

EXCHEQUER COURT OF CANADA.

Burbidge, J.]

SPILLING v. O'KELLY.

[March 7.]

Trade-mark—Infringement—Prior use—"King" cigars—Application to rectify register—Counterclaim—Title in trade-mark—Defence.

1. A manufacturer or dealer in cigars cannot acquire the right to an exclusive use, and be entitled to registration, of a specific trade-mark, of which the term "King" forms the leading feature, and is used in combination with the representation of some particular king, while other manufacturers or dealers use the same term with the likeness of other kings. *Spilling v. Ryall*, 8 Ex. C.R. 195, explained.

2. An application to rectify the register of trade-marks cannot be made by counterclaim. (Secus now, under General Order of 7th March, 1904; sic.)

3. In an action for the infringement of a trade-mark, the defendant may attack the legal title of the plaintiff's to the exclusive use of the trade-mark they have registered. *Partlo v. Todd*, 17 S.C.R. 196, referred to; *Provident Chemical Works v. Canadian Chemical Manufacturing Co.*, 4 O.L.R. 548, approved.

R. G. Code, and *E. F. Burritt*, for plaintiffs. *W. R. White*, and *A. W. Fraser*, for defendant.

Burbidge, J.]

[March 7.]

GORHAM MANUFACTURING CO. v. P. W. ELLIS & CO.

Trade-mark—Infringement—Sterling silver "hall-mark"—Right to register when goods bearing mark on Canadian market.

1. If by the laws of any country the makers of certain goods are required to put thereon certain prescribed marks to denote the standard or character of such goods, and goods bearing the prescribed marks are exported to Canada and put upon the market here, it is not possible thereafter, and while such goods are to be found in the Canadian market, for anyone to acquire in Canada a right to the exclusive use of such prescribed marks to be applied to the same class of goods, or to the exclusive use of any mark so closely resembling the prescribed marks as to be calculated to deceive or mislead the public. The fact that such marks were not trade-marks, but marks used to comply with statutes of the country of origin would not in that respect in any way alter the case.

Quare. Whether anyone would, in such a case, be precluded from acquiring a right in Canada to the exclusive use of such a trade-mark, where there was no importation into Canada of goods bearing the prescribed foreign marks?

2. The plaintiffs brought an action for the infringement of their registered specific trade-mark to be applied to the goods manufactured by