

## TRADE MARKS.

Mr. Desnoyers, in the Police Court, Montreal, June 1st, delivered the following judgment in the case of S. Davis vs. R. Heyneman, for alleged infringement of trade mark :

THE QUEEN v. ROBERT HEYNEMAN.—The information alleges that the informant, Samuel Davis, of Montreal, cigar manufacturer, on the 20th August, 1877, did cause to be registered in the trade mark registry office in Ottawa a certain trade mark which he was then using, and long before that had been using, consisting of the words "I like," and that such registration had been made under the provisions of the Trade Mark and Design Act of 1868. That, on or about the 31st December last, 1881, the defendant fraudulently, against the will of the informant, did mark certain cigars and cigar boxes with an essential part of the said trade mark, to wit, with the words "U like," with intent to deceive, and to induce persons to believe that the cigars and cigar boxes so marked "U like" were manufactured by the said informant, and did offer for sale and effectually did sell certain quantities of cigars so marked "U like."

The defendant alleges that the statute of 1868 concerning trade marks has been repealed by the statute of 1879, chap. 22, which enacts in section 4 that, "From and after the 1st of July, 1879, no person shall be entitled to institute any proceeding to prevent the infringement of any trade mark until and unless such trade mark is registered in pursuance of this Act." The prosecutor not having registered in pursuance of the Act of 1879, the defendant claims that he is debarred from taking the present proceeding. But section 38 of the Act of 1879, which repeals formally the statute of 1868, has a provision to the effect that all registrations made under such Act shall be and remain good and valid, and all liabilities, penalties and forfeitures incurred or to be incurred under the same, may be sued for as if the said Act had not been repealed. It is contended by the defendant that said proviso in section 38 does not limit nor restrain the broad dispositions of section four recited, but is simply applicable to liabilities, penalties or forfeitures incurred or to be incurred between the date when the act was passed (15th May, 1879) and the said date 1st July, 1879. And in support of this pretension the defendant quotes a judgment of Mr. Justice Johnson rendered on the 28th February last in a case of *Morse v. Martin*.\* Although

there is some analogy between the present case and the one just referred to, I do not find that the ruling of Mr. Justice Johnson can apply to the present case. I am of opinion that the statute of 1868 is still operative *quoad* the complainant's trade mark, and if I had any doubt as to the question of law, I hold that it would be my duty, as examining magistrate, to refer the case to a higher court to be adjudicated upon. The evidence before me bears out the facts alleged by complainant. But, says the defendant, there is not a word to show an intent on his part to deceive or defraud; and quite a number of authorities are cited to establish that the intent must be proved as well as the material facts. The facts proved are as follows:—The complainant, who is one of the largest cigar manufacturers in the Dominion, and whose reputation is that of a first class cigar manufacturer, has for many years adopted as his trade mark for a certain brand of cigars manufactured by him in Montreal the words "I like." He has registered this as his trade mark, and has succeeded in making a good reputation for his cigars, "I like," which have become popular and in demand. The defendant, who is also a cigar manufacturer in Montreal, has adopted for his cigars the mark or trade mark "U like." There is certainly a great similarity and very little difference in sound and in appearance between these two marks. What was the defendant's intention in adopting for his cigars the mark "U like?" It seems to me that the only answer under the circumstances is: to try and pass them off as the popular cigars known by the name of "I like," the word "like" being the most conspicuous of the two, and the chances being that the generality of smokers, unless their attention was particularly called to it, would overlook the word "U," and would have their attention attracted by the word "like." However, I do not think that this is a question for the magistrate to decide, but rather one for the jury. The defendant also contends that the prosecutor is not himself using a valid trade mark, and consequently his, the prosecutor's pretended trade mark, cannot be infringed. He says that a trade mark cannot consist of mere words. He quotes several authorities in support of his pretension, which are applicable under the English Statute of 1875, but our Statute does not preclude a trader from adopting a mere name or a mere sentence as his trade mark. As to the similarity between "I like" and "U like," I believe it is sufficient to induce the public in error and to take one for the other, unless particular attention and care be taken. One of the witnesses states that another mark, consisting of the words "We like," was seen by him on cigars in Chicago some ten years ago, and the defendant claims that consequently the prosecutor himself infringes the trade mark of another. The evidence on this point is not sufficient to justify me in dismissing the complaint.

\* 5 L. N. 99.