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GOOD HUMOR CORPORATION OF AMERICA ..... } PLAINTIFF;

Feb. 13.
Aug. 28.

AND

GOOD HUMOR FOOD PRODUCTS LIMITED AND HERBERT E. BRADLEY ..... } DEFENDANTS.

Trade-mark—General trade-mark—Associated companies under one management using same trade-mark—Validity of trade-mark—Limitation of trade-mark—Unfair Competition Act—Constitutional law—British North America Act—"Good Humor."

Plaintiff, a company incorporated in 1928 in the State of Ohio, one of the United States of America, deals in candy, food products and ice cream and ice cream confections, under the trade mark "Good Humor" which had been adopted originally by one, Burt, in 1919, and

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registered in Canada as a general trade-mark on February 9, 1924, plaintiff having acquired it together with the good will and business of Burt. Plaintiff had never used in Canada the trade-mark "Good Humor" and such trade-mark had been made known in Canada since 1930 only, and only in connection with ice cream and ice cream confections.

Plaintiff carries on business by means of a number of operating companies, incorporated in various States of the Union, licensing them to manufacture and sell ice cream and ice cream confections, the operations of all companies being identical; the stock of plaintiff and the operating companies is owned wholly by a Delaware company called Good Humor Corporation, and all companies are managed and governed by a committee of five members, the same committee for each company.

Defendant company was incorporated in the Province of Ontario, defendant Bradley being its President. Bradley had developed and marketed a cereal known as "Good Humor Frumenty," having adopted the trade-mark "Good Humor" in September, 1934, which trade-mark was registered in Canada, February 1, 1935, and later assigned to defendant company which had acquired the assets and good will of the business carried on by Bradley.

In this action plaintiff asked, *inter alia*, an injunction restraining defendant company from using the trade-mark "Good Humor" either for food products or as part of its corporate name; a declaration that defendant Bradley's application for registration of the words "Good Humor" as a trade-mark for cereal meals should not be granted.

By counter claim defendants asked for an order expunging plaintiff's trade-mark or in the alternative that it be limited to ice cream and ice cream confections.

Held: That although the operating companies of plaintiff's organization are seperate entities, distinct from the plaintiff company and Good Humor Corporation, the holding company, they all constitute one organization with the plaintiff company under its direction and control, and consequently the several trade-marks registered in plaintiff's name are valid and may properly be held by plaintiff.

2. That plaintiff's Canadian trade-mark should be limited to ice cream and ice cream confections.

3. That defendants' trade-mark in connection with cereal meal is valid.

4. That the Parliament of Canada under par. 2 of s. 91 of the British North America Act has the necessary competence to legislate in connection with trade names and that secs. 3, 7 and 11 of the Unfair Competition Act, 22-23 Geo. V, c. 38, are *intra vires* of the Canadian Parliament.

ACTION by the plaintiff asking for an injunction restraining defendants from infringing plaintiff's trade-mark rights.

The action was tried before the Honourable Mr. Justice Angers, at Ottawa.

O. M. Biggar, K.C. for plaintiff.

G. E. Maybee for defendants.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J., now (August 28, 1936) delivered the following judgment:

The plaintiff is a company incorporated under the laws of the State of Ohio and having its principal office in the City of Brooklyn, in the State of New York.

The defendant Good Humor Food Products Limited is a corporation organized under the laws of the Province of Ontario and has its principal place of business in the City of Toronto. The defendant Herbert E. Bradley, who resides in the City of Toronto, is the president of the defendant company.

The plaintiff, by its action, claims:

an injunction restraining the defendant company, its servants, agents and workmen from continuing to infringe the plaintiff's trade-mark (no. 155/34886) consisting of the words " Good Humor " and from using as a trade-mark for food products the said words or any words likely to cause confusion;

an injunction restraining the said defendant from using the words " Good Humor " as part of its corporate name;

a declaration that the application of the defendant Bradley (serial no. 165,698) for the registration of the words " Good Humor " as a trade-mark for cereal meals should not be granted and an injunction restraining him from prosecuting the same;

damages in the sum of $2,000 or such larger sum as may be awarded;

costs.

Plaintiff, at the opening of the case, presented a motion asking for an order expunging the registration by the defendant Bradley of the trade-mark " Good Humor " in connection with cereal meals, registered on the 1st of February, 1935, under no. N.S. 4233.

The statement of claim alleges *inter alia* that in or about 1919 the plaintiff's predecessor, one Harry B. Burt, adopted the words " Good Humor " as a trade-mark for candy and later extended the use of the said words to other products, including particularly ice cream and ice cream confections, and caused the words " Good Humor " to be registered as

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a general trade-mark on February 9, 1924, as no. 155/34886; that in or about 1928 the plaintiff company was incorporated under the name of "The Midlands Food Products Company" and acquired the goodwill and business of said Burt, including all trade-marks used in connection therewith and particularly the trade-mark "Good Humor"; that the name of the plaintiff company was changed to "Good Humor Corporation of America" later in the same year; that the sale of the plaintiff's products, particularly ice cream and ice cream confections under the trade-mark "Good Humor" increased and extended throughout the United States so that, at least in 1931, the name of the plaintiff company became generally known to the public in connection with the sale of food products and its products under the trade-mark "Good Humor" became familiar to the public; that the name of the plaintiff and its products in association with the said trade-mark were from the year 1931 onwards advertised in publications largely circulated in Canada so that they became known therein; that the defendant Bradley, being aware of the name and reputation of the plaintiff company and of its use of the words "Good Humor" as a trade-mark and being also aware of the plaintiff's registration of its said trade-mark, filed an application (serial no. 165,678) to register the words "Good Humor" as a trade-mark for cereal foods (later amended to refer to cereal meals) and promoted the defendant company with the intention that the said trade-mark registration should be assigned to it and be used by it in connection with the sale of cereals, including particularly a cereal known as "Good Humor Frumenty"; that the defendant company has sold cereals under the said trade-mark; that the effect of the defendant company continuing to carry on business under the present corporate name and selling cereals under the trade-mark "Good Humor" will be to create confusion and mislead the public into thinking that the plaintiff assumes responsibility for the character and quality of the products sold by the defendant company; that the use by the defendant company of its corporate name as a name under which food products are sold and the sale by it of food products under the trade-mark "Good Humor" are contrary to the provisions of sections 3, 7 and 11 of the Unfair Competition Act, 1932, and the

registration by the defendant Bradley of the words " Good Humor " would be contrary to the provisions of section 28 of the said Act.

In its motion to expunge the defendant's trade-mark from the register, plaintiff sets forth that the said trade-mark had, long before its adoption by the predecessor in title of the defendant, been in use by the plaintiff in the United States as a trade-mark for similar wares and was known in Canada in association with such wares by reason of their advertisement in printed publications circulating among potential users thereof in Canada.

The defendants, in their statement of defence, admit the allegations concerning the status of the parties; they further admit the registration by the said Harry B. Burt of the words " Good Humor " as a general trade-mark but deny that the said trade-mark was adopted or used by him in connection with any wares; they deny the other allegations of the statement of claim; and they plead specifically as follows:

the plaintiff has no right of action and this Court has no jurisdiction with respect to alleged violations of the provisions of sections 3, 7 and 11 of the Unfair Competition Act, 1932;

sections 3, 7 and 11 and other provisions of the said Act are *ultra vires* of the Dominion of Canada in so far as they directly or impliedly create or purport to create proprietary rights in trade-marks and trade names not used in Canada and in so far as they create or purport to create or take away the right of any person or corporation to use any trade-mark or trade name or to carry on business in any province of Canada;

the defendant Bradley, in the latter part of 1934, adopted the trade-mark " Good Humor " for a cereal meal developed by him and on or about September 29, 1934, applied it to the sale of a cereal meal and since that date he and his successor in title, Good Humor Food Products Limited, have continuously and extensively used the said trade-mark in connection with the sale of cereal meals throughout Canada;

on or about February 8, 1935, Good Humor Food Products Limited was incorporated by letters patent of the Province of Ontario for the purpose of acquiring the assets and good-

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will of the business of the defendant Bradley, including the trade-mark "Good Humor" and by instrument dated February 8, 1935, the defendant Bradley transferred the said business, goodwill and trade-mark to the said company;

the defendant Bradley registered the said trade-mark "Good Humor" as no. N.S. 4233 under date of February 1, 1935, and by confirmatory assignment dated December 11, 1935, registered the following day as no. 1470, the defendant Bradley assigned the said trade-mark and registration to Good Humor Food Products Limited;

on or about June 25, 1935, the plaintiff filed in the Patent Office a statement dated March 20, 1935, alleging that the trade-mark "Good Humor" was not and had never been used in Canada by it in connection with the sale of any goods and that it had been made known in Canada only in connection with ice cream and ice cream confections since 1930, and further alleging that the words "Good Humor" have been registered in the United States in connection with the following wares: candy, ice cream suckers, ice cream, frozen confections, chocolate and chocolate coatings, non-alcoholic maltless beverages, canned and bottled fruits and vegetables, tomato juice, pickles, soups, potato chips, coffee beans and ground coffee, bakery products, dairy products, nuts, dates, layer figs and dried fruits, tea in bulk, packaged tea and tea in the form of tea balls;

as a result of the filing of the said statement, the certificate of registration of the plaintiff was limited by the Registrar of trade-marks to the above-mentioned wares;

the plaintiff has no right, title or interest in or to the trade-mark "Good Humor" in Canada or, if it has, its interest is limited to ice cream and ice cream confections.

The defendants filed a counter-claim, in which after repeating the allegations of their defence, they say as follows:

the plaintiff's trade-mark is and was at the date the defendant Bradley adopted and applied for registration of the trade-mark "Good Humor" for cereal meals and always has been null and void;

if plaintiff's trade-mark registration was originally valid, which is denied, it has been abandoned and the words "Good Humor" were *publici juris* at the date the defend-

ant Bradley adopted them as a trade-mark and applied for their registration;

if plaintiff's registration is valid, which is denied, it should be limited to ice cream and ice cream confections;

the defendants therefore claim *inter alia:*

an order directing that the plaintiff's trade-mark be expunged; or, in the alternative,

an order that the said trade-mark be limited to ice cream and ice cream confections.

Before dealing with the questions of law it is, I believe, convenient to make a brief review of the facts disclosed by the evidence.

A certificate from the United States Patent Office, a photostatic copy whereof was filed as exhibit 2, shows that a trade-mark consisting of the words "Good Humor" for candy was registered on October 14, 1919, in the name of Harry B. Burt (no. 126,923), pursuant to an application filed on March 8, 1919.

A certificate from the United States Patent Office, a photostatic copy whereof was filed as exhibit 5, establishes that a trade-mark also consisting of the words "Good Humor" for ice cream suckers was registered on October 21, 1924, in the name of Harry B. Burt (no. 190,701), pursuant to an application filed on November 19, 1923.

A certificate of appointment from the Probate Court of the State of Ohio, a photostatic copy whereof was filed as exhibit 3, bearing date the 29th of July, 1926, discloses that Cora W. Burt and The Dollar Savings and Trust Company were, on the 17th of May, 1926, appointed executors of the last will and testament of Harry B. Burt deceased and that letters of authority were issued to them as such.

By an instrument in writing dated the 28th of July, 1926, and recorded in the United States Patent Office on the 18th of August, 1926, a photostatic copy whereof was filed as exhibit 4, Cora W. Burt and The Dollar Savings and Trust Company, as executors of the last will and testament of the late Harry B. Burt, assigned and transferred unto the said Cora W. Burt the entire right, title and interest in the trade-mark registrations nos. 126,923 and 190,701, together with the good-will of the business in connection with which the said trade-marks were used.

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It may be noted incidentally that no copy of the last will and testament of Harry B. Burt was filed and that consequently there is a link missing in the chain of title of the plaintiff company to the trade-marks in question. However, the deed of assignment from Cora W. Burt and The Dollar Savings and Trust Company, in their quality of executors of the will of the late Harry B. Burt, to Cora W. Burt, and the deeds of assignment from the latter to Midland Food Products Company were recorded in the United States Patent Office and the said trade-marks appear to be registered in the name of the plaintiff company, formerly Midland Food Products Company, which, in my opinion, is sufficient for the purposes of the present suit seeing that the title of the plaintiff company to the said trade-marks is not challenged.

The Midland Food Products Company was incorporated under the laws of the State of Ohio for the purpose *inter alia* of buying, selling, producing and manufacturing food products and confections of all kinds, by virtue of Articles of Incorporation dated the 23rd of February, 1928, and filed in the Office of the Secretary of State of the State of Ohio the following day, a photostatic copy whereof was filed as exhibit 1. Annexed to these Articles of Incorporation and forming part of exhibit 1 is a certificate of amendment dated April 21, 1928, filed in the office of the said Secretary of State on April 26, 1928, establishing that the name The Midland Food Products Company is changed to Good Humor Corporation of America.

By two instruments in writing, both dated April 23, 1928, photostatic copies whereof form part respectively of exhibits 2 and 5, Cora W. Burt sold, assigned and transferred unto The Midland Food Products Company her right, title and interest in and to the trade marks nos. 126,923 (for candy) and 190,701 (for ice cream suckers), together with the goodwill of the business therewith connected.

A general trade-mark consisting of the words "Good Humor" was registered in the Patent Office of the Dominion of Canada in the name of Harry B. Burt on February 9, 1924, under no. 34,886 pursuant to an application dated December 1, 1923, as appears from the certificate of the Commissioner of Patents filed as exhibit 6.

Annexed to this certificate are:

a document establishing that an assignment of the trade-mark no. 34,886 by Cora W. Burt and The Dollar Savings and Trust Company, executors of the will of Harry B. Burt, deceased, to Cora W. Burt, dated July 29, 1926, was registered in the Canadian Patent Office on August 11, 1926;

a document establishing that an assignment of the said trade-mark by Cora W. Burt to The Midland Food Products Company, dated April 23, 1928, was registered in the Canadian Patent Office on May 28, 1931.

Also attached to the certificate exhibit 6 is a document relating to the change of name of The Midland Food Products Company to Good Humor Corporation of America, by an amendment filed on April 26, 1928, with the Secretary of State for the State of Ohio and recorded in the Canadian Patent Office on July 14, 1931.

Finally forming part of the certificate exhibit 6 is the following memorandum:

Wares defined in reply to Notice under Section 23 of the Unfair Competition Act, 1932.

Candy, Ice Cream Suckers, Ice Cream, Frozen Confections, Chocolate and Chocolate Coatings, Non-alcoholic Maltless Beverages, Canned and Bottled Fruits and Vegetables, Tomato Juice, Pickles, Soups, Potato Chips, Coffee Beans and Ground Coffee, Bakery Products, Dairy Products, Nuts, Dates, Layer Figs and Dried Fruits, Tea in Bulk, Packaged Tea, and Tea in the form of Tea Balls.

March 21st, 1935.

(Signed) J. T. MITCHELL,
Acting Commissioner of Patents.

Serial No. 165678.

This memorandum appears to have been entered on March 21, 1935.

Other trade-marks issued by the United States Patent Office to the plaintiff company were filed as exhibits 9 to 19; although they have little, if any, materiality in the present case, it seems fair to mention them; they are, in chronological order, the following:

Wares	Date of issue	Date of filing of application	Number
Ice cream and ice cream suckers	April 8, 1930	July 12, 1929	269425
Ice cream and frozen confections	May 23, 1933	June 29, 1932	303459
Chocolate, chocolate coatings, and other chocolate and chocolate coatings for ice cream and other confections	January 30, 1934	Sept. 7, 1932	309740

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Non-alcoholic maltless beverages	October 30, 1934	June 30, 1934	318612
Canned and bottled fruits and vegetables, tomato juice, pickles and soups	November 6, 1934	June 30, 1934	318780
Potato chips	November 6, 1934	June 30, 1934	318781
Coffee beans and ground coffee	November 6, 1934	June 30, 1934	318782
Bakery products—namely, pies, cakes, cookies, doughnuts and rolls	November 27, 1934	June 30, 1934	319423
Dairy products—namely, cheese, butter and eggs	November 27, 1934	June 30, 1934	319424
Nuts, dates, layer figs, and dried and partially dried fruits, such as apricots and prunes	November 27, 1934	June 30, 1934	319425
Tea in bulk, packaged tea, and tea in the form of tea balls	March 5, 1935	Oct. 3, 1934	322310

This completes the list of trade-marks relied upon by the plaintiff.

A copy of the defendants' trade-mark (no. N.S. 4233) was filed as exhibit 20. This trade-mark appears to have been registered on February 1, 1935, in the name of the defendant Bradley pursuant to an application dated January 31, 1935. The date of first use is mentioned in the application as being September 29, 1934. The trade-mark is for cereal meals. An assignment of this trade-mark from Bradley to Good Humor Food Products Limited, dated December 11, 1935, was recorded in the Patent Office the following day.

Before dealing with the validity of the trade-marks, the question of infringement and the right of the defendant Good Humor Food Products Limited to use the words "Good Humor" in its corporate name, I must dispose of two preliminary objections raised by the defendants.

In the first place the defendants contend that the plaintiff has no goodwill in the United States trade-marks exhibits 2, 5 and 9 to 19 inclusive nor in the Canadian trade-mark exhibit 6, inasmuch as it does not manufacture or sell any wares, and that consequently it cannot succeed in its action.

The plaintiff, Good Humor Corporation of America, is one of a group of companies using in their corporate names the words "Good Humor." Its position has been defined by Jerome F. Glasser, its secretary-treasurer, heard as wit-

ness on behalf of plaintiff; I think it is expedient to quote the witness' deposition in this connection:

Q. I understand the Good Humor Corporation of America, the plaintiff company, is associated with, on the one hand, a company called the Good Humor Corporation, and, on the other hand, with a number of companies called "Chicago Good Humor Incorporated," "New York Good Humor Incorporated," "New Jersey Good Humor Incorporated," "Michigan," "Connecticut" and "Massachusetts Good Humor Incorporated"?

A. That is right.

Q. Now, how are those companies managed, or what have you to do with the management of all that group of companies?

A. The whole group of companies is managed by one management committee of which I am a member. There are five members and all the business, except the regular routine business, is managed by a manager of these various corporations. They are really in our line branches only.

Q. Has the Good Humor Corporation of America, the plaintiff company, a special manager?

A. No, sir, it is directed by a committee of five.

Q. What of the Good Humor Corporation not of America?

A. It is managed by a committee of five.

Q. And each of the others have a manager?

A. Yes, that is right.

Q. What is the relation between Good Humor Corporation of America and Good Humor Corporation?

A. The Delaware Corporation owns 100 per cent of the Good Humor Corporation of America.

Q. It has no active commercial functions?

A. No, it has not.

Q. Then what is the relation of the Good Humor Corporation to the other companies, each of which has a territory?

A. The Good Humor Corporation owns 100 per cent of the stock of each of those companies I mentioned.

Q. What do those companies do?

A. They manufacture and sell ice cream confections and ice cream at retail to the consuming public.

Q. What is the relation of Good Humor Corporation of America, the plaintiff company, to those six companies with territorial designations?

A. The Good Humor Corporation of America licenses the other manufacturing and selling corporations in the manufacture of ice cream confections.

Q. Does it furnish these operating companies, I may call them, with anything in the way of supplies?

A. Yes, it furnishes these various companies with the sticks, the wrapper or glassing bag and the chocolate toasted almond used for the covering of the ice cream and cocoanut.

Q. Are these sticks, which you refer to as being supplied to the operating company, distinguished in any way?

A. Yes, they all have the name "Good Humor" printed on them and as far as the glassing wrapper is concerned and the cartons containing the materials they are specifically printed with the name "Good Humor."

(I may note that a card of sticks was filed as exhibit A and a glassing bag as exhibit B.)

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Q. How do the operating companies carry on? What have they in the way of plant and equipment and how do they do business?

A. They have a manufacturing plant and they manufacture the ice cream and they have what they call sales cars, a light refrigerated body truck and tricycles and these are sent out on the streets and highways within the territory of these various companies and they sell direct to the people.

Q. Do the trucks sell ice cream direct to the people?

A. Yes, each sales car or truck has a salesman and he sells direct to the people.

The witness then goes on to say that all the trucks are similar and have a white refrigeration body bearing the words "Good Humor Ice Cream" and "Good Humor Confections"; and he adds that all the salesmen are dressed alike. According to him, there are approximately 400 sales cars in operation; the cars operate within a radius of between 50 and 100 miles of the various plants.

Further in his deposition Glasser is asked what is the relation between the trucks to the hand containers and tricycles and states:

A. They really are a supplemental or additional unit of our sales department.

Q. What are?

A. The containers which are boxes 10 inches wide by 13 inches high, some of them 20 inches wide, and these containers are also handled by our salesmen dressed in the same kind of uniform as the sales car salesmen and these containers are taken to the various territories by the sales car men and left off there and at night they pick them up and draw them back to the plant.

Asked about the selection of the locations, the witness gives the following information:

A. For every 20 salesmen we have a district manager who is supervised by the manager, that is, the manager of the branch controls all locations and assigns them to each man. We have direct supervision of where a man is to sell.

Q. How is the selection of the locations made; what kind of places are they actually placed at?

A. It is pretty hard to generalize but I would say—any good spot where the traffic is heavy or where the population is fairly thick.

Q. But, at all events, on the streets?

A. Yes, or on roads in areas surrounding these centres.

Referring to the tricycles Glasser says:

They operate from a central location. Their territories are not as extensive in distance as are the territories of the cars. They may be operated within a radius of 6 to 10 miles from the plant and they operate like the cars except that they operate closer to the plant.

Q. How many hand container salesmen have you got?

A. Possibly 200.

Q. And how many tricycle salesmen?

A. About 300 or maybe more.

His Lordship: These figures apply to the Plaintiff Company only.

The Witness: To all operating companies under this Managing Committee.

Q. (Mr. Biggar) The Plaintiff company do not operate any tricycles, trucks or hand containers?

A. That is right.

Turning next to the manner in which the plaintiff's goods are presented, Glasser testifies as follows:

Q. How is what is sold put up?

A. It is put up either as ice cream confection on a stick and placed in a glassing bag or cups or other containers in quantities of one-half pint and one pint and 4-ounce sundaes.

Q. Is there any bulk selling done?

A. No, we only sell packaged ice cream which is packaged at the plant.

Q. These sticks that you speak of, with the words "Good Humor" upon them, are they used for ice cream confections?

A. Yes.

Q. And have the glassing bags and cups the words "Good Humor" upon them?

A. The glassing bags, as well as the cups, have the name "Good Humor" upon them.

I have made copious citations from Glasser's deposition for the purpose of showing the nature of the plaintiff's organization and the relation between Good Humor Corporation, Good Humor Corporation of America and the divers operating companies.

It was urged on behalf of defendants that, inasmuch as the plaintiff, in whose name the trade-marks are registered, does not manufacture or sell any wares and consequently does not itself use the trade-marks but licenses the operating companies, which produce and distribute the wares, to use the trade-marks thereon, the trade-marks have become null and void. This contention would, as I think, be well founded if the licence had been given to an independent company or a stranger to use the trade-marks on goods other than the goods of the owner of the marks. Strictly speaking the operating companies are separate entities, distinct from the plaintiff company and Good Humor Corporation, the holding company. These various corporations, however, constitute one organization. All the shares of the plaintiff company and of the operating companies are held by Good Humor Corporation. The various corporations are governed by a committee of five members, the same for each and every one of them. The goods manufactured and distributed by the several

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operating companies are identical and are manufactured and distributed under the control and supervision of the plaintiff.

The trucks used for the delivery of the products of the several operating companies are, as we have seen, similar; the bodies are lined with a sign bearing the words "Good Humor Ice Cream" and "Good Humor Confections." The sticks used with the ice cream confections, the glassing bags, the cups, the other containers have upon them the words "Good Humor." All the salesmen are dressed in a similar uniform. It seems obvious to me that the various operating companies, although organized in different states under distinct charters, form with the plaintiff company a single organization under the latter's direction and control. The operating companies are in fact branches of the plaintiff company, although legally speaking they constitute separate entities. A somewhat similar case occurred in England and the decision of the Commissioner of Patents, though not binding on me as suggested by counsel for defendants, is in point and I must say that I agree with the Commissioner's remarks. The case in question is *In the matter of a Trade-Mark "Radiation"* (1). The observations of the Commissioner touching upon the question in issue appear on pages 42 (*in fine*) and 43 of the report and are thus worded:

> On behalf of the opponents it was argued that there is here no user of the word "Radiation" as a trade-mark by the Applicants, that for the present purpose the Applicants and each of the associated companies are separate entities, the Applicants merely holding the shares in and receiving the dividends earned by the associated companies which have their own individual trade-marks, and that the Applicants have merely licensed the associated companies to use the mark "Radiation" and in so doing have destroyed the mark as a trade-mark as in *Bowden Wire Limited* v. *Bowden Brake Company Limited.* 1914, 31 R.P.C. 385.
>
> I think, in the first place that the present case is distinguished from that dealt with in *Bowden Wire Limited* v. *Bowden Brake Company Limited.* In that case each of the companies was independent of the other in so far as the manufacture and marketing of its goods were concerned. Here the Applicants control not only the general policy of the associated companies but the design and quality of their goods. Further, the mark "Radiation" has been identified by the trade with the whole group of companies which includes and is controlled by the Applicants. This is clear from the declarations filed covering the answers to the questionnaire to which I have already referred. The declarants give their impressions in different terms, but reading their answers as a whole I

(1) (1930) 47 R.P.C., 37.

think they come to this, that in the trade the mark "Radiation" indicates the connection of the articles bearing it with the "Radiation" group of companies as a whole—whether or not the declarant knows the exact relationship between these companies is, I think, for this purpose immaterial. Moreover, there is no evidence that the use of the mark in the way I have already described has ever led to any material confusion or deception.

Now I think that I ought to treat this question as a practical one, just as I must so treat the question of distinctiveness of a trade-mark—See *In re Reddaway's Application.* (1927) 44 R.P.C. 27 at page 36. If the associated companies here concerned, although trading separately, had been branches of a single company or firm, the head office of which controlled the branches in the same way as the Applicants control their associated companies, there is, I think, no doubt that a trade-mark could properly be held by the company or firm as a whole, and I think that, treating the question as a practical one, I ought not to say that the form or constitution of the "Radiation" group of companies is such as to prevent the Applicants from holding a trade-mark which indicates the connection of the whole group of companies with the goods to which it is applied. The mark "Radiation" in this case becomes in effect the house mark of the whole group, in addition to which each associated company (or branch) may properly use its own individual mark.

This disposes of the first of the two preliminary objections raised by the defendants. The other one is that sections 3, 7 and 11 of the Unfair Competition Act, 1932, are *ultra vires* of the Dominion of Canada and that this Court has no jurisdiction to entertain the present action. I must say that, after giving the matter careful thought and study, I cannot agree with this contention.

Section 3 of the Act deals with trade-marks, section 7 with trade names; section 11 applies to acts of unfair competition and, in my opinion, has no relevance to the present case.

The material part of section 3 reads as follows:

No person shall knowingly adopt for use in Canada in connection with any wares any trade-mark or any distinguishing guise which

(*a*) . . . . . .

(*b*) is already in use by any other person in any country of the Union other than Canada as a trade-mark or distinguishing guise for the same or similar wares, and is known in Canada in association with such wares by reason either of the distribution of the wares in Canada or of their advertisement therein in any printed publication circulated in the ordinary course among potential dealers in and/or users of such wares in Canada; or

(*c*) is similar to any trade-mark or distinguishing guise in use, or in use and known as aforesaid.

I think that trade-marks come within the jurisdiction of the Dominion of Canada under the 2nd head of Section 91

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of the British North America Act dealing with "The Regulation of Trade and Commerce."

Reference was made to Article 6bis of the International Convention for the Protection of Industrial Property signed at the Hague on November 6, 1925, to which Canada was a party. This convention was ratified by the Dominion of Canada by an Act deposited in the archives of the Netherlands Government on May 1, 1928.

Article 6bis reads in part as follows:

> The contracting countries undertake to refuse or to cancel, either administratively if their legislation so permits, or at the request of an interested party, the registration of any trade-mark which is a reproduction of or an imitation capable of creating confusion with a mark considered by the competent authority of the country of registration to be well-known in that country as being already the mark of a person within the jurisdiction of another contracting country, and utilized for the same or similar classes of goods.

It was submitted by counsel for plaintiff that subsection (*b*) of section 3 of the Unfair Competition Act carries out article 6bis of the convention aforesaid. I believe it does, but I cannot see that the fact of the Dominion of Canada being a party to the convention in question could vest the Parliament of Canada with jurisdiction in matters of trade-marks or in fact any other matters stipulated in the said convention, if the Parliament of Canada had no such jurisdiction otherwise. The competence of the Parliament of Canada to deal with trade marks must be found, if it exists, in the British North America Act; as already stated, I think that under the 2nd head of Section 91 of the said Act the Canadian Parliament has jurisdiction in matters relating to trade-marks.

Counsel for defendants has also referred to section 7 of the Unfair Competition Act as being unconstitutional and *ultra vires* of the Dominion of Canada; it reads thus:

> No person shall knowingly adopt for use as the name under which he carries on business, or knowingly adopt for use in connection with any business, any trade name which at the time of his adoption thereof is the name, or is similar to the name, in use by any other person as the trade name of a business of the same general character carried on in Canada, or of such a business carried on elsewhere if its name is known in Canada by reason of the distribution therein of wares manufactured or handled by such person under such trade name, or of the advertisement of such wares in Canada in association with such trade name, in any printed publication circulated in the ordinary course among potential dealers in and/or users of similar wares in Canada.

It was argued on behalf of plaintiff that any possible question of lack of jurisdiction of the Parliament of Canada to legislate in connection with trade names disappears by a reference to article 8 of the International Convention for the Protection of Industrial Property; article 8 is in the following terms:

> A trade name shall be protected in all the countries of the Union without necessity of deposit or registration, whether or not it forms part of a trade-mark.

What I said with regard to trade-marks applies equally to trade names: the fact that Canada was a party to the convention in question cannot vest its Parliament with jurisdiction with respect to trade names, if it has no jurisdiction under the British North America Act. I am inclined to believe, however, that the Parliament of Canada, under paragraph 2 of section 91 of the British North America Act, has the necessary competence to legislate in connection with trade names and that section 7 of the Unfair Competition Act is *intra vires* of the said Parliament. Be that as it may, I do not think that the name of the defendant company is so similar to the plaintiff's name as to be objectionable.

The preliminary objections raised by the defendants being disposed of, I shall now consider the question of the validity of the trade-marks involved and the alleged infringement by the defendants of the plaintiff's trade-mark.

The evidence discloses that the several operating companies associated with the plaintiff company have sold ice cream and ice cream suckers in the United States under the name "Good Humor," particularly in the States of New York, New Jersey, Connecticut, Massachusetts, Michigan and Illinois.

The sales for the years 1929 to 1935 amounted, according to Glasser, to the following figures:

1929	$ 161,200
1930	1,002,100
1931	1,721,100
1932	1,441,500
1933	1,405,900
1934	1,583,100
1935	2,078,400

No sales were made in Canada.

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The operating companies, with the authorization of the management committee, advertised their ice cream and ice cream confections in newspapers published in Chicago, New York and Detroit. It may be noted that the name of the plaintiff company does not appear in these advertisements. Some of these newspapers, it was said, circulated in Canada; to what extent is not satisfactorily disclosed.

According to Glasser, advertisements were also made by radio, by folders delivered from house to house, by streamers put on the trucks and by balloons and other such small items given away. The proof in this connection is rather scant.

The plaintiff company spent in radio advertising in the years 1931 to 1935 the following sums:

1931	$18,854 16	
1932	36,282 38	
1933	10,049 74	
1934	65,647 45	
1935	40,000 00	(approximately)

Formal sales were also made in the United States of the plaintiff's other products (non-alcoholic maltless beverages, canned and bottled fruits and vegetables, tomato juice, pickles, soups, potato chips, coffee, bakery products, cheese, butter, eggs, nuts, dates, figs, dried fruits and tea). These products, however, were never put on the market and there is no proof that they were in any way advertised in the United States or in Canada.

As previously indicated, the first trade-mark which Harry B. Burt obtained in Canada was a general trade-mark; it consisted of the words "Good Humor"; this trade-mark was issued on February 9, 1924. In reply to a notice from the Registrar under section 23 of the Act the plaintiff company, assignee of Harry B. Burt, declared that the trade-mark applied to the wares enumerated in the memorandum forming part of exhibit 6 hereinabove reproduced.

The evidence establishes that of the wares defined in the memorandum aforesaid ice cream and ice cream confections alone were sold to the public and that alone they were advertised in papers circulating in Canada. For this reason I believe that the plaintiff's Canadian trade-mark bearing no. 34,886 ought to be limited to ice cream and ice

cream confections. See section 49 of the Patent Act; In re *Ralph's Trade-Mark* (1); *Pink* v. *J. A. Sharwood and Co. Ltd.* (2); *Continental Oil Co.* v. *Commissioner of Patents* (3).

Let us now turn our attention for a moment to the defendant's trade-mark.

Bradley, the president of the defendant company, states that the trade-mark "Good Humor" was suggested to him in September, 1934. He saw his patent attorneys and asked them to have it registered. The latter intimated that the first step to be taken was to make a search; this was done and it was found that, as the witness puts it, "there had been a general coverage of the mark under the terms of the old Act of 1924."

Asked what further steps he had taken, Bradley says:

> Then I started an investigation to find out what products this company produced and sold and we found from all the material we could get from them that it only applied to ice cream in certain sections of that country and no products were sold in Canada, to our knowledge, under the name of "Good Humor," and that the name was not in use in Canada.

The witness then adds that he first heard of the plaintiff and its trade-mark when he got the report on the search above mentioned. He never heard of any advertisements or radio broadcasts by the plaintiff.

After he had obtained the above information concerning the plaintiff and its products, Bradley instructed his patent attorneys to proceed with the registration of the mark. The defendant company thereupon started to deal with the marketing of the product. The first sale was made towards the latter part of September or the early part of October, 1934. The witness says that subsequently he received other orders. He was at that time doing business alone under the firm name of Good Humor Food Products. On February 8, 1935, Good Humor Food Products Limited was incorporated and took over the assets of Good Humor Food Products, including the goodwill and trade-mark "Good Humor." From the date he began using the mark "Good Humor" on his cereal meals and the date of the incorporation of the defendant company Bradley says that he continued to use the mark constantly and that his use was quite extensive. Since its incorporation the defendant

(1) (1884) 25 Ch. Div. 194. (2) (1913) 30 R.P.C. 725.
(3) (1934) Ex. C.R. 244 at 250.

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company has continued to use the trade-mark "Good Humor."

Bradley testifies that the defendant company sells its product to wholesalers, departmental and chain stores and to institutions.

Asked if his company advertised its product, Bradley replies:

> We have advertised in newspapers, periodicals and magazines and at conventions and we have sent out samples in cartons and folders and we have advertised by way of hand bills.

The witness adds that his company advertised by radio three times a week.

I may note that a folder containing specimens of advertising (tear sheets from newspapers, bulletins, leaflets, letters, etc.) was filed as exhibit G. The advertising made by the defendants appears to have been rather extensive; a minimum of $6,000 was spent in this connection up to December, 1935, according to Bradley's statement.

The retail selling price of the defendants' product to the end of 1935 amounted to approximately $25,000. Apart from the sales, the defendant company distributed some 30,000 sample packages of frumenty.

The defendant company's cereal meal "Frumenty" is, in my opinion, in a different class of wares from that of ice cream and ice cream confections. After careful consideration I have come to the conclusion that the trade-mark of the defendants is valid.

There will be judgment dismissing the plaintiff's action and its motion to expunge, with costs against the plaintiff in favour of defendants.

There will also be judgment maintaining the counter-claim of the defendants in part and directing that the trade-mark registered on February 9, 1924, under no. 34,886 be limited to ice cream and ice cream confections.

The defendants will have their costs of the counter-claim against the plaintiff.

Judgment accordingly.