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 March 7

IN THE MATTER OF AN APPLICATION TO REGISTER A
 TRADE-MARK.

J. J. MELCHERS, WZ APPLICANTS ;

AND

JOHN DE KUYPER & SON..... OPPOSANTS.

Trade-marks—Resemblance between—Refusal to register both—Grounds of.

The object of section 11 of the Act respecting Trade-marks and Industrial Designs (R. S. C. c. 63) as enacted in 54–55 Victoria, c. 35, is to prevent the registration of a trade-mark bearing such a resemblance to one already registered as to mislead the public, and to render it possible that goods bearing the trade-mark proposed to be registered may be sold as the goods of the owner of the registered trade-mark.

2. The resemblance between the two trade-marks, justifying a refusal by the Minister of Agriculture in refusing to register the second trade-mark, or the court in declining to make an order for its registration, need not be so close as would be necessary to entitle the owner of the registered trade-mark to obtain an injunction against the applicant in an action of infringement.
3. It is the duty of the Minister to refuse to register a trade-mark when it is not clear that deception may not result from such registration. (*Eno v. Dunn*, 15 App. Cas. 252 ; and *In re Trade-mark of John Dewhurst & Son, Ltd.*, [1896] 2 Ch. 137, referred to).

THIS was a reference by the Minister of Agriculture under the provisions of the Trade-mark Amendment Act, 54 & 55 Vict., c. 35, sec. 11.

The terms of the reference were as follows :—

DEPARTMENT OF AGRICULTURE.

COPYRIGHT AND TRADE-MARK BRANCH,

OTTAWA, Canada, 14th April, 1897.

Reference to the Exchequer Court of Canada :

In the matter of Messrs. Melchers' application to register a trade-mark.

An application having been made on the 16th February last, by Messrs. Bisailon, Brosseau & Lajoie, Advocates, of Montreal, on behalf of Messrs. Melchers, of Schiedam, in the Kingdom of the Netherlands, for the registration of a trade-mark consisting of certain signs and devices upon a label, intended to be affixed to bottles containing gin, described in the application as being a "Cerf-volant."

And Messrs. Abbotts, Campbell & Meredith, Advocates, also of Montreal, on behalf of Messrs. John de Kuyper & Son, of Rotterdam, Holland, protesting against the granting of the said application, which they hold to be an interference with their clients' trade-mark (heart-shaped label) No. 5415, I beg to refer the said application to the Exchequer Court, to hear and determine the matter, and to decide whether the label claimed by Messrs. Melchers should be admitted to be registered, pursuant to section 11 (*a* and *b*) and (2) of 54 & 55 Vict., c. 35.

(Sgd.) SYDNEY FISHER,
Minister of Agriculture.

To the Exchequer Court,
Ottawa.

The following is a copy of the description of the proposed trade-mark transmitted to the court with the reference :

Au Ministre de l'Agriculture,
Branches des Marques de Commerce et de fabriques.
Ottawa.

Nous, L. Irénée Boivin, et Joseph Marcelin Wilson, de la cité de Montréal, dans le district de Montréal, faisant affaires sous le nom de "Boivin, Wilson & Compagnie," représentants en Canada de la maison "J. J. Melchers, Wz.," de "Schiedam," Hollande, et autorisés par eux, transmettons ci-jointe copie en

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double d'une marque de commerce spéciale, conformément aux clauses de l'acte des marques de commerce et dessins de fabriques, dont je réclame la propriété, parce que je crois sincèrement qu'ils en sont les véritables propriétaires.

Cette marque de commerce spéciale consiste en une étiquette en forme de cerf-volant, la base placée en haut étant formée par une demi-circonférence raccordée aux côtés latéraux rectilignes, rappelle ainsi la forme d'un cerf-volant.

L'encadrement, de même forme que l'étiquette, se compose d'un trait noir simple.

Sur une bande noire circule, concentrique au haut du cadre se lit, en lettres blanches sur fond noir : "The largest gin distillery ;" puis au dessous, en lettres noires sur le fond de l'étiquette : "Genuine Hollands" et enfin en plus gros caractères "Geneva."

Le centre de l'étiquette est occupé par une vignette représentant un éléphant tourné vers la droite.

Immédiatement audessous de l'étiquette "J. J. M. Wz.," puis, sur une bande circulaire, concave vers le haut, "J. J. Melchers, Wz." Enfin, audessous "Schiedam," et au bas "Registered." Un fleuron en cul-de-lampe termine l'étiquette.

Nous demandons par ces présentes l'enregistrement de cette marque de commerce spéciale, conformément à la Loi.

Nous incluons, en mandat de poste, n° —, le montant de la taxe de vingt cinq piastres (\$25) requise par la clause douzième de l'acte précité.

En foi de quoi nous avons signé, en présence de deux témoins soussignés, au lieu et à la date ci-dessous mentionnés.

Montréal, 12 février, 1897.

Témoins :
 H. G. Bisson.
 M. Boivin.

LÉONARD IRÉNÉE BOIVIN.
 JOSEPH MARCELIN WILSON.
 BOIVIN WILSON ET CIE.

The following notice of the application to register the trade-mark was given by the Registrar in *The Canada Gazette* in four consecutive issues thereof, in pursuance of an order made in that behalf:—

IN THE EXCHEQUER COURT OF CANADA.

IN the matter of Messrs. Melchers' application to register a trade-mark, and in the matter of the Reference made therein to this court dated 14th April, 1897, by the Minister of Agriculture.

Notice is hereby given that Messrs. Melchers, of Schiedam, in the kingdom of the Netherlands, and residing and carrying on business at Schiedam aforesaid, under the firm name of "J. J. Melchers Wz." who, alleging in substance that they are the proprietors of the trade-mark hereinafter described, have applied to the Minister of Agriculture to have the same registered in the register of trade-marks kept in the Department of Agriculture, as a specific trade-mark to be applied to the sale of Hollands Gin manufactured and sold by them.

That the said specific trade-mark is in the said application described to consist of certain signs and devices upon a label intended to be affixed to bottles containing gin, described in the said application as a kite (*cerf-volant*).

This specific trade-mark consists of a label in the form of a kite, the base placed above being in the form of a semi-circumference joining the lateral rectilinear sides, thus suggesting the design of a kite.

The border consists of a single black scroll in the same alignment as the label.

On a black curving concentric band at the top of the border one reads, in white letters on a dark background: "The Largest Gin Distillery;" and below in black letters on the back-ground of the label:

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"Genuine Hollands;" and lastly, in larger letters: "GENEVA." In the centre of the label is a vignette (design) representing an elephant turned to the right. Immediately underneath the label: "J. J. M. Wz.," and on a circular band, concave towards the top: "J. J. Melchers Wz. Finally underneath: "Schiedam," and at the bottom: "Registered." A pendant ornament completes the label.

This trade-mark in question is, in the application for registration, described as follows, to wit: (Here follows a specific description of the trade-mark to be found *ante* p. 83.)

The following is a fac-simile of the duplicate copy so furnished:—



That the Minister of Agriculture has seen fit to refer the matter to the Exchequer Court for the determination of the following question:—

Whether the label claimed by Messrs. Melchers should be admitted to be registered pursuant to section 11 (*a* and *b*) and (2) of 54-55 Victoria, chapter 35?

That the present notice is to be inserted in four consecutive issues of *The Canada Gazette*; and that if any person desire to oppose the registration of such specific trade-mark he should, not later than fourteen days from the last insertion of such notice in *The Canada Gazette*, file a statement of his objections with the Registrar of this court and serve a copy of the same upon Messrs. Bisailon, Brosseau & Lajoie, Place d'Armes Hill, in the City of Montreal.

That if no one appears to oppose the registration of such trade-mark the applicants may file with the Registrar of the court an affidavit in support of the application, and upon ten days notice to the Minister of Agriculture, and upon serving him with a copy of any affidavit so filed, may move the court for an order to allow the registration of such trade-mark.

That if any person appear to oppose the registration, and file and serve a statement of his objections as hereinbefore mentioned, such person shall become a party to these proceedings and shall be liable to pay any costs the court may direct him to pay.

That the applicants shall, within fourteen days after service upon their solicitors of any statement of objections, file and serve an answer thereto, whereupon the said matter shall be, and be deemed ripe, for trial, and any issue or issues so raised by such statement of objections and answer may be set down for trial in like manner as any action in the court, and notice of such trial shall be given as well to the Minister of Agriculture as to the opposite party.

Dated at Ottawa, this 21st day of June, A.D. 1897.

(Signed), L. A. AUDETTE,
Registrar Exchequer Court.

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The following opposition to the registration was filed by the opposants herein :—

*Title of Proceeding.*

Johannes de Kuyper and Anna Maria de Kuyper *née* Amtmann, carrying on business at Rotterdam, in the Kingdom of the Netherlands, under the firm name of John de Kuyper & Son, hereby declare that they oppose the application of the said Messrs. Melchers, and say :

1. That heretofore, to wit, on the fourteenth day of September, eighteen hundred and ninety-five, the opposants registered in the Department of Agriculture, in Trade-Mark Register number twenty-three, fyle 5,415, in accordance with *The Trade-Mark and Design Act*, a specific trade-mark to be applied to the sale of Hollands gin and consisting of a white heart-shaped piece of paper used as a label and of the following words, devices and designs depicted thereon, to wit :—Along close to and parallel with the edge of the said heart-shaped paper or label there runs a scroll, consisting of one oval link alternating with two round links. Within the space enclosed by said scroll on one side at the top is the word "Genuine" and on the other side at the top the word "Hollands ;" the letters composing each of said words being aligned upon a curve and beneath which is a scroll curving parallel with the alignment of the word. Below these words and across the upper central space of the label is the word "Geneva" and beneath it an anchor inclined to one side and on each side of the anchor an ornamental scroll or flourish. The letters J, D. K. & Z. in capitals appear just beneath the anchor. Across the lower central space of the label is designed a ribbon upon which appear the words "John De Kuyper & Son" and below this is the word "Rotterdam" whilst in the apex of the heart is a vine or scroll. The whole as more fully appears

by a certified copy of the said registration, to which the opposants crave leave to refer.

2. That the said label or trade-mark is used by the opposants in connection with the sale of Hollands Gin and is applied on square faced bottles of dark glass, and is well known to the public.

3. That the trade-mark proposed for registration by the said Messrs. Melchers resembles the trade-mark of the opposants already registered as aforesaid.

4. That the trade-mark proposed to be registered by the said Messrs. Melchers is calculated to deceive and mislead the public, especially when applied to the sale of Hollands gin in connection with the dark square faced bottles in which the same is usually sold.

CLAIM.

The opposants pray that this honourable court may be pleased to reject the said application (a) because the said mark proposed for registration resembles said trade-mark of the opposants already registered; and (b) because the same is calculated to deceive and mislead the public, and the opposants pray for costs

Montreal, 14th August, 1897.

The following answer to the above opposition was filed by the applicants:—

*Title of Proceeding.*

Messrs. Melchers, for answer to John de Kuyper & Son's opposition in this matter, say:

I. That the heart-shaped label claimed to have been registered by opposants, and also the words and device printed or written upon it, had been in use for years in Europe and in Canada upon the same class of goods and was common to the trade long prior to the opposants alleged registration of same, and the heart-shape of the label has been and is one of the essential features, and the designs thereon were subordinated to the shape, and any originality or exclusiveness in

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the arrangement of said design or label or any part thereof, excepting the anchor, exist only by reason of such heart-shape.

2. That the registration alleged to have been obtained by opposants was obtained without sufficient cause, should have been refused and the registration of the alleged trade-mark should be cancelled and the entry thereof expunged from the registry.

3. That it is not true that the trade-mark proposed for registration by Messrs. Melchers resembles the trade-mark alleged as having been registered by opposants, but on the contrary among the striking differences between the two labels or trade-marks are the following: The opposants' label is heart shaped, your petitioner's is in the form of a kite. The scroll along and parallel with the edge of opposants' label is corrugated or rope-like, while that of your petitioners is a plain band or border. At the top of the plain band or border in white letters on a dark back-ground are the words, "The Largest Gin Distillery," while under the scroll on the over-links of the heart-shaped label are the words "Genuine Hollands," the letters being aligned upon a curve beneath which is a scroll curving parallel with the alignment of the words. The words "Genuine Hollands" are more prominently set out in the heart-shaped label than in the kite form one. Beneath the word "Geneva" on the heart-shaped label is an anchor inclined to one side, and on each side of the anchor an ornamented scroll or flourish; while in the centre of your petitioners, label is a design representing an elephant turned to the right. Immediately under this design are the letters J. J. M. Wz., and a circular band towards the top on a scroll with the name J. J. Melchers, Wz., while in the heart-shaped label, in corresponding position, are the letters J. D. K. Z. inclined to the right and underneath a rib-

bon instead of a scroll with John de Kuyper & Son. The word "Rotterdam" is on the heart-shaped label and under the name of such city is a vine or scroll; while in the corresponding place on the kite-shaped label is the word "Schiedam," and under this name the word "registered," and there is a "pendant" where in the heart-shaped label, is the scroll or vine.

4. It is not true that the trade-mark proposed to be registered by Messrs. Melchers is calculated to deceive or mislead the public.

The applicants, Messrs. Melchers, pray for the reasons above mentioned that this honourable court, may be pleased to reject the opposition of Messrs. John de Kuyper & Son, and declare that the registration of their trade-mark, as set out in paragraph no. 1 of their statement of objections, be set aside and declared null and void and be ordered to be erased from the Trade-Mark Register in the Department of Agriculture; and that the application of Messrs. Melchers for registration of this trade-mark be allowed with costs against the said John de Kuyper & Son.

Montreal, December 1st, 1897.

REPLY OF OPPOSANT TO ABOVE ANSWER.

*Title of Proceeding.*

The opposants reply to Messrs. Melchers' answer to their opposition, and say:—

1. As to paragraphs one and two of the said answer, opposants say that the allegations therein contained are irrelevant and do not constitute in law any answer to the opposition fyled herein, nor can effect be given thereto herein, and opposants claim the benefit of this objection as if they had demurred.

2. Subject to the foregoing, the opposants deny the allegations of paragraphs one, two, three and four of the said answer.

January 11th, 1898.

The matter was heard at Montreal.

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*T. Brosseau*, on behalf of the applicants: There is not such a similarity between the trade-mark of the opposants and that which the applicants seek to register, as to deceive the public in any way. The distinctive feature of the trade-mark proposed for registration by the applicants is the elephant, while that of the other is the anchor. The gin manufactured by the applicants is known to the trade and to consumers as the "Elephant Brand." There is no substantial reason for refusing the registration asked for. (He cites Eugène Pouillet: *Des Marques de Fabrique* p. 79.)

*C. S. Campbell*, for the opposants: The applicants are in the same position before the court as if they had never used their trade-mark. The heart-shaped label cannot be the subject of a trade-mark in Canada. (He cites *De Kuyper v. Van Dulken* (1); *Eno v. Dunn* (2); *Re Dewhurt's Trade-mark* (3); *The Queen v. Authier* (4).) The authorities show conclusively that if there is any possible similitude the registration of the second trade-mark ought to be refused.

*A. Ferguson, Q.C.* followed for the opposants. This is a case of first instance, and according to the English doctrine it ought to be decided upon the lines of analogy to cases already decided bearing the closest resemblance thereto. The case of *DeKuyper v. Van Dulken (ut supra)* decides that the opposants are the owners of the heart-shaped label as applied to the manufacture of gin. In view of that decision, and in view of the fact that the Minister is in doubt as to the propriety of granting the application in this case, the court ought not to order registration. The mere label itself is not the proper subject of a trade-mark, because, as was established in the case referred to, the use of a heart-shaped label was common to the trade.

(1) 4 Ex. C. R. 71.

(2) 15 App. Cas. 252.

(3) [1896] 2 Chan. 137.

(4) Q. R. 6 Q. B. 146.

We have by means of the use of our trade-mark upon a heart-shaped label, built up an important trade in this country; and our rights should not be lightly interfered with. (He cites *Speers' Case* (1).)

As to the question whether the resemblance between the two marks is such as to justify the Minister in refusing to register, I would refer to *In re Australian Wine Importers* (2). The only difference between the two marks is that in the case of the heart-shaped label there is an indentation that does not appear in the case of the kite. The resemblance is close enough to deceive the public. The second trade-mark is an interference with a vested right, and should not be protected by the court. (He cites *Crossmith's Trade-mark* (3).)

*Mr. Brosseau* replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 7th, 1898) delivered judgment.

This matter comes before the court on a reference by the Minister of Agriculture in which after reciting that an application had been made on the 16th of February, 1897, on behalf of Messrs. Melchers of Schiedam, in the Kingdom of the Netherlands, for the registration of a trade-mark, consisting of certain signs and devices upon a label intended to be affixed to bottles containing gin, described in the application as being a "cerf-volant," and that Messrs. John De Kuyper & Son, of Rotterdam, in the same kingdom had protested against the granting of the said application, which they held to be an interference with their trade-mark, consisting of a heart-shaped label No. 5415, the Minister referred the application to the court "to hear and determine the matter and to decide whether the label claimed by Messrs. Melchers should be admitted to be registered

(1) 55 L.T. N.S. 880.

(2) 41 Ch. D. 278.

(3) 60 L. T. N. S. 612.

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pursuant to section 11 (*a* and *b*) and (2) 54–55 Vict., chap. 35.”

The 11th section of the *Act Respecting Trade-marks and Industrial Designs* (1), as enacted in 54–55 Vict., chap. 35, is as follows :—

“ 11. The Minister of Agriculture may refuse to register any trade-mark in the following cases :—

(*a*.) If he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark.

(*b*.) If the trade-mark proposed for registration is identical with or resembles a trade-mark already registered.

(*c*.) If it appears that the trade-mark is calculated to deceive or mislead the public.

(*d*.) If the trade-mark contains any immorality or scandalous figure.

(*e*.) If the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark, properly speaking.

2. The Minister of Agriculture may, however, if he thinks fit, refer the matter to the Exchequer Court of Canada, and in that event such court shall have jurisdiction to hear and determine the matter, and to make an order determining whether and subject to what conditions, if any, registration is to be permitted.”

The questions to be determined on this reference are :—

1. Are the applicants entitled to the exclusive use of the trade-mark which they propose to register ; and

2. Is it identical with or does it resemble, a trade-mark already registered ?”

As to the first question there is no controversy. The applicants are undoubtedly entitled to the exclusive use of the trade-mark they propose to register if otherwise they are entitled to register it. Then, too, it is

(1) R. S. C. c. 63.

clear that the proposed trade-mark is not identical with any trade-mark already registered. The only question for determination is as to whether or not it so resembles the registered trade-mark of John De Kuyper & Son that registration ought to be refused ?

The further question as to whether or not it is calculated to deceive or mislead the public has not been directly referred to the court, though so far as such deception may depend upon the resemblance of such trade-mark to one already registered, the question is involved in that which has been submitted to the court. If the trade-mark proposed to be registered so resembles one already on the register that the owner of the latter is liable to be injured by the former being passed off as his, then a case is presented in which the proposed trade-mark is calculated to deceive or mislead the public. Whenever the resemblance between two trade-marks is such that one person's goods are sold as those of another the result is that the latter is injured and some one of the public is misled. To prevent these things from happening the legislature has given the Minister of Agriculture a discretion to refuse to register a trade-mark proposed for registration where it is identical with or resembles a trade-mark already registered. If, as in the present case, he refers the question to the court, the court should, I think, exercise its discretion and determine the matter upon the same principles as should guide the Minister in the exercise of his discretion.

The trade-mark that the applicants propose to register is described in their application as follows :

“ Cette marque de commerce spéciale consiste en une étiquette en forme de cerf-volant, la base placée en haut étant formée par une demi-circonférence raccordée aux côtés latéraux rectilignes, rappelle ainsi la forme d'un cerf-volant.

“ L'encadrement, de même forme que l'étiquette, se compose d'un trait noir simple.

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“Sur une bande noire circule, concentrique, au haut du cadre, se lit, en lettres blanches sur fond noir : ‘The largest gin distillery;’ puis au-dessous, en lettres noires sur le fond de l’étiquette : ‘Genuine Hollands,’ et enfin en plus gros caractères ‘Geneva.’

“Le centre de l’étiquette est occupé par une vignette représentant un éléphant tourné vers la droite.

“Immédiatement au-dessous de l’étiquette ‘J. J. M. Wz.’ puis sur une bande circulaire, concave vers le haut, ‘J. J. Melchers Wz.’ Enfin, au-dessous, ‘Schiedam,’ et au bas ‘Registered.’ Un fleuron en cul-de-lampe termine l’étiquette.”



The following extract from the certificate issued by the Minister of Agriculture, on the 12th of September, 1895, to John de Kuyper & Son gives a description of their registered trade-mark :

"This is to certify that this trade-mark (specific) to be applied to the sale of Hollands gin, and which consists of a white heart-shaped piece of paper used as a label, and the following words, devices and designs depicted thereon, to wit: Along close to and parallel with the edge of the said heart-shaped paper or label there runs a scroll consisting of one oval link alternating with two round links. Within the space enclosed by said scroll on one side, at the top, is the word 'Genuine,' and on the other, at the top, the word 'Hollands;' the letters composing each of said words being aligned upon a curve, beneath which is a scroll curving parallel with the alignment of the word. Below these words and across the upper central space of the label is the word 'Geneva,' and beneath it an anchor inclined to one side, and on each side of the anchor an ornamental scroll or flourish. The letters J. D. K. & Z., in capitals, appear just beneath the anchor. Across the lower central space

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of the label is designed a ribbon, upon which appear the words, 'John de Kuyper & Son,' and below this is

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the word 'Rotterdam,' whilst in the apex of the heart is a vine or scroll, as per the annexed label and application, has been registered in the Trade-Mark Register No. 23, folio 5415, in accordance with *The Trade-Mark and Design Act.*"

It will be seen from the description of the two trade-marks, and more especially by an inspection of the two labels that the differences in detail between the two are many, and as to their general appearance no one of ordinary intelligence and education would be likely to mistake the one for the other. The resemblance, such as it is, lies in the colour and shape of the label. In the one case the label is heart-shaped, in the other it takes the form of a kite, and in both the colours are white and black.

Messrs. de Kuyper & Son, who have for a long time had a well established business in Quebec and elsewhere in the Dominion, have for many years used the heart-shaped label on bottles containing gin made by them. After litigation and proceedings in this court, to which it is not necessary to refer more particularly, that label was registered in 1895. Messrs. Melchers are also distillers of gin. They have, too, for a number of years done business in Quebec and elsewhere in Canada. Formerly they used a label the colour and shape of which were very dissimilar to that used by de Kuyper & Son, as well as to that which they now seek to register. Then for a while they used a white heart-shaped label having, in general appearance, a somewhat close resemblance to de Kuyper & Son's label. That label they have abandoned in favour of the one now in question. These labels are in use attached to bottles of a similar shape and like general appearance. It will be seen, however, by an inspection of the exhibits in this case, that in the glass of the bottles used by Messrs. Melchers are impressed the

word and letters "J. J. Melchers, Wz." Of course they are not bound to use such bottles and may whenever they care to do so use bottles without any such distinguishing mark. And the fact is not material except as showing what is, I think, otherwise clear from the evidence, that they are not, so far as they are concerned, attempting to sell their gin as gin made by de Kuyper & Son. Why, then, have they changed their labels, and in the one case somewhat closely followed that used by de Kuyper & Son, and in the other come as near to it apparently as they thought it safe to do? The wholesale dealers, the retail dealers, the saloon-keepers, and the inn-keepers, all know the difference. None of them are misled or deceived by any resemblance between de Kuyper & Son's label and that which the applicants seek to register. None but the incautious and unwary among the customers of the retailers would be likely to be misled, and some of the witnesses appear to think that even with these the thing is not likely to happen. I am inclined, however, to take a different view. Although the resemblance between the two labels is not marked, yet there is a resemblance and one which it seems to me might in some cases mislead ignorant persons not on their guard. I fail to see why the applicants, who do not themselves attempt to sell their gin as that made by de Kuyper & Son, would care to have a label in any way resembling that used by the latter, if it were not that the retail dealers, the saloon-keepers and inn-keepers, or some of them, did not prefer to buy gin in bottles bearing labels with some such general resemblance, and did not buy more of it because the bottles bear such labels; or why the retailers would the more readily buy, and buy more, gin in bottles with such labels if the labels did not in some way enable them in selling to get some advantage from the reputation that

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John de Kuyper & Son have obtained as distillers of gin. Mr. Langlois, a travelling agent for the sale of groceries and liquors being asked in cross-examination which gin it was that he "pushed," answered that there is always one they need not push and that is the de Kuyper mark. If they took another mark they had to push it, but so far as de Kuyper's is concerned it is always asked for. And though this witness had not sold Melchers' gin I have no reason to think that his testimony does not fairly present the state and condition of the trade in gin in Quebec and other places where he travelled. And that shows us why it is that other distillers of gin, or their customers, find it an advantage, or think it to be an advantage, to use a label resembling that used by the de Kuypers. But there can be no advantage unless some persons are misled by the resemblance between the labels and buy gin made by others when they think they are buying De Kuypers'.

That, it seems to me, is a fair inference to draw from the facts of the case, and though not in itself conclusive, it strengthens the view which I have formed from an inspection of the two labels that there is on the whole such a resemblance between them as would justify the Minister of Agriculture in refusing to register the trade-mark in question, and the court in declining to make an order for its registration. It is always to be borne in mind in applications of this kind that the question is not the same as that which arises in an action for an infringement of a trade-mark. It does not follow that because the person objecting to the registration of a trade-mark could not get an injunction against the applicant, the latter is entitled to put his trade-mark on the register. [*Re Speer* (1); *In Re The Australian Wine Importers, Lt.* (2).] With

(1) 55 L. T. 880.

(2) L. R. 41 Ch. Div. 278.

reference to the exercise by the Comptroller of the discretion given him by *The Patent, Designs and Trade-Marks Act*, 1883, to register or to refuse to register a trade-mark, the House of Lords has held that he ought to refuse registration where it is not clear that deception may not result. [*Eno v. Dunn* (1); *See also in Re Trade-mark of John Dewhurst & Sons, Lt.* (2).] And that, I think, is a rule which the Minister of Agriculture and this court should follow in disposing of applications made under the Canadian Act.

The common sense view of cases of this kind is well stated in the *Law Quarterly Review* for 1896, vol. 12, p. 12:—

“The world is wide,” said Lord Justice Bowen once in a trade-mark case, “and there are many names. The world is wide, and there are many designs. There is really no excuse for imitation in a cathedral stove or anything else, and when we find such a stove selling largely, and another enterprising trader producing a similar article, only with different tracery, his conduct is only explicable on one hypothesis, and that is a desire to appropriate the benefit of another person’s business. [*Harper & Co. v. Wright & Co.* (3); reversed on appeal (4).] The argument of undesigned coincidence is one which may be commended to Judæus Apella, and the other argument—the stock argument—as to the proprietor of a design or trade-mark not being entitled to monopolize art or the English language, is about equally deserving of respect. In such cases, as Lord Westbury said in *Holdsworth v. McCrea* (5), and Lord Herschell in *Hecla Foundry Co. v. Walker* (6) repeated, the appeal is to the

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(1) 15 App. Cas. 252.

(2) [1896] 2 Ch. D. 137.

(3) [1895] 2 Ch. 593; 64 L. J.

(4) [1896] 1 Ch. 142.

(5) L. R. 2 H. L. at p. 388.

(6) 14 App. Cas. 550.

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eye, and rightly. It is the eye by which the buyer judges, and by which, if colourable imitations are by law allowed, he will be deceived and defrauded.”

I am of opinion that in this case the registration of the proposed trade-mark should not be permitted, but should be refused, and there will be an order of the court to that effect.

Judgment accordingly.

Solicitors for applicants : *Bisailon, Brousseau & Lajoie.*

Solicitors for opposants: *Abbotts, Campbell & Meredith.*
