

if not all, possessed bicycles, or parts thereof, wheels, etc., as ornamentations thereon. The use of these designs, except where they are copies or imitations, is not interdicted or affected by possession or registration of a trade mark, unless that trade mark is one that covers the identical design. There is no reason why the only word which can appropriately describe such a design cannot be used, provided that it is not applied to the article produced or offered for sale as descriptive of the whole product.

But, with regard to passing off, it was proved by reasonable evidence that, before registration, the respondent company had established the word "Bicycle" as having acquired a significance referable only to its own manufacture of a class, quality, style, and price of card, both in the United States and Canada, and that the word had not, by reason of the circulation of the other cards prior to 1902, lost that significance. It had become identified with these particular cards as the manufacture of the respondent company. See *Provident Chemical Works v. Canada Chemical Manufacturing Co.* (1902), 4 O.L.R. 545, 549.

It was not suggested that any of the respondent company's immediate customers were, or could be, deceived by anything done by the appellant. But it was contended that the appellant was attempting to pass off his cards as those of the respondent company by using in connection with class names, such as "Imperial Club," the term "Bicycle Series" as indicating back designs.

There was no evidence of any passing off having been accomplished. Even retail customers would not be easily taken in. See *National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co.*, [1894] A.C. 275; *Standard Ideal Co. v. Standard Sanitary Manufacturing Co.*, [1911] A.C. 78.

No purchaser (so far as appeared) had been misled into buying the cards which the appellant was selling, instead of the respondent company's; and, but for the single advertisement produced, the respondent company had not made out its right to interfere with the appellant company on this branch of the case. This advertisement was apparently a breach of the undertaking given in 1905, and was sufficient to warrant an injunction against its repetition, though not the award of damages made.

The respondent company should be restricted to an inquiry as to damages, if it insists upon more than nominal damages, and the costs of the inquiry should be reserved.

The judgment below should also be modified so as to limit the declaration in para. 1 and the injunction in paras. 5 and 7 to using the word "Bicycle" on the tuck cases and cartons and to