

THE J. P. BUSH MANUFACTURING COMPANY..... } CLAIMANTS ;
 AND
 ARTHUR N. HANSON AND HARRY S. McLAUGHLIN..... } RESPONDENTS.

1888
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 Oct. 24.

*Trade-mark—Essential elements of—Limited assignment of—Cancellation of registration in favor of prior assignee under unlimited assignment—R. S. C. c. 63, s. 11.*

The essential elements of a legal trade-mark are (1) the universality of right to its use, *i. e.* the right to use it the world over as a representation of, or substitute for, the owner's signature ; (2) exclusiveness of the right to use it.

Where respondents had obtained the exclusive right to use a certain trade-mark in the Dominion of Canada only, and had registered the same, and claimants subsequently applied to register it as assignees under an unlimited assignment thereof made before the date of the instrument under which respondents claimed title, the prior registration was cancelled.

APPLICATION to cancel registration of a trade-mark under R.S.C. c. 63, s. 11 (1), on the ground that the respondents were not entitled to the exclusive use of the trade-mark as registered by them.

The case arose upon the following facts :—

- (1) 11. If any person makes application to register, as his own, any trade-mark which has been already registered, and the Minister of Agriculture is not satisfied that such person is undoubtedly entitled to the exclusive use of such trade-mark, the Minister shall cause all persons interested in the matter to be notified to appear, in person or by attorney, before him, with their witnesses, for the purpose of establishing which is the rightful owner of such trade-mark ; and after having heard the said persons and their witnesses, the Minister shall order such entry or cancellation or both, to be made as he deems just ; and in the absence of the Minister, the deputy of the Minister of Agriculture may hear and determine the case and make such entry or cancellation or both, as he deems just :
- 2. Errors in registering trade-marks and oversights in respect of conflicting registrations of trade-marks may be corrected in a similar manner.—42 V. c. 22 s. 15.

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On the 21st August, 1886, a trade-mark, consisting of the words "Bush's Fluid Food Bovinine," was registered in the Department of Agriculture in the name of Messrs. Arthur N. Hanson and Harry S. McLaughlin, both of the City of Portland, Province of New Brunswick.

Argument  
 of Counsel.

On the 18th day of June last an application was received in the Department from Albert Ingard, of the City of New York, U.S.A., Secretary and Treasurer of the J. P. Bush Manufacturing Company, for the registration of a specific trade-mark consisting of the word-symbol "Bovinine" as applied to the sale of beef juice in a concentrated form, used as a medicinal nourishment in all cases of debility, and especially adapted to consumptive and dyspeptic patients.

August 1st and 2nd, 1888.

The matter was heard before the Deputy Minister of Agriculture.

*Pugsley*, Q.C. for claimants ;

*Skinner*, Q.C. for respondents.

LOWE, D. M. A., now (October 24th, 1888) rendered his decision.

The investigation in this matter has taken a somewhat wide scope, and the several statements put in evidence are conflicting and complicated; but I find the following facts:—

In the first place, Messrs. Arthur N. Hanson and Harry S. McLaughlin registered in this Department on August 1st, 1886, a trade-mark consisting of the words "Bush's Fluid Food Bovinine" in their own names. This registration was made simply and without any limitation.

It appears, from a document put in evidence, that the parties named were not the original proprietors,

but held the trade-mark in question by an assignment from Henry T. Champney, such assignment being dated June 1st, 1886, and limiting by its terms the trade-mark to the Dominion of Canada.

It further appears, from a document put in evidence, that the said Champney and I. Giles Lewis had assigned to the J. P. Bush Manufacturing Company, simply and without limitation, the same trade-mark, about one year previously, on June 25th, 1885.

Upon this statement of facts it is important to define that a trade-mark is a simple and absolute property, the same as a signature, or the name and style of a firm, without any limitation as to country, and runs everywhere throughout the domain of commerce.

In other words, the essential characteristics of a legal trade-mark are: (a) Universality of right to its use, that is, it is good as a representation of, or substitute for, the owner's signature all the world over; and (b) exclusiveness of the right to use it.

If the same trade-mark were to be used by different persons for the same species of merchandise, it would lead to inextricable confusion, its true and only legitimate purpose would be neutralized and destroyed, and it would lack the essential element of origin or ownership.

Tried by the test of these definitions, the limitation in the transfer by which Hanson & McLaughlin hold their claim to the title of the trade-mark in question renders the registration invalid.

I find, further, from the above statement of facts, in relation to the transfers affecting the trade-mark in question, that Champney, after his transfer to the J. P. Bush Manufacturing Company, in 1885, had no property whatever in such trade-mark to convey to Hanson & McLaughlin in 1886, and, therefore, he could not, by his act of transfer, vest any title in his

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1888 assignees, the respondents in this case. This is apart  
 from any question of his inability to divide the trade-  
 mark in order to limit its use to territory outside of  
 the United States.

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Mr. Skinner has contended that the assignment by the J. P. Bush Company, in 1884, to Champney did not give any right to the trade-mark, but only the right to manufacture, for the reason that this company was never the assignee of the James P. Bush trade-mark which was registered at Washington, in 1877. The evidence taken did not go into this point, but it is to be observed that the assignment above referred to from the company did transfer the trade-mark, whether with due authority or not; and it is further to be said that if the contention of Mr. Skinner were held to be valid, it would invalidate Hanson & McLaughlin's registration above referred to, and be at the same time a bar to the requested registration of the claimants, the J. P. Bush Manufacturing Company, for the reason that while both hold from Champney, he could not assign a title which belonged to another.

There is a further point to be noticed with respect to the limitation in the assignment of Champney to Hanson & McLaughlin, namely, that if they had represented at the time of applying for the registration that the priority of use or property in the trade-mark was vested in a company in the United States, the assignment only giving them the right to use it in Canada, the registration would have been declined by this Department, for the reason that the right to use a trade-mark must be absolute.

As regards the evidence put in by Mr. Skinner to prove sanction by the claimants of the assignment by Champney to Hanson & McLaughlin, I find much to make me believe that these men might have honest-

ly thought that they were dealing with the company through its President, without knowing that they were the victims of an unauthorized and clandestine transfer by Champney, the President, as Mr. Pugsley in effect contended, and the claimants in effect set forth. I do not wish by the conclusion which I have arrived at, as regards the right of the parties to the simple fact of registration, to prejudice any of the rights which any of these parties may have under these somewhat complicated and mixed transactions.

And I think it well still further to point out that nothing in connection with this registration affects the rights of Hanson & McLaughlin to the use of any formula, or to the manufacture of any medicinal or nourishing fluid or extract from beef, or anything else. It is only that in the circumstances stated they cannot use the particular trade-mark registered.

I, therefore, decide that the trade-mark registered in this Department, in Register 12, Folio 2733, on the 21st August, 1886, consisting of the words "Bush's Fluid Food Bovinine" must be cancelled.

And I further decide that, from the evidence so far adduced, whatever property the said Champney had in the trade-mark in question was transferred by him to the J. P. Bush Manufacturing Company, and that the claimants acquired title from him. Priority is, therefore, awarded to the J. P. Bush Manufacturing Company, and their claim of right to registration of the trade-mark consisting of the word-symbol "Bovinine" is admitted.

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