seeing many of the articles but was not certain that he had seen all of them. His evidence was not in any way shaken on cross-examination on this point.

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After the hand-made models of the defendant were completed, orders were given to the engineering department in October 1945 to procure the necessary moulds. Some were made in the defendant's plant and others by an outside firm. The date when the orders were given is not established but the invoices indicate that all were delivered in 1946.

Evidence was given by the plaintiff to indicate that a scrutiny of the defendant's toys would show that the processes used by the plaintiff company in manufacturing its toys had been closely followed by the defendant company, and it was urged that this indicated a close imitation of the plaintiff's goods. On the other hand, evidence was given by the defendant that its processes were standard in the art and common to the trade. I do not think I need be concerned with this matter. The question here involved is not that of processes of manufacturing, but whether, in the result, the finished articles of the defendant and the manner in which they were disposed of constituted unfair practice.

I have carefully examined each of the individual articles here in question. It is apparent at once that to a certain extent there is a large degree of similarity between the individual pieces made by the plaintiff and the similar articles made by the defendant—in some cases more than in others. But that similarity arises because of the fact

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that in each case the manufacturer is endeavouring to imitate as closely as possible the senior article in everyday use. The similarity is functional, the plaintiff's bath, for example, being intended to simulate a full-size bath, as does also the defendant's. The major portion of each article is in white plastic. But in every article where a different colour is used in the trimming, the plaintiff has used black plastic and the defendant blue plastic, e.g., on the spigots, taps, handles, doors and drawer handles, chair seats and stove plates. The word "Reliable" appears prominently in blue lettering on the top of the defendant's bath, on the door of its refrigerator and on the front of the stove; and in plain lettering on the front of the sink. The words, "A Reliable Product—Made in Canada," are stamped on the toilet, wash basin, table and chairs. The only article on which the word "Reliable" does not appear is the hamper.

On the plaintiff's toys the words "Made in U.S.A.—A Renwal Product—Pat. Pend. U.S.A. & Canada," or similar words, appear on all except the wash basin. Considering the small size of the toys I think the defendant has done practically everything that it could be expected to do in marking them so as to indicate that they were its products.

But even a casual examination and comparison indicates very apparent differences between the products of the two companies.

The kitchen sinks are about as dissimilar as it would be possible to make them and still retain the similarity to a sink. The plaintiff's is much smaller, the sink being at the left side with one drainboard at the right. It has three drawers of differing sizes and two doors opening downwards. The defendant's sink has two drainboards with the sink centrally disposed; it has four drawers of equal size at the right and one at the top left. It has three doors all opening outwardly.

The kitchen stoves are equally dissimilar. The plaintiff's is obviously a gas stove with four burners, all on a solid black base at the left of the top of the stove. The raised portion at the back is plain in design but with a clock stamped on the center portion. The five gas switches are at the top left and underneath are two drawers. At the right are two further drawers of differing sizes. The

defendant's stove is an electric stove with four blue plates inserted in the plain white surface. The design of the vertical back portion is ornamented and irregular and also has a clock. There is one large cupboard under the electric switches at the right, and at the left two drawers extending to the top of the stove.

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There are substantial differences also in the two refrigerators. The defendant's is somewhat larger and has a vegetable bin under the door (the plaintiff's has no such bin). The word "Reliable" appears prominently in blue on the front of the door and hinges, drawers, handles and latch are in blue. In each case the door opens at the right. More ornamentation appears on the plaintiff's refrigerator and it includes a circular design with line extensions on the door. The plaintiff's base is cut away in front but that is not so with the defendant's. Each has a cardboard back with ribs to retain it in place.

The kitchen chairs are about the same size. The main differences lie in the chair seats, those of the plaintiff being pebbled and in black while those of the defendant are grained and in blue; and in the backs which bear no similarity at all.

Each kitchen table has a plain top. The plaintiff's is somewhat larger and has but one drawer while the defendant's has two. As previously mentioned, each is marked on the under surface with the name of the manufacturer.

The bathroom hampers are also dissimilar. That of the plaintiff has a diamond pattern on the front and on each side thereof a strip of vertical weaving. It has a lid on the top. The defendant's has no lid and on the front only a pattern in horizontal weaving with no side strips. Each has a cardboard back and ribs for holding it in place. The plaintiff's name is stamped on the inner portion of the hamper, but, as stated above, the name of the defendant does not appear on its hamper.

The baths are about the same size. The spigot of the plaintiff's is in black and that of the defendant in blue. The word "Reliable" is prominently marked in blue on the top of the defendant's bath and the company's name is stamped on the under portion; the line design extends across the front and the left end. It is constructed so as

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to be used in a corner, that is, the front and one end are exposed. The plaintiff's bath has black trim, has a flared-out front and is plain at both ends, indicating that it is similar to a senior built-in bath. The plaintiff's name appears prominently on the under portion.

The bathroom basins are also dissimilar. The plaintiff's has black taps and the bowl is oval, the sides and the top are cut off and squared. The defendant's trim is in blue, the bowl is square, each of the corners is built up. The pedestal bears the stamp "Reliable" and all its sides have a line design, whereas those of the plaintiff's are plain. The name of the company and "Made in Canada" also appear on the under side of the defendant's basin.

The toilet in general outline has some similarities due entirely to functional requirements. There are substantial differences, however. The trim on the plaintiff's is black and that of the defendant's is blue. The plaintiff's water box is quite plain and small, that of the defendant having a base which does not appear in the plaintiff's, and a portion of the front cut away. Each has the stamped name of the manufacturer. The rear part of the plaintiff's bowl is tapered so as to connect only with the central portion of the tank; that of the defendant's is flared outwardly to form the full base for the tank. The steps in the base or pedestal are different in size and number.

These comparisons which I have made lead me to the conclusion that in shape, form or get-up, the various articles of the defendant are not imitations of the plaintiff's toys, nor do they closely resemble them. I see nothing in the toys of the defendant which would lead one familiar only with the plaintiff's toys to infer that the toys of the defendant were put out by the plaintiff. As I have pointed out, the defendant's name, "Reliable," and "Made in Canada" appear upon all the defendant's toys except the hamper and that is so markedly different from the plaintiff's hamper that no one could be confused. I recognize that the mere marking of goods with the name of the manufacturer would not by itself be sufficient in all cases to avoid a charge of passing-off, but it is an element to be considered and in this case an important element as indicating the good faith of the defendant.

In the case of *A. G. Spaulding & Bros. v. A. W. Gamage Ltd.* (1), Parker, L.J., in the House of Lords gave his opinion on the basis of passing-off actions as follows:

My Lords, the basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is, where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such case the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up is calculated to deceive. It would, however, be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on.

In the case before me there is no evidence whatever that there has been any confusion between the goods of the plaintiff and those of the defendant, or that anyone has been deceived into believing that the goods of the defendant were those of the plaintiff company, nor is there any evidence that the defendant company at any time represented or attempted to represent its goods as those of the plaintiff. The evidence of experienced buyers in Canada shows clearly that the defendant company has been well and favourably known for many years in Canada as a manufacturer of toys, and since 1941 or 1942 as a manufacturer of plastic articles. Its goods are advertised widely in several ways, including advertisements over the radio. Its reputation in Canada was established long before the goods of the plaintiff company were first displayed in Canada in March 1946. The defendant marked each of the toys here in question (except the hamper) with its name and "Made in Canada." At the time when the toys here in question first came on the market in Canada the plaintiff's toys had not been sold in Canada, and therefore it can hardly be found that the plaintiff had at that time established any goodwill in Canada for its toys.

The various allegations of the plaintiff on passing-off may be dealt with very shortly. It relies on the similarity in shape or configuration of the toys themselves. I accept the evidence of the defendant's witnesses that the nine toys

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of the plaintiff and the defendant both simulated to a very marked extent the full size articles which had been in common use both in the United States and Canada long before the plaintiff conceived the idea of manufacturing doll house furniture. I do not think it necessary to examine that evidence in any detail, but I refer particularly to the evidence of the witnesses Wiles, Coughtrey, Sullivan, Hill, Radley and Marshall.

The plaintiff also alleges that in the size and colour of its toys the defendant has imitated those of the plaintiff. The uncontradicted evidence is that for doll house furniture, the size used by the plaintiff had been standardized in the trade prior to 1940, and doll house furniture made in ivory and white (as well as in other colours) for kitchen and bathroom pieces prior to 1940.

The plaintiff also fails in its allegations that in manufacturing toys with trim of a different colour (such trim being added in the assembling process), with cardboard backs for certain of the items, and in selling these in boxes and with inserts, the defendant had imitated its goods and get-up in such a way that the public would be deceived. It is established beyond question that all of these practices were common to the trade for a great many years before they were adopted by the plaintiff.

Reference may be made to *J. B. Williams Company v. H. Bronnley & Co. Ltd.*, *J. B. Williams Company v. J. H. Williams*, (1). Cozens-Hardy, M. R., in rendering judgment in the Court of Appeal, said at p. 771:

What is it necessary for a trader who is plaintiff in a passing-off action to establish? It seems to me that in the first place he must, in order to succeed, establish that he has selected a peculiar—a novel—design as a distinguishing feature of his goods, and that his goods are known in the market, and have acquired a reputation in the market, by reason of that distinguishing feature, and that unless he establishes that, the very foundation of his case fails. If he takes a colour and a shape which are common to the trade the only distinctive feature is that which he has added to the common colour and the common shape, and unless he can establish that there is in the added matter such a similarity as is calculated to deceive, I think he must fail. Now what he has to prove on the question of "calculated to deceive" cannot, I think, be better stated than it is in *Schweppes Ltd. v. Gibbens*, where Lord Halsbury said:—"The whole question in these cases is whether the thing—taken in its entirety, looking at the whole thing—is such that, in the ordinary course of things, a person with reasonable apprehension and with proper eyesight would be deceived."

And at p. 773 Fletcher Moulton, L.J., said:

The foundation of this action is that a certain get-up of an article has been associated with the article as produced by the particular manufacturer, and that to use that get-up, or anything that can be mistaken for that get-up by a reasonable person, is equivalent to an assertion that the goods are the goods of the Plaintiffs. The essence, therefore, of the action is that you must prove that there is a distinctive get-up, which has acquired that secondary meaning in the eyes of the public.

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In *Payton & Co., Ltd. v. Snelling, Lampard, & Co., Ltd.* (1) Lindley, M. R., in the Court of Appeal said at p. 52:

After all said and done, what have we to consider? What is it that the Plaintiffs must make out in order to entitle them to succeed in this action? They must make out that the Defendants' goods are calculated to be mistaken for the Plaintiffs', and, where, as in this case, the goods of the Plaintiff and the goods of the Defendant unquestionably resemble each other, but where the features in which they resemble each other are common to the trade, what has the Plaintiff to make out? He must make out not that the Defendant's are like his by reason of those features which are common to them and other people, but he must make out that the Defendant's are like his by reason of something peculiar to him, and by reason of the Defendant having adopted some mark, or device, or label, or something of that kind, which distinguishes the Plaintiff's from other goods which have, like his, the features common to the trade. Unless the Plaintiff can bring his case up to that he fails.

As I have stated above there is no distinctive get-up in the toys of the plaintiff or in their packaging. Everything that they have done was common to the trade. The plaintiff had first introduced its toys on the United States market about February 1946 and in Canada about October 1946, and no effort was made to establish that any secondary meaning in the eyes of the public had been acquired.

The real question of importance is, when you look at the finished articles and the get-up of the packaging, are they things calculated to deceive? In my view they are not. Both parties hereto have merely taken what was common to the trade and the defendant has been careful throughout to indicate very clearly that the goods which it sold were made by it by fixing its trade name "Reliable" to all of the articles except one—the hamper—and its design is not that of the plaintiff's hamper, but follows very closely the design of Exhibit R15, a full size hamper purchased by the witness McGee in 1943. The boxes of the defendant company are marked on the top and on all four sides with the word "Reliable" and on two sides appear the full name and address of the defendant company.

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The gravamen of the plaintiff's case is that the defendant made miniature imitations of certain articles, which imitations had been previously made by the plaintiff. As both imitations were of the same type of objects, they were necessarily similar to a certain extent and that similarity exists in the construction of the articles in question. The right to make a toy imitation of a natural or artificial object was common to all the trade. There was no attempt by the defendant and no reason for attempting to deceive the public as to the origin of manufacture of its articles. The likeness was in the goods themselves.

I must find that there is no legal basis for an action based on unfair competition. The plaintiff's action will therefore be dismissed with costs to be taxed.

Judgment accordingly.