

MULOCK, C.J.

FEBRUARY 16TH, 1906.

## TRIAL.

## KERSTEIN v. COHEN.

*Trade Mark—Infringement—Fancy Word—Use of Similar Word by Competitor in Business—Probability of Deception—Judgment in Previous Action—Colourable Imitation—Costs.*

Action to restrain defendants from infringing plaintiffs' trade mark.

J. A. Macintosh, for plaintiffs.

J. H. Moss, for defendants.

MULOCK, C.J.:—Plaintiffs are, and for some years have been, engaged in the business of selling, throughout Canada and the United States, optical goods consisting of eye glasses and spectacles, also frames and cases therefor, and in or about the year 1900 they adopted as a trade mark in connection with such business the word "Shur-On," with a hyphen between the letters "r" and "o," registering this trade mark in the United States on 28th July, 1902, and in Canada on 14th April, 1903.

From time to time they put on the market different varieties of eye glasses and spectacles, attaching to each article a tag having printed thereon the word "Shur-On," which was frequently preceded by some other word such as "Ino," "Uno," "Ela," "Trufit," etc., intended to indicate a special variety of eye glass. They also marked the word "Shur-On" on some cases and . . . on metal frames. They also in connection with the word "Shur-On" advertised their goods somewhat extensively in the two countries—at times in their advertisements referring to the eye glasses by such words as "On to stay on," "On to stay," "An eye glass that stays on," etc. In these and other ways they endeavoured to associate in the public mind the word "Shur-On" with their goods.

On 16th April, 1903, plaintiffs began an action against the present defendants, charging them with infringements of their (plaintiffs') trade mark by the use of the word "Shur-On" in connection with defendants' business of manufacturing and selling optical goods, and on 24th March,