

BETWEEN:

THE GREAT ATLANTIC AND PACIFIC }
 TEA COMPANY, LIMITED } APPELLANT,

1943
 June 17
 1945
 Oct. 25

AND

THE REGISTRAR OF TRADE MARKS RESPONDENT.

AND

BETWEEN:

THE GREAT ATLANTIC AND PACIFIC }
 TEA COMPANY, LIMITED } APPELLANT,

AND

THE REGISTRAR OF TRADE MARKS RESPONDENT.

Trade Mark "Sunnybrook Brand"—Word mark "Sunnybrook"—The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap 38, secs. 21, 29, 35, 44 (2).—The Trade Mark and Design Act, R.S.C. 1927, chap. 201, secs. 15, 36—Nature of trade mark right—Trade mark symbol of good will—Trade mark not assignable in gross—Goodwill of business carried on in Canada by registered owner of trade mark in association with wares for which it has been registered not divisible—Partial or territorial assignment of registered trade mark for use in Canada not permitted—Registration of word mark to be used in association with wares only in a particular territorial area in Canada not authorized.

The Registrar of Trade Marks refused to record a partial or territorial assignment to the appellant by Jacob Halpern of the trade mark "Sunnybrook Brand" as applied to butter, eggs, cheese, fish and provisions, for that part of Canada lying to the east of Lake Superior, on the ground that there was no provision under The Unfair Competition Act, 1932, for recording partial or territorial assignments. He also refused to grant the appellant's application to register "Sunnybrook" as a word mark to be used on eggs only in that part of Canada lying east of the west end of Lake Superior on the grounds that there was no provision in The Unfair Competition Act, 1932, for the registration of a trade mark the use of which was to be restricted to a defined territorial area in Canada and that the proposed mark was confusingly similar to the trade mark "Sunnybrook Brand". From these decisions the appellant appealed.

Held: That if a person has registered a trade mark for use in Canada in association with certain wares, he cannot validly assign such trade mark unless he also assigns the whole of the good will of the business carried on by him in Canada in association with such wares.

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2. That under section 44 (2) of the Unfair Competition Act, 1932, there cannot be a partial assignment of a registered trade mark for use in Canada by the assignee either in respect of some of the wares for which it has been registered or in respect of all of them for a particular area in Canada. A registered trade mark cannot in Canada be validly assigned by partial or territorial assignments.
3. That there is no authority in the Unfair Competition Act, 1932, for the registration of a word mark such as that proposed by the appellant to be used in association with wares only in a particular territorial area in Canada.

APPEALS from the Registrar's refusal to record a partial or territorial assignment to the appellant of the trade mark "Sunnybrook Brand" as applied to butter, eggs, cheese, fish and provisions for that part of Canada lying to the east of Lake Superior and his refusal to register "Sunnybrook" as a word mark to be used on eggs only in that part of Canada lying east of the west end of Lake Superior.

The appeals were consolidated and heard together before The Honourable Mr. Justice Thorson, President of the Court at Ottawa.

O. M. Biggar, K.C., for appellant.

W. P. J. O'Meara, K.C., for respondent.

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

The PRESIDENT, now (October 25) delivered the following judgment:

These two appeals were heard together pursuant to an order for their consolidation. The first is from the Registrar's refusal, dated December 3, 1942, to register "Sunnybrook" as a word mark to be used in connection with eggs in a specified territorial area in Canada; the second is from his refusal, dated October 9, 1942, to record a partial or territorial assignment from one Jacob Halpern to the appellant of the trade mark "Sunnybrook Brand" as applied to butter, eggs, cheese, fish and provisions.

The facts are not in dispute. On February 26, 1915, Jacob Halpern of Toronto applied, under the Trade Mark and Design Act, R.S.C. 1906, Chap. 71, for the registration

of a specific trade mark consisting of the words "Sunnybrook Brand" to be applied to the sale of butter, eggs, cheese, fish and provisions and the mark was duly registered on March 23, 1915, in "The Trade Mark Register No. 84, Folio 20619". On March 9, 1922, Woodland Dairy Limited, of Edmonton, a company incorporated under the laws of the Province of Alberta, applied for the registration of a specific trade mark consisting of a design picturing a creek or brook with trees and the rising sun coming up behind the trees together with the words "Sunny Brook Brand Creamery Butter" worked into the design. This application was refused on April 17, 1923, because of the prior registration of "Sunnybrook Brand" by Jacob Halpern. Woodland Dairy Limited then obtained from Jacob Halpern a partial assignment of his trade mark No. 84/20619 to be used in connection with the sale of dairy products in all that part of the Dominion of Canada lying to the west of Lake Superior and also in connection with the oriental trade. This partial assignment, dated November 15, 1923, was registered on January 4, 1924. Woodland Dairy Limited then assigned its interest in the trade mark to Woodland Dairy Limited, a company incorporated under the laws of the Dominion of Canada. This assignment, dated January 10, 1930, was recorded on September 30, 1933, and the name of Woodland Dairy Limited was entered on the register as the owner of the trade mark as applied to dairy products only in the territory specified.

On November 20, 1941, Jacob Halpern executed another partial or territorial assignment of the trade mark "Sunnybrook Brand" in favor of the appellant, in which he recited its original registration on March 23, 1915, and the first partial assignment of it to Woodland Dairy Limited on November 15, 1923. By this assignment Jacob Halpern assigned, sold and transferred to the appellant all his right, title and interest in and to the said trade mark and the good will of the business connected therewith in all that part of the Dominion of Canada lying to the east of Lake Superior. On December 24, 1941, the Registrar advised the appellant's solicitors that the document being a partial assignment could not be recorded and also took the position that the rights of Jacob Halpern had expired by reason of his failure to pay the renewal fee. On January

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28, 1942, Jacob Halpern executed a fresh assignment which differs from the previous one only in that there is no reference in it to the territory "in all that part of the Dominion of Canada lying to the east of Lake Superior". On October 9, 1942, the Registrar notified the appellant's solicitors that "the assignment. . . . may not be recorded, since there is no provision under The Unfair Competition Act, 1932, for recording partial or territorial assignments". From this decision the appellant gave notice of appeal on March 10, 1943.

On March 19, 1942, the appellant applied for registration of "Sunnybrook" as a word mark, to be used on eggs but only in that part of Canada lying east of the west end of Lake Superior. With its application the appellant, claiming to be the owner of the trade mark "Sunnybrook Brand" in all that part of Canada lying east of Lake Superior, filed a request that the registration of the said mark be cancelled so far as it affects the said part of Canada, the cancellation to be effective upon a new registration being made in the appellant's name. On December 3, 1942, the Registrar rejected this application on the ground that there was no provision in The Unfair Competition Act, 1932, for the registration of a trade mark the use of which was to be restricted to a defined territorial area in Canada. It was also considered that the word mark applied for was confusingly similar to registration No. 84/20619. On January 14, 1943, the appellant gave notice of appeal from this decision.

The circumstances under which a trade mark may be assigned are stated in section 44 (2) of The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, as follows:

44. (2) A registered trade mark shall not be assigned or transmitted except in connection and concurrently with an assignment or transmission of the good will of the business carried on in Canada in association with the wares for which such mark has been registered, and in any case such trade mark shall be determinate with such good will; provided however that any registered owner of a trade mark whose headquarters are situate in Canada and who is entitled to its exclusive use in connection with a business carried on in Canada may assign the right to use such trade mark in any other country, in association with any wares for which such trade mark is registered, in connection and concurrently with his assignment of the good will of the business carried on in such other

country in such wares, provided that the grant of such right is forthwith recorded by the grantor of such right in the register maintained pursuant to this Act.

Section 44 (2) up to the first proviso is similar in effect to the first sentence of section 22 of the Trade Marks Act, 1905, of the United Kingdom, which read as follows:

22. A trade mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the goods for which it has been registered and shall be determinable with that goodwill.

This goes back to section 70 of the Patents, Designs, and Trade Marks Act, 1883, and section 2 of the Trade Marks Registration Act, 1875, by which provision was first made for the registration of trade marks.

Prior to the coming into force of The Unfair Competition Act, 1932, section 15 of the Trade Mark and Design Act, R.S.C. 1927, chap. 201, provided as follows:

15. Every trade mark registered in the office of the Minister shall be assignable in law.

This goes back, through the revisions of 1906 and 1886 to section 14 of The Trade Mark and Design Act of 1879 and section 5 of The Trade Mark and Design Act of 1868. It has been the subject of judicial comment. In *Smith v. Fair* (1) there is a suggestion by Proudfoot J. that there could be an assignment of a trade mark independent of good will. But a different view was taken in *Gegg v. Bassett* (2), where Lount J. held that a trade mark could not be seized and sold by itself. At page 264, he said:

I am clearly of opinion that a right to a trade mark is not exigible under execution and therefore that no title passed to the plaintiff. The sheriff could seize and sell only goods and chattels or an interest therein, and the right to a trade mark is something quite different. The right is assignable it is true, but only, I think, in connection with the goodwill of the business, general or specific, in which the trade mark has been used.

And in this Court in *In re Vulcan Trade Mark* (3) Cassels J. stated that he had no hesitation in adopting the view of Mr. Justice Lount. The weight of Canadian judicial opinion supports the view that under the Trade Mark and Design Act while a trade mark was assignable it was not assignable in gross. That being so, section 15 is merely declaratory of the position reached at common law.

(1) [1887] 14 O.R. 729 at 739 (3) [1914] 15 Ex. C.R. 265 at 272
 (2) [1902] 3 O.L.R. 263

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At common law no one assumed at first that a trade mark could be assigned at all for it was not then regarded as property. But as the function of the trade mark developed a different view prevailed. An interesting discussion of the origin of trade marks and the attitude of the courts in dealing with them is to be found in Schechter-Historical Foundations of Trade Mark Law.

Originally there were two classes of marks affixed to goods. One was proprietary; this was the "merchant's mark" and its purpose was to indicate ownership of the goods. The other was regulatory; this was a production mark that had to be placed on goods to indicate their source of origin or manufacture so that the person whose mark it was might be held responsible for any inferiority of quality that might exist in them. These marks, although their purposes were quite different, are the source of the idea of the identification of trade marks with the ownership or origin of the goods on which they appear. But they were not regarded as property. Even as late as 1857 it was stated by Vice-Chancellor Sir W. Page Wood in *The Collins Company v. Brown* (1) that "it is now settled law that there is no property whatever in a trade mark". He did recognize, however, that "a person may acquire a right of using a particular mark for articles which he has manufactured, so that he may be able to prevent any other person from using it", but the basis for intervention by the Court was that the use of the mark by such other person would be a fraud on the first user. The common law action for infringement of a trade mark was originally an action in deceit or an action on the case for deceit. Since no right of property in the trade mark was recognized there could be no assignment of it.

It is obvious that there has been a great change in the function of the trade mark. The consumer of goods bought under a trade mark is now not primarily concerned with any particular owner or origin of them; and the owner of the mark who is injured by its infringement is not concerned with whether the buyer knows who he is or where the goods come from or not. The consumer buys the goods under a mark with which he becomes familiar and is entitled to know that when he buys similar goods

(1) [1857] 3 K. & J. 423 at 426

again under such mark they will be as satisfactory as the previous goods had been; now it is the trade mark that "sells the goods", as Lindley L. J. put it in *Powell v. The Birmingham Vinegar Brewery Company Ltd.* (1). The trade mark has become an important factor in creating and sustaining the good will of the owner's business in the goods for which the mark was registered and on which it is used. Indeed, it is the symbol of such good will and inseparable from it.

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Increasing realization of this association between a trade mark and the good will of the owner's business in the goods on which it is used has resulted in much clarification of the true nature of a trade mark, although it cannot yet be said to be fixed. Schechter's book develops this theme in an interesting manner. The original common law action gave the owner of a trade mark quite inadequate protection against piracy of it. He was injured even although fraud on the part of the infringer could not be proved and even although there had been no such fraud, and the common law remedy of damages only did not give him sufficient relief. But before the equitable remedies could be applied it was necessary to deal with the trade mark right as property. This was done by Lord Chancellor Westbury in 1863 in *Hall v. Barrows* (2) where he said:

a trade mark consists in the exclusive right to the use of some name or symbol as applied to a particular manufacture or vendible commodity, and such exclusive right is property.

And in the same year in the famous case of *The Leather Cloth Company Limited v. The American Leather Cloth Company Limited* (3) Lord Westbury refused to accept the view expressed in other cases that there is no property in a trade mark. At page 142 he said:

It is correct to say that there is no exclusive ownership of the symbols which constitute a trade mark apart from the use or application of them; but the word "trade mark" is the designation of these marks or symbols as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property. The true principle therefore would seem to be, that the jurisdiction of the Court in the protection given to trade-marks rests upon property, and that the Court interferes by injunction because that is the only mode by which property of this description can be effectually protected.

(1) [1896] 13 R.P.C. 235 at 250

(3) [1863] 4 De G.J. & S. 137;

(2) [1863] 4 De G.J. & S. 150 at

[1864] 11 H.L. 523

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Lord Westbury's recognition of a trade mark as property marked a great change in the attitude of the courts on the protection of trade mark rights for the owner's right of action against an infringer was no longer based on fraud by him. But it is important to note that a trade mark was regarded as property only when applied to a vendible commodity; and that apart from such use and application there was no property in it at all. If there cannot be a trade mark in gross, there obviously cannot be an assignment of it in gross. Lord Westbury discussed the question of the assignability of a trade mark in a general way, but when the case went to the House of Lords, Lord Cranworth laid down the following principle, at page 534:

the right to a trade mark may, in general, treating it as property or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser.

This case may be regarded as authority for the statement that neither at law nor in equity could there be an assignment of a trade mark in gross. There has been general acceptance of this view.

When, therefore, section 15 of the Trade Mark and Design Act speaks of a trade mark as being assignable in law, I think it is reasonable to construe the section as meaning that it is assignable under the conditions laid down by the law, that is to say, that it is assignable only with the business in the goods on which the trade mark is used and cannot be assigned in gross. That being so, then there is no substantial difference in effect between section 15 of the Trade Mark and Design Act and the first part of section 44 (2) of The Unfair Competition Act, 1932.

The Leather Cloth Company Case (supra) was followed in *Pinto v. Badman* (1). Fry L. J. there dealt with the assignability of trade marks and regarded the statement of Lord Cranworth, to which I have referred, as conclusive authority. Then he went on to refer to the Statutes of 1875 and 1883 and said, at page 195:

Now another indication that that is the law is to be found in this, that both the Statutes of 1875 and 1883 have regulated the right of transfer after registration, and in both cases they have confined it to assignment or transfer with the goodwill of the business in the article in respect of which the trade mark is registered. It is obvious that the

Legislature in so enacting are intending to confine the right of assigning the trade mark after registration within the same limits by which it is confined at law and in equity before registration.

Fry L. J. thus regarded the Statutes of 1875 and 1883 as being declaratory in respect of registered trade marks of the existing law regarding the assignability of trade marks prior to provision having been made for their registration. His remarks afford strong support for the statement by Fox on the Canadian Law of Trade Marks and Industrial Designs, at page 153, that the effect of section 44 (2) of The Unfair Competition Act, 1932, has been merely to place the principles of the common law on the subject of assignability of trade marks in statutory form.

The good will of the business concerned in the goods for which the trade mark has been registered is indivisible; the whole of such good will must be assigned in order to make the assignment of the trade mark valid under section 22 of the Trade Mark Act, 1905, of the United Kingdom. This was settled in *John Sinclair Ltd's Trade Mark* (1). In that case a trade mark had been registered for tobacco whether manufactured or unmanufactured. The trade mark was assigned but the assignee used it on cigarettes only and the assignor continued its tobacco business. Since it was not intended by the parties that the good will of the business in manufactured and unmanufactured tobacco should pass to the assignee of the trade mark the assignment of it was ordered to be expunged as not being in compliance with the requirements of section 22. The trade mark having been registered for tobacco whether manufactured or unmanufactured and there being only one business concerned in such goods, there could not be an assignment of the trade mark for use only on cigarettes. Since the whole of the good will of the business concerned in the goods for which the trade mark has been registered must be assigned to make the assignment of the trade mark valid, it follows that in the absence of statutory authority there cannot be a partial assignment of the trade mark either in respect of some of the goods for which it has been registered or in respect of all of them for any particular area in which the business concerned in the goods has been carried on.

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(1) [1932] 49 R.P.C. 123

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The principle of the decision in *John Sinclair Ltd's Trade-mark (supra)* is as applicable in Canada as it was in the United Kingdom. Section 44 (2) of The Unfair Competition Act, 1932, distinguishes between a business carried on in Canada and a business carried on in any other country. Where a person is entitled to the exclusive use of a trade mark in connection with a business carried on in Canada and also carries on business in any other country, he may assign the right to use the trade mark in such other country in association with any wares for which such trade mark is registered provided he also assigns the good will of the business carried on in such other country in such wares and there may be as many assignments as there are businesses in other countries. But in respect of the business carried on in Canada in association with the wares for which the trade mark has been registered, its good will cannot be subdivided. Section 44 (2) contemplates that the registered trade mark shall carry with it all of the good will of the business carried on in Canada in association with the wares for which it has been registered. Under the section as it stands such good will is indivisible and the mark cannot be disassociated from it. Consequently if a person has registered a trade mark for use in Canada in association with certain wares, he cannot validly assign such trade mark unless he also assigns the whole of the good will of the business carried on by him in Canada in association with such wares. It follows that under section 44 (2) of The Unfair Competition Act, 1932, there cannot be a partial assignment of a registered trade mark for use in Canada by the assignee either in respect of some of the wares for which it has been registered or in respect of all of them for a particular area in Canada. A registered trade mark cannot in Canada be validly assigned by partial or territorial assignments.

In my opinion, the law was the same under The Trade Mark and Design Act. The Act drew a sharp distinction between trade marks and industrial designs in the matter of their assignability. While section 15 merely provides that every trade mark shall be assignable in law, section 36 dealing with the assignability of industrial designs specifically provides for their partial assignment. It reads as follows:

36. Every design shall be assignable in law, either as to the whole interest or any undivided part thereof,...

(2) Every proprietor of a design may grant and convey an exclusive right to make, use and vend and to grant to others the right to make, use and vend such design within and throughout Canada or any part thereof for the unexpired term of its duration or any part thereof.

This difference in the Act leads to the conclusion that while there could be a partial assignment of an industrial design the Act did not allow the partial assignment of a trade mark. There are other sections in the Act supporting this view. Section 36 of The Trade Mark and Design Act still remains in effect.

Under these circumstances, although the validity of the partial assignment from Jacob Halpern to Woodland Dairy Limited, dated November 15, 1923, is not before the Court, it is difficult to see what authority there was for its registration.

The view that section 44 (2) of The Unfair Competition Act, 1932, does not permit partial or territorial assignments of a trade mark in Canada is in accord with the general scheme of the Act. Section 35 is one of its governing sections. It reads as follows:

35. An application for the registration of a trade mark shall be deemed to assert a claim on the part of the applicant to be registered as owner of the mark throughout Canada.

It is intended as a matter of policy that a registered trade mark shall have currency throughout Canada and that there shall be only one registration in Canada in respect of it. This purpose would be defeated if the owner of the mark were allowed to sell it piecemeal, so that there would be one registered owner of it for British Columbia, another for Alberta and so on. The same idea of one registered trade mark for Canada shows itself in many other sections of the Act such as sections 3, 4, 5, 7, 8 etc. There are two exceptions to this general policy. Section 29 allows the Exchequer Court of Canada, under certain circumstances, to specify whether the registration which it authorizes by declaration should extend to the whole of Canada or be limited to a defined territorial area in Canada, but it has no application in the present case. The other exception is set out in section 21, which provides as follows:

21. Notwithstanding any other provision of this Act, if in any action or proceeding in the Exchequer Court of Canada it appears that prior to the date of the coming into force of this Act two or more persons have

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adopted the same or a similar trade name, or have adopted the same or a similar trade mark or distinguishing guise for use in connection with similar wares, and that neither would be entitled to a judgment forbidding the other from continuing to use his trade name, trade mark or distinguishing guise in any territorial area within Canada, the Court shall, so far as, having regard to the evidence adduced, it is possible to do so, define the territorial area within which each of the persons concerned may so continue and shall give judgment between the parties accordingly, or may, if the parties agree or the circumstances permit, specify the conditions, by way of difference or otherwise, under which each of the parties may continue to use his trade name, trade mark or distinguishing guise throughout Canada.

Section 21 has, I think, no application to a case such as this where there was originally only one registered trade mark and, if the first partial assignment to Woodland Dairy Limited was improperly recorded, it is difficult to see how it could apply at all, but even without so deciding it seems clear to me that the Court could act under it only when the parties interested in the mark were all before the Court. While notice of the appeals herein was served on Woodland Dairy Limited, whose name appears on the register, it was not made a party to these proceedings, and the Court cannot, therefore, make any order as between it and the appellant.

In my opinion, the assignment from Jacob Halpern to the appellant cannot meet the requirements of section 44 (2). The certificate of registration shows that the trade mark was registered "to be applied to the sale of Butter, Eggs, Cheese, Fish and Provisions". To make it assignable there must also be an assignment of the good will of the business carried on by Jacob Halpern in Canada in association with such wares. Counsel for the appellant argued that the registration should be allowed in order to give a common sense operation to the Act; that the alternative would be a vacancy for the word mark "Sunnybrook Brand" in Eastern Canada which could not have been contemplated; and that to allow such a vacancy would be to fly in the face of common sense and the purpose of the Act. I am unable to agree with this view. In the first place it is based upon the assumption that the first partial assignment was a proper one, which, to say the least, is not established. Secondly, as I see it, the assignment under review is not permissible under the plain terms of section 44 (2). It is contrary to the general scheme of the Act

that there should be divisibility of a registered trade mark in Canada, except in the special circumstances mentioned, and section 44 (2) clearly contemplates only one assignee for a registered trade mark in Canada. Jacob Halpern by reason of his own separate dealings with his trade mark and his separate partial assignments of it has so acted as not to be able to comply with the requirements of the section. In my opinion, the Registrar was clearly right in his refusal to record the assignment and the appeal from his decision must be dismissed.

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The second appeal likewise fails. There is, in my opinion, no authority in The Unfair Competition Act, 1932, for the registration of a word mark such as that proposed by the appellant to be used in association with wares only in a particular territorial area in Canada. Certainly the Registrar could make no such registration; nor can I find any authority for the Court to order it. The application to register "Sunnybrook" as a word mark to be used in association with eggs only in that part of Canada lying east of the west end of Lake Superior runs counter to section 35 and the general scheme of the Act as it stands and does not come within any of the exceptions to it. Moreover, the proposed word mark "Sunnybrook" is clearly confusingly similar to the trade mark "Sunnybrook Brand" as registered by Jacob Halpern on March 23, 1915, as No. 84/20619 and is consequently barred from registration by section 26 (f). The Registrar was right, in my opinion, in refusing the appellant's application and the appeal from his decision is dismissed.

In accordance with the usual practice, under which, as I understand it, costs are not awarded either to or against the Registrar on appeals from his decisions, the appeals herein are dismissed without costs.

Judgment accordingly.