Observations as to the meaning of the expression "property" in a trade mark, and as to what amounts to a colourable imitation of a trade mark. (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 13 W. R. 873.)

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, Esq., Q.C., *Reporter to the Court.*)

MASON v. MORGAN.

Injury by domestic animals—Trespass maintainble—Evidence of Scienter—Right of bailee or owner to recover—General verdict on two counts—Plaintiff not bound to elect.

Held,—affirming the judgment of the County Court, and *Blacklock* v. *Millikan*, 3 C. P. 34,—that trespass is maintainable against the owner of a bull which has broken into the plaintiff's close, and there killed his mare, defendant not being present or aware of the act.

Held, also, that upon a count in case, alleging defendant's knowledge of the bull's vicious propensity, the fact that he had at once admitted that his bull had done the injury, and offered the plaintiff $10, was properly submitted to the jury as evidence of such knowledge, with a caution, however, as to its weight, as in *Thomas* v. *Morgan*, 2 Cr. M. & R. 496.

The mare was in the plaintiff's field at the time of the accident, and had been put there by his father, who said he had given it to the plaintiff. Semble, that the right of property was immaterial, as the defendant, even if only a bailee, could recover its value against a wrong-doer.

The plaintiff having declared in one count for entering his close, and there destroying his mare, and in the other in case for keeping the bull, knowing his vice, &c., and having recoverd a general verdict, *Held*, that he was not bound to elect upon which count to take his verdict. *Hacke* v. *Adamson*, 14 C. P. 201, remarked upon.

[Q. B., H. T., 28 Vic.]

Appeal from the County Court of the United Counties of York and Peel.

The declaration contained two counts.

First count.—For that the said defendant broke and entered a certain close of the plaintiff, called and known as lot 31, in the 3rd concession of the township of Scarboro', in the County of York, and then and there, with a certain bull of the defendant, tore up, damaged, and spoiled the earth and soil of the said close, and also then and there with the said bull cut, gored, wounded, and killed divers, to wit, two horses of the plaintiff, then and there found and being quietly depasturing in the plaintiff's said close, and other wrongs did, to the plaintiff's damage.

Second count.—And whereas also the defendant wrongfully kept a certain bull of a fierce, wicked, and mischievous nature; and the said bull, whilst the defendant so kept the same, attacked, gored, cut and wounded two horses of the plainltiff whereby the said horses became sick, sore, lame, and disordered, and one of the said horses by means thereof died, and the plaintiff was put to great expense and loss in curing and taking care of the other of said horses.

Pleas.—1. To the first count, not guilty; 2. To the first count, that he did what is complained of by the plaintiff's leave; 3. To the second count, not guilty.

At the trial the defendant was allowed to add a plea denying the plaintiff's property. The evidence shewed clearly that the injury complained of was done by the defendants' bull, which had got into the plaintiff's field, as it was alleged, by defects in the defendant's fence. It was proved that the defendant more than once admitted that he had no doubt his bull had committed the injury, and that he had offered the plaintiff $10. He mentioned this offer to a magistrate who was endeavouring to effect a settlement between them, and said he would have done more if it had not been for a summons he had in his hand. The only evidence as to property was given by the plaintiff's father, who said, "I gave the mare to the plaintiff: I left her with three others on the plaintiff's place: I told the plaintiff that when the mare foaled, if she turned out a good mare, I would give it to him. That was all that took place about giving the mare to the plaintiff."

A verdict having been found for the plaintiff, a rule *nisi* was obtained for a new trial, or to arrest the judgment, which, after argument, was discharged. The objections taken, and the points decided, are fully stated in the following judgment given in the court below.

HARRISON, Co. J.—This was an action for the loss of a mare which was in the plaintiff's field, and which was gored by defendant's bull, which broke into the field from the defendant's close, as was alleged, from defect of fences. The declaration contained two counts. 1st, a count in trespass *quœre clausum fregit*, alleging the injury to the mare as damage; and 2nd, a count in case, alleging a *scienter* by defendant. At the trial it was contended that no action was maintainable on the first count, because trespass would not lie, and the case of *Beckwith* v. *Shoredike* (4. Burr. 2092) was relied on; and that the action in the second count failed, because there was no sufficient proof of *scienter* by the defendant. A further issue was raised that there was no proof that the mare was the property of the plaintiff, as affecting the damage on the first count, and the gist of the action on the second.

I overruled the objection that trespass was not maintainable, and so directed the jury; but as there might be said to be some ambiguity in the evidence on the question of property, I allowed a plea denying the plaintiff's property to be put on the record, and left that question, as well as the question of *scienter*, to the jury, who found for the plaintiff on both counts. The plaintiff had refused to elect on which of the two counts he would take the verdict, as it was objected he was bound to do by the defendant.

On the motion in term the same objections were urged, and were those only relied on. On the first point I thought I was bound by the decision in *Blacklock* v. *Millikan*, (3 C. P. 34,) and the cases there cited, to hold that trespass was maintainable in the present case, and that the case in Burrow was not an authority against the position. I ought to mention that I found that the doctrine held by Mr. Chief Justice Macaulay appeared to be recognised in most of the text writers on the subject. I consider, therefore, that the plaintiff had a right of action on the first count.

As regards the second point, I had the case of *Thomas* v. *Morgan* (2 C. M. & R. 496) before me when I charged the jury. I told them that the prompt and direct admission by the defendant that his bull had done the injury, and his offer of recompense, were proper evidence for them to consider whether the defendant knew anything