

the assignment of this contract, would take it subject to all equities as between you and Mr. Mountain, because under that agreement I still consider and told you that you would in no way commit or obligate yourself as between them to the prejudice of any defence you might have upon the same as between you and Mr. Mountain."

Mr. Hegler was one of His Majesty's counsel learned in the law, and must be taken to have used the word "equities" in its ordinary legal sense. The context itself precluded other meaning. The conclusion that what Mr. Hegler in 1918 thought he said to the defendant in 1913 was to be believed as against what he wrote in 1916, could not be accepted.

The proper inference had not been drawn from this letter, and might now be drawn by this Court: *Russell v. Lefrançois* (1883), 8 Can. S.C.R. 335; *Cameron v. Bickford* (1884), 11 A.R. 52; *Fleuty v. Orr* (1907), 13 O.L.R. 59.

The defendant's covenant having been procured by Mr. Hegler on the representations stated in the letter of the 1st May, the defences open to the defendant as against Mountain, on whose behalf a material misrepresentation had been found to have been made, were open to the defendant as against the plaintiffs. The defendant was entitled to invoke against the plaintiffs all the equities he could have invoked against their assignor, and so was entitled to succeed in this action.

*Appeal allowed with costs.*

SECOND DIVISIONAL COURT.

OCTOBER 3RD, 1919.

D'NELLY v. UNION CONE CO.

*Trade Name—"Real Cake Cones"—"Ideal Cake Cones"—Secondary Meaning—Evidence—Deception—Passing off—Injunction.*

Appeal by the defendants from the judgment of LOGIE, J., at the trial, in favour of the plaintiff, in an action to restrain the defendants from passing off their goods as those of the plaintiff.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

McGregor Young, K.C., and S. Factor, for the appellants.

J. M. Ferguson and J. P. Walsh, for the plaintiff, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the ground upon which the plaintiff sought relief was that the defendants were deceiving the public to the plaintiff's loss, and, at the trial, attention seemed to have been directed entirely to the