register the same in Canada until after the Act 42 Vict. c. 22 (A.D. 1879), had no action for infringement of mark against a person who had registered a similar mark in Canada in 1876.

PER CURIAM. This action is brought against the defendants for damages for fraudulently using the plaintiff's trade mark, and also to restrain him from further infringement of the plaintiff's alleged rights in respect of it.

The circumstances are somewhat peculiar. The plaintiff sets out that, being a subject of the United States of America and residing there, he, with his brother, as long ago as 1865 began to make a stove polish, which soon became known and valuable, and having acquired his brother's interest in 1868, he has ever since that time continued the business alone, under the name of Morse Brothers. In order to secure a trade mark in his own country the plaintiff caused the article in question to be put up in a conspicuous manner: that is to say, in small oblong cubical blocks, in wrappers of red paper, on which was printed a picture of an orb rising over a sheet of water, and across the picture, were the printed words "The rising sun stove polish." He then adopted that representation or device as his trade mark, and got it registered in his own country under an Act of Congress of July, 1870. The plaintiff then alleges that from the beginning of his business (*i. e.* from 1865,) he has used this trade mark both in the United States and in Canada, and that from the small packages and low price of the article, and from its being in great demand, people buy it without much examination, and their attention is generally caught by the shape and color of the oblong packets; and then he avers that for over two years past (*i. e.* two years from the date of the action, which is 30th January, 1880,) the defendant, intending to deceive purchasers, and injure the plaintiff, has manufactured and sold a stove polish put up very much in the same way, the difference being merely this, that whereas the plaintiff's trade mark as already described was an orb rising over water and the words "rising sun stove polish," the defendant used a vignette or picture of an orb or sun without any water, and instead of "rising sun," put "sunbeam" stove polish.

Then, the plaintiff says that about the 20th December, 1879, he registered his trade mark in Ottawa; and also, that the defendant (though it is not said when) has registered his, without, however, the picture of the orb; and merely using the words "sunbeam stove polish."

Then follow averments of damage, and the usual conclusions for condemnation to pay for the past, and for restraint in the future.

There was a demurrer to this declaration, and it was afterwards amended in some respects, and I have stated its effect as amended. Besides the demurrer, the defendant pleaded that long before the plaintiff's action he (the defendant) had been making and selling a stove polish in this country, and had registered his trade mark at Ottawa, in Oct., 1876, and that it is different in important particulars from plaintiff's. The amendment was permitted without costs, and there was subsequently a consent to defer the law hearing till the merits came up; and the whole case on law and merits is now before the Court.

The first question would seem to be: have we anything to do with the defendant's rights in his own country in this trade-mark anterior to the 1st of July, 1879? For he tells us that he only registered it in this country in 1879, and we have our own statute (42 Vic., c. 22), which says in sec. 4:—"From and after the 1st of July, 1879, no person shall be entitled to institute any proceeding to prevent the infringement of any trademark until, and unless such trademark is registered in pursuance of this Act." The question then would not be the general one, which might have arisen before the statute of 1879, whether a foreign trade mark was protected in the British dominions; probably it was, and we have the highest authority for saying so,—(see the cases collected and cited at p. 11, and p. 46 in Sebastian's Law of trade marks);—but the question now is, whether having the right before 1879 to prevent the defendant from using his trade mark, and not having exercised his right while it existed, before the passing of the statute, the plaintiff can now, after the statute of 1879, as quoted above, come into court here, and ask protection on any other terms than those contained in the Act. The defendant may have done the plaintiff a wrong during all those years, a wrong which nevertheless was not complained of until it was too late. In the face of this enactment, which, in the most positive terms, says that after the 1st July, 1879, nobody shall insti-