Legal.

The following is the full text of the Judgment given in the suits entered by Archdale Wilson and Co., Hamilton, against The Lyman Brothers and Co., Limited, Toronto, particulars of which appeared in these columns at the time of the trial.

WILSON v. LYMAN BROTHERS.

In the High Court of Justice—Judgment, Rose, J.; S. H. Blake, Q.C., and J. J. Scott for Plaintiff. Thomson, Q.C., and Henderson for Defendants.

I have no doubt the fly paper sent out by the plaintiff became known to the trade as pads, and that an order given for pads to any house that had been dealing with the plaintiff or knew of his goods would be filled by sending to the person giving the order the fly paper manufactured by the plaintiff. I am not able to say upon the evidence that the purchasing public made any distinction between fly paper and fly pads. They may have done so, but the evidence does not satisfy me that they did. I think that the way in which the defendants put up their fly paper, both as to the form, the envelopes, the packing into boxes, and the ornamentation of the boxes and the advertisements as shown at the trial, was calculated to mislead.

I do not think I can, upon the evidence, however, say that it has been shown that the plaintiff has suffered any loss by reason of the action of the defendants. I do not say that he has not.

It may be that the defendants are hardly in a position to deny that what they have done has been a detriment to the plaintiff, as they evidently thought it was a benefit to themselves.

Mr. Justice Kay, in Waterman v. Ayers, 39 C.D., at page 33, said as follows:—"so that here is a most plain attempt to obtain a portion of the plaintiff's custom, and to pass off the goods which the defendant is making, as being goods which really are either made or selected or sold by the plaintiff; and the rule has always been, since I have known anything of the profession, that where a man designedly does a thing of that kind he will not be heard to say that this will not damage the plaintiff, because his designedly taking the trade mark of another man shows that he expects by that to gain an advantage to himself, and, when he does, that advantage is so much damage to the other man."

If it were necessary for the disposition of this case that I should determine whether the plaintiff had been in fact injured, I should again go over the evidence most carefully, but for reasons that will appear, I do not think I am called upon to find that fact, or to say whether the defendants did what they did by design or inadvertence. Certainly the plaintiff thought they were acting designedly and wickedly, and with an endeavor to steal from him the business that he had built up by years of patient industry and careful business enterprise, and I can quite well understand his irritation. If what the defendants did was by inadvertence, it was most unfortunate.

One is loath to believe that a house with the long commercial standing that the defendants' house is said to have (about fifty years), would stoop to means so dishonorable for the purpose of taking away from a rival dealer any portion of his business, and I am glad I have not to determine the question.

The plaintiff's trade mark is described by the plaintiff in his application for registration under the Trade Mark and Design Act of 1871 as follows: "The said specific trade mark consists in the words 'Wilson's Fly Poison Pad,' the same being printed on a poison pad represented in the annexed drawing as circular in form, but it may be cut in other shapes, the essential feature of the trade mark being the words, 'fly poison pad,' prefixed with or without my name, but preferably with it, and I hereby request the said specific trade mark to be registered in accordance with the law."

The defendants described their goods as "The Lyman Bros. & Co. (limited) Lightning Fly Paper Poison." The word "pad" only appears upon the envelopes, as printed at the top, as follows: "Three pads in a package, 5 cents. Six pads in a package, 10 cents."

The defendants were served with the writ without any notice of intention to bring an action, and immediately communicated with the plaintiff through their solicitors, and I have no doubt from reading the correspondence, that the defendants would have made such alterations in the form and the appearance of their envelopes, etc., as would have removed all the plaintiff's objections, were it not that the plaintiff believed that he had the right to prevent the defendants from using the word "pad" in any form upon the package. Indeed, that was the contest at the trial.

The defendant's contention was put in argument somewhat as follows, namely, that unless the court had the right to restrain the defendants from putting up fly paper in the form of pads, there was no right to restrain the defendants from stating on the envelopes that the envelopes contained pads.

The plaintiff's claim must rest, I imagine, upon the contention that by registering the specific trade mark, and by using the word "pad," the fly paper put up by the plaintiff was so described that the trade would understand when an order was given for pads that the plaintiff's pads were desired, and, therefore, the defendants were not at liberty to make use of the word "pad" at all in connection with the sale of the pads put up by them.

I do not think that is so. I have examined some, but not all of the very many cases which were cited upon the argument, and I do not think that I can restrain the defendants from telling the truth in describing the goods which they were offering for sale. If the defendants had used their name before words which could easily have been confused with the words used by the plaintiff and registered as his trade mark, another question might have arisen; but the defendants do not describe their paper as "pads" in giving the name of the goods put up, but only say that in their packages of lightning fly paper poison are either three or six pads, according to the fact.

I think, therefore, the plaintiff fails in his endeavor to restrain the use by the defendants of the word "pad" as used.

If the defendants will make such changes in their envelopes, ornamentation of boxes, and advertisements as will remove the probability of any misleading by them, I think the only order that I shall make will be that each party pay their own costs of the action.

If the parties cannot agree upon the changes to be made, I may be referred to.

If the parties desire for any purpose to apply to me with reference to the order to be taken out, I shall be glad to hear them.

Advertising.

Practical Hints on Advertising.

One of the first questions to be decided is how much to spend for advertising. After that comes, "How to spend it."

The amount must depend, of course, on the size of the business and the percentage of profits. It is wise, I think, to set the figures low. Then in emergencies and extra dull times additional expenditure is possible.

If you are carrying all the sail you possibly can, and the wind dies down a little, you will lose your momentum. If, on the contrary, you have a "balloon-jib" to run up, and a few reefs to let out of the other sails, you can go right ahead.

The same idea applied to the apportionment of the appropriation is a good thing, too.

* * *

I do not believe in the fixed-space idea in advertising a retail business. That is to say, I would make space contracts for so many lines or inches to be used during one year, and not for a certain four, six, or eight-inch space every day.

Ordinarily, of course, the size would be the same from day to day, but varying conditions of trade should be met by variations in the size of the ad.

Every business house, no matter how small, should have in convenient tabulated form the exact amount of business transacted in each day, each week, and each month of the preceding year. Along-