

fact that The Allen & Wheeler Company, not involved in the suit, had used the same mark prior to either plaintiff or defendant in other territory, *Hanover Star Milling Co. v. Metcalfe*, 240 U.S. 403, 38 Sup. Ct. 357.

The same question has also arisen in England in the case of *Edge & Sons Ltd. v. Gallon & Sons* (1899), 16 R.P.C. 509; (1900), 17 R.P.C. 557. The facts in this case were as follows (17 R.P.C.): "In 1888 E. commenced to call his blue 'Dolly,' and it was ordered, invoiced and advertised thereafter as 'Dolly.' In 1894 a company was formed which took over the business of E. In 1898 the company commenced an action against G. & Son for supplying blue not being the plaintiffs' to persons ordering 'Dolly Blue.' The blue so supplied was blue manufactured by R. and bore R's trade mark, which consisted of a washing tub called in some parts a 'Dolly' tub and in other parts a 'Peggy' tub with a handle of a dolly or peggy stick projecting from it. R. had used this trade mark since 1871, and registered it under the Trade Marks Act in 1876. It was admitted that R's blue was called 'Oval Blue' and was invoiced as 'Oval'; but the defendants' case was that retail customers often asked for it as 'Dolly Blue,' both before 1888 and since, and that there had, in fact, been a concurrent use of the word 'Dolly' to describe E's blue and R's blue. *Held*, at the trial, that the plaintiffs were entitled to an injunction. The defendants appealed to the Court of Appeal, who held that concurrent user of the term 'Dolly' to denote Ripley's blue as well as the plaintiffs' was proved, and the judgment of the Judge at the trial was wrong. The appeal was allowed with costs above and below, and the plaintiffs' costs of the trial, which had been paid by the defendants, were ordered to be repaid to them, but without interest. The plaintiffs then appealed to the House of Lords. *Held*, by the House of Lords, that the concurrent user was proved, and the judgments of the Court of Appeal were right.

Under the Canadian Trade Mark and Design Act, R.S.C. 1906, ch. 71, sec. 11, the applicant is required to be entitled to the exclusive use of the trade mark.

In *Parlo v. Todd* (1888), 17 Can. S.C.R. 196, Ritchie, C.J., said at 199: "And this sec. 8, which is relied on as giving an absolute exclusive use, must be read in connection with the other provisions of the statute and it is quite clear that this exclusive use is only to attach when there is a legal registration."

"It is not the registration that makes the party proprietor of a trade mark; he must be proprietor before he can register," at p. 200. "I think the term 'proprietor of a trade mark' means a person who has appropriated and acquired a right to the exclusive use of the mark," at p. 201 . . . (See *McAndrew v. Bassett* (1864), 4 DeG. J. & S. 380 at 384.)

In the same case in the Appeal Court (1887), 14 A.R. (Ont.) 444 at 451, Hagarty, C.J.O., said: "I think the object of the Act was not to create new rights but to facilitate the vindication of existing rights . . . (cites early statutes). All this legislation is based upon the further protection of existing rights. Next year 24 Vict., ch. 21, was passed, for the first time establishing a register. It declares it expedient to make provision for the better ascertaining and determining the right of manufacturers and others to enjoy the exclusive use of trade marks claimed by them."