

set up in his opposition. Therefore, the case did not come under the objection of *chose jugée*. The principle had been laid down that when there came to be uncertainty whether it was *chose jugée* or not, the Court should lean in favor of the doubt. The Court below had given the respondent the benefit of the two payments, and the Court here did not think that judgment should be disturbed.

DORION, C.J., did not think this was a case of *chose jugée*. The point in issue here never came up before. The question was whether a party who had made certain payments on account would be allowed afterwards, on an opposition, to plead what he should have pleaded at first. The general rule was that this would not be allowed, but there were exceptions. Here the Court had proof by the plaintiff himself that he had received more money than he had given credit for. It would be the height of injustice to say that because a man put a wrong date to a payment he was not to be allowed afterwards to correct the error of date. Courts would not encourage parties in such a course, but where there would be great injustice done, as here, the Court would exercise its discretion, and allow the defendant the benefit of the sums which were undoubtedly paid.

MONK, J., said if the judgment in the Court below had pronounced on the two items in question, the plea of *chose jugée* might have been urged, but these items had not been gone into, and the question of *chose jugée* did not arise.

Judgment confirmed.

*E. Carter, Q.C.*, for Appellant.

*Davidson & Cushing* for Respondent.

JOHN KERRY et al. (plaintiffs in the Court below), Appellants; and LES SŒURS DE L'ASILE DE LA PROVIDENCE (defendants in the Court below), Respondents.

*Trade Mark, Name of a Substance Cannot Constitute—Charitable Corporation's Right to Trade.*

The term "Syrup of Red Spruce Gum," being only the name of a substance, does not properly constitute a trade mark, and the sale of another preparation, differing essentially in external appearance and composition, under the name "Syrup of Spruce Gum," is no violation of such mark.

This was an appeal from the judgment dismissing the suit brought by Messrs. Kerry &

Co. against the Nuns for infringement of their trade mark, by selling an imitation of Gray's Syrup of Spruce Gum. The Judge of the Superior Court held that there had been no violation of plaintiffs' trade mark, and that the words "Syrup of Spruce Gum" could not properly constitute a trade mark, involving, as they do, only the name of a substance, and plaintiffs had no monopoly of such words. The Judge held that the Nuns had been competing improperly in the market with the plaintiffs, but it was for the Crown alone to prosecute corporations for exceeding their powers, and added that the plaintiffs themselves proved no license or privilege possessed by them to trade. The defendants had brought an incidental demand for damages against the plaintiffs for interference with their sale of Spruce Gum. This was also dismissed, on the ground that although the interference was held to be proved, yet the defendants had drawn the trouble upon themselves by trading in excess of their charter rights.

DORION, C. J., said he found that his firm had formerly acted as counsel for the Nuns in connection with this matter, and he could not take part in the judgment; but as the other four judges were unanimous, the judgment would be rendered.

RAMSAY, J., said the action substantially was brought for the violation of a trade mark—that was the principal object. The plaintiff in the court below brought his action against the Nuns for having used a trade mark, and he sought to obtain damages, and also asked for an account from the Nuns, and that they be restrained from further selling goods marked with this mark. The first question the court had to examine was whether there was a trade mark in the possession of the appellants, and then whether that trade mark was violated or not. With regard to the question whether there was a trade mark validly in the possession of the appellants, the question did not come up so much in this court as it did in the court below, because in the court below there was a cross demand by the Nuns against the appellants for having violated their trade mark. The cross demand was rejected, and there was no appeal taken from that dismissal. The ground on which the incidental demand was dismissed