

ELWOOD B. MOYER.....PLAINTIFF;

AND

ARTHUR A. HOLLAND.....DEFENDANT.

1932
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 Nov. 15.  
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 1933
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 Feb. 7.  
 May 8.  
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Trade-mark—Petition to expunge—Registration without sufficient cause—Assignment of trade-mark—Reservation by assignor of right to use trade-mark—Assignment acted upon by assignee—Person aggrieved.

Defendant granted plaintiff, a manufacturer of ice cream cones, permission to use defendant's registered trade-mark, reserving to himself the right to continue the manufacture of ice cream cones and the use of his trade-mark in connection therewith. Plaintiff manufactured and sold cones under defendant's trade-mark. At the trial of the action it was shown that defendant's trade-mark was similar to another that had been in use for a number of years.

Held: That defendant's trade-mark is on the register "without sufficient cause" and should be expunged.

2. The assignment of a trade-mark to be valid must be made in conjunction with the assignment of the business with which it is connected.
3. To void the trade-mark, the assignment must have been acted upon by the assignee.
4. The plaintiff is a person aggrieved within the meaning of s. 45 of the Exchequer Court Act, R.S.C., 1927, Ch. 201.

ACTION by the plaintiff asking an order that defendant's trade-mark be expunged from the Register of Trade-Marks.

The action was tried before the Honourable Mr. Justice Angers, at Toronto.

W. A. McMaster K.C. for plaintiff.

R. S. Robertson K.C. for defendant.

The facts are stated in the reasons for judgment.

ANGERS J., now (May 8, 1933), delivered the following judgment.

The plaintiff, by his action, is asking:

(a) that the specific trade-mark of the defendant registered on the 2nd day of June, 1930, register No. 229, folio 49610, consisting of the word "Crispy," in letters of diminishing size, enclosed within a looped border, used in connection with the sale of ice cream cones be expunged;

(b) that an order be given directing the patent office to register the plaintiff's trade-mark applied for under Serial number 154023, being a specific trade-mark, consisting of

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the drawing of a cone with the words "Sugar Crisp" printed in a plain circle on the cone, which is otherwise corrugated, and the drawing of the head and shoulders of a girl in a circle, which is partially hidden by the said cone, the girl having in her hand one of the said cones.

In his statement of claim the plaintiff alleges that he is and has been since about the 25th of May, 1930, a manufacturer of an ice cream cone having the words "Sugar Crisp" printed in a plain circle on a cone which otherwise is corrugated; that the defendant obtained on the 2nd of June, 1930, a trade-mark consisting of the word "Crispy," registered in connection with ice cream cones, register No. 229, folio 49610; that the defendant had never, at the time of registration, used the said trade-mark, not being engaged in the business of manufacturing or selling ice cream cones and that he had never intended to engage in such manufacture or sale; that, at the time the defendant obtained the said trade-mark, he knew or should have known that the word "Crispy" or "Crisp" or a combination of such words, or words similar thereto, were used by manufacturers and vendors of ice cream cones in Canada prior thereto; that, by reason of said registration, plaintiff was wrongfully prevented from registering his trade-mark "Sugar Crisp"; that he was notified of the refusal by the Commissioner of Patents to register it on the 21st of April, 1931.

In his statement of defence the defendant admits that he obtained his trade-mark "Crispy" as set forth in the statement of claim, denies all the other allegations thereof and pleads especially: that he was the first user of the said trade-mark "Crispy" and has since October 1929 used it in connection with the manufacture and distribution of ice cream cones and has, at great expense, constructed and operated a special machine for the manufacture of ice cream cones, the moulds of said machine having the said trade-mark imprinted therein; that by a written agreement dated the 23rd of June, 1931, the defendant granted to plaintiff the right to use the said trade-mark, which said agreement is now in default; that the action is an attempt on the part of plaintiff to evade his obligations under the said agreement and to secure the use of the defendant's trade-mark free from obligation; that defendant has no knowledge of any prior use of the word "Crispy" or "Crisp" or com-

bination of such words, or words similar thereto, and that, even if such words had been so used, they would not constitute prior use, nor would they defeat the defendant's trade-mark nor his right to use it.

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In his reply and joinder of issue the plaintiff admits the agreement referred to in the statement of defence but says that the assignment to plaintiff of the use of the said trade-mark was not made in connection with any business.

A copy of the defendant's trade-mark was filed as exhibit 2.

An uncertified copy of the defendant's application for the registration of his trade-mark, admitted in evidence in lieu of a duly certified copy thereof, together with a letter from the Commissioner of Patents to plaintiff's solicitor, were filed as exhibit 4.

The letter from the Commissioner quotes the report received from the Examiner in charge of the application, which reads partly as follows:

Under Folio 49610, of Register No. 229, Mr. Arthur A. Holland, of Toronto, Ont., has a trade-mark consisting of the word "Crispy" having the letters of diminishing size and enclosed within a looped border, registered in connection with ice cream cones, since June 2, 1930.

Your client's application, copy enclosed, appears to be in conflict with the registration cited and must be refused.

At trial counsel for plaintiff declared that he abandoned his demand for an order directing the Patent Office to register the trade-mark applied for by his client, because he had not advertised or taken the necessary proceedings to obtain that relief. Consequently the only demand now before the Court is for the expunging of the defendant's trade-mark.

The essential facts may be summarized as follows.

The defendant first became interested in the ice cream cone business in March or April 1929. At that time he made an endeavour to purchase the business of the International Cone Company Limited, of Toronto. He was introduced to Mitchell, the president and general manager of the company, by one Yerex, a self-termed sales organizer. Holland spent a good deal of time during the month of May 1929 in the plant of the International Cone Company, having interviews with the president or watching the cone machine in operation (*see dep. Holland, p. 98 and Yerex, pp. 153 and 154*). He made an offer of \$25,000 to Mitchell, but the offer was refused.

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After his negotiations with Mitchell had fallen through, Holland says that he tried to buy a cone making machine, but did not succeed. He then made up his mind to have one made. He prepared designs and took them to Ward and Cooper, machinists, of Toronto, who built the machine for him (dep. Ward, p. 130, in fine, and 131, and Holland, p. 99).

The work on the machine was started in September or October 1929 according to Ward's testimony (p. 131), or about the month of June 1929 according to the version of Clarke, machinist in the employ of Ward and Cooper, who worked on the machine (dep. Clarke, p. 66). The work lasted a considerable time; a lot of experimenting had to be done before the machine was gotten to the point where it produced a satisfactory cone.

On August 10, 1929, the defendant, through his solicitor, filed an application for a specific trade-mark consisting of the word "Krispy": see file exhibit 1. The application, a copy whereof is included in the file exhibit 1, is dated the 15th of July, 1929.

On the 20th of August 1929, defendant's solicitor wrote to the Commissioner of Patents, sending him a new application, amended by substituting the word "Crispy" for the word "Krispy"; the application, as the previous one, bears date the 15th of July, 1929.

On the 4th of November, 1929, the Commissioner notified the defendant's solicitor that the word "Crispy" was "descriptive of the biscuitlike qualities of ice cream cones, and therefore not registrable as a trade-mark," and that his client's trade-mark was refused.

On the 23rd of May, 1930, defendant's solicitor wrote to the Commissioner as follows:

This application has now been amended in conformance with a conference had with the Commissioner, the letters of the word "Crispy" being of diminishing size to fit on the cone and having a looped border extending therearound.

Following this amendment, the defendant's trade-mark was registered in the form in which it appears in exhibit 2, consisting, as I have previously noted, of the word "Crispy," having letters of diminishing size and enclosed within a looped border.

As it has already been mentioned, Clarke, who was a machinist in the employ of Ward and Cooper, says that he

commenced working on the machine in June 1929. Ward, on the other hand, declares that the work started in October. Orley White, a cone maker, called as witness on behalf of plaintiff, says that he saw the machine some six weeks before Christmas of that year. He was hired by Holland to help him bake some cones (dep. pp. 61 and 62). When he first saw the machine in Ward and Cooper's premises, there was only the frame; he worked for a week before he had a unit to light. During the six or seven weeks he worked with Holland, they turned out approximately 500 good cones.

Clarke, the machinist, to whom I have previously referred, says that no cones were made before White came; he adds that during the time White worked with the defendant, they produced between 500 and 1,000 cones. A thing which appears to me evident is that in November and December, 1929, Holland was experimenting and trying out the machine. He did not, during that period, manufacture cones in large quantities, obviously not in quantities sufficient to supply the trade.

Holland at that time had a number of boxes of the type of exhibit C, but without the label; he started to use the label after the trade-mark had been registered, which means after June 2, 1930.

Asked as to what he did with the cones he manufactured during the fall of 1929, Holland replies as follows (p. 100):

I never produced them commercially but I employed Mr. Yerex to go out and introduce these cones throughout the country. We made up boxes and he took them out as samples, and distributed them throughout the country.

Q. What sort of boxes did you use?—A. The box you have there, exhibit C. That is one of the boxes.

Holland, on this point, is corroborated by Yerex, except that the latter does not remember exactly whether he started distributing cones in the latter part of 1929 or the early part of 1930 (dep. pp. 154 and 155).

Experimenting went on in 1930, the machine being gradually perfected. At first the machine was operated with two moulds of five cones each similar to the mould filed as exhibit B. Around March or April, 1930, these moulds were replaced by two others of eight cones each (dep. Clarks, p. 67).

The experimental stage, according to Holland, lasted until the spring of 1931 (dep. p. 102). Moore, a machinist

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in the employ of Ward and Cooper, declares that he worked on the machine practically up to the time it was taken over by Moyer (dep. p. 84).

Holland claims that the building of the machine and the experiments he made cost him nearly \$30,000, of which \$22,000 or \$23,000 were disbursements (dep. pp. 102 and 122).

Holland swears that probably 50,000 cones were made before the trade-mark was registered (dep. p. 100).

The cones were not sold, excepting a few which were sold by Yerex, unknown to Holland; they were distributed gratuitously to dealers in ice cream cones with a view to introducing them on the market and investigating the possibilities of sales: see depositions of Langley, p. 126, and Yerex, p. 154.

Yerex says that he distributed cones in boxes or otherwise "well over or around 150,000 or 200,000." This figure must include the number of cones distributed from the commencement of the operations up to the time the machine was sold to Moyer and perhaps also a little bit of exaggeration. At all events, whatever may have been the number of cones distributed up to the 2nd of June, 1930, the date on which the defendant's mark was registered, or rather to the 23rd of May, 1930, the date on which the application was amended, I am satisfied that there was then a bona fide established business. There was no established business on July 15, 1929, when the application for the trade-mark "Krispy" was made, nor even on August 10, 1929, when it was filed; but with this we are not concerned. The operations were started in the fall of 1929 and in May, 1930, the machine, although only partly finished, was producing cones. The proof shows that the defendant, at that time, really carried on and intended to carry on the business of cone manufacturing. The plaintiff's claim that there was no established business when the defendant's trade-mark was applied for, viz., in May, 1930, is unfounded and the action on this ground fails.

It is argued on behalf of plaintiff that the defendant's trade-mark should be expunged because the word "Crispy" is descriptive. The word "Crispy" is a common word of the English language, an adjective to be found in all standard English dictionaries; it undoubtedly describes the quality

of the thing or object to which it is applied. When the defendant sought to register the word "Crispy" alone, the Commissioner refused to register it, and rightly so. The defendant however was not to be easily deterred; he modified his mark by enclosing the word "Crispy," written in letters of diminishing size, within a looped border and as a result of his persistency he persuaded the Commissioner to register the new mark. I must admit that there is very little in the defendant's mark and that, had I been the Commissioner, I would have hesitated very much before registering it. However, now that the mark is on the register, I do not feel inclined to order that it be expunged on this ground.

Counsel for plaintiff raised the question that the defendant's trade-mark ought not to have been allowed because of the existence of the trade names "Dandy-Crisp" of the Consolidated Wafer Company Limited, a subsidiary of Robinson Cone Company Limited, and "Best Cake" of the International Cone Company Limited, the cones "Best Cake" being sold in a box bearing, among others, the words "sweet and crispy."

Regarding the name "Dandy-Crisp," the evidence shows that it has been used for approximately fifteen years and that an average of 2,000,000 cones have been sold under that name each year. Copies of invoices covering sales of "Dandy-Crisp" cones dating back to July and August 1925 were filed as exhibit 14.

As to the "Best Cake" cone, the evidence discloses that this product has been sold since 1925.

Counsel for plaintiff submitted that the defendant knew of these two trade names and that he made a false statement in his application when he declared that he was the first to make use of the name "Crispy"; counsel further submitted that, if a trade-mark is registered upon a misrepresentation of the facts, the Court should, for that reason alone, expunge it from the register, and cited in support of his contention the case of *The Billings and Spencer Company v. Canadian Billings and Spencer Limited* (1). I quite agree with the decision of the Honourable Mr. Justice Audette in the above case, but I must say that the evidence of record does not convince me that the defendant made in

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(1) (1921) 20 Ex. C.R., 405.

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his application, knowingly or otherwise, an incorrect statement of facts. The proof does not show that he was aware of the trade name "Dandy-Crisp"; he apparently knew of the name "Best Cake" used in connection with the sale of ice cream cones by the International Cone Company Limited, for having been during several weeks in the company's plant during the spring of 1929, with the intent of purchasing its business; he saw cone boxes in the premises and he may or he may not have noticed the words "Sweet and Crispy" in the upper left hand corner of the box; for a casual observer not particularly interested in reading all the printed matter on a box, I must admit that the words "Sweet and Crispy" on the box exhibit 11 do not catch the eye. But even if the defendant did notice this inscription on the International Cone Company's boxes, I do not think that he made a false statement in saying that he was the first to use the word "Crispy" as a trade-mark. The words "Sweet and Crispy" just as the words "quality guaranteed" appearing on the upper right hand side of the box (exhibit 11) are merely indicative of the quality of the cones; neither are used as trade names. On this further ground the action fails.

It was urged furthermore on behalf of plaintiff that first use is a prime essential of a trade-mark; decisions were cited among which, most in point, are: *Groff v. Snow Drift Baking Powder Co.* (1) and *Partlo v. Todd* (2). Plaintiff's contention is that, in view of the prior use by Consolidated Wafer Company Limited of the mark Dandy-Crisp and by International Cone Company Limited of the words "Sweet and Crispy" on its cone boxes, the defendant's trade-mark should not have been allowed to go on the register. I do not think that the name "Best Cake" is in the way of the defendant's trade-mark notwithstanding the fact that the boxes in which they are sold have imprinted on them, among other literature, the words "Sweet and Crispy." The case is different however with the Dandy-Crisp mark. I am inclined to believe that the Commissioner would have refused the defendant's application had he been acquainted with the fact that Consolidated Wafer Company Limited had been using the name "Dandy-Crisp" for a period of fifteen years or thereabout; that is what I would have done

(1) (1889) 2 Ex. C.R., 568.

(2) (1888) 17 S.C.R., 196.

if I had been in his position. After some hesitation which I would not have experienced had the proceedings been instituted by the Consolidated Wafer Company Limited based on the likelihood of confusion, I have reached the conclusion that the defendant's trade-mark is on the register "without sufficient cause" and that it should accordingly be expunged: see *Epstein v. O-Pee-Chee Company Limited* (1); *Channell Ltd. v. Rombough* (2).

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There is however another reason for which I believe that the defendant's trade-mark ought to be expunged from the register and that is the permission given by defendant to plaintiff, under the agreement exhibit 6, to use it in connection with his own business.

The assignment of a trade-mark to be valid must be made in conjunction with the assignment of the business with which it is connected: *Bowden Wire Limited v. Bowden Brake Company* (3); *United Drug Co. v. Rectanus Co.* (4); Kerly on Trade-Marks, pp. 401, 405, 411 and 425; otherwise the public is liable to be misled.

At page 411, Kerly says:

The old section, which applied to patents and designs as well as to trade-marks, contained a reference to the granting of licences. This is now wholly dropped, no doubt because licences are inapplicable in respect of the rights in a trade-mark acquired by registration. A licence to use a trade-mark is unnecessary if the trade-mark is to be used in connection with the goods of the proprietor of the trade-mark, and is illegal, because leading to deception, if it is to be used in connection with the goods of anyone else. The principle of section 22 seems to be as applicable to a partial assignment as to an absolute assignment.

In the case of *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (5), Hodgins, J. said:

But I do not think that, in case they possessed and had used a trade-mark in connection with that business, whether an American or Canadian business, they could by assignment give the respondents the right to use that mark or name, unless they continued the business done here by selling goods made by the appellants. If the effect and intent of the sale-agreement was merely to enable the respondents to continue importing and selling the appellants' goods, their use of the trade-name or mark would seem to be quite within the cases. But, if it was contemplated by the agreement and so agreed that the respondents could manufacture and sell their own product, then I can see no foundation for the proposition that they could use, or that the appellants could give them the right to use, the latter's trade-mark in what was a new business in new goods.

(1) (1927) Ex. C.R., 156.

(4) (1918) 248 U.S.R., 90, at 97.

(2) (1925) 1 D.L.R., 234.

(3) (1913) 30 R.P.C., 580, at 590,
 and (1914) 31 R.P.C., 385, at
 pp. 392 and 395.

(5) (1923) 54 O.L.R. 537, at 555.

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Earl Loreburn in re *Bowden Wire Limited v. Bowden Brake Company* (1) clearly and concisely laid down this doctrine when he said:

The appellants have misconceived, or at all events misused, the protection which the law gives to a trade-mark. The object of the law is to preserve for a trader the reputation he has made for himself, not to help him in disposing of that reputation as of itself a marketable commodity, independent of his good-will, to some other trader. If that were allowed, the public would be misled, because they might buy something in the belief that it was the make of a man whose reputation they knew, whereas it was the make of someone else.

In the same case Lord Dunedin expressed a similar opinion (*ubi supra*, p. 392):

My Lords, in so acting, I think it is free from doubt that the Wire Company really vitiated their own trade-mark as registered. It was an attempt to assign a trade-mark in gross, a thing that cannot be done. By registration they affected to tell the public that goods in the class and of the description specified, marked with the registered mark, were their goods; that is to say, manufactured, or at least put on the market by them. But in reality, with their assent, the mark was, in practice, adhibited to goods which were not put on the market by them, but manufactured by or which were of composite manufacture and put on the market by the Brake Company. Therefore, on objection taken, I am of opinion that the registration as it stands must be expunged.

In the matter of the petition of *Jonkopings och Vulcans Tandsticksfabriksaktiebolag of Westra Storgatan and in the matter of the specific trade-marks Vulcan Superior, etc.* (2), Cassels, J., dealing with the difference between the Canadian statute and the English act and the assignment of a trade-mark in gross, expressed himself as follows (p. 271):

The Canadian statute differs materially from the English Act.

In *Smith v. Fair*—a decision of the late Vice-Chancellor Proudfoot, (14 O.R. 736) there is a dictum which would rather indicate that the Vice-Chancellor's view was that there must have been evidence of prior user in Canada. He also apparently is taken to have held that under our statute a trade-mark might be assigned in gross. This is merely a dictum and it was held the other way in the case of *Gegg v. Basset* (3 O.L.R. 263) by Lount, J. I have no hesitation in adopting the view of Mr. Justice Lount. It is thoroughly in accord with the opinions of the English judges. It is quite true that the Canadian statute permits an assignment of a trade-mark, but it would be contrary to all rule applicable to trade-marks if a mark could be assigned to somebody who would use it upon goods neither manufactured nor sold by the owner of the trade-mark. It would have the effect of leading to misrepresentation. I may say in passing that the Berliner case, referred to in *Smith v. Fair*, is a case of passing-off. If the judgment on appeal cited by Proudfoot, V.C., is looked at it will appear that it was not decided on the ground of infringement of trade-mark.

(1) (1914) 31 R.P.C., at 392.

(2) (1914) 15 Ex. C.R., 265.

The judgment of Cassels, J. was confirmed by the Supreme Court of Canada: see *In the matter of the "Vulcan" Trade Mark* (1), particularly the notes of Davies, J. at p. 417.

See also *Mello-Creme Products v. Ewan's Bread Ltd. et al* (2).

In *Gegg v. Bassett* (*ubi supra*, at pp. 264, in fine, and 265) Lount said:

The right is assignable it is true, but only, I think, in connection with the good-will of the business, general or specific, in which the trade-mark has been used.

The same principle applies to a partial assignment of a trade-mark and to a licence to use it, if the trade-mark is to be used in connection with the assignee's or licensee's own goods.

The clause in the agreement exhibit 6 relating to the trade-mark reads as follows:

4. The Vendor will permit the Purchaser, if he so desires, to use the trade name "Crispy" which the Vendor has registered in Canada, provided that this agreement is not at any time in default, in which case the right to use such name shall be immediately and without notice withdrawn.

The defendant did not assign his business to the plaintiff; on the contrary he reserved his right to continue the manufacture of ice cream cones and the use of his trade-mark in connection therewith.

By clause 6 of the agreement the defendant undertook, for a period of ten years, not to build in Canada cone machines of the stationary horizontal type, except to the order of the plaintiff; the clause is worded as follows:—

6. The Vendor covenants with the Purchaser that he will not for a period of ten years from the date hereof build in Canada cone machines of the Stationary Horizontal Type except to the order of the Purchaser, and agrees to build for the purchaser during said period such type of machines as he may require at actual cost plus twenty per cent.

The defendant had designs for the construction of another type of machine and he admits that he intended to continue making cones and using the name "Crispy." At page 106 of Holland's deposition, we find this answer:

The statement I made was that according to my contract I should not build any more of these horizontal machines but that I would go into the manufacture of a rotary machine under my patents, and reserve the "Crispy" name. I gave him the exclusive right on the horizontal machine. I had built and designed the rotary, and Mr. Moyer knew all about it.

(1) (1915) 51 S.C.R., 411.

(2) (1930) Ex. C.R., 124, at 129.

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I may note here incidentally that Moyer denies categorically he knew anything about this other machine (dep. p. 171):

His LORDSHIP: Q. Did you know about the other machine?—A. No, sir.

Q. Nothing at all?—A. No, sir. I would not have brought the first machine if he had had a better one to sell. We had a whole year ahead of us. There was no rush for me.

In cross-examination, the defendant emphasized his statement that he intended to continue carrying on business as cone manufacturer and using his trade-mark (dep. p. 107):

Q. Notwithstanding the fact that you intended to build a machine which could be run more economically than this one, he went and bought this machine?—A. He did.

Q. You told him at the time that you were intending to have the new machine to go on and manufacture "Crispy" cone?—A. I reserved the right for that purpose.

Q. But did you tell him?—A. I don't know that I gave him the details to that extent.

Q. You actually did reserve the right to use the word "Crispy"?—A. Yes.

Q. And intended to use the word "Crispy" in the manufacture of cones upon this new machine you were going to make?—A. Yes, I certainly did.

It has been said that, to void the trade-mark, the assignment must have been acted upon by the assignees; I find in Kerly (op. cit. at p. 425) the following observations:

And, although an assignment of a trade-mark be inoperative by reason of being an assignment in gross, the assignor may lose his right to the mark by such assignment, at all events if the assignee has acted upon the assignment. Thus, where an exclusive licence in gross for a term of years to use a trade name was granted, it was held that the assignor had at the end of the term lost his right to claim that the name indicated his manufacture.

See *Ford v. Foster* (1); *Thorneloe v. Hill* (2).

The evidence adduced on the part of plaintiff shows that the latter acted upon the assignment and manufactured and sold a large quantity of cones using the defendant's trade-mark and on some occasions the word "Crispy" without the looped border: see deposition Moyer at pages 17, 18, 19 and 20; also exhibits 7, 8 and 17.

At page 20 we find the following statements:

Q. Have you manufactured many cones similar to Exhibit 8?—A. That is the only kind of cone we make now.

Q. How many, I said?—A. We have manufactured, I presume, possibly six or eight millions. We have never packed that many, because we have had to throw a lot of them away.

Q. Can you tell me how many you have sold, in an estimate?—A. Around four million or thereabouts.

The plaintiff's version on this point is uncontradicted; on the other hand, it is corroborated by Mulvihill (dep. p. 96).

Moyer had started in the cone business in May, 1930; exhibit 3 is a sample of the cone he was putting out at that time with the name "Sugar-Crisp." According to his statement, he manufactured approximately one and a half millions of these cones during the summer of 1930 (dep. p. 3).

He applied for his trade-mark Sugar-Crisp: see exhibit 4. The application was refused on account of Holland's trade-mark "Crispy." It was then that plaintiff communicated with the defendant: see deposition Moyer at page 5 and correspondence filed as exhibit 5. When Holland returned to Toronto early in May, 1931, he went to see Moyer and after some negotiations the agreement (exhibit 6) was entered into.

Section 45 of the Trade Mark and Design Act (R.S.C., 1927, chap. 201) enacts that:

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

The plaintiff, who has been a cone manufacturer since May, 1930, is undoubtedly, in my opinion, an aggrieved person within the meaning of section 45: *Kerly on Trade-Marks*, 6th Ed., pp. 324 *et seq.*; *In re Appollinaris Co.'s Trade-Mark* (1); *In the Matter of Powell's Trade-Mark* (2); *In the Matter of Talbot's Trade-Mark* (3); *Jones v. Horton* (4); *W. J. Crothers v. Williamson Candy* (5.).

When the case first came up for trial, counsel for plaintiff, after calling two witnesses, made a motion to amend his statement of claim by adding thereto paragraph 3a, worded as follows:

3a. At the time that the defendant applied for and obtained the said trade-mark he knew or should have known, that the word "Crispy" or

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| (1) (1891) L.R. 2 Ch., 186. | (3) (1894) 11 R.P.C., 77, at 82 |
| (2) (1893) 10 R.P.C., 195, at 201; | and 83. |
| (1893) 11 R.P.C., 4, at 7 and 8. | (4) (1922) 21 Ex. C.R., 330. |
| (5) (1925) S.C.R., 377. | |

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"Crisp" or a combination of such words or of words similar thereto were used by manufacturers and vendors of ice cream cones in the Dominion of Canada prior to the said time.

The motion being granted, counsel for the defendant asked for an adjournment on the ground that he was not prepared to meet this new allegation. The case was adjourned *sine die* and the costs were reserved.

The amendment raised a new and serious ground of attack against the defendant's trade-mark and I believe that counsel for defendant was, in the circumstances entitled to an adjournment. Having now to deal with the costs of the motion to amend and the costs thrown away as a result of the adjournment, I have reached the conclusion that I will render justice in ordering that the plaintiff pay the costs of the motion to amend and the costs of the day.

Adjudicating now on the merits, there will be judgment ordering that the defendant's trade-mark registered on the 2nd day of June, 1930, register No. 229, folio 49610, consisting of the word "Crispy" having the letters of diminishing size and enclosed within a looped border, be expunged from the register, with costs against the defendant.

The costs of the motion to amend and the costs of the day shall be set off against the costs of action.

Judgment accordingly.