

MIDDLETON, J.

APRIL 29TH, 1906.

*UNITED STATES PLAYING CARD CO. v. HURST.

Trade Mark—Infringement—Colourable Imitation—Trade Name—Intent to Deceive—"Passing off"—Evidence—Laches and Acquiescence—Abandonment—Injunction—Damages—Profits—Reference—Costs.

Action to restrain the defendant from infringing certain trade marks of the plaintiff company for playing cards.

These trade marks consisted, first, of the word "Bicycle" as applied to playing cards; secondly, of three designs, separately recorded as trade marks. These trade marks were registered by the plaintiff company on the 3rd August, 1906, but the marks had been in use during many previous years.

The action was tried without a jury at Toronto.

D. L. McCarthy, K.C., and Britton Osler, for the plaintiff company.

F. B. Fetherstonhaugh, K.C., and A. C. Heighington, for the defendant.

MIDDLETON, J., set out the facts in a written opinion, and said that the proper inference from all the evidence was that the defendant and Messrs. Goodall & Co., the largest English manufacturers of playing cards, conspired together to defraud the plaintiff company of its trade name and of the profits legitimately its as the result of its advertising and enterprise.

Numerous defences were argued, but none of them had been made out.

Under our law, a trade mark exists independently of registration; and here the plaintiff company was entitled to succeed, not only by virtue of its trade marks, but because a plain case of "passing off" had been made out. No person who had been deceived was called as a witness; but, where the intention to pass off is abundantly proved, and the goods are put up in such an imitative form as to make the passing off easy, it is not by any means essential that an actual case of passing off should be proved.

It was said that the plaintiff company had, by acquiescence and laches, abandoned its trade marks, and that they had become publici juris, not only because of the defendant's user, but because of the manufacture, by two Montreal makers, of cards which might be deemed infringements; but these were not really infringements. Another firm manufactured a card called the "Bicyclette," which was probably intended as an imitation of the plaintiff company's