

## JOHN KERRY, ET AL., V. LES SŒURS DE L'ASILE DE LA PROVIDENCE.

relief accordingly ; but under the circumstances without costs.

Chancellor.] [Sept. 16.]

DYNES V. BALES.

*Cloud on title.*

A person having no title to the lands in question, made a conveyance thereof to another, and took back a mortgage for the alleged price, both of which instruments were duly registered. *Held*, that the fact of registration, notwithstanding the decision in *Hurd v. Billington*, 6 Gr. 145, entitled the owner of the lands to a decree in this Court for the cancellation of such registration as a cloud upon his title.

Chancellor.] Sept. 16.]

SMITH V. ELLIOTT.

*Insolvency—Mortgages.*

Where an insolvent mortgagor obtained his discharge in insolvency, and afterwards procured from the assignee a transfer of the equity of redemption, the Court, in a foreclosure suit, refused to give any personal remedy by *p. fa.*, against the goods of the mortgagor, although it might be that the mortgagee was entitled to obtain from the insolvent a release of his interest.

Full Court.] [Sept. 17.]

MCDONALD V. NOTMAN.

*Insolvency—Express promise to pay.*

Although a debt which has been extinguished by the discharge of the debtor in Insolvency is a sufficient consideration for an express promise to pay the claim, it is not sufficient to raise an implied promise, by a voluntary payment, subsequently to such discharge, of part of the claim.

## CANADA REPORTS.

## QUEBEC.

JOHN KERRY et al. (plaintiffs in the Court below), Appellants ; and LES SŒURS DE L'ASILE DE LA PROVIDENCE (defendants in the Court below), Respondents.

*Trade mark, name of a substance cannot constitute—Charitable Corporation's right to trade.*

The term "Syrup of Red Spruce Gum," being only the name of a substance, does not properly constitute a trade mark, and the sale of another preparation, differing essentially in external appearance and composition, under the name "Syrup of Spruce Gum," is no violation of such mark.

This was an appeal from the judgment dismissing the suit brought by Messrs. Kerry & Co. against the Nuns for infringement of their trade marks by selling an imitation of Gray's Syrup of Spruce Gum. The Judge of the Superior Court held that there had been no violation of plaintiff's trade mark, and that the words,

"Syrup of Spruce Gum," could not properly constitute a trade mark, involving, as they do, only the name of a substance, and plaintiffs had no monopoly of such words. The Judge held that the Nuns had been competing improperly in the market with the plaintiffs, but it was for the Crown alone to prosecute corporations for exceeding their powers, and added that the plaintiffs themselves proved no license or privilege possessed by them to trade. The defendants had brought an incidental demand for damages against the plaintiffs for interference with their sale of Spruce Gum. This was also dismissed, on the ground that although the interference was held to be proved, yet the defendants had drawn the trouble upon themselves by trading in excess of their charter rights.

DORION, C. J., said he found that his firm had formerly acted as counsel for the Nuns in connection with this matter, and he could not take part in the judgment ; but as the other four judges were unanimous, the judgment would be rendered.

RAMSAY, J., said the action substantially was brought for the violation of a trade mark—that was the principal object. The plaintiff in the court below brought his action against the Nuns for having used a trade mark, and he sought to obtain damages, and also asked for an account from the Nuns, and that they be restrained from further selling goods marked with this mark. The first question the court had to examine was whether there was a trade mark in the possession of the appellants, and then whether that trade mark was violated or not. With regard to the question whether there was a trade mark validly in the possession of the appellants, the question did not come up so much in this court as it did in the court below, because in the court below there was a cross demand by the Nuns against the appellants for having violated their trade mark. The cross demand was rejected, and there was no appeal taken from that dismissal. The ground on which the incidental demand was dismissed was, that the Nuns were not a trading corporation, and had no right to have a trade mark. The question now was whether Kerry & Co.'s trade mark was violated by the action of the Nuns in selling a particular kind of spruce gum. What was violation of a trade mark? It was taking the trade mark of another and using it. There was another kind of violation ; you might take something that was similar, and present it in such a shape that it would deceive the public, and thus defeat the object of the trade mark. That was precisely what the appellants pretended the respondents had done in this case. They said : You have taken not exactly our trade mark ; but you have gone and made another