

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

J. H. Moss, K.C., and A. C. Heighington, for the appellant.

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

HODGINS, J.A., read the judgment of the Court. He said that the chief contention arose over the trade mark No. 46/11090, which consisted of the use of the word "Bicycle." By the judgment in appeal, the use of this word was prohibited, and two card-designs (Imperial Club, Bicycle Series, 1 and 8) were declared to be an infringement of the trade mark. As to this particular mark it was contended by the appellant that the word was and is *publici juris*; that it is not a valid trade mark; that, if there was any infringement, it had been discontinued, pursuant to arrangement, in 1905; and that there had not, since then, been any interference with the respondent's rights.

The word "Bicycle" was not printed on the appellant's cards, but on the packages. A special trade mark, in the words of the certificate of registration, was granted as a mark "to be applied to the sale of playing cards." This particular mark was not infringed by the cards sold by the appellant.

Reference to *Parlo v. Todd* (1888), 17 S.C.R. 196.

If the designs on the back of the cards contain a bicycle or parts of it, there is nothing in the respondent's trade mark to prevent the use of the word by the appellant as properly describing that design, if he does not apply that word to the article itself, or to the packages in which it is sold, and on the sale thereof, as designating the class of card itself. Nor does the solitary word "Bicycle" prevent the pictorial representation of that aid to locomotion being used in ornamental design.

Reference to *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15, 27.

The use of an ordinary word such as "Bicycle" as describing merely the design on the back of a card becomes prohibited because it is forbidden if applied to the article itself or to any package containing it.

Reference to sec. 5 of the Trade Mark and Design Act, R.S.C. 1906 ch. 71.

The respondent company's witnesses all agreed that the word "Bicycle" was adopted to indicate a particular class, quality, or style of card of a specific finish and price, but having upon the individual cards numerous and differing designs, most of which,