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**Notice of Appeal.**  
**In Chancery of New Jersey.**

107-553

<p>Between A. HOLLANDER &amp; SON, INC., a corporation, Complainant, and PHILIP A. SINGER &amp; BRO., INC., a corporation, Defendant.</p>	}	On Bill, etc.	10
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The defendant, Philip A. Singer & Bro., Inc., a corporation, hereby appeals from the Final Decree made in the above entitled cause on August 20, 1935 by his Honor, Luther A. Campbell, Chancellor of the State of New Jersey, on the advice of the Honorable Alfred A. Stein, one of the Vice Chancellors of the said Court, and from the whole and every part thereof to the Court of Errors and Appeals, the last resort in all causes. 20

Dated: August 26th, 1935.

EDWARD R. McGLYNN,  
Solicitor for and of Counsel  
with Defendant, Philip A.  
Singer & Bro., Inc. 30

I conceive there is good cause for appeal in the above entitled cause.

EDWARD R. McGLYNN,  
Of Counsel with Defendant.

To: Complainant, A. Hollander & Son, Inc., a corporation, and Leber & Ruback, Esqs., solicitors for complainant. 40

**Petition of Appeal.**NEW JERSEY COURT OF ERRORS  
AND APPEALS.

10	Between A. HOLLANDER & SON, INC., a corporation, Complainant-Respondent, and PHILIP A. SINGER & BRO., INC., a corporation, Defendant-Appellant.	}	On Appeal from the Court of Chancery.
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*To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:*

20     The petition of Philip A. Singer & Bro., Inc., a corporation of New Jersey, the appellant in the above entitled cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery on August 20th, 1935 by his Honor, Luther A. Campbell, Chancellor of the State of New Jersey and advised by the Honorable Alfred A. Stein, one of the Vice Chancellors of said Court, in a certain cause in the Court of Chancery, wherein the said A. Hollander & Son, Inc. was complainant and the said Philip  
 30     A. Singer & Bro., Inc., was defendant, in these respects, to wit:

(a) That the said decree adjudges that complainant's trade-mark, consisting of the geometrical design delineated in the bill of complaint is a valid and subsisting trade-mark and is the exclusive property of the complainant;

40     (b) That the said final decree adjudges that the defendant's trade-mark, delineated in the bill

*Petition of Appeal.*

of complaint, infringes upon complainant's said trade-mark and has been unfairly and unlawfully used by the defendant since July 1, 1934.

(c) That the said final decree adjudges that the defendant, its officers, agents, representatives, servants and employees, and all persons acting in aid of or in concert with the defendant, be and they hereby are perpetually restrained and enjoined from stamping, marking or impressing upon fur skins or pelts the said trade-mark, so as aforesaid used by the defendant, or any other trade-mark geometrically similar to complainant's said trade-mark, and from advertising, exhibiting, or otherwise using or employing, directly or indirectly or by any means or for any purpose whatsoever in the business of dressing and/or dyeing and/or marketing and/or selling fur skins or pelts, the trade-mark so as aforesaid used by the defendant, or any other trade-mark geometrically similar to complainant's said trade-mark.

(d) That said final decree adjudges that the defendant make discovery of and concerning all furs, skins and pelts dressed and dyed by it since July 1, 1934, upon which it marked, stamped or impressed the said infringing trade-mark, and of and concerning all gains, profits and avails realized by the defendant from the performance of such dressing and dyeing work, and that the defendant account to and render and pay unto the complainant such part of such profits, gains and avails realized by the defendant from the performance of such work from and after July 1, 1934 as is attributable to its use of said infringing trade-mark, and if such apportionment and allocation of profits cannot be determined then

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*Petition of Appeal.*

the defendant shall render and pay to complainant all of the profits so made by it.

(e) That said final decree adjudges that it be referred to Abe J. David, Esq., one of the Special Masters of this Court, to take and find the account of such gains, profits and avails, and to find and report, if he can determine the fact, what portion of said profits are attributable to the defendant's use of the said infringing trade-mark. The said Special Master is hereby empowered and directed to examine or cause to be examined the books of account of the defendant touching and concerning its business of dressing and/or dyeing muskrat into what is commonly known as "Hudson Seal" for the period commencing July 1, 1934 and ending with the date of this decree, and to examine the defendant's officers, agents, servants and employees concerning the said business, the books of account therefor and all entries either made therein or omitted therefrom, and that said Master do report to this Court with all convenient speed what profits, if any, realized by the defendant are due to the complainant under the directions contained in this decree. All further equity is reserved until the coming in of said Master's report.

(f) That the said final decree adjudges that the defendant pay to the complainant the taxed costs of this suit, in which shall be included the sum of Seven Hundred and Fifty Dollars, hereby allowed as a counsel fee to complainant.

And your petitioner humbly appeals from all of said final decree, upon the grounds that the same is erroneous for that:

1. That the Court of Chancery should have found and decreed that the symbol used by the

*Petition of Appeal.*

complainant in connection with its dressing and dyeing work as set forth in the bill of complaint is not a trade-mark and not the exclusive property of the complainant, in that the said symbol was not used by the complainant in connection with the merchandising or sale of any goods by it, and in that the use made by the complainant of the symbol as set forth in the bill of complaint and proofs is not such as to constitute the said symbol a technical trade-mark. 10

2. That the Court of Chancery should have found and decreed that the symbols used by the defendant in connection with its dressing and dyeing operations, as set forth in the bill of complaint and as illustrated by the specimens submitted in evidence at the hearing did not infringe upon the complainant's trade-mark, if the same be determined to be a trade-mark, and should have found and decreed that the use by the defendant of its trade symbols was proper and rightful, in that the symbols used by the defendant are not similar to the complainant's symbol and not of such character as to confuse, mislead or deceive, or tend to confuse, mislead or deceive the ordinary customers dealing with the complainant and defendant, or such members of the public as might buy merchandise bearing such symbols, and should have determined that the use by the defendant of its said symbols did not constitute unfair competition. 20 30

3. That the Court of Chancery should have determined that the complainant was not entitled to the restraints granted in the said final decree for the reasons hereinabove set forth.

4. That the Court of Chancery should have de- 40

*Petition of Appeal.*

terminated that the complainant was not entitled to an accounting in that:

10 A. The symbol used by the complainant as set forth in the bill of complaint does not constitute a trademark, and accordingly the complainant is not entitled to an accounting for any gains, profits or avails realized by the defendant from the use of the symbols complained of.

B. That if the conduct of the defendant did constitute unfair competition, the complainant is not entitled to recover anything beyond the actual damage suffered by the complainant and there are no findings by the Court of Chancery such as might warrant an accounting as a punitive measure.

20 C. That if the complainant's symbol is a trademark, still the complainant is not entitled to an accounting unless the conduct of the defendant was fraudulent, and the Court of Chancery made no finding of such fraudulent conduct, nor would the evidence justify such finding.

30 D. That the bill of complaint and proofs fail to show any business operations on the part of the defendant which are capable of producing a profit by reason of the use of the said symbols, since they establish that the defendant's earnings result from contracts for dressing and dyeing products of others, the trade symbol being annexed to the product after the completion of the operations so that none of the defendant's customers could conceivably have been confused, misled or deceived into giving their contracts to the defendant by reason of the symbol.

40 E. The complainant was guilty of laches.

*Petition of Appeal.*

5. That if the defendant is liable to account, its liability should be limited to an accounting in connection with the sales, if any, by the defendant of merchandise bearing the said symbol and should not embrace an accounting for profits on contracts for dressing and dyeing, where the symbol was placed upon the merchandise dressed and dyed, after the making of the contracts for the work, and in fact, after the completion of such contracts, except where the use of the trademark could have confused, misled or deceived the defendant's patrons into thinking that they were dealing with the complainant rather than the defendant. 10

6. That the Court of Chancery should have denied the relief prayed for and should have dismissed the bill of complaint for the reason that the complainant was guilty of unclean hands, in that the complainant, as disclosed by the bill of complaint, affixes the trade symbol, which it seeks to protect, upon muskrat fur although the symbol bears the expression "Hudson Seal", by reason of which conduct the complainant has been deceiving the public into believing that the muskrat furs were seal furs. 20

7. That the Court of Chancery should have denied the relief prayed for and should have dismissed the bill of complaint by reason of the fact that the complainant was guilty of laches. 30

8. That the Court of Chancery, if the complainant is entitled to the relief prayed for, allowed an excessive counsel fee to the complainant. 40

*Petition of Appeal.*

9. That the Court of Chancery should have found and decreed that the complainant was not entitled to the relief prayed for by it and that its bill of complaint should have been dismissed.

Your petitioner therefore prays that the said final decree of the said Chancellor may be, in the  
10 particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this honorable Court shall seem meet.

EDWARD R. McGLYNN,  
Solicitor for and of Counsel  
with Defendant-Appellant.

MERRITT LANE,  
Of Counsel.

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**Bill of Complaint.**

Filed 3/13/35.

## IN CHANCERY OF NEW JERSEY.

*To His Honor Luther A. Campbell, Chancellor of  
the State of New Jersey:*

The complainant, A. Hollander & Son, Inc., a corporation, respectfully shows unto your Honor as follows: 10

1. It is a corporation organized and existing under and by virtue of the Laws of the State of Delaware, having been incorporated in that State on or about June 27, 1919. Thereafter during the year 1919 it was duly authorized to transact business within the State of New Jersey and has ever since continued to possess such authority. Since 1919 complainant has maintained its principal place of business, consisting of its principal factories, plants and offices, in this State, at the City of Newark, in the County of Essex. 20

2. Upon the incorporation of complainant the then existent co-partnership of A. Hollander & Son sold, assigned, transferred and conveyed unto complainant the former's entire business, consisting of its factories, plants, machinery, equipment, materials and all its other assets, including the former's right to all trade names, trade-marks and trade designs, and including the good-will of the business of said co-partnership. Said co-partnership had been formed in 1896 and originally consisted of Adolph Hollander, the founder of the business, and his son Harry Hollander. Thereafter Michael Hollander, Albert Hollander and Benjamin W. Hollander, now respectively the President, Vice-President and Treasurer of complainant, were admitted to said partnership and were members thereof at the time of the incorporation of complainant and the aforesaid sale and 40

*Bill of Complaint.*

conveyance to it by said co-partnership. Upon such incorporation and sale the said co-partnership was dissolved.

3. From 1896 to 1919 the said co-partnership was engaged continuously in the business of dressing and dyeing various kinds of furs, skins and pelts. Since 1919 complainant, as the successor of said co-partnership, has continued in such business uninterruptedly to the present time and is today and has for some years past been the largest fur dressing and dyeing concern in the world. Complainant's said business consists of receiving fur skins in a raw state from complainant's customers, who generally are either dealers in raw skins or manufacturers of fur garments. Upon such raw skins complainant bestows highly skilled labor, resulting in a finished fur product ready for conversion into garments or wearing apparel. Complainant has for many years enjoyed a high reputation in the fur world for the excellence of its products, such excellence being achieved by the employment of secret recipes, formulae and methods, the exclusive property of complainant. This excellence of quality has for more than a quarter of a century been recognized universally by dealers, manufacturers, department stores and retailers and also by ultimate users and consumers, so that for many years last past women shopping for fur garments have by such excellence been induced to purchase complainant's products. It has become quite the common practice for women, to whom fur garments are exhibited for the purpose of sale, to ask that the inner lining of the garment be opened so that they might inspect the dyer's trade-mark appearing on the reverse side of the fur skin. For over twenty-five years it has been the practice of com-
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*Bill of Complaint.*

plainant and said predecessor firm to stamp, mark and impress on the reverse side of its customers' skins the appropriate trade-mark of complainant and its predecessor firm. The trade-mark so impressed is the one commonly employed by complainant as appropriate to the type of skin so being marked. This practice of marking and stamping fur skins on their reverse side is not peculiar to complainant but is common and general in the fur industry, each dyer impressing upon the skins dyed by him his own distinctive trade-mark or device. This practice enables not only the ultimate purchaser or user to recognize the product of any particular dyer whose trade-mark is known to such purchaser or user but enables also the dealer and manufacturer to distinguish the skins and products of each dyeing concern from those of all other dyeing concerns. By such means of differentiation both confusion and deception are quite generally avoided.

4. One of the principal products of complainant's factories is the skin commonly called "Hudson Seal". It consists of a muskrat sheared and dyed black so as to resemble Alaskan seal. Prior to 1908 that product was wholly unknown in this country except as it was imported from France. In Paris there then was and ever since has been a concern known as Chapal Freres, which for some years prior to 1908 produced in France such Hudson Seal. In 1908 J. D. Williams, Inc., of Brooklyn, commenced the production of Hudson Seal in Brooklyn, at about which time the said firm of Chapal Freres also commenced to produce it in America. From 1908 until 1913 the Williams Company and Chapal Freres were the only concerns in the United States which produced and marketed such Hudson Seal. In 1913 the com-

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*Bill of Complaint.*

- plainant's predecessor, the firm of A. Hollander & Son, began producing Hudson Seal, in which production it has become the world leader. Prior to complainant entering this field, retailers in this country, in advertising Hudson Seal, advertised it extensively as "Hudson Seal, Chapal Dyed".
- 10 When the firm of A. Hollander & Son entered this field in 1913 it produced what the entire country regarded as an article much superior to Chapal Freres', in that the Hollander pelt was stronger and more pliable, thereby avoiding deterioration resulting from cracks and breaks in the pelt. Thereafter when the woman buyer went to purchase her fur garment and asked for a "Chapal Dyed" seal, the retailer would inform her that there was a better product on the market dyed by
- 20 "Hollander" and would thereupon introduce to her the new Hudson Seal product of A. Hollander & Son. Thusly, in the course of a few years, the said Hollander Hudson Seal product became very generally and favorably known and denoted excellence in quality, and the hereinbelow specified trade-mark or device of A. Hollander & Son on the reverse side of the skin became known to the purchaser and was associated in her mind with the Hollander product.
- 30 5. From 1913 continuously to 1919 the firm of A. Hollander & Son, and, from 1919 continuously to the present time, the complainant caused all the skins or pelts dressed and dyed by it into Hudson Seal to be stamped, marked and impressed on the reverse side thereof with the following

*Bill of Complaint.*

trade-mark or device, such impression being accomplished by various stamping processes:



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6. On October 5, 1932, complainant filed in the United States Patent Office its application for registration of the aforementioned trade-mark, after which date, on the 28th day of February, 1933, the said trade-mark was duly registered by the Commissioner of Patents of the United States of America and there was then duly issued and delivered to complainant a Certificate of Registration of the United States of America, #301404. By virtue of the Act of Congress applying to such registration, such certificate remains in force for the period of twenty years from the date of registration. Complainant has continued to own and hold and now owns and holds such Certificate of Registration and the rights derived therefrom.

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7. From 1913 down to 1919 the firm of A. Hollander & Son advertised extensively its Hudson Seal product, such advertisements appearing in

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*Bill of Complaint.*

trade publications, trade circulars and letters, broadcasting sheets, placards and window exhibits. From 1919 down to the present time complainant has continued the foregoing mode of advertising, adding thereto advertising by means of exhibitions in department stores and at various museums and educational institutions and  
 10 by advertisements inserted in daily newspapers and in magazines read by the general public. In all such advertisements of complainant's Hudson Seal product there appeared prominently displayed complainant's said trade-mark, which trade-mark has been observed by many millions of persons. Since 1913 the said trade-mark has been stamped and impressed on more than 75,-  
 20 000,000 muskrat skins dressed and dyed to Hudson Seal. Complainant verily believes and charges the fact to be that there has obtained in the mind of the buying public since 1913 and down to the present time a general impression and recollection of the complainant's said trade-mark and that in the mind of the buying public such trade-mark has at all times since 1913 been associated with complainant's Hudson Seal product and complainant's factories as its place of origin.

8. Defendant was incorporated in 1921 under  
 30 the Laws of the State of New Jersey and has ever since been engaged in the business of dressing and dyeing fur skins. In 1922 the defendant commenced to dress and dye Hudson Seal and stamp-

*Bill of Complaint.*

ing on the reverse side of the skins the following trade-mark:



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The defendant's activity in the production of Hudson Seal was not long continued and was virtually abandoned in the year 1922. From 1922 until July 1934 the defendant produced no Hudson Seal. From 1922 until September 1, 1928 the defendant had no inclination to dress and dye Hudson Seal. From September 1, 1928 to July 1, 1934, the defendant produced no Hudson Seal, due to the fact that it was under contract with complainant not to dress or dye that kind of skin until December 31, 1933, and was under a final injunction allowed by your Honor on June 10, 1929, restraining it from that day and until July 1, 1934, from dressing and/or dyeing "seal dyed muskrats", otherwise known as "Hudson Seals". Said Final Decree was entered in a certain other suit by this complainant against said defendant and others (Chancery Docket 73, page 65), to which Final Decree complainant begs leave to refer for greater particularity.

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*Bill of Complaint.*

9. Since the month of July, 1934, the defendant company has been producing Hudson Seal and has been advertising extensively its Hudson Seal product. In all its advertising literature and on the reverse side of all the skins processed by it there appears the following trade-mark adopted by the said defendant:

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10. Complainant is informed and verily believes and charges the fact to be that within the last eight months the skins so processed and marked by the defendant have amounted to many thousands in number. On March 7, 1935, the defendant advertised in *Women's Wear Daily*, a trade publication that "in the last eight months more than 10,000 coats of Singer's Hudson Seal have been sold to former users of other brands." Prominently displayed in said advertisement is the defendant's said trade-mark. Complainant charges the fact to be that the skins dressed and dyed by the defendant and stamped as aforesaid with its trade mark have been converted into fur garments, which have been distributed and will

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*Bill of Complaint.*

be distributed widely throughout the entire country.

11. In the early part of July, 1934 and in August, 1934, complainant protested to the defendant against the latter's use of said trade-mark, complainant asserting and insisting that it constituted an infringement of its own trade-mark, above mentioned. Defendant's president assured complainant that defendant would discontinue the use of said trade-mark. That assurance not being kept, complainant caused to be sent to defendant a letter, written by its counsel, whereof the following is a true copy: 10

"September 26, 1934

"Philip A. Singer & Bro., Inc.  
169 Malvern Street,  
Newark, New Jersey. 20

Attention of Mr. Philip A. Singer

My dear Mr. Singer:

I want to recall to your memory the fact that about five or six weeks ago I spoke to you over the telephone with regard to your Hudson Seal trade mark. I told you then that A. Hollander & Son, Inc. claims that this trade mark bears such a close resemblance to the trade mark which they have used for many years for their Hudson seal that it is likely to deceive the purchasing public. Their trade mark antedates yours by many years. After that telephone call you came up to my office with a portfolio of advertisement clippings and we had quite a talk about the matter. I found fault with your trade mark and told you then that my client is insistent upon its position and that unless you would desist from using said trade mark suit would be commenced against you to obtain an injunction against your continued use of it. It is my recollection that you told me that you would think it over and consult counsel and 30 40

*Bill of Complaint.*

let me know what your determination would be. To the date hereof I have not heard from you and I have been instructed by Mr. Michael Hollander that unless you stop using the trade mark, to commence suit against you. May I now ask you for your answer to the position you take.

10 In addition to the foregoing, I have been informed by Mr. Herman A. Fenning that you recently promised him that your company would discontinue the use of this trade mark but that you have not kept your promise. If I will not hear from you by next Monday I will take it that you do not intend to discontinue the use of the trade mark, and we will be driven to resort to the courts for relief.

Very truly yours,

L/H

SAMUEL F. LEBER."

20 Thereafter there were several conferences between the defendant's president and complainant's counsel and one or more conferences between the defendant's counsel and complainant's counsel, all held with a view to prevailing upon the defendant to discontinue the use of said trade-mark. About three months ago defendant's president, Mr. Philip A. Singer, informed complainant's representative that he was considering abandoning the trade-mark objected to and had  
30 under consideration a new trade-mark which could not possibly offend. He undertook to notify complainant's representative what his final position would be on the question. As recently as February 26, 1935, the defendant's said president informed complainant's representative that defendant might voluntarily discontinue the use of said trade-mark and would adopt another in substitution thereof. Such discontinuance has not occurred. Complainant therefore charges the fact to  
40 be that defendant uses and intends to continue

*Bill of Complaint.*

using said trade-mark, notwithstanding complainant's protest and objections.

12. The said trade-mark which defendant uses and intends to use constitutes an infringement upon and against complainant's said trade-mark and is violative of complainant's rights in the premises. The defendant's said trade-mark is so similar to complainant's said trade-mark in size, geometrical design and in general features as to confuse, mislead or deceive or tend to confuse, mislead or deceive the ordinary purchaser having but a general recollection of complainant's trade-mark and not having presented to him at one and the same time that trade-mark and the defendant's simulating trade-mark. In addition to the foregoing, dealers and persons in the trade are being confused and in the future are likely to be confused while engaged in selecting skins of complainant, mistaking for them those produced by the defendant. Complainant further says that the close similarity between the respective trade-marks of complainant and defendant enables and will enable unscrupulous dealers, manufacturers, middlemen and retailers to palm off defendant's Hudson Seal product as that of complainant's.

13. Until the month of February, 1935, whenever complainant used or impressed its said trade-mark, it added thereto and immediately underneath the same the words "Dyed Muskrat". The defendant added underneath its said trade-mark the words "Dyed Muskrat". Since February, 1935, complainant has altered in one respect the language within its said trade-mark, substituting for the word "Seal" the word "Dyed" and placing the word "Seal" immediately before

*Bill of Complaint.*

the words "Dyed Muskrat", so that as altered the said trade-mark is as follows:



In all other respects, geometrically and otherwise, the said trade-mark remains unchanged.

14. In consequence of the defendant's unlawful doings and actings, hereinabove related, and because of the confusion and deception resulting therefrom, complainant has lost and will continue to lose custom which otherwise would naturally and ordinarily flow to it. The extent of such future loss will be incapable of ascertainment, inasmuch as complainant will at no time have the means of establishing the identity or number of persons confused, misled or deceived by the similarity of defendant's trade-mark to that of complainant.

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Complainant, being without adequate remedy at law, therefore prays:

40 1. That the defendant, Philip A. Singer &

*Bill of Complaint.*

Bro. Inc., a corporation, may answer this Bill of Complaint and each statement therein made.

2. That the defendant, Philip A. Singer & Bro. Inc., a corporation, its officers, agents, servants, employees and representatives, and all persons acting in concert with it, be perpetually restrained and enjoined by the decree of this Court from stamping, marking or impressing upon furs, skins or pelts the said trade-mark used by the defendant and hereinabove described, or any other trade-mark geometrically similar to complainant's trade-mark hereinabove described, and from advertising, exhibiting or otherwise using or employing said trade-mark or any other trade-mark geometrically similar to complainant's said trade-mark. 10

3. That defendant make discovery of and concerning all furs, skins and pelts dressed and dyed by it, upon which it marked, stamped or impressed its said trade-mark, and of and concerning all gains, profits and avails realized by it from the performance of such dressing and dyeing work. 20

4. That it be decreed that the defendant account to and render and pay unto complainant all profits, gains and avails realized by it since July 1, 1934, from the dressing and dyeing by it of furs, skins and pelts, upon which it stamped, marked or impressed or caused to be stamped, marked or impressed the defendant's said trade-mark. 30

5. That complainant may have such other and further relief in the premises as may be just and as may be agreeable to equity and good conscience.

6. That your Honor grant unto complainant the State's Writ of Injunction, restraining and enjoining the defendants as hereinabove prayed. 40

*Bill of Complaint.*

7. That a writ of subpoena may issue commanding said defendant to answer this Bill of Complaint and to abide by such decree as this Court may make in the premises.

LEBER & RUBACK,  
Solicitors for and of Counsel  
with Complainant.

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**Affidavit of Herman A. Fenning.**  
IN CHANCERY OF NEW JERSEY.

20	Between A. HOLLANDER & SON, INC., a corporation, Complainant, and PHILIP A. SINGER & BRO., INC., a corporation, Defendant.	}	On Bill for Injunction, etc.
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State of New Jersey }  
County of Essex } ss.:

30 Herman A. Fenning, of full age, being duly sworn according to law on his oath, deposes and says:

40 1. Since complainant's incorporation I have been its Secretary and for many years prior thereto I had charge of the fiscal affairs of the predecessor firm of A. Hollander & Son. For about thirty years I have been very fully acquainted with all the business affairs of said firm and of the complainant and have had general supervision of its advertising policies and activities. I am also acquainted with general business practices in

*Affidavit of Herman A. Fenning.*

the fur industry, in both its wholesale and retail spheres. Complainant was incorporated in the State of Delaware on or about June 27, 1919. Thereafter in 1919 it was authorized to do business in New Jersey. Since that year it has maintained its principal place of business, consisting of its principal factories and offices, at Newark, New Jersey.

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2. Complainant's business was founded in 1889 by Adolph Hollander. In 1896 he formed a firm with his son, Harry Hollander, now deceased. The name of that firm was A. Hollander & Son. Thereafter there were admitted to said firm Michael Hollander, Albert Hollander, and Benjamin W. Hollander, now respectively complainant's President, Vice-President and Treasurer. Harry Hollander died and Adolph Hollander sold out his interest to the three persons last named, who constituted the said firm in 1919 when complainant was incorporated. Upon such incorporation the said firm sold to complainant the former's entire business, consisting not alone of its factories, machinery and equipment, but also all its other assets, including the right to all trade names, trade-marks and trade designs and including the good-will of the firm's business.

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3. From 1896 to 1919 the said co-partnership was engaged continuously in the business of dressing and dyeing various kinds of furs, skins and pelts. Since 1919 complainant, as the successor of said co-partnership, has continued in such business uninterruptedly to the present time and is today and has for some years past been the largest fur dressing and dyeing concern in the world. Complainant's said business consists of receiving fur skins in a raw state from complainant's customers, who generally are either dealers in raw

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*Affidavit of Herman A. Fenning.*

skins or manufacturers of fur garments. Upon such raw skins complainant bestows highly skilled labor, resulting in a finished fur product ready for conversion into garments or wearing apparel. Complainant has for many years enjoyed a high reputation in the fur world for the excellence of its products, such excellence being achieved by

10 the employment of secret recipes, formulae and methods, the exclusive property of complainant. This excellence of quality has for more than a quarter of a century been recognized universally by dealers, manufacturers, department stores and retailers and also by ultimate users and consumers, so that for many years last past women shopping for fur garments have by such excellence been induced to purchase complainant's products. It has become quite the common practice

20 for women, to whom fur garments are exhibited for the purpose of sale, to ask that the inner lining of the garment be opened so that they might inspect the dyer's trade-mark appearing on the reverse side of the fur skin. For over twenty-five years it has been the practice of complainant and said predecessor firm to stamp, mark and impress on the reverse side of its customers' skins the appropriate trade-mark of complainant and its predecessor firm. The trade-mark so im-

30 pressed is the one commonly employed by complainant as appropriate to the type of skin so being marked. This practice of marking and stamping fur skins on their reverse side is not peculiar to complainant but is common and general in the fur industry, each dyer impressing upon the skins dyed by him his own distinctive trade-mark or device. This practice enables not only the ultimate purchaser or user to recognize the product of any particular dyer whose trade-

40 mark is known to such purchaser or user but en-

*Affidavit of Herman A. Fenning.*

ables also the dealer and manufacturer to distinguish the skins and products of each dyeing concern from those of all other dyeing concerns. By such means of differentiation both confusion and deception are quite generally avoided.

4. One of the principal products of complainant's factories is the skin commonly called "Hudson Seal". It consists of a muskrat sheared and dyed black so as to resemble Alaskan seal. Prior to 1908 that product was wholly unknown in this country except as it was imported from France. In Paris there then was and ever since has been a concern known as Chapal Freres, which for some years prior to 1908 produced in France such Hudson Seal. In 1908 J. D. Williams, Inc., of Brooklyn, commenced the production of Hudson Seal in Brooklyn, at about which time the said firm of Chapal Freres also commenced to produce it in America. From 1908 until 1913 the Williams Company and Chapal Freres were the only concerns in the United States which produced and marketed such Hudson Seal. In 1913 the complainant's predecessor, the firm of A. Hollander & Son, began producing Hudson Seal, in which production it has become the world leader. Prior to complainant entering this field, retailers in this country, in advertising Hudson Seal, advertised it extensively as "Hudson Seal, Chapal Dyed". When the firm of A. Hollander & Son entered this field in 1913 it produced what the entire country regarded as an article much superior to Chapal Freres, in that the Hollander pelt was stronger and more pliable, thereby avoiding deterioration resulting from cracks and breaks in the pelt. Thereafter when the woman buyer went to purchase her fur garment and asked for a "Chapal Dyed" seal, the retailer would inform her that

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*Affidavit of Herman A. Fenning.*

there was a better product on the market dyed by "Hollander" and would thereupon introduce to her the new Hudson Seal product of A. Hollander & Son. Thusly, in the course of a few years, the said Hollander Hudson Seal product became very generally and favorably known and denoted excellence in quality, and the hereinbelow  
 10 specified trade-mark or device of A. Hollander & Son on the reverse side of the skin became known to the purchaser and was associated in her mind with the Hollander product.

5. From 1913 continuously to 1919 the firm of A. Hollander & Son, and, from 1919 continuously to the present time, the complainant caused all the skins or pelts dressed and dyed by it into Hudson Seal to be stamped, marked and impress-  
 20 ed on the reverse side thereof with the following trade-mark or device, such impression being accomplished by various stamping processes:



6. On October 5, 1932, complainant filed in the  
 40 United States Patent Office its application for

*Affidavit of Herman A. Fenning.*

registration of the aforementioned trade-mark, after which date, on the 28th day of February, 1933, the said trade-mark was duly registered by the Commissioner of Patents of the United States of America and there was then duly issued and delivered to complainant a Certificate of Registration of the United States of America, #301404. By virtue of the Act of Congress applying to such registration, such certificate remains in force for the period of twenty years from the date of registration. Complainant has continued to own and hold and now owns and holds such Certificate of Registration and the rights derived therefrom. 10

7. From 1913 down to 1919 the firm of A. Hollander & Son advertised extensively its Hudson Seal product, such advertisements appearing in trade publications, trade circulars and letters, broadcasting sheets, placards and window exhibits. From 1919 down to the present time complainant has continued the foregoing mode of advertising, adding thereto advertising by means of exhibitions in department stores and at various museums and educational institutions and by advertisements inserted in daily newspapers and in magazines read by the general public. In all such advertisements of complainant's Hudson Seal product there appeared prominently displayed complainant's said trade-mark, which trade-mark has been observed by many millions of persons. Since 1913 the said trade-mark has been stamped and impressed on more than 75,000,000 muskrat skins dressed and dyed to Hudson Seal. I verily believe that there has obtained in the mind of the buying public since 1913 and down to the present time a general impression and recollection of the complainant's said trade-mark and that in the mind of the buying public such trade-mark has 20 30 40

*Affidavit of Herman A. Fenning.*

at all times since 1913 been associated with complainant's Hudson Seal product and complainant's factories as its place of origin.

8. Defendant was incorporated in 1921 under the Laws of the State of New Jersey and has ever since been engaged in the business of dressing and dyeing fur skins. In 1922 the defendant commenced to dress and dye Hudson Seal and stamping on the reverse side of the skins the following trade-mark:

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The defendant's activity in the production of Hudson Seal was not long continued and I believe was virtually abandoned in the year 1922. From 1922 until July 1934 the defendant produced no Hudson Seal. From 1922 until September 1, 1928, the defendant had no inclination to dress and dye Hudson Seal. From September 1, 1928 to July 1, 1934, the defendant produced no Hudson Seal, due to the fact that it was under contract with complainant not to dress or dye that kind of skin until December 31, 1933, and was under a final injunction allowed by the Chancellor of the State

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*Affidavit of Herman A. Fenning.*

of New Jersey on June 10, 1929, restraining it from that day and until July 1, 1934, from dressing and/or dyeing "seal dyed muskrats", otherwise known as "Hudson Seals". Said Final Decree was entered in a certain other suit by complainant against defendant and others (Chancery Docket 73, page 65).

9. Since the month of July, 1934, the defendant company has been producing Hudson Seal and has been advertising extensively its Hudson Seal product. In all its advertising literature and on the reverse side of all the skins processed by it there appears the following trade-mark adopted by the said defendant: 10



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10. I am informed and verily believe that within the last eight months the skins so processed and marked by the defendant have amounted to many thousands in number. On March 7, 1935, the defendant advertised in Women's Wear Daily, a trade publication, that "in the last eight months more than 10,000 coats of Singer's Hudson Seal have been sold to former users of other brands."

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*Affidavit of Herman A. Fenning.*

Prominently displayed in said advertisement is the defendant's said trade-mark. I am informed and believe that the skins dressed and dyed by the defendant and stamped as aforesaid with its trade-mark have been converted into fur garments, which have been distributed and will be distributed widely throughout the entire country.

- 10 11. On June 18, 1934, there appeared in the Fur Age Weekly (a trade publication) an advertisement inserted by the defendant announcing that beginning July 1st the defendant would accept muskrats for dressing and dyeing Hudson Seal. Prominently displayed in that advertisement was the trade-mark hereinabove set forth in Paragraph 9 of this affidavit. About two weeks thereafter Mr. Philip A. Singer, who is the president of the defendant company and its directing
- 20 head, called upon me with reference to his company's note then held by complainant. After we had discussed that subject I told him that I had seen his trade-mark advertised and that we regarded it as a decided infringement upon our trade-mark. I told him that we wanted no trouble or litigation with him and that we expected him to discontinue using that trade-mark. He expressed regret that he should have given us cause to complain and promised to change his trade-
- 30 mark. He failed to do so and I took occasion the following month to remind him of his promise. He again promised to make the change. When he again failed to keep his promise I took the matter up with Mr. Michael Hollander, complainant's president, who directed me to see our counsel and give instructions for the institution of suit to restrain the defendant's use of its said trade-
- 40 Leber who, I am informed, sent to the defendant

*Affidavit of Herman A. Fenning.*

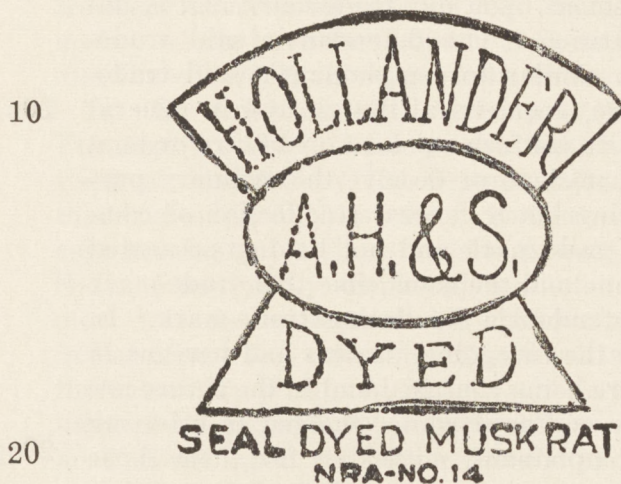
a letter, set forth in Paragraph 11, of the annexed bill.

12. The defendant uses and intends to continue to use the said trade-mark. It constitutes an infringement upon our trade-mark and is unfair competition. The defendant's said trade-mark is so similar to complainant's said trade-mark in size, geometrical design and in general features as to confuse, mislead or deceive or tend to confuse, mislead or deceive the ordinary purchaser having but a general recollection of complainant's trade-mark and not having presented to him at one and the same time that trade-mark and the defendant's simulating trade-mark. In addition to the foregoing, dealers and persons in the trade are being confused and in the future are likely to be confused while engaged in selecting skins of complainant, mistaking for them those produced by the defendant. I further say that the close similarity between the respective trade-marks of complainant and defendant enables and will enable unscrupulous dealers, manufacturers, middlemen and retailers to palm off defendant's Hudson Seal product as that of complainant's.

13. Until the month of February, 1935, whenever complainant used or impressed its said trade-mark, it added thereto and immediately underneath the same the words "Dyed Muskrat". The defendant added underneath its said trade-mark the words "Dyed Muskrat". Since February, 1935, complainant has altered in one respect the language within its said trade-mark, substituting for the word "Seal" the word "Dyed" and plac-

*Affidavit of Herman A. Fenning.*

ing the word "Seal" immediately before the words "Dyed Muskrat", so that as altered the said trade-mark is as follows:



In all other respects, geometrically and otherwise, the said trade-mark remains unchanged. The foregoing change was made upon the suggestion of the Federal Trade Commission.

14. We have during the last 20 or 25 years spent several millions of dollars for advertising and sales promotion. I had occasion last September to compile our advertising expenses alone from 1921 to September 1, 1934, and this exclusive of expenses incurred in sending salesmen and con-

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*Affidavit of Herman A. Fenning.*

tact-men throughout the country. Those advertising expenses, year by year, are as follows:

1921	57,452.36	
1922	91,974.56	
1923	84,878.46	
1924	73,320.27	
1925	81,448.46	
1926	98,335.80	10
1927	55,424.69	
1928	69,878.01	
1929	58,167.47	
1930	103,348.27	
1931	66,703.20	
1932	42,568.55	
1933	53,365.13	
1/1/34 to 8/31/34	66,337.03	
	1,003,202.26	20

To the foregoing should be added our advertising expenses since September 1, 1934, which expenses have been very substantial.

Our chief product which we thusly presented was Hudson Seal and it is a fair estimate that the major part of the expenses above enumerated were incurred with relation to Hudson Seal. All or almost all of our advertising matter relating to Hudson Seal carried our aforementioned trade-mark. 30

Our Hudson Seal exhibit has been displayed 346 times in 116 of the principal cities of the United States, located in 30 states of the Union. These 30 states represent virtually the entire fur buying area of the United States. It is our estimate that by means of these 346 exhibits our Hudson Seal product and our said trade-mark were 40

*Affidavit of Herman A. Fenning.*

directly and forcefully presented to many millions of consumers throughout the United States.

10 15. In consequence of the defendant's unlawful doings and actings, hereinabove related, and because of the confusion and deception resulting therefrom, complainant has lost and will continue to lose custom which otherwise would naturally  
 10 and ordinarily flow to it. The extent of such future loss will be incapable of ascertainment, inas-  
 20 much as complainant will at no time have the means of establishing the identity or number of persons confused, misled or deceived by the simi-  
 20 larity of defendant's trade-mark to that of complainant.

16. After the skins are processed by us they are stretched. They also otherwise undergo much  
 20 handling. One of the results of this is that very often the lettering within the stamped trade-mark becomes blurred and obscured, there remaining  
 20 in outstanding relief the geometrical outline of the trade-mark.

HERMAN A. FENNING.

Sworn to and subscribed before me  
 this 12th day of March, 1935.

Joseph Schoenholz,  
 Attorney at Law  
 of N. J.

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**Affidavit of Meyer E. Ruback.**  
IN CHANCERY OF NEW JERSEY.

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Between

A. HOLLANDER & SON, INC., a  
corporation,

Complainant,

and

PHILIP A. SINGER & BRO., INC.,  
a corporation,

Defendant.

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On Bill for  
Injunction,  
etc.

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State of New Jersey }  
County of Essex } ss.:

Meyer E. Ruback, of full age, being duly sworn according to law on his oath, deposes and says:

I am a member of the firm of Leber & Ruback, solicitors for the complainant in the above entitled cause. About three months ago I had occasion to see Mr. Philip A. Singer, defendant's President, about some matters not concerning the subject of the annexed bill. My relations with Mr. Philip A. Singer have for the last several years been very friendly and cordial. On the occasion last referred to, I told Mr. Singer that my firm was under instructions to file a bill against his company to restrain the use of its Hudson Seal trade-mark and that I desired to avoid litigation between the two companies. He said that he was not afraid of the litigation because he could prove that he used the same trade-mark when he first produced Hudson Seal in the early Twenties, and that complainant made no objection thereto at that time. He said, however, that he had under consideration a new trade-mark which could not possibly be objectionable and that if he adopted the new trade-mark he would aban-

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*Affidavit of Meyer E. Ruback.*

don the old one. I asked him to let me know. He promised to do so. I saw Mr. Singer on several occasions thereafter, asked him each time about the new trade-mark that he had said he was considering and each time he told me that he had the matter under advisement.

10 On February 26, 1935, I spoke to Mr. Singer over the telephone and told him I could no longer wait for an answer from him, that my information was that he was stamping his skins with the same trade-mark and that our client was insisting that action be taken. He told me that he had already made a change in the trade-mark painted on his trucks but that I need wait no longer on him for his answer as to whether or not he would discontinue stamping skins with the trade-mark. Later that day I received a telephone call from a Mr. 20 Weinstein, an attorney associated with Mr. Edward R. McGlynn. Mr. McGlynn is defendant's counsel. Mr. Weinstein told me that he had just been informed by Mr. Philip Singer that I was about to file a bill, and that he knew nothing about the matter. He requested that I take no action until Mr. McGlynn's return from his vacation in the south. I gave such assurance. Mr. McGlynn has been back to his office for more than a week. Mr. Fenning this morning exhibited to me the defendant's advertisement in Women's Wear Daily 30 of March 7, 1935, and directed that we file the bill at once, without waiting further upon Mr. Singer's pleasure.

MEYER E. RUBACK.

Sworn and subscribed to before me  
this 12th day of March, 1935.

Joseph Schoenholz,  
Attorney at Law  
of N. J.

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**Affidavit of Sadie Hausman.**

IN CHANCERY OF NEW JERSEY.

Between A. HOLLANDER & SON, INC., a corporation, Complainant, and PHILIP A. SINGER & BRO., INC., a corporation, Defendant.	}	On Bill for Injunction, etc.	10
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State of New Jersey }  
 County of Essex     } ss.:

Sadie Hausman, of full age, being duly sworn according to law on her oath, deposes and says:

I am employed by the firm of Leber & Ruback, solicitors for the complainant in the above entitled cause and my duties are generally those of secretary to Mr. Samuel F. Leber. On September 26, 1934, I typed the letter set forth in Paragraph 11 of the annexed bill. After it was signed by Mr. Leber I deposited the same in the mails, addressed to the Singer Company at 169 Malvern Street, Newark, New Jersey. 20

Mr. Leber is at present in Florida and is not expected back until about the 18th of March. 30

SADIE HAUSMAN.

Sworn and subscribed to before me  
 this 12th day of March, 1935.

Joseph Schoenholz,  
 Attorney at Law  
 of New Jersey.

**Order to Show Cause.**

Filed March 13, 1935.

## IN CHANCERY OF NEW JERSEY.

10	Between A. HOLLANDER & SON, INC., a corporation, Complainant, and PHILIP A. SINGER & BRO., INC., a corporation, Defendant.	}	On Bill for Injunction, etc.
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20 This matter being opened to the Court by Meyer E. Ruback, Esq., of Leber & Ruback, solicitors for and of counsel with complainant, and upon reading and filing complainant's Bill and the affidavits thereunto annexed:

30 It is, on this 13th day of March, 1935, ORDERED that the defendant show cause before the Chancellor, at Chancery Chambers, No. 1060 Broad Street, Newark, N. J., on Tuesday, the 19th day of March, 1935, at 10 o'clock in the forenoon, or as soon thereafter as the matter can be heard, why complainant's prayer for relief should not be granted and why the defendant should not, by Order of Preliminary Injunction, be restrained and enjoined, pending this suit, from doing and committing the acts complained of in said Bill of Complaint, and why the complainant should not be awarded, pendente lite, the injunctive relief prayed for in said Bill; and

40 It is further ORDERED that a copy of the within Order and said Bill of Complaint and the affidavits thereto annexed (which complainant's solici-

*Order to Show Cause.*

tors may certify to be a true copy) be served upon the defendant company within one day from the date hereof. Service may be made personally upon the President of said company or its registered statutory agent or may be sent by registered mail addressed to the registered office of the defendant company; and

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It is further ORDERED that such answering affidavits as the defendant intends to rely upon shall be served upon complainant's solicitors at least two days before the return day of this Order and that such additional and/or reply affidavits as complainant intends to rely upon shall be served upon the defendant at least one day before such return day.

LUTHER A. CAMPBELL,

C. 20

Respectfully advised,

ALFRED A. STEIN,

V. C.

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**Stipulation of Facts and Submitting Cause for  
Final Determination.**

107/553.

IN CHANCERY OF NEW JERSEY.

	Between A. HOLLANDER & SON, INC., a corporation, Complainant, and PHILIP A. SINGER & BRO., INC., a corporation, Defendant.	} On Bill for } Injunction, } etc.
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Complainant having in and by its Bill of Com-  
 plaint herein charged that defendant's trade-  
 mark described in said Bill infringes complain-  
 ant's trade-mark described in said Bill and that  
 the defendant's use of its trade-mark constitutes  
 unfair competition; and the parties being of opin-  
 ion that the question of infringement and unfair  
 competition is in the instant case answerable most  
 satisfactorily by judicial inspection and compar-  
 ison of complainant's and defendant's respective  
 trade-marks, and that there is no need for the  
 submission of oral proofs but that a final deter-  
 mination can be made in the cause upon the with-  
 in stipulation:

It is, therefore, on this 15th day of March, 1935,  
 STIPULATED by and between said parties, acting  
 by their respective solicitors, as follows:

1. The issuance of process in this cause is  
 hereby waived and the defendant hereby enters  
 its appearance.

*Stipulation of Facts and Submitting Cause for  
Final Determination.*

2. The defendant hereby admits all the allegations of fact contained in the Bill of Complaint but does not admit any conclusions of law nor the allegation that defendant's trade-mark infringes upon complainant's trade-mark, nor the allegation that complainant is entitled to the relief prayed for. The matters so not admitted are submitted to the Court's determination. 10

3. On the return of the Order to Show Cause the parties may submit skins and advertising literature bearing the several trade-marks set up in the Bill of Complaint. Said skins and advertising literature shall constitute evidence in the cause. Upon the Court's comparison of the respective trade-marks and upon the within stipulation the Court shall finally determine complainant's right to relief and shall enter its Final Decree accordingly. A final hearing in any other form is hereby distinctly waived by both parties. 20

4. Nothing herein contained shall preclude either party from any right to appeal from any Final Decree so entered.

LEBER & RUBACK,  
Solicitors for Complainant.

EDWARD R. McGLYNN, 30  
Solicitor for Defendant.

**Memorandum Opinion.**

COURT OF CHANCERY OF NEW JERSEY.

Chambers of Elizabeth, N. J.  
 Alfred A. Stein  
 Vice Chancellor April 17, 1935.

Leber & Ruback, Esqs.,  
 60 Park Place, Newark, N. J.

10 Edward R. McGlynn, Esq.,  
 17 Academy Street, Newark, N. J.

A. Hollander & Son, Inc., Compl't., and  
 Philip A. Singer & Bro. Inc., Def't.

20 This matter is presented on complainant's motion for entry of a final decree granting the relief prayed for in the bill of complaint. The prayer is for injunction against the defendant corporation enjoining it from stamping, marking or impressing upon furs, skins or pelts the trademark used by the defendant or any other trademark geometrically similar to complainant's trade-mark, and from advertising, exhibiting or otherwise using or employing said trade-mark or any other trade-mark geometrically similar to complainant's trade-mark.

30 The cause by stipulation on the part of counsel in open court was submitted for final hearing and decision, and it was stipulated that the entire bill of complaint, excepting the portions thereof alleging infringement and the conclusions of law is admitted as true by the parties.

I have read and considered the briefs of both parties and the cases cited and have come to the conclusion that the injunction should go. I have not prepared or filed formal opinion and will not do so except in the event of an appeal from the decree.

40 On the settlement of the decree the matter of counsel fee, if any, will be passed upon.

STEIN, *V. C.*

**Final Decree.**

IN CHANCERY OF NEW JERSEY.

107/553.

Between A. HOLLANDER & SON, INC., a corporation, Complainant, and PHILIP A. SINGER & BRO., INC., a corporation, Defendant.	}	On Bill for Injunction and Relief.	10
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This matter coming on to be heard in the presence of Leber & Ruback, Esqs., solicitors for and of counsel with the complainant, and Edward R. McGlynn, Esq., solicitor for and of counsel with the defendant, and the cause being submitted by the parties for final adjudication and decree upon a written stipulation filed in the cause wherein the defendant admitted all the allegations of fact contained in the Bill of Complaint, but not admitting any conclusions of law nor the allegation that the defendant's trade-mark infringes upon complainant's trade-mark, nor admitting the allegation that complainant is entitled to the relief prayed; and said parties having, under appropriate provision contained in said stipulation, submitted at the hearing specimens of skins or fur pelts stamped or impressed with the trade-marks of said parties, respectively; and the Court having examined the said Bill of Complaint and the exhibits consisting of stamped skins offered by said parties and received in evidence, and having heard and considered the oral arguments of counsel and written briefs filed by them in support of

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*Final Decree.*

and in opposition to the relief prayed by complainant, and being of opinion that complainant is entitled to such relief:

It is, therefore, on this 20th day of August, 1935, by his Honor Luther A. Campbell, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED as follows:

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1. That complainant's trade-mark, consisting of the geometrical design delineated in the Bill of Complaint, is a valid and subsisting trade-mark and is the exclusive property of the complainant.

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2. That the defendant's trade-mark, delineated in the Bill of Complaint, infringes upon complainant's said trade-mark and has been unfairly and unlawfully used by the defendant since July 1, 1934.

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3. That the defendant, its officers, agents, representatives, servants and employees, and all persons acting in aid of or in concert with the defendant, be and they hereby are perpetually restrained and enjoined from stamping, marking or impressing upon fur skins or pelts the said trade-mark, so as aforesaid used by the defendant, or any other trade-mark geometrically similar to complainant's said trade-mark, and from advertising, exhibiting, or otherwise using or employing, directly or indirectly or by any means or for any purpose whatsoever in the business of dressing and/or dyeing and/or marketing and/or selling fur skins or pelts, the trade-mark so as aforesaid used by the defendant, or any other trade-mark geometrically similar to complainant's said trade-mark.

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*Final Decree.*

4. That the defendant make discovery of and concerning all furs, skins and pelts dressed and dyed by it since July 1, 1934, upon which it marked, stamped or impressed the said infringing trade-mark, and of and concerning all gains, profits and avails realized by the defendant from the performance of such dressing and dyeing work, and that the defendant account to and render and pay unto the complainant such part of such profits, gains and avails realized by the defendant from the performance of such work from and after July 1, 1934, as is attributable to its use of said infringing trade-mark, and if such apportionment and allocation of profits cannot be determined then the defendant shall render and pay to complainant all of the profits so made by it. 10

5. That it be referred to Abe J. David, Esq., one of the Special Masters of this Court, to take and find the account of such gains, profits and avails, and to find and report, if he can determine the fact, what portion of said profits are attributable to the defendant's use of the said infringing trade-mark. The said Special Master is hereby empowered and directed to examine or cause to be examined the books of account of the defendant touching and concerning its business of dressing and/or dyeing muskrat into what is commonly known as Hudson Seal for the period commencing July 1, 1934 and ending with the date of this decree, and to examine the defendant's officers, agents, servants and employees concerning the said business, the books of account therefor and all entries either made therein or omitted therefrom, and that said Master do report to this Court with all convenient speed what profits, if any, realized by the defendant are due to the complain- 20  
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*Final Decree.*

ant under the directions contained in this decree. All further equity is reserved until the coming in of said Master's Report.

10       6. That the defendant pay to the complainant the taxed costs of this suit, in which shall be included the sum of Seven Hundred and Fifty dollars, hereby allowed as a counsel fee to complainant, and that complainant have and hereby is awarded execution for such costs and counsel fee.

LUTHER A. CAMPBELL,  
C.

Respectfully advised,  
ALFRED A. STEIN,  
V. C.

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**Opinion of Vice Chancellor.**  
IN CHANCERY OF NEW JERSEY.

Between A. HOLLANDER & SON, INC., a corporation, Complainant, and PHILIP A. SINGER & BRO., INC., a corporation, Defendant.	}	On Bill for Injunction.  Docket 107, page 553.	10
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(Decided September 23, 1935)

APPEARANCES:

MESSRS. LEBER AND RUBACK, Solicitors for and of Counsel with Complainant.	20
MR. EDWARD R. MCGLYNN, Solicitor for Defendant.	
MR. MERRITT LANE, of Counsel with de- fendant.	

1. The test in infringement of a trade-mark is whether the alleged infringing trade-mark, taken as a whole, so far resembles the other mark as to be likely to be mistaken for it by the casual or unwary purchaser. 30

2. The resemblance need not be so great that one would be deceived who should see the trade-marks or labels side by side. If an ordinary purchaser, looking at the article offered to him, would naturally be led, from the mark or label attached to it, to suppose it to be the product of a rival manufacturer, and would purchase it in that belief, the court will enjoin the use of such mark as fraudulent.

3. The law is well settled that if the 40

*Opinion of Vice Chancellor.*

manufacturer puts it in the power of the retailer to misrepresent, he is answerable for the probable consequences.

10 4. Fraudulent intent need not be shown where the necessary and probable tendency of the defendant's conduct is to deceive the public and pass off his goods or business as and for that of the complainant. Unfair competition is fraudulent conduct.

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STEIN, V. C.

20 This is a suit to restrain the continued infringement of complainant's trade-mark, registered in the United States Patent Office, and to restrain the unfair competition that inheres in the defendant's use of a similar trade-mark to stamp its own product. In addition to the injunctive relief sought, complainant in its bill prayed for discovery concerning the products upon which the defendant stamped or impressed the allegedly infringing trade-mark and concerning the profits made by the defendant from those products, and prayed further that the defendant be decreed to account and pay unto complainant the profits realized by the latter from the dressing and dyeing of those fur skins and pelts upon which the defendant stamped or impressed the infringing  
30 trade-mark.

There are no controverted facts in this case, save the ultimate fact of infringement. All the facts alleged by complainant in support of the ultimate fact of infringement were admitted by the defendant's stipulation filed in the cause. That stipulation provides that:

40 "The defendant hereby admits all the allegations of fact contained in the Bill of Complaint but does not admit any conclu-

*Opinion of Vice Chancellor.*

sions of law nor the allegation that defendant's trade-mark infringes upon complainant's trade-mark nor the allegation that complainant is entitled to the relief prayed for. The matters so not admitted are submitted to the Court's determination."

The stipulation further provided that on the return of the order to show cause, allowed on the filing of the bill, both parties might submit skins and advertising literature bearing the several trade-marks set up in the bill of complaint, and that such skins and advertising literature should constitute evidence in the cause, and that: 10

"Upon the Court's comparison of the respective trade-marks and upon the within stipulation the Court shall finally determine complainant's right to relief and shall enter its Final Decree accordingly. A final hearing in any other form is hereby distinctly waived by both parties." 20

The facts appearing in the bill, admitted by the defendant's stipulation, establish that complainant's business has been conducted continuously since 1896; until 1919 by the co-partnership of A. Hollander & Son and since 1919 by complainant company as the successor in interest to the partnership business. That business consists of receiving from customers furs and skins in a raw state and by means of highly skilled labor and the application of secret formulae and processes converting those skins into finished fur products ready to be made into fur garments. That business is commonly called fur dressing and dyeing. The bill alleges that for more than a quarter of a century the excellence in quality of complainant's products has been universally recognized 30 40

*Opinion of Vice Chancellor.*

not alone by dealers, manufacturers and retailers but also by the ultimate consumer. The bill also establishes that it is a common thing for women negotiating for the purchase of a fur garment to ask that the inner lining be opened so that inspection might be had of the dyer's trade-mark appearing on the reverse side of the fur skin. For  
 10 over a quarter of a century complainant and its predecessor firm have stamped and impressed their trade-marks on the skins dressed and dyed by them. This practice is not peculiar to complainant but obtains generally in the fur industry, each dyer stamping his own distinctive trade-mark on the skins dyed by him. Such stamping of the trade-mark on the skin itself enables the retail purchaser to recognize the product of any  
 20 particular dyer whose trade-mark is known to him, and also enables the dealer and the manufacturer to distinguish the products of each dyeing concern. Because of such stamping of trade-marks on the skins themselves both confusion and deception are avoided.

One of the principal products put out by complainant is a muskrat, sheared and dyed black so as to resemble Alaskan seal. Complainant and its predecessor firm have been producing that item  
 30 continuously since 1913. There are other concerns that have been producing the same kind of article and it has borne for a great many years (at least since 1908) the trade name "Hudson Seal". Complainant's Hudson Seal product is highly regarded and has been greatly in demand by consumers, so much so that complainant's trade-mark impressed on the backs of skins has become known to the retail purchaser and is associated in the latter's mind with the complainant's product. That trade-mark, which complainant's  
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ant seeks to protect by this litigation, has been stamped by complainant and its predecessor upon all their Hudson Seals dressed and dyed from 1913 to the present time. That trademark, though so used continuously from 1913 to the present time, was not registered until recently. On February 28, 1933 it was duly registered with the Commissioner of Patents of the United States and a certificate of registration issued to complainant, which certificate is by law effective for twenty years from the date of registration.

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It is established by complainant's bill and defendant's admission that since 1913 complainant's trade-mark has been extensively advertised not only in the trade by trade advertising but also to the consumer public by advertisements in daily newspapers and magazines and by exhibitions in department stores, museums and educational institutions, and that since 1913 that trade-mark has been stamped on more than 75 million muskrat skins dressed and dyed into Hudson Seal. Complainant alleges that in consequence of this (and the court can well believe it aside from the fact that the defendant has admitted the allegation) there abides in the mind of the buying public a general impression and recollection of complainant's trade-mark and that the trade-mark is to the public mind suggestive of complainant's Hudson Seal product and of its factories as the product's place of origin.

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The defendant company commenced the production of Hudson Seal in 1922 and used the trade-mark set forth in paragraph 8 of the bill of complaint, a trade-mark closely resembling complainant's trade-mark. The use, however, was a very short one because defendant abandoned its Hudson Seal business in 1922. From 1922 until

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July 1934 the defendant produced no Hudson Seal. For the first six years of that period and for reasons of its own it did not deal in Hudson Seal. From September 1928 to July 1, 1934 the defendant made no Hudson Seal because it was under contract with complainant not to do so until December 1, 1933, and was also placed under  
10 a final injunction by this court entered in June 1929, restraining it at the suit of this complainant from producing Hudson Seal prior to July 1, 1934.

In July 1934 the defendant resumed the production of Hudson Seal and in the prosecution of that business adopted and has been using since July 1, 1934 the trade-mark complained of. That trade-mark defendant has been extensively advertising and also stamping it on the reverse sides  
20 of the skins processed by it. Those skins in turn have been converted into fur garments and distributed throughout the country. Complainant promptly protested in July and in August of 1934 against the use of the defendant's trade-mark, claiming it to be an infringement upon its own. The defendant's president promised to discontinue the use. That promise was not kept and complainant thereupon, by its counsel, protested  
30 by letter on September 26, 1934, demanding that the use of the objectionable trade-mark be discontinued and threatening suit for an injunction if that were not done. Thereafter complainant made several efforts to prevail upon the defendant to stop the protested use. Defendant's president stalled along, postponing final answer to the protest, saying as recently as the end of February, 1935, that he might voluntarily discontinue the objectionable trade-mark and adopt another  
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in its stead. Failing so to do the bill in this case was filed on March 13, 1935.

Complainant charges in paragraph 12 of the bill (and this is not admitted by the defendant's stipulation but on the contrary submitted to the court's eye for determination) that the defendant's trade-mark is so similar to complainant's trade-mark in size, geometrical design and in general features as to confuse, mislead or deceive, or tend to have that effect upon, "the ordinary purchaser having but a general recollection of complainant's trade-mark and not having presented to him at one and the same time that trade-mark and the defendant's simulating trade-mark." It is also charged that dealers and persons in the trade are likely to experience confusion in selecting skins, mistaking the defendant's for those of complainant. It is also charged that the close similarity between the two trade-marks furnishes to an unscrupulous dealer, manufacturer or retailer the opportunity of palming off the defendant's product for that of complainant.

In February of this year complainant made a change in the language appearing within its trade-mark. The change is set forth in paragraph 13 of the bill. I regard that change as unimportant, since the contest between these parties relates to the geometrical design and not to the language used. The complainant does not claim any exclusive or superior right in the use of the trade name "Hudson Seal". That trade name seems to be common property, used by all producers of "Hudson Seal" since 1908. At the oral argument had before me both sides limited the contest to the geometrical designs of the two trade-marks. On that occasion complainant offered and there were received in evidence two skins,

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one dyed by complainant and stamped with its trade-mark and the other dyed by the defendant and stamped with the latter's trade-mark. These two skins represented the product *after* it had been handled in a so-called "stretching process". The defendant offered in evidence and there were received two skins, representing the respective

10 products of the parties and bearing their respective trade-marks, which skins, however, had not yet been subjected to the "stretching process". The defendant contended that such infringement as might appear from a comparison of the two trade-marks and such harm as might otherwise result was neutralized by the fact that within complainant's trade-mark appeared the name "Hollander" and in the defendant's trade-mark

20 the name "Singer". I do not believe that the presence of the name "Singer" within the defendant's trade-mark can justify the use of the mark itself if geometrically it too closely resembles the complainant's mark. It is conceivable that there are many persons who might recall the mark and not the name. The defendant's stipulation carried with it the admission that in the mind of the general buying public complainant's trade-mark is well imbedded (paragraph 7

30 of bill). I cannot perceive why in reason and fair dealing one trader should be permitted to adopt and use another trader's mark, simply because he annexes to that mark his own name. Were courts to permit that, it would put an end to private property in a trade-mark, a right which the courts have, independent of statute, zealously guarded. Apart from the foregoing considerations, an inspection of the four skins received in evidence demonstrates that on the two skins

40 where the "stretching process" had already been

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applied the names of the respective concerns are greatly blurred, causing the outstanding thing to be the geometrical design and not the name.

The two trade-marks have been examined by me with great care. They are substantially alike in size and, but for the fact that the defendant has used straight lines in substitution for the curved lines appearing in complainant's trade-mark, the two designs are almost identical. By superimposing one design upon the other I was able graphically to perceive the slightness of the difference between the two designs and I was impressed with the fact that the defendant's mark was a studied attempt to simulate complainant's mark, creating some differences—it is true—but making the general resemblance an exceedingly close one. "Similarity, not identity, is the usual recourse, where one party seeks to benefit himself by the good name of another", said Mr. Justice BRADLEY in *Celluloid Co. v. Cellonite Co.*, 32 Fed. Rep. 94, quoted in *The International Silver Company v. William H. Rogers Corporation*, 66 N. J. Eq., 119, at 138, 57 A. 1037, affirmed with enlargement of restraint in 67 N. J. Eq., 646, 60 A. 187. What has been spoken of similarity in trade names may equally be said of similarity in trade-marks. The English cases referred to, but not cited, by Chancellor WALKER in the opinion in the *National Biscuit* case have, in attempting to delineate in physical terms the degree of resemblance necessary to warrant judicial interference, held that a trade-mark to be unlawfully taken need not be copied exactly nor need it be copied with slight variations, but that the use of a *substantial* portion of it will justify equitable interposition. As was said by the Master of the Rolls in *Singer Manufacturing Co. v. Wilson*, 2

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Ch. D. 434, 443, “ \* \* \* \* what the court has to satisfy itself of is that there has been an essential portion of the trade-mark used to designate goods of a similar description.”

The United States Supreme Court in the leading case of *McLean v. Fleming*, 96 U. S. 245, 251, said: “What degree of resemblance is necessary  
10 to constitute an infringement is incapable of exact definition, as applicable to all cases. All that courts of justice can do, in that regard, is to say that no trader can adopt a trade-mark, so resembling that of another trader, as that ordinary purchasers, buying with ordinary caution, are likely to be misled.”

Vice Chancellor VAN FLEET in *Wirtz v. The Eagle Bottling Company*, 50 N. J. Eq., 164, 24 A. 658, after approving the principle of *McLean v. Fleming*, said: “For the purposes of this case,  
20 the rule laid down and enforced in *McLean v. Fleming*, *supra*, will be adopted as the true one. That declares that exact similitude is not required; in other words, that the counterfeit need not be a *fac simile* of the genuine, but that if the counterfeit so closely resembles the genuine as to mislead ordinary purchasers, buying with the care usually exercised in such transactions, the  
30 use of the counterfeit should be prohibited. \* \* \* ” See also *Hilton v. Hilton*, 90 N. J. Eq., 564, 567, and cases there cited.

In the *Hilton* case Mr. Justice TRENCHARD, speaking for our Court of Errors and Appeals, said: “Similarity, not necessarily identity, of names is recognized as a basis for relief.” Citing *International Silver Co. v. William H. Rogers Corporation*, 66 N. J. Eq., 119; 67 N. J. Eq., 646.  
40 It might also here be mentioned that in the *Hilton* case our Court of Appeals laid down the rule that

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“A nice discrimination is not expected from the ordinary purchaser.”

In the instant case it was urged in behalf of the defendant that there was no evidence before me that complainant dealt with the ultimate consumer or buying public and that the evidence that was before me showed that complainant dealt only with jobbers, wholesalers and distributors and that the latter class of persons are not likely to be deceived. It was also stressed that there is no evidence before me to indicate actual deception on the part of the buying public. With respect to the first of these contentions, it suffices to say that it has been held that the mere fact that the dealer or first buyer is not likely to be deceived does not excuse the protested simulation if in fact the ultimate consumer may be deceived. In the first of the Rogers cases in this state (*The International Silver Company v. William H. Rogers Corporation*, 66 N. J. Eq., at 137) Vice Chancellor STEVENS pointed out that the defendant had sufficiently distinguished its goods from those of complainant “as far as jobbers, and possibly as far as retail dealers are concerned”, and said: “if there were no other class of persons that might be misled, I would say that notwithstanding the imitation of the name the complainant was not entitled to an injunction \* \* \*. But the case is different when we come to the ultimate purchaser. \* \* \* The law is well settled that if the manufacturer puts it in the power of the retailer to misrepresent, he is answerable for the probable consequences.”

In the second of the Rogers cases (*International Silver Company v. Rogers*, 72 N. J. Eq., 933 at 938), 67 A. 105, Mr. Justice TRENCHARD, speaking for the Court of Errors and Appeals, said: “In

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cases like the present one, it is elementary that the person to be considered is not the jobber or wholesaler, but the ordinary purchaser at retail."

In the case of *Cauffman v. Schuler*, 123 Fed. Rep. 205, the Circuit Court for the District of New Jersey held that: "It is not necessary that the resemblance should be such as would deceive  
 10 first or intelligent purchasers. It is sufficient if it be calculated to deceive the unwary, the incautious or the innocent purchaser. Neither need the resemblance be so great that one would be deceived who should see the labels placed side by side. If an ordinary purchaser, looking at the article offered to him, would naturally be led, from the label attached to it, to suppose it to be the product of a rival manufacturer, and would purchase  
 20 it in that belief, the court will enjoin the use of such article as fraudulent."

The rule last stated obtains generally. It was well expressed by the United States Circuit Court of Appeals in the case of *Western Oil Refining Co. v. Jones*, 27 Fed. Rep., 2nd Series, 205, as follows: "Upon the question of infringement, the test, as frequently announced by this court, is whether the alleged infringing trade-make or label, *taken as a whole*, so far *resembles* the other mark or  
 30 label as to be *likely* to be mistaken for it by the *casual* or *unwary purchaser*." (Italics mine)

The question therefore must be considered from the angle of the ordinary purchaser, unaware of the differences existing between the two trade-marks and without his attention directed to such differences. It is hardly conceivable, certainly not likely, that both trade-marks would be exhibited to him by the dealer or middleman so as to enable him to exercise discretion and make selec-  
 40 tion. Such a purchaser is moved solely by his

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general impression and recollection. The United States District Court in the case of *Prichard & Constance v. Aime Co. Inc.*, 5 Fed. Supp. 282, said : "This determination (speaking of similarity of sound or appearance or significance) is to be made with reference to the impression made on the ordinary purchaser by recollection, not by a comparison of the two words, placed side by side." 10

With respect to the defendant's contention that there is no evidence of actual deception or confusion on the part of the buying public, it is a sufficient answer to say that no such evidence is necessary. Our courts have held that: "Neither actual confusion nor actual fraudulent intent need be shown where the necessary and probable tendency of the defendant's conduct is to deceive the public and pass off his goods or business as and for that of the complainant." See *Hilton v. Hilton*, 90 N. J. Eq., at 567 and cases there cited. 20

Applying the foregoing principles to the facts in the case at hand, it is obvious that the defendant's trademark is deceptive. While it varies from complainant's trade-mark, as curved lines necessarily vary from straight lines, the resemblances are most pronounced. It seems to me that the resemblances, not the differences, control the question. The psychological effect upon the mind of the customer, relying on his general recollection of complainant's trade-mark, would be such that upon seeing the defendant's trade-mark on the back of the skin he would be easily misled into regarding and accepting it as the complainant's trade-mark, particularly if the name within the trade-mark were blurred or obliterated. Even if the name of the dyer were legible it would in many instances be meaningless, where the cus- 30 40

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tomers' mind has retained an impression of the design but not of the name of the designer. There are other likely situations in which either deception or confusion would result on the part of the unsuspecting buyer. It is against all such situations that complainant is entitled to be protected.

10 The defendant's contention that the two trade-marks were not geometrically alike can be dismissed with the statement of Vice Chancellor STEVENS in *Standard Table Oil Cloth Company v. Trenton Oil Cloth and Linoleum Company*, 71 N. J. Eq., 555, 558, that "It is not necessary to prove that the defendant's marks or figures are identical with those of complainant. \* \* \* " In that case this court restrained the use of an ellipse, suggesting that upon complainant's protest the  
20 defendant should have abandoned the ellipse and substituted therefor some other geometrical figure.

In the case of *Ohio Baking Co. v. National Biscuit Co.*, 127 Fed. Rep., 116, the court dealt with two trade-marks, which later were the subject of litigation before Chancellor WALKER in the case hereinbelow mentioned. These two trade-marks were dissimilar enough to make it difficult to express a comparison by word description. Yet the  
30 use of resembling elements, such as parallel lines, crossing lines, circles and ovals, was such that the entire ensemble created a *general resemblance*. An injunction was allowed notwithstanding the fact that wholly dissimilar words were used in connection with the resembling labels or trade-marks. Subsequently, in 1914, these conflicting labels were compared and considered by Chancellor WALKER in the case of *National Biscuit Company v. Pacific Coast Biscuit Company, et al.*, 83  
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N. J. Eq., 369 at 376. He pointed out that when laid side by side the resemblance is not marked but when used as the defendant used it "the similitude is striking, and when thus associated is of a character calculated to mislead and deceive the unwary and unsuspecting purchaser." While the report of that case does not contain an impress of the conflicting trade-marks or labels, I have had the benefit of an inspection of those labels contained in a volume of its adjudicated cases published by the National Biscuit Company. That inspection, in the light of the result reached by the Chancellor in the National Biscuit Company case, leaves no possible doubt as to the infringing character of the defendant's trade-mark in the instant case. 10

I have already suggested that the resemblances, not the differences, should control the question of infringement. That was the view of Judge Kirkpatrick in the Federal case of *Cauffman v. Schuler*, ubi supra. He said: 20

"It is true that there are differences in labels, such as substitution of the words 'Imperial' for 'Cauffman's,' the omission of the word 'Celebrated,' and other differences, such as the wording of the 'caution' and the name subscribed thereto. It is not, however, the dissimilarities which are the test, but the resemblances. As was said by Judge Lacombe in *Hansen v. Siegel-Cooper Company* (C.C.) 106 Fed. 690: 'It is possible, but highly improbable, that two persons, neither of whom had ever seen or been informed of the other's design, might have produced packages as similar as the two before the court.' I am unable to account for the numerous resemblances referred to, except as the result of design. There should be but one motive for dressing de- 30 40

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defendant's goods in a garb so nearly like complainant's, and that was to acquire a part of the trade which the complainant had built up for his goods, and engage in a competition in trade, which the courts of equity hold to be unfair."

10 In *Helmet Co. v. Wm. Wrigley, Jr. Co.*, 245 Fed. Rep. 824, 829, the Circuit Court of Appeals regarded similarity in general appearance as controlling over differences in features. It said:

20 "While there are different features of these packages, both in words and colors, yet there is a most striking similarity in their general appearance. Complainant's product, it is true, can be distinguished from defendant's products when the packages are examined together for purposes of comparison; this can be done too when they are examined separately by one who is familiar with the two sets of packages, since he can do so through the presence or absence alone of Wrigley's name; but the identity is so marked that the average user desiring the product of either producer would in all likelihood be misled into buying the product of the other."

30 In connection with the production of "Hudson Seal" there are special and persuasive reasons why the defendant, when selecting a trade-mark, should studiously have avoided resemblance to complainant's trade-mark. I examined the skins received in evidence from the parties. To my eye they were indistinguishable in the color, lustre and feel of the hair side and in the color and general appearance of the reverse or leather side. To distinguish the one product from the other it was necessary for me to look for the trade-mark. In those skins where the name was blurred it re-  
40 quired close scrutiny to distinguish between the

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skins. An attempt by me to make a casual selection of the skins of each party, without giving attention to the name, resulted in confusion, notwithstanding the fact that previously, at the oral argument, I had had presented before me enlarged reproductions of the two trade-marks and had listened to argument on their points of similarity and difference. By this test I demonstrated to myself that one, not introduced to the subject of conflict as I was, could very easily mistake the defendant's trade-mark for that of complainant where the latter he but generally recalled after having seen it in some newspaper, magazine or other form of advertising. Then, again, the respective trade-marks are stamped with the same color (black) ink or other stamping material, on the same color background (light brown), so that the unsuspecting purchaser has not even the opportunity of color differentiation to assist him in giving effect to his recollection. These considerations, together with the fact that the defendant adopted its trade-mark immediately after it was freed from our injunction restraining it from dressing and dyeing "Hudson Seal" prior to July 1, 1934, together with the fact that the defendant's trade-mark differs geometrically from complainant's only in that straight lines have been substituted for curved lines, lead me to the conviction that the defendant's mark is a studied counterfeit of complainant's mark and was adopted in furtherance of a "palming-off" purpose. The defendant has well brought itself within the language of the case of *Williamson Candy Co. v. Ucanco Candy Co.*, 3 Fed. Rep., 2nd Ser., 156, 158, where it was said:

"(3) A trader, desiring to deceive, but not versed in the mental sciences, or in the

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10 method of implanting in the human mind through association of ideas or by suggestion a desired impression or belief, would probably use only such dress, marks, or names as would present directly to the eye or ear a deceptive resemblance to the dress, mark, or name of the trader having an established good will. But the trader, not more honest, but more skilled in the means and methods of confusing and deceiving the human mind, would probably resort as well to less direct, but not less successful, ways of accomplishing his aim. By such a person the power through suggestion to awaken the imagination and direct the mind to a predetermined goal would not be overlooked. But the law guards the good will of a trader—and thereby the public—against unlawful injury, and with equal care, whether the method of deception by which the injury is brought about is of the latter or of the former character.”

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I conclude, therefore, that complainant has clearly established its right to injunctive relief.

This brings me to the question of the accounting for profits. The defense strongly urged that such accounting should be denied for the reason that the bill does not charge the defendant with intentional imitation, nor does it contain any allegation of fraud or of a fraudulent intent. While it is true that fraud is not charged in *haec verba*, the facts making out a case of fraud are fully presented. For the complainant to have characterized the defendant's conduct, admitted by the stipulation, as fraudulent, would merely have added a conclusion. Vice Chancellor Emery said, in *Eureka Fire Hose Company v. Eureka Rubber Manufacturing Company*, 69 N. J. Eq., at 167:

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40 “This protection is granted without regard to the intent of the infringer, because a fraudulent intent to deceive the public

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and appropriate the benefit of the trade reputation of another is conclusively presumed, from the using of the name or mark after request to desist, although the absence of such intent may in some cases be a defense to an action for damages."

Vice Chancellor Lane, in the case of *Hilton v. Hilton*, 89 N. J. Eq. 149, at 154, after quoting from the *Eureka Fire Hose* case and citing *Wirtz v. Eagle Bottling Co.*, supra, *International Silver Co. v. Rogers*, supra, and *National Biscuit Co. v. Pacific Coast Biscuit Co.*, supra, said: "Expressed briefly, I think the rule is that 'unfair competition' is 'fraudulent conduct'." The *Hilton* case was affirmed by the Court of Appeals in 89 N. J. Eq., 182, 104 A. 375, with a modification that does not disturb the definition of "unfair competition" given by the Vice Chancellor.

Nor do I find any merit in the defendant's contention that the complainant should be denied relief because by its trade-mark it has advertised as "Hollander Seal" or "Seal" what in fact is a dyed muskrat. This contention was advanced for the first time after the case, already closed, had been under advisement for several weeks and the court had notified counsel that the injunction would be awarded. At no time was any testimony introduced or offered to the effect that the public had ever been deceived by the trade name "Hollander Seal". On the contrary, the bill distinctly set forth that the dyed muskrat was *commonly* called "Hudson Seal", that it has been produced in this country by that name by various concerns since 1908 and that complainant since it commenced producing that article in 1913 and continuously to February 1935 stamped immediately underneath its trade-mark the informative

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words "dyed muskrat" and that since February 1935 it has added the words "seal dyed muskrat". This, it seems to me, has at all times fully apprised the buying public of the true character of the article subjected to complainant's processes. There is nothing in the pleadings or evidence in this case to warrant the invocation of the "unclean hands" doctrine. The evidence that is before me indicates that in the respect under consideration complainant has dealt openly and fairly with the public to which its products, not directly but ultimately find their way.

It was also insisted for the defendant that profits should not be allowed if the defendant acted in good faith or through inadvertence or in ignorance of complainant's rights. It is unnecessary for the court to express an opinion as to whether these considerations, if sustained in fact, constitute matter of defense. In the Wirtz case good faith did not excuse the infringement. Vice Chancellor Van Fleet held that: "The legal quality of an act, resulting in injury, must be decided not by the motive with which it was done, but by the consequences which have necessarily resulted from it. The law, in civil cases, does not attempt to penetrate the secret motive which induced the act brought in judgment, but judges of its legal quality solely by the consequences which have actually and necessarily proceeded from it. It is no less a dictate of justice, than of sound reason, that every person must be understood to have intended to do just what is the natural consequence of his act deliberately done."

The defendant here will not be heard to advance the claim that he acted in good faith or through inadvertence or in ignorance of complainant's rights. Immediately after it commenced the in-

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fringement it received protests from complainant, both orally and in writing, was informed of the details of complainant's claim of infringement and was threatened with an injunction suit. Its promises to discontinue the objectionable use were not kept. Complainant's efforts to secure by peaceful means a discontinuance of the infringement proved futile. Up until the award of the injunctive decree the defendant persisted in the use of the infringing trade-mark and claimed the right to do so. Its conduct was the product of bad faith, not good faith; of purpose and deliberation, not inadvertence, and of an attitude assumed in defiance of complainant's asserted rights, of which it was fully informed, and not in ignorance. 10

After the court announced that an injunction would go the defendant suggested laches on the part of complainant. The court is aware of the rule that the party aggrieved by an infringement or by any act of unfair competition should not be permitted to remain silent, stand idly by, all the time knowing that the offender is creating profits and then come in, when the profits have accumulated, and demand them as his own. Such conduct should and does bar the right to the profits, though it does not bar the right to injunctive relief. But, that is not the situation here. The defendant has by its stipulation admitted the substance appearing in paragraph 11 of the bill, from which it appears that in the early part of July 1934 and again in August the complainant informed the defendant of the claimed infringement and the latter promised discontinuance; that by letter sent in September complainant's objections were fully stated to the defendant and this very suit was threatened; that thereafter there 20 30 40

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were a number of conferences between the defendant's president and complainant's representative for the purpose of prevailing upon the defendant without suit to discontinue the infringement; that about three months before the bill was filed defendant's president stated that he was considering abandoning the objectionable trade-mark and the adoption of one "which could not possibly offend". As recently as two weeks before the filing of the bill the defendant's president stated that the defendant might voluntarily abandon the protested use. It would seem that these promises and representations were made by the defendant to the complainant to influence the latter to refrain from bringing the threatened suit. Although it later turned out that these promises and assurances were not given in sincerity and were given to string the complainant along, yet the complainant had a right to assume that the defendant might voluntarily discontinue the infringement and thus render unnecessary the effort and expense of an injunction suit. A desire to avoid by peaceful means litigation is to be applauded and encouraged rather than draw the penalty of the loss of a part of the legitimate relief to which the wronged party is by law entitled. I find nothing in complainant's delay of about eight months in bringing suit from which can be spelled out laches. The defendant did not during those eight months alter its position prejudicially as a result of the passage of time. On the contrary, through the entire period it knew of complainant's claim and its purpose to protect it by suit, if persuasion and threat of suit proved unavailing. The defendant chose to stall along, taking with wide open eyes the chance that it might have to account for its profits if the threatened suit

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were brought and the defendant's conduct were adjudged to be unfair competition.

I am now brought to the measure of the profits to be determined.

Our courts have held that the property right in a trade-mark is of the same quality as a copyright or the right to a patent, and that the remedies available to the owner of any of those rights are, in the absence of statutory regulation, analogous. Our courts have adopted the federal rule stated in *Bragg Manufacturing Co. v. Hartford*, 56 Fed. Rep. 292, that: 10

“ ‘The test of jurisdiction (to decree an accounting) applied in the later cases is whether the bill is filed in season to enable the complainant, under the rules and practice of the court, to move for and obtain an injunction before the expiration of the patent.’ If so, although there may be nothing for the injunction to restrain at the time of the hearing (the patent having expired), yet, jurisdiction having existed, to grant an injunction upon the bill filed, the account will be decreed.” 20

See *The Clark Thread Company v. The William Clark Company*, 55 N. J. Eq. 658, 668, 37 A. 599, reversed on *measure* of profit in 56 N. J. Eq. 789, 40 A. 686. 30

In the unfair competition case of *The L. Martin Company v. L. Martin and Wilckes Company*, 75 N. J. Eq., 257, 72 A. 294, the Court of Errors and Appeals adopted the rule of the United States Supreme Court in *Tilghman v. Proctor*, 125 U. S. 136, to the effect that where a court of equity entertains jurisdiction of a suit for infringement of a patent it will not regulate the plaintiff to the law courts for damages “but will itself admini- 40

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ster full relief by awarding, as an equivalent or substitute for legal damages, a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage." In this case our Court of Appeals said that it is better to follow the English rule and that of the United States Supreme Court and "limit the accounting to the profits made by the defendant."

In all of the cases that I have examined I found that where the injunction issued, whether it was in a trade-mark, trade name, patent or other kind of unfair competition suit, the profits, when allowed, were *all* the profits made by the defendant from the sale or marketing of the article or commodity with respect to which infringement occurred. I found no case (other than the *Hamilton-Brown Shoe* case below cited) in which the court suggested that the profits might be so apportioned that complainant shall receive only those profits which could be directly attributed to the use of the infringing mark, name or label. I find that in the California case of *Graham v. Plate*, 40 Cal. 593, 599, it was claimed that it was impossible to determine how much of the profit was due to the trade-mark and how much to the intrinsic value of the article. The court said:

"Every consideration of reason, justice and sound policy demands that one who fraudulently uses the trade-mark of another should not be allowed to shield himself from liability for the profit he has made of the use of the trade-mark on the plea that it is impossible to determine how much of the profit is due to the trade-mark and how much to the intrinsic value of the commodity."

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I have been much helped and guided by the opinion of Mr. Justice Pitney, speaking for the United States Supreme Court in the case of *Hamilton-Brown Shoe Company v. Wolf Brothers & Company*, 240 U. S. 251; 36 Sup. Ct. Rep. 269. There it was insisted by the defendant that the profits recoverable by the successful complainant should be limited “to such amount as may be shown by direct and positive evidence to be the increment of defendant’s income by reason of the infringement, and that the burden of proof is upon complainant to show what part of defendant’s profits were attributable to the use of the infringing mark.” The Supreme Court held that the complainant was not required to make such apportionment where it cannot be made and that to accede to the defendant’s contention would result in a denial of all compensation to the complainant. The court quoted from *Graham v. Plate* the following:

“In sales made under a simulated trademark it is impossible to decide how much of the profit resulted from the intrinsic value of the commodity in the market, and how much from the credit given to it by the trademark. In the very nature of the case it would be impossible to ascertain to what extent he could have effected sales and at what prices except for the use of the trademark. No one will deny that on every principle of reason and justice the owner of the trademark is entitled to so much of the profit as resulted from the use of the trademark. The difficulty lies in ascertaining what proportion of the profit is due to the trademark, and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable certainty, it is more consonant with reason and justice

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10 that the owner of the trademark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another, so that they cannot be distinguished and separated, he shall lose the whole, for the reason that the fault is his; and it is but just that he should suffer the loss rather than an innocent party, who in no degree contributed to the wrong."

20 In *Dickinson v. Thum*, 8 Fed. Rep., 2nd Ser., 570, 573, the defendant insisted that the burden rested upon the plaintiff to prove what profits were attributable in whole or in part to an infringing trade-mark and that the evidence there did not support a finding that any profits were so attributable. The court pointed out that the defendant had been adjudged to be a wilful infringer of a vaild trade-mark and said that in that situation he cannot urge successfully that his sales were due to the merit of his product or that it could not be ascertained how much of the sales was due to merit and how much to the infringement. The court further said:

30 "(5) Under the facts found and proved, the rule of *Hamilton-Brown Shoe Co. vs. Wolf Bros. & Co.*, 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629, is applicable. The infringer must account for the entire profits derived from the sale of the infringing goods. The recovery will not be limited to such amount as can be shown by direct and positive evidence to have resulted from the use of the infringing mark. The burden is not cast upon the plaintiff to attempt the impossible task of showing what part of defendant's profits are attributable to the use

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*Opinion of Vice Chancellor.*

of the infringing mark and what part to the intrinsic merit of his goods or other causes. Whatever conflict in the previous decisions might be found was put at rest by that decision."

I have therefore come to the conclusion that the defendant should reveal the number of skins dressed and dyed by it since July 1, 1934, upon which it stamped or impressed the trade-mark here held to be an infringement and to account for all the profits made by it from such work. If it can definitely be determined how much of those profits are attributable to the use of the infringing trade-mark itself then complainant shall have no more. If, however, that cannot be determined then complainant is entitled to all of the profits and the defendant will be decreed to make payment thereof.

There will be a decree in accordance with these conclusions and a reference to a master to take the account.

## ADDENDUM

Since writing the foregoing opinion my attention has been called to the fact that an appeal has been taken from the decree advised by me in this matter and that the counsel fee of \$750.00 allowed by me to complainant is challenged as excessive. Before the allowance was made counsel filed with me a statement of the time spent and the services rendered in the cause. Aside from this, I of course know, from sitting in the case, what counsels' labors were. Although no oral proofs were taken at the final hearing there were several arguments at different times concerning the question of the defendant's accountability for profits. Briefs

*Opinion of Vice Chancellor.*

and reply briefs were filed by complainant's solicitors and they exhibit considerable labor in the gathering of authorities, and were of aid to the court. Considering the time which counsel necessarily must have spent in the preparation of the bill of complaint, exhibits, briefs and in several appearances before the court, I was satisfied that the claim which the solicitors made that about eight full days were spent in the litigation is correct. Considering the standing of counsel and the character of the work performed, I regarded an allowance of \$750.00 as altogether reasonable.

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**Exhibit C-3.**

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No. 301404

## THE UNITED STATES OF AMERICA

To All To Whom These Presents Shall Come:

This Is To Certify That by the records of the United States Patent Office it appears that A. Hollander & Son, Inc., of Newark, New Jersey, a corporation organized under the laws of the State of Delaware, did, on the 5th day of October, 1932, duly file in said Office an application for Registration of a certain

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## TRADE-MARK

shown in the drawing for the goods specified in the statement, copies of which drawing and statement are hereto annexed, and duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the Commissioner of Patents.

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And, upon due examination, it appearing that

*Exhibit C-3.*

the said applicant is entitled to have said Trade-Mark registered under the law, the said Trade-Mark has been duly registered this day in the United States Patent Office, to A. Hollander & Son, Inc., its successors or assigns.

This certificate shall remain in force for Twenty Years, unless sooner terminated by law.

In Testimony Whereof I have hereunto  
set my hand and caused the seal of the  
Patent Office to be affixed, at the City of  
Washington, this twenty-eighth day of  
(Seal) February, in the year of our Lord one  
thousand nine hundred and thirty-three,  
and of the Independence of the United  
States the one hundred and fifty-seventh.

THOMAS E. ROBERTSON,  
Commissioner of Patents.

Attest:

G. P. TUCKER,  
Law Examiner.

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*Exhibit C-3.*

Registered Feb. 28, 1933      Trade-mark 301,404

## UNITED STATES PATENT OFFICE

A. Hollander &amp; Son, Inc., of Newark, New Jersey

Act of February 20, 1905

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Application filed October 5, 1932.

Serial No. 330,954.

(Trade-mark here delineated same as)  
(shown in Par. 5 of Bill of Complaint)

## STATEMENT

To the Commissioner of Patents:

20 A. Hollander & Son, Inc., a corporation duly  
organized under the laws of the State of Dela-  
ware, located in the City of Newark, County of  
Essex, and State of New Jersey, and doing busi-  
ness at 143 East Kinney Street, in said city, has  
adopted and used the trade-mark shown in the  
accompanying drawing, for Fur Skins, particu-  
larly muskrat skins dyed in imitation of seal, in  
Class No. 1, raw or partly prepared materials,  
and presents herewith five facsimiles showing the  
30 trade-mark as actually used by applicant upon  
the goods, and requests that the same be regis-  
tered in the United States Patent Office in accord-  
ance with the act of February 20, 1905, as amend-  
ed. The trade-mark has been continuously used  
and applied to said goods in applicant's business,  
and in the business of applicant's predecessor, A.  
Hollander & Son, a firm, from whom title was

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*Exhibit C-3.*

derived, since 1913, and is applied or affixed to the goods by a stamping process.

Applicant is the owner of registration No. 78,518 of June 21, 1910, and the renewal thereof, and No. 152,826 of March 7, 1922.

No rights are claimed to registration of the word "Seal" apart from the mark as shown.

Applicant hereby appoints Harry B. Rook, 24 Commerce Street, Newark, N. J., registration No. 10,804 its attorney, with full power of substitution and revocation, to prosecute this application for registration, to make alterations and amendments therein, to receive the certificate, and to transact all business in the Patent Office connected therewith.

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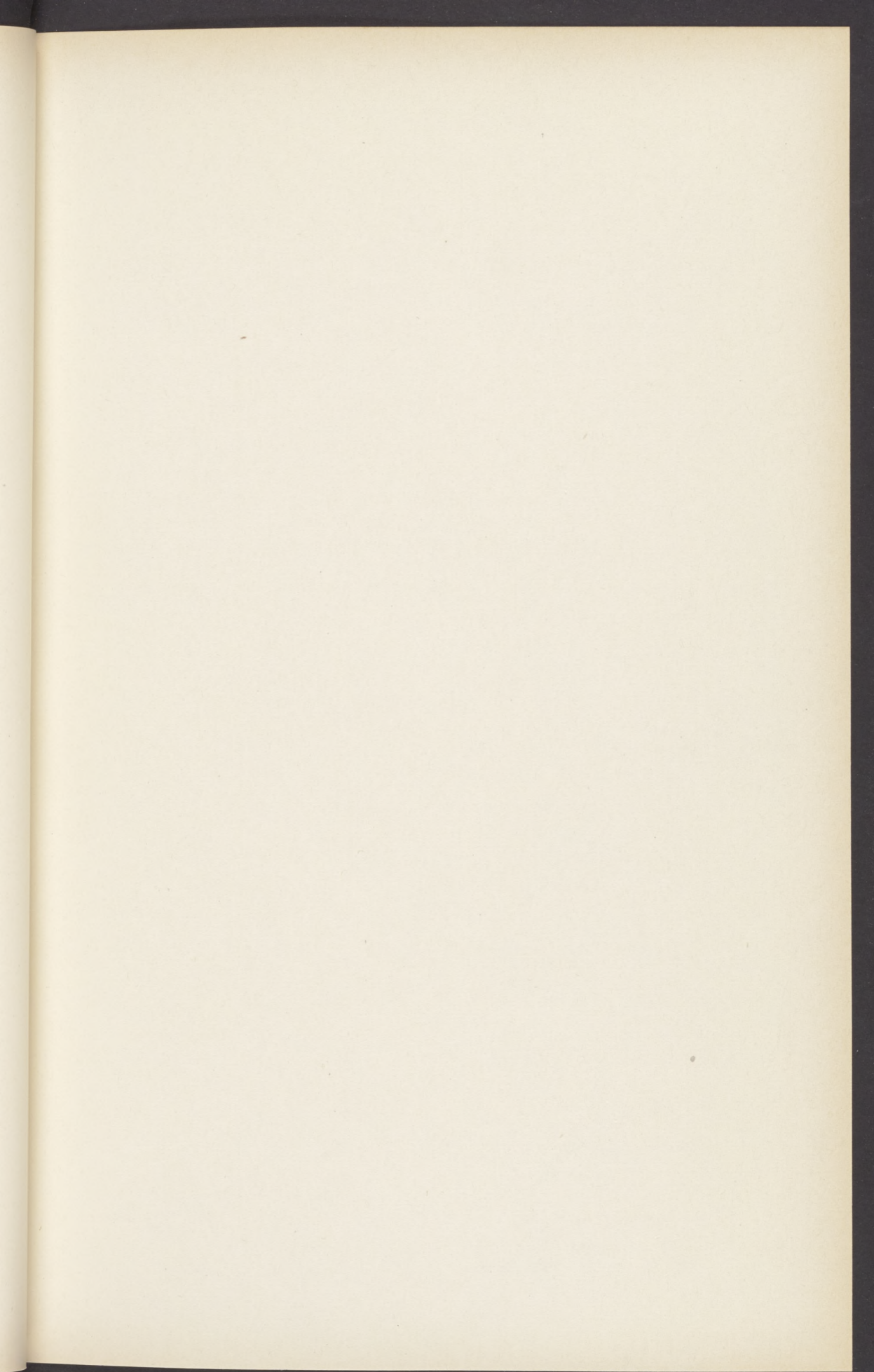
(L.S.) A. HOLLANDER & SON, INC.,  
By ALBERT HOLLANDER,  
Vice-President.

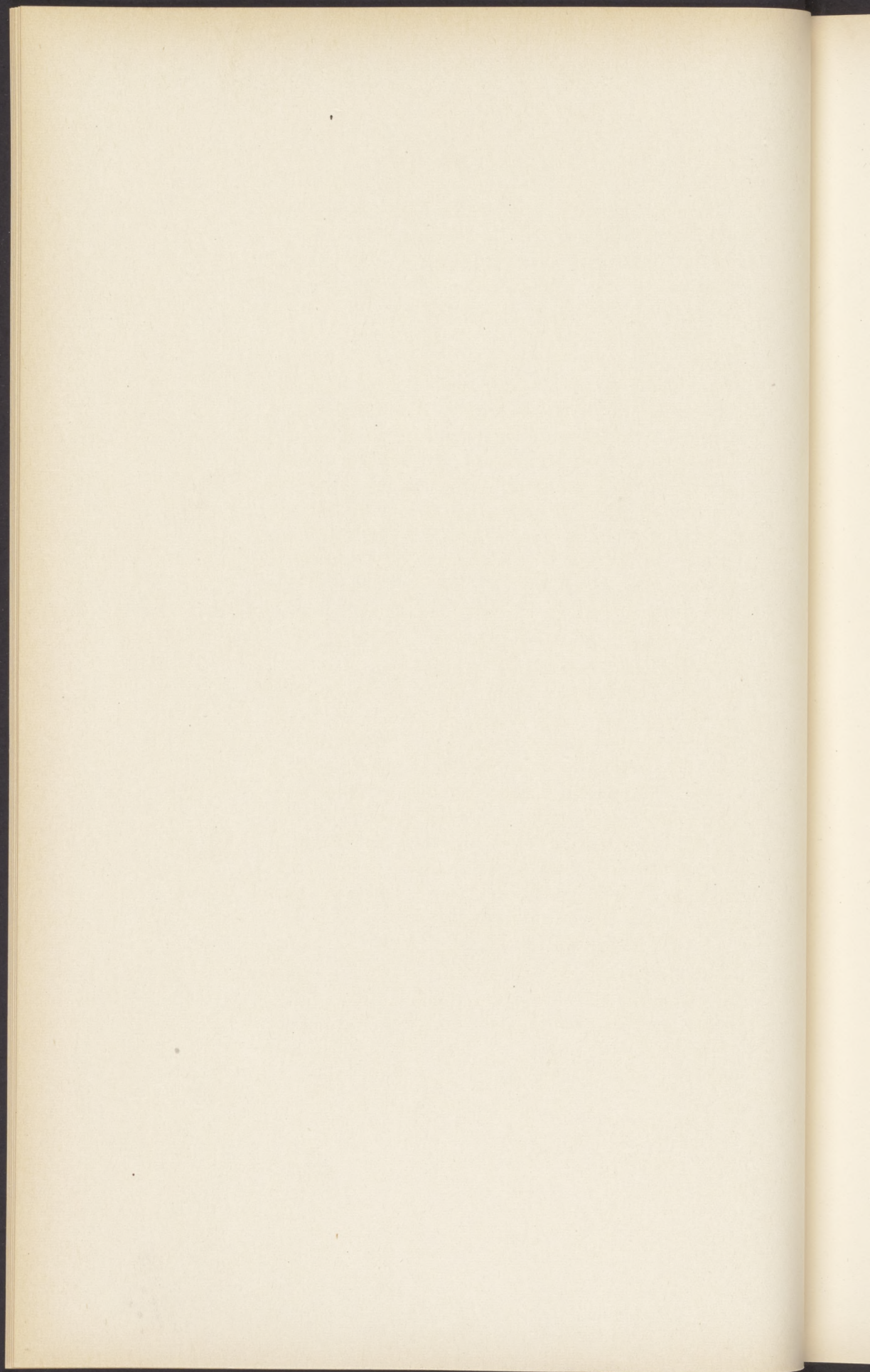
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MEMORANDUM OF AGREEMENT, Made this 6th day of August, in the year Nineteen Hundred and Twenty-eight, by and between PHILIP A. SINGER & BRO., INC., a corporation of the State of New Jersey, having its principal office in the City of Newark, in the County of Essex and State of New Jersey, as party of the first part, and PHILIP A. SINGER and LEO H. SINGER, both of the said City of Newark, as parties of the second part, A. HOLLANDER & SON, INC., a corporation of the State of Delaware, duly authorized to transact business in the State of New Jersey, and having an office in the said City of Newark, as party of the third part, and MICHAEL HOLLANDER, ALBERT HOLLANDER and BEN WILLIAM HOLLANDER, all of the said City of Newark, as parties of the fourth part, WITNESSETH :

1. The parties of the second part are officers, directors and controlling stockholders of the party of the first part and join in this agreement and enter into the undertakings and covenants thereof as an inducement to the party of the third part and the parties of the fourth part to execute the same. The parties of the fourth part are officers, directors and controlling stockholders of the party of the third part and join in this agreement and enter into the undertakings and covenants thereof as an inducement to the parties of the first and second part to execute the same.

2. The party of the first part hereby bargains, sells, assigns, sets over and conveys to the party of the third part all the machinery, implements, appliances and equipment located at its plant on Green Street, Newark, N. J., as more particularly shown and set forth in Schedule "A" hereto an-

nexed, all of which the parties of the first and second part represent to be free of all liens. The said party of the first part, moreover, hereby assigns unto the party of the third part, all its right, title and interest in and to the lease which it holds on said Green Street premises, the party of the third part assuming from and after September 1, 1928, the performance of said lease with as full force and effect as if it were originally named as tenant in said lease (but only with respect to obligations thereunder arising on and after September 1, 1928), and agrees to pay all the rents reserved and named in said lease from and after September 1, 1928, and to observe all the covenants and obligations thereof on and after said date, and to hold free and harmless the said party of the first part from any and all such obligations under said leasehold as arises on and after September 1, 1928.

3. The party of the first part and the parties of the second part do hereby covenant and agree that they will not, nor will any of them, for the space of five years and four months, commencing September 1, 1928, and ending December 31, 1933, directly or indirectly, as principal, agent, officer, director, servant or employee, or in any other capacity, or by any other means, engage in the dressing or dyeing of any kind or kinds of pelts, skins or furs other than rabbits, excepting white rabbits, which white rabbits they shall neither dye nor dress. The party of the first part and the parties of the second part further covenant that they will not, in any capacity or by any means for the period of time aforementioned, engage in any business whereof the foregoing business, occupation or enterprise is part. This restriction is limited in its operation to any such business, occupa-

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tion or enterprise conducted anywhere in the United States of America or in the Dominion of Canada. The parties of the first and second part hereby declare that the foregoing restriction is, in point of territory and in all other respects, reasonably necessary for the proper and adequate protection of the parties of the third and fourth part and they covenant and agree that they will at no time hereafter question the validity of said restrictive covenant, nor will they assert that said covenant is broader than reasonably necessary or that the same is in any other respect unenforceable against them and each of them. 10

The foregoing restrictive covenant shall be liberally construed in favor of the covenantee, and so as to sustain said covenant against the covenantors, it being hereby declared that the foregoing restrictive covenant has been the main inducement to the entry into the within contract by the parties of the third and fourth part. 20

In the event the parties of the first and/or the second part shall knowingly breach the foregoing covenant, then the parties of the third and fourth part shall be relieved from each and every covenant and agreement herein contained and from all obligation respecting the same. Upon the occurrence of such breach, there shall forthwith terminate all the rights of the parties of the first and second part hereunder, including the right to royalties or to compensation or other thing of value by this agreement or by law required to be paid. Notwithstanding the termination of all of such rights the parties of the first and second part shall continue bound by all their covenants and agreements herein contained, and notwithstanding the foregoing the parties of the third and fourth part shall be entitled to the benefit and advantage of 30 40

every provision in this agreement expressed without liability to make compensation of any kind for such benefit and advantage, and shall have the right to sue for any and all damages resulting from any breach committed by the parties of the first and/or second part, and to use and employ all available legal remedies to restrain and enjoin any breach or the continuance thereof; all of the foregoing rights and remedies to be cumulative.

10 4. The party of the first part and the parties of the second part furthermore agree that immediately upon the execution of this agreement, they will deliver to the party of the third part in writing, properly verified by affidavit of the parties of the second part, all processes, recipes and formulae, secret or otherwise, heretofore and/or now used by the parties of the first and/or second part

20 in the dyeing and/or dressing of all fur skins or pelts, excepting rabbits. It is expressly understood that the acceptance by the party of the third part of said verified written formulae shall be in writing and shall be considered final and that no questions whatever shall be raised thereafter as to the correctness or efficiency of said formulae, processes and recipes, and that the parties of the first and second part shall, by turning over said

30 verified formulae, be considered to have fully performed this part of this agreement, the intent of this provision being that no questions whatsoever shall be thereafter raised as to the correctness or completeness of said formulae. The parties of the first and second part hereby represent that they are the sole, absolute and unqualified owners of said formulae, processes and recipes and have the full and absolute right to dispose of same in manner aforesaid. It is understood that said

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formulae, processes and recipes shall then and thereafter, excepting as hereinafter set forth, become and be the property of all the parties hereto, but that the parties of the first and second part shall not, prior to December 31, 1933, use said formulae, or grant licenses with respect thereto, or divulge any or all of them in any respect whatsoever. After December 31, 1933, said formulae, processes and recipes shall be the property of all the parties hereto without any restrictions or limitations whatsoever. It is also expressly understood that the parties of the first and second part shall not in any manner whatsoever be responsible or liable for any results obtained in working out or with said formulae. 10

5. It is agreed, moreover, that should the restrictions expressed in paragraph 3 of this agreement against the parties of the first and second part dressing or dyeing any pelts, skins or furs other than rabbits there excepted, be held in any respect to be illegal or invalid, and should the said parties be freed therefrom, and then in any manner avail themselves of such freedom or relief and engage in the restricted business, occupation or enterprise mentioned in said paragraph three, then and in that event all rights of the parties of the first and second part hereunder including the right to royalties or compensation shall forthwith cease and terminate and the parties of the third and fourth part shall have the full right to retain, use and employ the formulae, recipes and processes delivered to them by the parties of the first and second part without liability to pay any royalty with respect thereto or compensation of any kind therefor. 20 30

6. It is, furthermore, agreed, in consideration of the premises, that the party of the third part 40

shall pay as royalties to the party of the first part or its nominee or assignee the sum of two cents for every marmot skin (to include marmot skins of any and all description, except what is known in the trade as susliki and/or petchaniki), marmot fur or marmot pelt dyed between September 1, 1928 and December 31, 1933, by the party of the third part, or any of its subsidiary or branch corporations (owned in part or in whole by the parties of the third and fourth part), excepting that  
10 no royalty shall be paid on what is commonly known in the trade as susliki and/or petchaniki skins, and excepting that no royalties shall be paid on any marmot skins which shall have been damaged or destroyed in the dyeing process and the dyeing charges therefor not paid. This royalty shall be paid on all marmot skins, as afore-  
20 said, when dyed, whether the said skins are owned by the parties of the third and fourth part themselves, or whether they are dyed for others, and whether or not the formulae of the parties of the first and/or second part shall have been used in such dyeing of the marmot furs or pelts. This royalty shall be paid for the term of five years and four months from September 1st, 1928, payments to be made every three months, commencing on the first day of December, 1928, and to include royalties on all skins dyed during the then  
30 past three full calendar months. It is understood that the party of the third part guarantees that the aggregate of said royalties during said term of five years and four months shall be forty thousand dollars (\$40,000.) and agrees at the end of said stated period to pay the difference between any lesser aggregate amount actually paid as roy-

alties during said term and said stated sum of Forty Thousand Dollars (\$40,000.) providing the right to such royalties shall not theretofore have terminated. It is understood, moreover, that the party of the third part on the 15th day of each month shall render a written detailed report to the party of the first part, containing a complete record of marmot skins dyed during the preceding month, and the party of the first part shall have the privilege of examining the proper books and records at reasonable times and in a reasonable manner in order to check up the correctness of said report. Said examination may be made only by the party of the second part or by any of the following named firms of accountants:

Price, Waterhouse & Co., 56 Pine St., New York City or  
S. D. Leidensdorf & Co., 1 Pershing Square,  
New York City,

or any other accountant nominated by the parties of the second part and in writing approved by the parties of the fourth part.

Unless the parties of the first and/or second part shall, within thirty days after the receipt of any monthly report concerning said royalties, object thereto in writing, pointing out specifically the items objected to, and deliver such written objections within said thirty days to the parties of the third and/or fourth part, such monthly report shall be, become and continue binding and conclusive upon the parties to this agreement, and thereafter no question whatever shall be raised as to the accuracy, truthfulness or completeness of said monthly report.

7. It is expressly understood that the party of the third part shall not in any manner whatsoever use the name or names of the parties of the first or second part in connection with their business.

10 8. It is furthermore understood that all the policies of insurance pertaining to said premises on Green Street shall be assigned by the party of the first part to the party of the third part, the premiums thereon to be apportioned.

20 9. The parties of the first and second part hereby agree that immediately upon the execution of this agreement they will permit the parties of the third and fourth part to enter into and upon the Green Street plant elsewhere above in this agreement mentioned, for the purpose of experimenting and becoming familiar with the recipes, processes and formulae mentioned in Paragraph 4 of this agreement, and the parties of the second part will, if so required to do by the parties of the third and fourth part, instruct any person or persons designated by the parties of the third and fourth part in the proper application and use of said processes, recipes and formulae; the foregoing service to be without extra charge or compensation and to be deemed as within the consideration of this agreement.

30 IN WITNESS WHEREOF, the parties to this agree-

ment have in due form executed the same the day and year first above written.

PHILIP A. SINGER & BRO., INC.,

By: PHILIP A. SINGER,  
President.

Signed, Sealed and Delivered  
in the presence of:

ATTEST:

Leo H. Singer,  
Secretary.

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Philip A. Singer (L.S.)  
Leo H. Singer (L.S.)

A. HOLLANDER & SON, INC.,

By MICHAEL HOLLANDER,  
President.

ATTEST:

Samuel F. Leber,  
Asst. Secretary.

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Michael Hollander (L.S.)  
Ben Wm. Hollander (L.S.)  
Albert Hollander

By  
Michael Hollander (L.S.)  
Atty. in fact.

Witness to all signatures:  
Meyer E. Ruback.

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## Schedule "A"

PHILIP A. SINGER &amp; BRO., INC.

Schedule of machinery located at Green St. plant.

- Two (2) 7½ H. P. Motors on driers  
 Two (2) 10 H. P. Motors on tanks in dye house  
 One (1) 5 H. P. Motor on cage in dyehouse  
 One (1) 5 H. P. Motor on pump in boiler room  
 One (1) 15 H. P. Motor on the drums  
 10 One (1) 20 H. P. Motor on the drums  
 Two (2) 5 H. P. Motors running fleshing machines  
 One (1) 15 H. P. Motor running Kicker  
 One (1) 20 H. P. Motor running drums  
 One (1) 7½ H. P. Motor running tanks in wash  
 house  
 One (1) 7½ H. P. Motor running finish blower  
 cage  
 One (1) 3 H. P. Motor running fans in dry room  
 One (1) 2 H. P. Motor running fans  
 Two (2) large size kicking machines  
 One (1) small size kicking machine  
 20 Nine (9) fleshing machines  
 One (1) Troy wringing machine  
 One (1) Towlhurst Wring machine  
 One Cosann sewing machine  
 One (1) blower cage  
 Two (2) Tanks in wash house  
 Two (2) Proctor dryers  
 Six (6) large size ceiling fans  
 Five (5) tanks in dyehouse  
 All tables that are now being used  
 Sixteen (16) shop boxes on castors  
 30 One (1) fleshing machine grinder  
 Ten (10) trucks for Proctor dryers  
 Fifty (50) crates  
 One (1) steam jacketed kettle  
 One hand rotary pump  
 Six (6) bleaching dishes  
 Six (6) topping dishes  
 One (1) time clock  
 One (1) cage in dye house  
 Seven (7) cages  
 Twelve (12) drums  
 40 One (1) small drum

PHILIP A. SINGER & BRO., INC.,  
By PHILIP A. SINGER.

Newark, N. J., August 6th, 1928.

A. Hollander & Son, Inc.,  
Newark, New Jersey

Gentlemen:

As part of our transaction evidenced by the Agreement between us dated August 6th, 1928 concerning the equipment in our Green Street plant and the other matters in said agreement provided for, we do hereby agree and consent that you may hereafter use and employ on Marmot skins dyed by you or by any of your subsidiaries the stamp or mark or legend of "Philip A. Singer & Bro. Inc." or any stamp, mark or legend like the one now used by us or similar thereto. 10

Very truly yours, 20

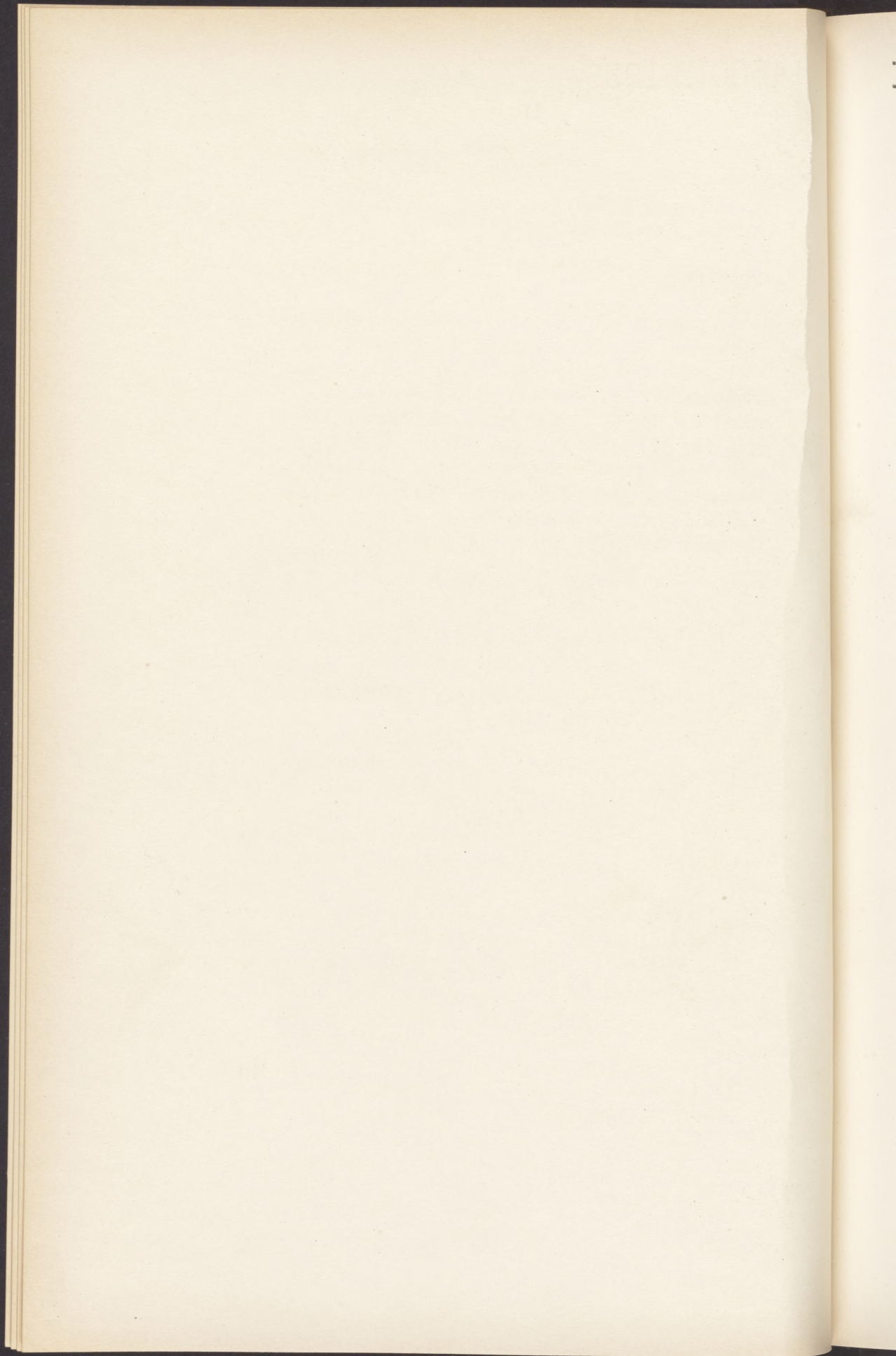
PHILIP A. SINGER & BRO., INC.,

By: PHILIP A. SINGER,  
President.

LEO H. SINGER,  
Secretary.

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**New Jersey Court of Errors and Appeals**

No. 145, OCTOBER TERM, 1935.

Between

A. HOLLANDER & SON, INC., a corporation,  
Complainant-Respondent,

*and*

PHILIP A. SINGER & BRO., INC., a corporation,  
Defendant-Appellant.

On Bill, &c.

Defendant's Appeal  
from Decree Enjoining  
Infringement of  
Trade-mark and  
Directing Accounting.

Sat Below:

Stein, V. C.  
Campbell, C.

(Italics and the like ours, except where otherwise noted.)

**BRIEF OF DEFENDANT-APPELLANT.**

**Statement of the Record.**

This is an appeal, notice of appeal (p. 1), petition (p. 2) by defendant (hereinafter called "Singer"), from a final decree (p. 43) advised by Stein V. C., following his memorandum opinion, in the form of a letter to counsel (p. 42), adjudicating (p. 44) that complainant's trade-mark "consisting of the geometrical design delineated in the bill of complaint, is a valid and subsisting trade-mark" and the exclusive property of the complainant (hereinafter called "Hollander"), and that Singer's trade-mark infringes upon Hollander's trade-mark and "has been unfairly and unlawfully used by the defendant since July 1, 1934," and enjoining Singer perpetually "from stamping, marking or impressing upon fur skins or pelts the said trade-mark, so as aforesaid used

by the defendant, or any other trade-mark geometrically similar to complainant's said trade-mark, \* \* \*," and that Singer make discovery "concerning all furs, skins and pelts dressed and dyed by it since July 1, 1934" upon which it used the infringing trade-mark and "all gains, profits and avails realized by Singer from the performance of such dressing and dyeing work," and that Singer account and pay to Hollander "such part of such profits, gains and avails realized by the defendant from the performance of such work from and after July 1, 1934, as is attributable to its use of said infringing trade-mark, and if such apportionment and allocation of profits cannot be determined *then the defendant shall render and pay to complainant all of the profits so made by it,*" and referring the matter to a Special Master to take the account, conferring upon the Special Master power to examine all books of account of Singer "touching and concerning its business of dressing and/or dyeing muskrat into what is commonly known as Hudson Seal for the period commencing July 1, 1934" and to examine Singer's officers, agents, servants and employees "concerning the said business, the books of account therefor and all entries either made therein or omitted therefrom," and directing Singer to pay to Hollander taxed costs including a counsel fee of \$750.

After the taking of the appeal the Vice Chancellor filed an opinion (p. 47); the bill was filed March 13, 1935 (p. 9); counsel for the parties, conceding "that the question of infringement and unfair competition is in the instant case answerable most satisfactorily by judicial inspection and comparison of complainant's and defendant's respective trade-marks, and that *there is no need for the submission of oral proofs* but that a final determination can be made in the cause upon the

within stipulation" (p. 40), stipulated that Singer "admits all the allegations of fact contained in the bill of complaint but does not admit any conclusions of law nor the allegation that defendant's trade-mark infringes upon complainant's trade-mark, nor the allegation that complainant is entitled to the relief prayed for."

So far at least as an accounting is concerned, counsel for *both* parties were *mistaken* when they assumed that "*there is no need for the submission of oral proofs,*" and the stipulation rests upon a mistake, if an accounting be considered to be involved, which indicates that, at the time the stipulation was made, accounting was not supposed to be in the case (see pp. 45, 61 of this brief).

They further stipulated that, on the return of the order which had been made, requiring Singer to show cause why temporary restraint should not go, the parties might submit skins and advertising literature bearing the several trade-marks which should constitute evidence in the case, and that "upon the Court's comparison of the respective trade-marks and upon the within stipulation the Court shall finally determine complainant's right to relief and shall enter its final decree accordingly. A final hearing in any other form is hereby distinctly waived by both parties."

It is clear from *this* that counsel assumed that a final decree would *end* the case. But the final decree made does *not* end the case. It directs an accounting.

The case was then argued before the Vice Chancellor and various skins and advertising matter submitted (which have been lodged with the Sergeant-at-Arms of this Court) and the case was briefed. The briefs were confined to a discussion as to whether infringement had been shown. Nothing was said with respect to an accounting. The

memorandum of the Vice Chancellor (p. 42) did not suggest an accounting. It was confined to the matter of *injunction* and purported to dispose of everything in the case except the matter of *counsel fees*, which was reserved. Not until application was made for a final decree was the matter of accounting mentioned. Then, for the first time, counsel for Singer realized that Hollander was insisting upon an accounting and that the case of *neither* party upon *that* issue had been fully developed. Objections were made in open court to the making of the decree, so far as accounting was concerned, upon the ground that Singer was entitled to show what the real facts were if an account was to be insisted upon, but the decree was signed. Thereupon this appeal was taken and thereafter, on October 3, 1935, a petition was presented in the Court of Chancery, praying that the decree be re-opened and that a rehearing be granted. An order to show cause was allowed which, up to the present writing, has not been argued.

Hollander insisted upon proceeding with the discovery and accounting notwithstanding the appeal. An application was made to the Court of Chancery to stay the discovery and accounting, which application the Court refused in a memorandum opinion which is printed at page 27 of the papers on the application to this Court for a stay. Thereupon Singer applied to this Court for a stay, application noticed for the first day of the term. Singer's papers upon this application have been filed. In the meantime the discovery and accounting has not proceeded, Hollander agreeing not to proceed pending the determination of the application for a stay by this Court.

The petition of appeal, among other things, challenges (par. 8, p. 7) the amount of the fee

allowed by the Court to Hollander as excessive. This led to the Court adding an addendum to its opinion (p. 73). The insertion of this provision in the petition of appeal was an inadvertence. When the petition was drawn everything was mentioned and, when it was signed by counsel, the fact that it included this challenge to the allowance of fees was overlooked. It is conceded that, if Hollander is entitled to prevail, the amount of counsel fee allowed is *not* excessive.

### Statement of the Case.

The facts must be taken from the bill (p. 9), taken in connection with the stipulation (p. 40), except that the parties may rely upon matters of common knowledge and other facts which are disclosed by reference by both parties to prior litigation. Both Hollander and Singer, Hollander from 1896 (and its predecessor) (p. 10), and Singer since 1921 (p. 14), have been engaged in the business of dressing and dyeing fur skins; about 1913 Hollander adopted a method of shearing and dyeing muskrat skins in such a manner as to so closely resemble seal as that the product was indistinguishable from seal to the ordinary observer; the name of "Hudson Seal" was used to designate the product; no claim is made that Hollander is entitled to the exclusive use of the name "Hudson Seal" as it had been used by others prior to Hollander entering the field and has been since used by others; about 1913 Hollander, by its predecessor, adopted a trade-mark, an imprint of which appears upon page 13; in 1922 Singer commenced to dye to "Hudson Seal" and adopted a trade-mark, an imprint of which appears on page 15; Singer did not produce "Hudson Seal" for any great length of time and from 1922 until

July 1, 1934 produced none; from September 1, 1928 to July 1, 1934, Singer was under contract with Hollander not to dress or dye muskrat to the style of "Hudson Seal"; from June 10, 1929 until July 1, 1934 Singer was under injunction of the Court of Chancery restraining it from producing "Hudson Seal", the result of a suit instituted by Hollander, in effect, for the specific performance of the contract, which injunction was the result of an agreement between the parties settling the litigation. (The proceedings in that suit, Chancery Docket 73, page 65, are made a part of the present bill by reference, page 15; the contract between the parties, which was executed August 6, 1928 and made a part of the proceedings in the prior litigation and, by reference, a part of the bill in the instant case, is printed in a supplemental state of the case.)

Under the contract last mentioned, Singer agreed that it would not, until December 31, 1933, "engage in the dressing or dyeing of any kind or kinds of pelts, skins or furs other than rabbits, except white rabbits; which white rabbits they shall neither dye nor dress." (The explanation for the fact that the injunction hereinafter mentioned went to July 1st, 1934, is that as a result of the negotiations for settlement, the contract was in effect extended to July 1st, 1934.)

A letter, written by Singer to Hollander of August 6, 1928, was held by the Court of Chancery in *Singer v. Hollander*, 104 N. J. Eq. 352, to be a part of that contract and by that letter Singer consented that Hollander might "hereafter use and employ on marmot skins dyed by you or by any of your subsidiaries the stamp or mark or legend 'Philip A. Singer & Bro. Inc.' or any stamp, mark or legend like the one now used by us or similar thereto."

After July 1, 1934, when the force of the injunction had been spent, Singer commenced to produce "Hudson Seal" and use the trade-mark, the imprint of which appears on page 16; in the early part of July, 1934, and in August, Hollander protested to Singer, and Singer's president "assured complainant that defendant would discontinue the use of said trade-mark" (this statement in the bill is not of a fact but of a conclusion); on September 26, 1934, counsel for Hollander wrote Singer the letter printed at page 17, directing the attention of Singer to the fact that counsel had advised its president that unless it desisted from using the trade-mark "suit would be commenced against you to *obtain an injunction against your continued use of it*"; several conferences were held between the parties and counsel, all with "a view to *prevailing upon the defendant* to discontinue the use of such trade-mark"; about three months before the filing of the bill Singer's president "informed complainant's representative that he was *considering* abandoning the trade-mark objected to and had under consideration a new trade-mark which could not possibly offend" and undertook to notify the representatives of Hollander "what his *final position* would be on the question"; some two weeks before the filing of the bill, Singer's president had informed Hollander's representative "that defendant *might* voluntarily discontinue the use of said trade-mark and would adopt another in substitution thereof"; such discontinuance "has not occurred," speaking as of the date of the filing of the bill, March 13, 1935.

Neither Hollander nor Singer deal with the ultimate purchaser; each takes fur skins, belonging either to dealers in raw skins or manufacturers of fur garments, and dress and dye the skins and return them to the owners; the skins are then manufactured into fur garments and sold, ulti-

mately reaching the wearer; neither buys or sells skins; *the trade-mark is impressed on the reverse of the skins and, when a garment has been manufactured, is invisible; it is necessary to rip the lining to expose it.* (There are always two, and sometimes three linings.)

The idea of shearing and dyeing muskrat to resemble Alaskan Seal originated in France; about 1908, it was brought to this country by a concern in Brooklyn and, about the same time, the French firm commenced to produce in the United States, and until 1913, J. D. Williams, Inc., the Brooklyn concern, and Chapal Freres, the French concern, were the only producers in the United States of "Hudson Seal," at which time Hollander took up the production.

The bill (p. 12) contains the following:

"When the firm of A. Hollander & Son entered this field in 1913 it produced what the entire country regarded as an article much superior to Chapal Freres', in that the Hollander pelt was stronger and more pliable, thereby avoiding deterioration resulting from cracks and breaks in the pelt. Thereafter when the woman buyer went to purchase her fur garment and asked for a '*Chapal Dyed*' seal the retailer would inform her that there was a better product on the market dyed by 'Hollander' and would thereupon introduce to her the new Hudson Seal product of A. Hollander & Son."

While the stipulation admits the *facts* charged in the bill, it does not, we submit, bind Singer to an admission of *this* statement with respect to what "*would be done*", not only because it is too general to mean anything but because the alleged fact is so opposed to common knowledge as to be incredible. Imagine a woman, or a man, going into a fur garment store and asking for a "Hudson Seal, *Chapal dyed*". Nothing is impossible

and therefore some instances of this kind may have happened but, if so, they must have been so rare as not to play any part in a serious litigation. The probability is rather that, when the purchaser went to a fur garment store and asked for a seal coat and it was apparent to the salesman that the purchaser was not in financial condition to pay for a seal coat, the salesman said, "We have a wonderful *Hudson Seal* for only \* \* \* (so much money)" and the purchaser bought what, in the mind of the purchaser, was a seal coat, whereas in fact it was muskrat and not from Hudson Bay.

No better combination of words to deceive than "Hudson Seal" could have been selected. Unquestionably the idea which springs to the mind from the word "Hudson", in connection with "Seal", is Hudson Bay, in the north where furs are produced. Everyone knows Alaskan Seal and they are *seal*. "Hudson Seal" means, to the ordinary person, a seal which comes from Hudson Bay, where, so far as the writer of this brief knows, there may never have been a seal, although the writer of this brief knows so little about it that the Bay may be full of seals; the manufacturer of the garment, and the person who sold it, knew full well, not only that the product was not seal, but also it was sheared and dyed by either Chapal, Hollander or Singer, as the case might be, for their dealings were *with* Chapal, Hollander or Singer.

No one was deceived, or could have been deceived, except the ultimate purchaser, and the ultimate purchaser was not deceived with respect to dyeing by Chapal, Hollander or Singer but with respect to the product being of muskrat rather than of seal.

There is no statement in the bill that actual confusion had occurred; a tendency to confuse *is*

charged and upon *that* the bill rests; there is no statement that the conduct of Singer was fraudulent; it is true that, as stated by counsel for Hollander in his reply memorandum for Hollander on the application for the signing of the decree, in dealing with the objections of Singer to that portion of the decree which directs an accounting, without giving Singer an opportunity to present proofs, "ever since that ancient day when pleadings were evolved in our English law, it has been a recognized principle that pleadings should contain only the facts and not characterizations", but the *design* and *intent* of a party are facts and, had Hollander intended to charge actual fraud, it would, and should, have charged, as *facts* that Singer intended and designed to create confusion and to appropriate to itself the good will of Hollander and, in the absence of such an allegation, *Singer could readily assume that no charge would be made of any actual fraud.* Certainly it cannot be contended that Singer admitted *actual fraud* by its stipulation. If it had there would have been no necessity for the Court to make any comparison of trade marks. (See pp. 61, 62 of this brief.)

It may also be true that it is not necessary to allege actual injury, but it is significant, on the issue of accounting, that the only charge in the bill with respect to injury is general (p. 20) and goes only to this—that "complainant has lost and will continue to lose custom which otherwise would naturally and ordinarily flow to it." The charge is made that the extent of such *future* loss will be incapable of ascertainment. There is no allegation that the loss already accrued, if any, is incapable of actual ascertainment. It has not been suggested, nor does the bill indicate, that there were any cases of *actual* confusion or loss, although the general charge is made (par. 12 of the bill, p. 19) that "dealers and persons in the

trade are being confused and in the future are likely to be confused while engaged in selecting skins of complainant, mistaking for them those produced by the defendant.”

The effect of the decree directing accounting (p. 43) is to give to Hollander all the profit which Singer has made with respect to any skins upon which its mark has been impressed. It is true that the decree provides that the Master ascertain, *if possible*, how much profit Singer made as a result of the use of the mark. But it then provides that, if *that* profit is unascertainable, Singer should account for the whole profit. The decree is predicated upon the theory that Singer made *some* profit as a result of the use of his mark but there is no admission, or proof, of such a condition.

It will be the contention of Singer on the accounting that it made *no* profit *as a result of the use of the mark*. Before it can be said that Singer has made a profit *as a result of the use of the mark* there must, we submit, be evidence that it received a contract for the shearing and dyeing of skins to “Hudson Seal” which it would not have received if it had not used the mark. If the Court should take that view, Singer would not be particularly injured as the result of the direction to account. But the Court apparently has *not* taken that view. If it had, *no direction to account should have been made* until the Court had some proof of such nature before it (*Dickinson vs. O. & W. Thum Co.*, 8 Fed. (2) 570, at p. 573, considered pp. 59, 60, 61 of this brief). Unless some such proof as this is required, it would seem to be an almost impossible task to indicate what profit has been made as a result of the use of the mark, and Singer, under the terms of the decree, would be obliged to account to Hollander for all of the profit which it made on the shearing and dye-

ing, *notwithstanding the lack of any proof of actual loss to Hollander*. In the process of discovery and accounting Singer would be obliged to disclose such facts as would make it possible for Hollander, practically its only, and a most bitter, competitor, to get at the formulae of Singer, for the decree would compel it to discover the amounts of its purchases, prices paid and the like, which, in turn, would indicate the source and the nature of the materials, and the cost of its labor, the nature of the work to which the labor was allocated. Hollander would be able to get at the most private financial affairs of Singer. The shearing and dyeing of muskrat to resemble seal is not conducted by Singer in a separate department but as an integral part of its business and Hollander would have access to its entire bookkeeping system.

### **The Issues.**

1. Singer submits that the two trade-marks are not so similar as to tend to confusion, and, in determining this matter, the facts that neither Hollander nor Singer sells anything and that they deal only with raw fur dealers and manufacturers who send them the skins for processing and who, therefore, know to whom the skins are sent and can not be confused, and that the marks are not used for the purpose of indicating the origin of the manufactured garment nor as sales advertising, nor visible to the ultimate purchaser unless the lining of the garment is ripped, must be given consideration. And Singer will submit that any purchaser who is so discriminating and particular as to require the ripping of a lining to get at the mark cannot possibly be deceived for the very fact that he is so discriminating and particular indicates that he would not be deceived.

2. The use of the mark in connection with the terms "Seal" or "Hudson Seal" has such a tendency to deceive the ultimate purchaser as to the nature of the fur as to close the door of a court of equity to Hollander.

3. A discovery and an accounting for profits on all of the skins upon which Singer affixed its mark is not justified under the circumstances of this case and upon the meager facts presented by the bill and stipulation and the Court below should have at least declined to direct the accounting until all of the facts had been presented to it and until some proof had been presented either that Singer had made *some* profit as a result of the use of the mark or that Hollander had been injured, and, in this connection, we submit that the mere fact, if it be a fact, that Singer has so bound itself by stipulation as that it cannot, as matter of right, demand the opportunity to produce further proofs, does not alter the situation for the burden was on Hollander to present such facts to the Court as might be necessary in order that the Court reach a proper conclusion, and those facts were not before the Court.

## ARGUMENT.

### POINT I.

Singer submits that the two trade-marks are not so similar as to tend to confusion, and in determining this matter the facts that neither Hollander nor Singer sell anything and that they deal only with raw fur dealers and manufacturers who send them the skins for processing and who, therefore, know to whom the skins are sent and cannot be confused, and that the marks are not used for the purpose of indicating the origin of the manufactured garment nor as sales advertising, nor visible to the ultimate purchaser unless the lining of the garment is ripped must be given consideration, and Singer will submit that any purchaser who is so discriminating and particular as to require the ripping of a lining to get at the mark cannot possibly be deceived for the very fact that he is so discriminating and particular indicates that he would not be deceived.

#### Preliminary.

The bill alleges that Singer used the mark in advertising. It is quite evident that no one could be deceived by such use of the mark. The text of the advertisements is so clear in indicating the advertiser as Singer, not Hollander, as that, by no stretch of the imagination, could the fact that the mark appears in some of the advertising tend to confuse.

It is admitted that Singer has as much right to process the skins to the type of "Hudson Seal" as has Hollander. While this concession is made,

it is clear, we submit, that in effect, Hollander treats the case as if it were entitled to the exclusive right to shear and dye skins to "Hudson Seal."

In any event Hollander, in its briefs below, laid no stress upon the advertisement.

It said, in its memorandum below "So in the case at bar, the elements composing the respective designs are somewhat different though similar. The wording is almost entirely different. These marks, as was stated above, are stamped on the backs of fur skins. It is there, *and not upon advertisements* that the mischief lies".

#### **The Respective Designs.**

The imprints of the respective designs appear on pages 13, 15, 16 and 20.

The first thing that strikes the eye is the prominence of the *name*. Approximately two-thirds of the trade-mark of Hollander (p. 13) is taken up with the name "Hollander" and "A H & S"; almost the same percentage of the trade-mark used by Singer in 1921 is taken up by the name "Singer" and "P A S & B", and a little less than one-half of the trade-mark used by Singer since July 1934, is taken up by the name "Singer"; it is impossible to conceive that the most indiscriminating person, looking at these marks, would not immediately be struck by the fact that one was Hollander's and the other Singer's; in most of the trade-mark cases in which infringement has been found, the name has been so manipulated as not to strike the eye; here, in both marks, the prominence is given to the names; it may be true that, as Hollander insisted below, the *mere* addition of a name is *not* determinative (*Standard Oilcloth Co. v. Trenton Oilcloth Co.*,

71 N. J. Eq. 555); but it is *one* of the elements to be taken into consideration, for the ultimate test is tendency to confuse.

On a casual inspection of the marks, it appears that they are designed to direct attention to the middle figure; in Hollander's mark (p. 13) the middle feature is a simple, fat ellipse; in Singer's (pp. 15, 16) the middle feature is a simple, slender diamond; Hollander's mark gives the impression of curves, Singer's of straight lines and sharp angles.

The type of lettering in the marks is entirely different; in Hollander's it is more or less crowded, slender; in Singer's (p. 16) open; the arrangement of the lettering is entirely different; in Hollander's (p. 13) the name "Hollander" is at the top; at the top of Singer's mark last used (p. 16), is the word "Hudson"; in the ellipse, in Hollander's mark (p. 13), there are the initials A H & S; in Singer's (p. 16) the name "Singer"; the lettering in "Hollander" and "Singer" is entirely different; at the bottom of both marks is the word "Seal" but in different lettering.

It would be well, we submit, to compare these marks (p. 13 and p. 16) with the marks in *Standard Oilcloth Co. v. Trenton Oilcloth Co.*, 71 N. J. Eq. 555, at page 556. A casual inspection of the marks there considered indicates that there might be tendency to confuse. No such tendency is indicated by the most casual inspection of the two marks involved in this case.

Nor is it possible for the ordinary person, on casual inspection, to mistake the one for the other, if the one is seen without the other beside it for purposes of comparison. If anyone saw the Hollander mark and then, three months later, saw the Singer mark, it is clear that he would not be let to believe that the Singer mark was the Hollander mark or that the article which was shown

bearing the Singer mark was an article upon which Hollander had worked.

The Vice Chancellor (p. 55) reaches the conclusion that the *general resemblance* between the two marks is exceedingly close and he says that "by superimposing one design upon the other I was able graphically to perceive the slightness of the difference between the two designs".

We submit that, if one superimposes one mark over the other, and *that is not the test*, there are striking *differences* disclosed.

In *Bear Lithia Springs Co. v. Great Bear Spring Co.*, 71 N. J. Eq. 595, affirmed 72 N. J. Eq. 871, both the Vice Chancellor and this Court held that the use by an alleged infringer of the figure of a polar bear was not an infringement on a mark which contained a black bear, both concerns being engaged in selling water and both using in their titles the name "Bear", one title being "The Great Bear Spring Company" and the other the "Bear Lithia Water Company". No infringement was found.

See also *Corbett Bros. v. Reinhardt-Meding Co.*, 77 N. J. Eq. 7, hereafter considered.

#### **The Law and Further Argument.**

The law is well settled and we do not quarrel with what the Vice Chancellor has said with respect to it. General statements of the law, however, help but little. The difficulty comes when one attempts to apply the well settled law to a state of facts. And the *facts* in each case cited must be taken into consideration, for each stands upon its own facts. In the case at bar there are two most important elements to consider: neither Hollander nor Singer deal with the general public; *their customers* cannot be deceived; the marks of each on the garment, when sold to the ultimate

purchaser, are concealed and it is necessary to rip a lining before a purchaser can get at the mark; neither Hollander nor Singer is engaged in the buying and selling either of skins or of the garments manufactured from the skins.

There is a statement in the bill (p. 10) that "it has become quite the common practice for women, to whom fur garments are exhibited for the purpose of sale, to ask that the inner lining of the garment be opened so that they might inspect the dyer's trade-mark appearing on the reverse side of the fur skin".

It may be that it can be contended that the allegation of the "practice" is an allegation of a fact and so admitted by the stipulation; it is, in reality, an allegation of a conclusion which must be based upon the happening of specific instances of the kind which would support the *inference* that a *practice* existed; in no true sense, therefore, is the allegation of a "practice" one of fact; there is no allegation in the bill of a single specific case where a woman has adopted what we should suppose would be a most unusual course of conduct.

It is hardly conceivable that many women purchasing fur garments are at all interested in the *name* of the *dyer*; they *are* interested in the looks and the feel of the garment and the price and the nature of the fur; if women were so interested in the name of the dyer and if the mark was so important, from the standpoint either of the buyer or of the seller of the garment, then why would not the mark be placed upon some portion of the garment which would be readily accessible?

It is almost as impossible to believe (and the Court is not obliged to believe anything merely because it may be argued that it is stipulated) as that, as alleged in the bill, a woman buyer would go to a merchant to purchase a fur and ask for a "Chapal Dyed" Seal. She *might* ask for a "Hud-

son Seal," but hardly, we submit, for a "Chapal Dyed" Seal. And if she *did* ask for a "Chapal Dyed" seal which the bill (p. 12) alleges she did, she certainly expected to get seal but she got muskrat. Hollander unconsciously in its bill indicates the fraud on the public.

Assuming for the moment, that there *are* a sufficient number of women purchasers who insist upon the inner lining of the garments being ripped, to the end that they may see the dyer's mark, to play any part in a controversy of this kind, it is apparent that such women buyers must be a most discriminating and a most particular class, and a class who would, by no possibility, be deceived, by observing the "Singer" mark, into believing that the garment was "Hollander" dyed, and *that* is the test.

It was urged below that the manufacturers of fur garments stretch and pull the skins and so work them that the wording contained on the mark becomes obscured. We find no allegation in the *bill* to that effect, but, if it be so, it is quite apparent that the discriminating and particular woman who would insist upon the inner lining of the garment being ripped so that the mark might be seen, would also inspect the mark, to see which she had caused the lining to be ripped, with some degree of care and, if she examined with care (or without care as we submit) she could not possibly be deceived.

"A *nice* discrimination is not expected from the ordinary purchaser," as this court, speaking by Mr. Justice Trenchard, said in *Hilton v. Hilton*, 90 N. J. Eq. 564, at page 567. *But* the test is *not* whether the *unwary* and *careless* purchaser would be misled.

Vice Chancellor Van Fleet, in *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164, said, at page 168:

“\* \* \* where the similarity is sufficient to convey a false impression to the public mind, and is of a character to deceive the ordinary purchaser, *buying with the caution usually exercised in such transactions*, there sufficient ground exists to entitle the injured person to redress. There are cases which lay down a more liberal rule in favor of persons claiming protection, and declare that if the resemblance is only such as is calculated to deceive the careless and unwary, a sufficient degree of similarity will exist to justify the court in interdicting the use of the counterfeit. \* \* \*

“For the purposes of this case, the rule laid down and enforced in *McLean v. Fleming, supra*, will be adopted as the true one. That declares that exact similitude is not required; in other words, that the counterfeit need not be a facsimile of the genuine, but that if the counterfeit so closely resembles the genuine as to mislead ordinary purchasers, *buying with the care usually exercised in such transactions, the use of the counterfeit should be prohibited*. An important part of this rule, as it applies to this case, is that clause of it which directs that, in determining whether the counterfeit so closely resembles the genuine as to be likely to deceive the ordinary buyer, the court *must take into consideration the degree of care which buyers usually exercise in buying such an article as that which is the subject of the distinguishing mark; for it is a matter of common knowledge that the ordinary buyer does not, as a general rule, exercise as much caution in buying an article for which he pays a few pennies as he does in purchasing a more valuable thing*. The instances are very rare, I suppose, where a purchaser exercises as much care in buying a bottle of beer as he does in buying a bottle of whiskey, a box of cigars, or a hat or a coat.”

“Hudson Seal,” while not as expensive as seal, is by no means inexpensive.

The *Wirtz* case has been consistently cited with approval and was so cited by this Court in the *Hilton* case, 90 N. J. Eq. 564 at page 567.

In *Rosenthal v. Blatt*, 80 N. J. Eq. 90, Vice Chancellor Leaming said at page 92:

“But assuming that the name ‘London Shop’ as used by complainants is wholly free from any criticism of the nature suggested, I am unable to conclude that defendant has entered the field of unfair competition in the use of the name ‘Page of London.’ As already stated, there is no resemblance between the two names used by the respective parties, except such as arises from the common use of the word ‘London;’ and the only danger of confusion from the use of the two names appears to me to arise from the possibility of a person observing the word ‘London’ and paying little or no attention to the remaining part of either trade-name.

“Complainants have received telephonic messages and mail relating to purchases made at defendant’s store, and have received by express and otherwise goods which have been purchased at defendant’s store accompanied with requests for their exchange or a return of the purchase price. In one instance a customer at one of the stores of complainants was sent to another store of complainants for a specific article and the customer went to defendant’s store by mistake. *These occurrences disclose some confusion which it is urged is to be attributed to a similarity of the two trade-names.* It is quite possible that the confusion referred to has arisen from the use of the word ‘London’ as a part of the trade-name of both contending parties; but such confusion is, in my judgment, *to be more appropriately attributed to extreme carelessness and inattention upon the part of the customers who have made the specific errors referred to.* Complainants have no property right to the exclusive use of the word ‘London’ in connection with their business. They

are only entitled to protection against unfair competition by defendant; they are entitled to be protected against defendant passing his goods or business as complainants' goods or business, and the test is whether or not the public is likely to be deceived. Concrete instances of confusion which can only be appropriately attributed to *extreme carelessness or inattention* on the part of customers are clearly inadequate to establish a similitude which does not in fact exist. I am unable to believe that the name 'Page of London,' used in the manner in which it is being used by defendant, is operative to deceive or mislead any reasonable person by reason of its resemblance to the name 'London Shop,' or to improperly divert complainants' trade."

And the same principle runs through all of the cases. See *Centaur Co. v. Link*, 62 N. J. Eq. 147; *Polackoff v. Sunkin*, 115 N. J. Eq. 134, and cases cited at page 136 of that report.

In *Rosenthal v. Blatt*, 80 N. J. Eq. 90, the Court (Leaming, V. C.) held that the tendency to deceive had not been proven although there was proof of *actual* confusion, which confusion the Vice Chancellor said "could be more appropriately attributed to *extreme carelessness and inattention* upon the part of the customers who have made the specific errors referred to."

In *Evening Journal Ass'n v. Jersey Publishing Co.*, 96 N. J. Eq. 54, the Court of Chancery (Backes, V. C.) in holding that "Jersey-Observer" (the name of the Hudson Observer having been changed to Jersey-Observer) did not have such a tendency to confuse with respect to a newspaper printed in the same locality named the "Jersey Journal" as to warrant an injunction, said (p. 58):

"Again, it is claimed that 'Jersey' facilitates newsdealers and newsboys palming off

the 'Observer' for the 'Journal'. A complete answer is that any unscrupulous handler can impose upon an unsuspecting buyer, and not only the 'Observer,' but any other newspaper as readily. *Ordinary care—a squint at the paper—would frustrate it.*"

Possibility of confusion is not sufficient; there must be probability. 63 *Corpus Juris* 397, sec. 104, title Trade-Marks; page 372, sec. 75.

There is a distinction where the parties deal with jobbers, wholesalers, or the like, who know with whom they deal and who cannot be deceived and other cases. The situation is stronger here, where *nothing* is sold by either Hollander or Singer, work only being performed upon skins sent to them by concerns who know to whom they are sending the skins.

In *Corbett Bros. Co. v. Reinhardt-Meding Co.*, 77 N. J. Eq. 7, Vice Chancellor Emery, in coming to the conclusion that a trade-mark had not been infringed, refers to the fact that both parties dealt with jobbers or retailers, and that "there is no evidence that the jobbers or retailers have been, or are likely to be, deceived into purchasing defendant's goods for complainant's by any similarity in the monograms." There was similarity in the trade-marks, with respect to which the Vice Chancellor said (p. 9):

"It is a form of trade-mark which, I think, was necessarily liable to a certain degree of imitation in general effect, if the general form or idea of the monograms was adopted, and its protection as a trade-mark therefore must, in a case of this kind, to some extent, depend upon *the liability of a purchaser to be deceived on close inspection*. In reference to the use of the monogram, I conclude upon the whole evidence that a case of violating trade-marks or of unfair competition has not been made out."

In the case at bar the form of the geometrical design of Hollander is such as that, if others are not to be prevented from using *any* geometrical design, there *must be some degree* of similarity. If Singer used a rectangle, an eclipse, or a circle, there would be a *certain* similarity.

In *Hill Bread Co. v. Goodrich Baking Co.*, 89 Atl. 863 (not officially reported), Vice Chancellor Stevenson declined to grant an injunction in a case involving an alleged infringement of a label used on the wrapper of bread, and in the course of his opinion said (p. 864):

“It appears that very large quantities of bread are sold wrapped in white waxed paper with red labels and tied with red string, and that buyers of bread are used to this method of wrapping a loaf of bread for sale: that such is the way in which one may expect to find loaves of bread supplied in groceries. So that we have a buying public in and around Newark, educated in respect to these packages, knowing that bread is sold in this way, and, under those circumstances, the public look naturally more at the detail than they otherwise would, and, when we come to look at the details of these packages, we find they are very dissimilar. The most casual observation discloses marked differences. I do not think I need repeat them; they have been very fully pointed out and discussed by counsel on the argument.”

He then considered the alleged similarity of the seal to a rosette, and said (p. 865):

“Differentiation of course can be made in a variety of ways. You might take two packages which are so similar that a buyer might be deceived and then differentiate *by removing some common feature or altering some common feature of the two*; you can differentiate by adding to one package what is not found on the other. You have to take the

package as a whole; you cannot go into details so as to find that, *because there is a simulation of a single detail of one, in a detail of the other, therefore, there is a violation of the complainant's rights, and an injunction must go.* In considering details in respect to the law of unfair competition, it must be determined whether the two details, which perhaps resemble each other, *in connection with all the other features and in connection with the known customs of the trade, lead to deception and fraud.*"

The theory of the court below seemed to be that points of similarities must be considered, *not* points of dissimilarity (p. 59). The fact is that *both* similarities *and* dissimilarities must be regarded.

The Vice Chancellor indicates that the lettering plays no important part (p. 59). We submit that lettering must be considered as *one* of the elements and an *important* element, for, as Vice Chancellor Stevenson said in the *Hill Bread Co.* case, "You might take two packages which are so similar that a buyer might be deceived and then differentiate by removing some common feature or altering some common feature of the two \* \* \*."

The part that lettering plays is indicated by this court in *International Silver Company v. Rogers*, 72 N. J. Eq. 933, at page 938, this court permitting the defendant to use a name of which Rogers was a part, which tended to confuse the articles manufactured by the parties to the litigation, if he would stamp upon the articles the words "not the original Rogers," or "not connected with the original Rogers."

It is true that in that case Mr. Justice Trenchard, speaking for this court, used the language quoted at the bottom of page 57, but the articles manufactured were for sale to ultimate

consumers; both companies were engaged in the sale of silver plated ware. Mr. Justice Trenchard limited what he said, which is quoted, to "cases like the present one," 72 N. J. Eq. at page 938.

Assuming that the ultimate purchasers of the garments are to be considered, then we submit, as we have heretofore argued at page 18, that, inasmuch as the only ultimate purchasers who ever could see the marks are those who are so discriminating and particular as that they require that the lining of the garment be ripped and the mark exposed, that it is not to be assumed that such discriminating and particular purchasers could possibly be deceived. Certainly it will not be assumed in the absence of any allegation or charge that any particular purchaser has been, in fact, deceived.

**Consideration of Cases Relied Upon by the Vice-Chancellor and by Hollander in the Court Below.**

No case can be considered as authority until its facts are examined. An examination of the facts in the cases cited by the Vice Chancellor and by Hollander below will indicate, we submit, how different they were from the facts in the case at bar.

*Celluloid Co. v. Cellonite Co.*, Circuit Court of the United States, District of New Jersey, Bradley, J., 32 Fed., page 94, mentioned by the Vice Chancellor (p. 55), was a case involving similarity of names. Notwithstanding the similarity, which was apparent, the court denied a temporary injunction.

*International Silver Company v. William H. Rogers Corp.*, 66 N. J. Eq. 119, 67 N. J. Eq. 646, 72 N. J. Eq. 933, mentioned by the Vice Chancellor (pp. 55, 56), was another similarity of names

case, and the similarity was apparent, and the probability of deception clear.

In *National Biscuit Co. v. Pacific Coast Biscuit Co.*, 83 N. J. Eq. 369, mentioned by the Vice Chancellor (p. 55), the infringing company had used two types of seals which the Chancellor held did not infringe, and then it had abandoned those types and had adopted a seal "upon a background of red of exactly the same shade as the complainant's seal," and differing only in marking, and had used it in precisely the same manner as the complainant, the difference being only in the arbitrary words, the one "In-er-seal," and the other "Swastika." The facts were such as led the Chancellor, Walker, to say (p. 376):

"Inspection and comparison of the cartons of the complainant and defendant, of the nomenclature and wrapper embellishments, and of the red-end seal application, are sufficient to satisfy me of the copying by the defendant of the complainant's trade name and carton and carton wrappers. I cannot conveniently deal with the cartons collectively, nor will it be possible, within the limits of these conclusions, to advert in detail to all of the points of similarity between the two sets of cartons to which my attention has been called, and, therefore, reference will only be made to the prominent features."

*Singer Manufacturing Co. v. Wilson*, 2 Chan. Div. 434, mentioned by the Vice Chancellor at the bottom of page 55, is a case, it seems to us, which aids Singer. The suit was brought by the Singer Sewing Machine Company against Wilson to enjoin Wilson from using the name "Singer" in connection with the sale of any sewing machine sold by Wilson unless of Singer's manufacture. It was heard in Chancery before Jessel, Master of the Rolls. He said (p. 442):

“What do we mean by saying that the trade-mark has been taken? That, again, has given rise to a great variety of decisions, but the principle, I think, is clear. A trade-mark, to be taken need not be exactly copied; it need not be copied even with slight variations; *but it must be a substantial portion of the trade-mark.* It has sometimes been called the *material portion*, but that means the same thing; it means the *essential portion* of the trade-mark, and it is sometimes a very difficult thing for a Judge to say what is the essential portion of it. As to that, no doubt authorities are useful. It must depend on the nature of the articles, and on the nature of the trade-mark also. Of course, where the trade-mark is very special, or peculiar in one respect, and is unlike any other trade-mark in the world; if it had, for instance, the portrait of a fanciful animal such as we are familiar with in heraldry, or one which no human being had ever thought of before, if it was a new animal invented for the purpose of the trade-mark, *then*, even though it was accompanied by other idiccia making up the trade-mark, I think very few Courts would doubt that the man who put the fanciful animal on goods of the same description or quality would invade the rights of the original owner of the trade-mark. I only put that as an illustration; many others will present themselves to the minds of the gentlemen of the Bar who are familiar with the subject. *Therefore, what the Court has to satisfy itself of is, that there has been an essential portion of the trade-mark used to designate goods of a similar description.* I say of a similar description, because there is no right in a trade-mark except to protect the manufacturer of the goods. If a seller of carriages invented this fanciful mark, this curious animal, and put it on carriages, that would not prevent a manufacturer of woollen goods from putting it as a trade-mark on woollen goods. As I said before, you must have regard, not merely to the mark, but to

the nature of the goods upon which the mark is impressed. That being so, I think I have disposed of the first class of cases."

In dealing with the matter of unfair competition, he said (p. 444):

"Again, if he (the alleged unfair competitor) tells the purchaser in plain English that the goods, however described, are in fact manufactured by himself, and makes this statement again in an open and full manner—that is, he does not use a small type for the one statement and a large type for the other, and does not do anything which shews an intention to deceive, but openly and fairly states all the circumstances—then it appears to me you have a very strong indication to shew that he did not intend to deceive, and that *no reasonable person ought to have been deceived*, although, if he had used one or more of the terms he has used without that explanation, he might have been liable to a charge of misrepresentation. *But, as in every other case of fraud—for it must be fraud—the case must be proved.* I say it must be fraud, because in the second class of cases the Defendant knows two things: he knows the goods were manufactured by himself and not the Plaintiff, and he knows the representation he is using is to convey to the mind of the purchaser (when I say he knows it, if it is reasonably calculated to convey, he must know the meaning of language so reasonably calculated to convey the idea) a contrary impression, that is a distinct and direct fraud; and I go further, and although it is no part of my business to decide on morals, yet as we often talk of legal fraud, perhaps irregularly and improperly as distinguished from moral fraud, that appears to me to be moral fraud, and moral fraud of a very gross character, because he knows the facts, and knowingly misrepresents them to induce a man to buy as goods manufactured by somebody else, goods manufactured by himself."

He then considered the facts and said (p. 444):

“The Plaintiffs, as I said before, have very distinct trade-marks indeed, which I have described. The Defendant has also a distinct trade-mark, very distinct indeed, which is put on his machines of a fairly considerable size, and as far as I can see, *of the same size as the trade-mark which the Plaintiffs put on their machines. If it differs, it differs so minutely that I have not been able to appreciate the difference.* It is of brass like theirs, and it is very distinctive, ‘Newton Wilson & Company, Manufacturers.’ There is then a St. George and a Dragon and the word ‘Trade-mark,’ and ‘144, High Holborn, London.’ If that trade-mark has any meaning at all with the use of the word ‘Manufacturers,’ it means that Newton Wilson & Co. are the manufacturers of the article upon which this brass plate is affixed. I so read it, and I think any intelligent person would so read it also, and I am gratified so far to find from the evidence that whenever the attention of any of the witnesses was called to this brass plate, they at once recognized the fact that it was a representation that Newton Wilson & Co. manufactured that article.

Again, I have seen the machines, and in my opinion *any ordinary purchaser* looking at the machines ought to have seen that brass plate upon them. That, again, is a question which I must decide for myself as a jury, and in my opinion trade-marks, being made for those who have ordinary sight and ordinary minds, *and not being made for persons of extraordinary acuteness or extraordinary dullness*, I think there is on every machine sold by the Defendants a fair and reasonable notice, not calculated to mislead any one, that the machines sold by them with that mark affixed to them are manufactured by the firm of Newton Wilson & Co.”

And (p. 447):

“I am not, as I consider, to decide cases in *favour of fools or idiots*, but in favour

*of ordinary English people, who understand English when they see it, and are not deceived by any difference in type, but who have before them a very plain statement."*

He dismissed the bill (p. 448) and was affirmed by the court of appeal (pp. 451 to 463).

In that case the contour of the two trade-marks was precisely the same, the *only* difference being in the name of the manufacturer. In this case, the contour of the trade-marks is *not* the same, and the name of Singer in the alleged infringing trade-mark is so clear that any person of ordinary intelligence would know, upon seeing it, that the processing and dyeing were performed by Singer, and not by Hollander.

*McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828, mentioned by the Vice Chancellor (p. 56), is also an authority which supports the position of Singer, rather than that of Hollander. In that case a concern had adopted as the name for a medical preparation, "Dr. McLean's Liver Pills"; the offending trade-marks used the name, "Dr. J. H. McLean's Universal Pills \* \* \* Vegetable Liver Pills \* \* \* Dr. McLean's Universal Pills." The court (at p. 832 of 24 L. Ed.), said:

"Difficulty frequently arises in determining the question of infringement; but it is clear that exact similarity is not required, as that requirement would always enable the wrong-doer to evade responsibility for his wrongful acts. Colorable imitation, which requires *careful inspection to distinguish the spurious trade-mark from the genuine*, is sufficient to maintain the issue; but a court of equity will not interfere, *when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other*. Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the *ordinary purchaser in the*

*exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress, if he has been guilty of no laches."*

We have no such situation here.

The court, while using the language quoted by the Vice Chancellor (p. 56), also said (p. 832 of 24 L. Ed.):

"Argument, to show that the name of the pills, as given in the trade-mark of the respondent, was of a character to mislead and deceive, is scarcely necessary, as they are *idem sonans* in the usual pronunciation; nor can it be doubted that the form of the box containing the pills and the general appearance of the wrapper which surrounded it were calculated to have the same effect. Mention may also be made of the fact that the color of the label and the wax impression on the top of the box are well suited to divert the attention of the unsuspecting buyer from any critical examination of the prepared article."

In this case the ordinary purchaser, buying with ordinary caution, never sees the trade-mark. It is only the extraordinary purchaser who is extraordinarily cautious who sees the trade-mark, and that such a purchaser could be deceived does not appear.

We have already mentioned *Wirtz v. The Eagle Bottling Co.*, 50 N. J. Eq. 164, cited by the Vice Chancellor (p. 56), (pages 19-20 of this brief).

The *Hilton* case, mentioned by the Vice Chancellor (p. 56), was another case of the misuse of names and has very little, if any, application to the matter here.

In *Cauffman v. Schuler*, 123 Fed. 205, mentioned by the Vice Chancellor (p. 58), labels attached to bottled ginger brandy were involved. The case was decided by Kirkpatrick, United

States District Judge in the Circuit Court of the United States, District of New Jersey. The similarity of the labels is indicated by the second headnote, which reads:

“Complainant was the manufacturer of a bottled beverage known to the trade as ‘Cauffman’s Ginger Brandy.’ Defendant sold a similar article; his label being of the same size, shape, and color as that of complainant. The color, size, and position of the printed matter were alike. The description setting forth the nature and quality of the article, as well as the division of the label into lines, and its decoration with scrolls, and the location of the manufacturer’s title, were similar. Defendant used a ‘caution’ label of the same size, color, and arrangement of printing as complainant, and possessing a subscription of the maker’s title. The word ‘Imperial’ was substituted for ‘Cauffman’s,’ and the word ‘Celebrated’ was omitted, and the wording of the ‘caution’ and the name subscribed thereto were dissimilar. Held, that defendant’s use of his label would be enjoined.”

In *Western Oil Refining Co. v. Jones* (C. C. A. 6th), 27 Fed. 2d 205, mentioned by the Vice Chancellor (p. 58), the name “Silver Flash” was held to infringe “Super Flash” for the reasons stated at page 206:

“When we come to consider the use of the name *as spoken*, we have no difficulty in holding that there was infringement, whatever doubt there may be as to the effect of its more limited use on signs and placards. From the nature of appellee’s business its *trade-name will be frequently spoken*; and although a casual observer might not mistake it for appellant’s name when it is written or posted upon placards, he would quite likely, we think, mistake the one for the other when the words *are spoken*. For example, if one were told that ‘Super-Flash’ was sold at one

of appellee's stations, he might easily understand it to be 'Silver Flash.'"

The District Court had denied an injunction. The language quoted from the opinion by the Vice Chancellor at page 58, insofar as it indicates that the casual or "*unwary purchaser*" is to be considered, does not express the law, if, by "*unwary*," is intended "*careless*." Usually the test is the effect upon the "*ordinary*" purchaser acting with such caution as "*ordinary*" purchasers would act under the circumstances. But that test is not applicable here, because only the extraordinary and cautious purchaser could ever see the trade-mark.

We have already considered (p. 16 of this brief) *Standard Table Oil Cloth Co. v. Trenton Oil Cloth & Linoleum Co.*, 71 N. J. Eq. 555, 558, mentioned by the Vice Chancellor (p. 60). An inspection of the two marks in that case will indicate how different the situation was from that at bar.

The same observations apply to what the court said in *Ohio Baking Co. v. National Biscuit Co.*, 127 Fed. 116, mentioned by the Vice Chancellor (p. 60), as we have already made with respect to *National Biscuit Co. v. Pacific Coast Biscuit Co.*, 83 N. J. Eq. 371 (p. 27 of this brief).

*Helmet Co. v. Wm. Wrigley, Jr., Co.* (C. C. A. 6th), 245 Fed. 824, mentioned by the Vice Chancellor (p. 62), was a chewing gum case. The facts as stated by the court (p. 828) were:

"The most convincing evidence to be found in the record in support of the charge of unfair competition appears in the trade-dress employed by the respective parties, excluding of course the Mountain brand. The packages of both parties, consisting of counterbands and individual pieces of chewing gum, are all substantially of the same size. The groundwork of these counterbands is white, and all

have a green bar, appearing on both sides, with the name Spearmint displayed thereon in white letters, but the bar of complainant's counterband has a rude spearhead at one end. At one end of complainant's counterband is a sprig of spearmint in green, at the other end are the words, 'The Flavor Lasts,' in green letters disposed above and below the point of the spear, and the same figure and words are displayed in the same way on the opposite side. At each end of two of the defendant's counterbands is a green shield, one bearing the letters 'I. X. L.' in white, and the other 'Lasting Flavor' in white, and the same design and letters appear at the ends of the opposite sides. The remaining counterband of defendant has at one end a shield outlined by double green lines with white center and bearing the letters 'I. X. L.' with some flourishes in green, the other end showing a helmet in green, with the words 'Helmet Gum' in green letters immediately above the helmet, and the same designs appear at the ends of the opposite side. The names 'Wrigley' and 'Pepsin Gum' appear in red letters, the one above and the other below the green bar, on both sides of complainant's counterband; while the names 'Pepsin' and 'Chewing Gum' appear in green letters, the one above and the other below the green bar, on both sides of one of defendant's counterbands. The names 'Pepsin' and 'Chewing Gum' in red letters are similarly arranged on another of defendant's counterbands, and the names 'Helmet' and 'Chewing Gum' in red letters appear in the same positions on the remaining counterband of defendant. One edge of complainant's counterband shows the following: A green bar with a spearhead bearing the words 'The Flavor Lasts' in white letters, and immediately under the bar the name 'Wm. Wrigley, Jr., Co.,' with the names of the cities Chicago and New York at one end of the name of the company, and Toronto and London, England, at the other end, and the opposite edge is the same except that

the words borne on the green bar are 'Perfumes The Breath' in white letters. On one edge of defendant's counterbands these words appear in green letters and figures, 'Guaranteed' and beneath this word, 'Under the Pure Food and Drugs Act, June 30, 1906, Serial No. 18035'; on the opposite edge, 'A Pleasant Chewing Gum containing Pepsin and other pure food ingredients;' underneath these words are 'Lasting Flavor Good for Digestion.' On another of defendant's counterbands the same words appear on one edge except that 'Guaranteed' is in red letters, and on the opposite edge the same words appear except that the first sentence is in red letters, and the others in green. On one edge of defendant's remaining counterband are the words in green letters, 'Guaranteed by The Helmet Co., Cincinnati, Under the Food and Drugs Act, June 30, 1906,' and on the opposite edge the word 'Spearmint' appears in green letters. Above the letters on each of the edges last mentioned are two heavy dotted parallel lines in red. Complainant's and defendant's packages alike contain five pieces or bars of chewing gum, and are completely inclosed in pink paper, except that the pieces of chewing gum are not so inclosed at the ends of one of defendant's packages."

It was in the light of *these* facts that the court used the language quoted by the Vice Chancellor at page 62.

*Williamson Candy Co. v. Ucanco Candy Co.*, 3 Fed. 2nd, page 156, was another candy, popcorn and chewing gum case, and the court used the language quoted by the Vice Chancellor at page 63 in connection with the facts indicated by the court (at p. 159) as follows:

"But those facts fall far short of an exoneration. The plaintiff's rights are not so narrow. It was and is also entitled to have the public not induced into having 'Oh Johnnie,' instead of 'Oh Henry,' upon the direct or in-

direct representation or suggestion that the 'Oh Johnnie' bar is of the same origin as the 'Oh Henry' bar. Common origin may be indicated and expressed in many different ways. I think nothing has been omitted, even to the diminutive ending of 'Oh Johnnie,' that would be calculated to create in the mind of the public the impression or belief that the 'Oh Johnnie' bar is the smaller brother of the 'Oh Henry' bar. That is a suggestion well calculated to deceive, for the public does not need to be told that brothers are children of the same parents. The impression so created in the mind of purchasers is not, I think, materially affected by the fact that the name of the manufacturer appears upon the respective bars or wrappers."

We submit that the proofs before the court were not sufficient to warrant a decree adjudging either infringement of a trade-mark or common law unfair competition.

## POINT II.

**The use of the mark in connection with the terms "seal" or "Hudson Seal" has such a tendency to deceive the ultimate purchaser as to the nature of the fur as to close the door of a court of equity to Hollander.**

The marks of both Hollander and Singer were affixed to skins dyed to resemble seal; they were made up into garments, which were known and advertised as "Hudson Seal"; the trade-mark of "Hollander" (p. 13), with great prominence, displayed the word "seal"; Hollander began the production of "Hudson Seal" in 1913; the natural inference, due to the use of the term "Hudson Seal", of the ordinary purchaser would be that the garment was made of a skin of a seal which

comes from Hudson Bay; there is an Alaskan seal; seals are known to come from cold climates in the North; Hudson Bay is known as a fur producing country; the words "Hudson Seal" imply a type of *seal*; the ordinary purchaser would not realize that what is termed "Hudson Seal" is dyed muskrat; the responsibility for the production of the article termed "Hudson Seal"; but which is in reality dyed muskrat, is on the dyer; the means by which the transformation is accomplished is the dressing and dyeing; the allegation in the bill (p. 12) that women purchasers would ask for "Chapal Dyed *seal*" indicates that the women purchasers thought that the "Chapal Dye" was a method of dyeing *seal*, not muskrat. We have further considered the facts on this issue of fraud (pp. 17-19).

Hollander urged below that, because it used the term "dyed muskrat" on its mark, there could be no deception.

But, here, Hollander is met by its own argument, made in an attempt to show that there could be confusion caused by Singer's use of its trademark. If, as urged by Hollander, the lettering on the trade-mark, with respect to the names of the dyers, could not have the effect of preventing confusion because the ordinary purchaser would not observe the lettering or because the lettering would become blurred, upon which assumed fact the Vice Chancellor strongly relied (p. 63), then the same reasoning will apply to the lettering "dyed muskrat". Hollander knew that the garments manufactured of the skins, sheared and dyed by it, were to be sold as "Hudson Seal"; the greater part of its business, as charged in the bill, is in giving the seal effect to the muskrat skin, and it says that over seventy-five million muskrat skins have been dressed and dyed by it since 1913 to "Hudson Seal".

The Vice Chancellor disposes of the insistence on the part of Singer with respect to the unclean hands doctrine, in effect, by his statement (p. 65) —“At no time was any testimony introduced or offered to the effect that the public had ever been deceived by the trade name ‘Hollander Seal.’”

Neither was there any evidence in the case that anyone had been deceived by Singer’s trade-mark.

If the court may assume, upon a comparison of the trade-marks, that they are of such a nature as that confusion may well be created, without any proof that it *has* been created, so the court may assume that the use of the term “Hudson Seal” or “Hollander Seal” in connection with a product known as “Hudson Seal” to designate dyed muskrat may well deceive the ultimate purchaser.

Hollander in its bill refers (par. 13, p. 19) to a change in the form of its lettering from “dyed muskrat” to “seal dyed muskrat,” and Hollander annexed to its reply memorandum, on the application to settle the decree, which included the accounting, an order of the Federal Trade Commission which recited that that Commission had, on the 28th day of November, 1934, issued a complaint against Hollander and certain others, alleging that Hollander and others were using unfair methods of competition, and that an answer had been filed on January 25, 1935, in which Hollander and others consented that the Commission might make an order requiring them to cease and desist from the violations of law alleged in the complaint, and then ordered that Hollander and others, in connection with the dyeing or dressing, sale, offering for sale, or advertising of dyed muskrat fur or dyed cony (rabbit) fur, cease and desist from: “1. Describing furs in any other way than by the use of the correct name of the fur as the last word of the description, and when any dye or blend is used simulating another fur the true name of

the fur appearing as the last word of the description must be immediately preceded by the word 'dyed' or 'blended,' compounded with the name of the simulated fur." \* \* \* "3. Using the word 'seal' or the words 'Hudson Seal' standing alone or in connection, combination or conjunction with any other word or words to describe or designate dyed muskrat unless and until the word 'seal' or the words 'Hudson Seal' are compounded with the word 'dyed' and such word or words so compounded are immediately followed by the word or words signifying or designating the true name of the fur, as 'seal-dyed muskrat' or 'Hudson Seal-dyed muskrat'."

This order was entered on the 25th day of June, 1935.

In *Perlberg v. Smith*, 70 N. J. E. 638, at page 647, Vice Chancellor Garrison said:

"I do not think it necessary to indulge in numerous citations for so familiar a principle. If a complainant is shown to be deceiving the public he cannot receive protection. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; 27 L. Ed. 706; *Stirling Silk Manufacturing Co. v. Sterling Silk Co.*, 59 N. J. Eq. (14 Dick.) 394 (Vice Chancellor Emery, 1900); *Koehler v. Sanders*, 122 N. Y. 65; 9 L. R. A. 576; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. C. 523; 11 Eng. Rep. 1435; *Prince Manufacturing Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24; 27 L. Ed. 942, and note, in which many cases are cited; S. C., 17 L. R. A. 129, and note."

In *Bear Lithia Springs Co. v. Great Bear Spring Co.*, 71 N. J. E. 595, Bergen, V. C., held that, because the label used on carbonated water by the complainant contained the statement "bottled at the spring," which was untrue, all relief should be denied. This court (72 N. J. E. 871) affirmed upon another point upon which the Vice

Chancellor had also relied, this court expressing the view that it was not convinced of the propriety of the application that was thus made by the Vice Chancellor of the ethical maxim of "clean hands" to the circumstances of the then case. This court did not indicate that the doctrine of unclean hands did not apply in a case of this kind.

In *Johnson & Johnson v. Seabury & Johnson*, 71 N. J. E. 750, this Court conceded that the doctrine of unclean hands applies in this type of a case, and said (p. 754):

"If it can be established in any case that the trade name which the complainant seeks to protect owes its value in any material degree to false representations on his part, we think he is not entitled to the protection of a court of equity. To give him relief would not perpetrate a falsehood by decree of the court as in a case where the false representation *is on the face of the trade mark* or label, but it would enable a man to profit by his own wrong, and the court would be in the position of protecting a property right acquired by fraud."

The type of misrepresentation there involved was considered by this Court as "mere puffing". The misrepresentation involved in the instant case cannot be placed in the category of "mere puffing".

In *N. Y. and N. J. Lubricant Co. v. Young*, 77 N. J. E. 321, at page 324, Vice Chancellor Stevens said:

"And Lord Westbury, in *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137 said: 'When the owner of the trade-mark applies for an injunction to restrain defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark or in the business connected with it, be himself guilty of any false or misleading rep-

*reversed 84  
N. J. E. 469, but  
without dis-  
turbing the  
principle,  
the court  
finding as  
a fact no  
misrepresentation.*

resentation; for if he makes any material false statement in connection with the property he seeks to protect, he loses and very justly, his right to claim the assistance of a court of equity.' The statement of the law, by Lord Westbury, was approved on appeal by the house of lords. 11 H. L. Cas. 523.'

The idea of dressing and dyeing muskrat skins so that they resemble seal and cannot be told from seal except by one who knows, to the end that they may be made up into garments to be sold to purchasers as "Hudson Seal" is a fraud, and Hollander takes the credit for introducing methods which had the effect of making a better product which could only have the effect of making it more like seal, although no process could make it seal.

Hollander's mark was used to designate it as the creator of this fraudulent product. The proceedings before the Federal Trade Commission, and the order of that Commission, could only rest upon the finding that a fraud had been perpetrated and the answer filed by Hollander in the Federal Trade Commission proceedings consented that the order be made that it "*cease and desist from the violations of law alleged in the complaint.*"

The result of the order of the Federal Trade Commission, which was made on June 25, 1935, amounted to an adjudication that, before that order had been entered, the public was being deceived and that the acts which Hollander and others had performed and which they are forbidden to perform, are acts which would tend to the deception of the public.

This order of the Federal Trade Commission was brought into the case by Hollander and was before the court before the final decree was advised and the making of the order, consented to, is not in accord with the finding of the Vice Chancellor (p. 66) that "The evidence that is before

me indicates that in the respect under consideration complainant has dealt openly and fairly with the public to which its products, not directly but ultimately find their way.''

There was no evidence before the court other than the allegations of the bill, and there are no allegations of the bill, we submit, upon which the finding of the Vice Chancellor on this branch of the case can rest.

### POINT III.

**A discovery and an accounting for profits of all of the skins upon which Singer affixed its mark is not justified under the circumstances of this case and upon the meagre facts presented by the bill and stipulation and the Court below should have at least declined to direct the accounting until all of the facts had been presented to it and until some proof had been presented either that Singer had made some profit as a result of the use of the marks or that Hollander had been injured; and, in this connection we submit that the mere fact, if it be a fact, that Singer has so bound itself by stipulation as that it cannot, as matter of right, demand the opportunity to produce further proofs does not alter the situation for the burden was on Hollander to present such facts to the Court as might be necessary in order that the Court reach a proper conclusion, and those facts were not before the Court.**

We have already indicated that the effect of those portions of the decree which direct a discovery and an accounting is not only to compel Singer to account for all the profits which it made on the dressing and dyeing of muskrat to resemble

seal, irrespective of whether (a) it received any profit as a result of the use of the trade-mark; (b) Hollander, suffered any damage, but also to compel it to disclose its books of account and confidential information so that, when the discovery and accounting is over, Hollander will have appropriated to itself the trade secrets, including formulae (dressing and dyeing fur skins being an art and the stock in trade of a dresser and dyer being his secret methods), and knowledge as to all of the details of Singer's financial concerns, without a suggestion of proof to the effect that Hollander has been in any wise damnified.

We realize that the decree directs that, if the profit made by Singer as a result of the use of the alleged infringing mark can be ascertained, Singer need only pay *that* amount but it is apparent that it is impossible to say that Singer realized any profit as a result of the use of the mark unless it be shown that Singer received some business as a result of the use of the mark which otherwise it would not have received, but that is not the theory of the decree.

Immediately upon the decree being signed, Hollander proceeded to attempt to compel Singer to produce all of its books before the Master designated in the decree, taking the view that it had the right under the decree, to examine the books and the officers of Singer and to show the entire profit which Singer had made on its dressing and dyeing of muskrat to resemble seal, and that, in the progress of so doing, it was privileged to examine all the books of Singer, and that the burden was then on Singer, the whole profit being shown, to demonstrate what part of the profit was due to the use of the trade-mark. It is impossible for Singer to show how much of its entire profit was due to the use of the mark. It takes the position that *none* was so due, but it is impossible,

upon the theory of Hollander, for Singer to prove the negative. If it does not prove the negative, then the assumption will be, upon Hollander's theory, that, under the decree, Hollander is entitled to the entire profit.

The burden is, therefore, shifted from Hollander to prove that *some* profit was obtained by Singer as a result of the use of the mark which, if it be the fact, Hollander might easily prove by showing that Singer had obtained some business as a result of the use of the mark which otherwise it would not have received.

In the progress of the discovery and accounting Hollander will become possessed of secrets of Singer of much greater advantage to it and of much greater detriment to Singer than all the money than can possibly be involved in a decree.

When the objection was made to the inclusion in the decree of a direction to account without Singer being permitted to put in proofs the Vice-Chancellor considered that Singer was bound by its stipulation. Let us look at the stipulation (p. 40) for a moment. It recites that the parties are of the opinion that the "question of infringement and unfair competition is" \* \* \* "answerable most satisfactorily by judicial inspection and comparison of complainant's and defendant's respective trade marks, and that there is *no need for the submission of oral proofs*" and paragraph 3 provides that, upon the Court's comparison, Hollander's right to relief shall be determined and a final decree entered.

What did the parties comprehend by this stipulation? It is obvious that if the matter of accounting was to be considered, complainants' right to relief could *not* be determined by a comparison of the marks and that there *was* necessity for the submission of oral proofs. Accounting, as the cases hereinafter mentioned indicate, does *not*

*follow a decree for an injunction as a matter of course.* Many injunctions are granted in cases in which accountings are denied.

The matter of accounting could not therefore have been contemplated by *either* counsel when the stipulation was made. The course the negotiations between the parties took, prior to the institution of suit, hereinafter mentioned was such as to lead Singer and his counsel to believe that accounting was not in the case (pp. 49, 50, 51 of this brief). The Vice-Chancellor when he sent his memorandum to counsel apparently did not consider that accounting was in the case for he said nothing about it (p. 42) although he *reserved* the matter of *counsel fees* (pp. 51, 52 of this brief).

*We submit that the stipulation has no effect whatever on the matter of accounting and that, upon the application for an accounting, at the foot of the decree, proofs were in order.* The making of the decree for accounting, without an opportunity being afforded to produce proofs, was, we submit, error. The stipulation looked only to the "final decree" which was considered to be the decree adjudicating infringement and granting injunction if Hollander prevailed. It did *not* look to what is essentially a matter to be considered at the foot of the decree. The application for accounting was a distinct proceeding and should, we submit have been so treated.

It is true that courts have allowed accountings for profits in trade-mark cases upon the theory that a trade-mark is the property of its owner and that the infringer is guilty of using that property, and therefore should fairly be required to compensate the owner for the profit that has been made by the use of his own property, and it has also been held (almost exclusively in cases of actual fraud) that, if it is impossible to segregate the profits obtained solely as a result of the use

of the trade-mark from the profits obtained as a result of the sale of the article manufactured with the mark imposed, all the profits will be allowed to the owner of the mark upon the theory that the fraudulent conduct of the infringer has placed him in the position in which he finds himself, but in all of the latter cases, we submit, it appears, either from affirmative proof or from clear inference, that, as matter of fact, the infringer *did* make a profit as the result of the use of the mark.

And most, if not all of the cases, concern marks used on manufactured goods produced and sold by the infringer, the subject of barter and sale, and the circumstances have been such as that it might be inferred that the mark had something to do with the sale of the article, and that the article would not have been sold had the purchasers assumed that the articles were manufactured or produced by the infringer and not by the owner of the mark.

We have no such situation here, for neither Hollander nor Singer create articles for sale and they do not sell. All that they do is to dress and dye the skins and they deal *only* with those who know them and who cannot be deceived. There is no inference here that any person dealing with Singer was deceived into dealing with it upon the assumption that Singer was Hollander.

In unfair competition cases, the theory with respect to accounting has been variously expressed. The true rule, we submit, is that the complainant should be made good for any loss which it can show it has sustained. In this case, there is no charge in the bill of any specific loss and the circumstances are such as to indicate that no loss could be shown.

The hardships imposed upon infringers by the rules with respect to accounting, particularly in strictly trade-mark cases, has led the court in a

great many cases to deny accounting upon more or less slender grounds, and even in cases of actual fraud, which is not the case at bar.

In *The International Silver Company v. William H. Rogers Corp.*, which engaged the attention of the Court of Chancery and this court upon several occasions, 66 N. J. E. 119, 67 N. J. E. 646, 71 N. J. E. 560, 72 N. J. E. 933, notwithstanding the fact that the defendant, Rogers, was guilty of actual fraud, as is apparent from what the court said, including statements of Vice Chancellor Stevens, 66 N. J. E. 119, at page 134:

“The law favors competition and none the less because it may be carried on by a competitor bearing the same name. *What it does, and all that it does, is to prevent the passing off of one man of his goods as the goods of someone else, to the injury of the latter.* Had Rogers been seeking to so pass off his goods? *It is evident that he had been,* and that, at this period at least, he was seeking to appropriate to himself the reputation and trade of another.”

And page 135:

“Aside, then from the rule requiring distinguishing marks, I think the conclusion is inevitable that up to, or nearly up to, the time of the formation of the Rogers corporation, Rogers was using the name to gain for himself a profit which belonged to another. *He was consciously seeking to pass off his goods as the goods of his competitor.*”

The Court of Chancery *denied* an accounting (66 N. J. E. 140), and its decree in this respect was unanimously affirmed by this court (67 N. J. E. 646), notwithstanding the fact that this court broadened the scope of the injunction advised by the Vice Chancellor, this court stating, page 651: “In the present case the corporate name was se-

lected unnecessarily, *with the intent to make an unfair use of it.*”

The ground upon which the accounting was denied was that, for approximately a year, without interference by the complainant, defendant corporation had expended money in the building up of its business. The rule was applied, notwithstanding the fact that the defendant was guilty of actual fraud, that he consciously attempted to appropriate the good-will of the complainant and notwithstanding the fact that, prior to the time of the expenditure of the money, an injunction had been obtained in New York by the complainant against one of the sales agents of the defendant enjoining it from acting as the defendant's selling agent. One of the reasons actuating the Vice Chancellor in denying the accounting is stated by him (66 N. J. E. 142):

“It was not able, after the lapse of two years, to show *that a single customer, either at wholesale or retail, had actually been deceived; that is, had been buying the defendant's goods supposing them to be of the complainant's manufacture.* Its case rested and was decided wholly on the *likelihood* that customers would or might be deceived because of the similarity of the name. Under these circumstances I think the complainant has been guilty of such laches as to disentitle it to an account. What Vice Chancellor Wood said, in *Beard v. Turner*, applies here: ‘If you induce another to lay out money by keeping back a right which you intend at some future time to assert, you may induce him to incur serious expenditure. \* \* \* But suppose you wish to profit by that act of which you say you have a right to complain, and shall at some future period complain of, then I apprehend that this court will say you must come here at once—for this reason, that you ask in the bill for an account of the profits made by this gentleman upon the sale of the goods.’”

And we have the same situation here. There is no suggestion that a single customer of Hollander has been deceived by the act of Singer or that a single ultimate purchaser has acquired a Hudson Seal garment which he thought to be "Hollander" dyed, whereas, in fact, it was "Singer" dyed.

The Vice Chancellor disposed of this objection to the accounting by holding—(1) that "‘unfair competition’ is ‘fraudulent conduct’", quoting from *Hilton v. Hilton*, 89 N. J. E. 149, at page 154, in the Court of Chancery.

For the purpose of determining whether an injunction will go the remarks of the court in the *Hilton* case may accurately express the law, but they have no application to the matter of accounting. Unfair competition does not necessarily imply "actual fraud" which is one of the important matters to be considered on the application for an accounting, but which is unimportant on the application for an injunction. And, when the facts in the *Hilton* case are taken into consideration, it appears to be obvious that there was an *actual intent* on the part of the defendant, by the use of the name, to appropriate the good-will of the complainant and there was proof (with respect to the legality of which there was a question) of actual confusion.

2. That Singer had persisted notwithstanding the warnings of Hollander.

It is true that the bill charges that, in the early part of July, 1934, and in August of that year, Hollander had protested against Singer's use of its mark (p. 17), and that the letter of September 26th, 1934 (p. 17) was written. It is apparent from that letter that Singer never agreed to discontinue. The statements in the letter as follows (p. 17): "I found fault with your trade mark and told you then that my client is insistent upon its position and that unless you would desist from

using said trade mark suit would be commenced against you *to obtain an injunction* against your continued use of it. It is my recollection that you told me that you would *think it over* and *consult counsel* and let me know what your determination would be. To the date hereof I have not heard from you and I have been instructed by Mr. Michael Hollander that unless you stop using the trade mark to commence suit against you. May I now ask you for your answer to the position you take," are inconsistent with the bald statement in par. 11 of the bill (p. 17) as follows: "Defendant's president assured complainant that defendant would discontinue the use of said trade-mark." That statement apparently rests upon an assertion said to have been made by one Fenning, mentioned in the letter of September 26, 1934, to the effect that the president of, Singer, had promised that Singer would discontinue the use of the mark.

The statements contained in par. 11 of the bill (p. 18), following the letter, indicate that *no promise was made* but that several conferences were held with a view to prevailing "upon Singer to discontinue the use of such trade-mark," and, about three months before the filing of the bill, the president of Singer, had informed Hollander's representative that he was *considering* "abandoning the trade-mark objected to and had *under consideration* a new trade-mark which could not possibly offend." As recently as two or three weeks before the filing of the bill the President of Singer had informed Hollander's representative "that defendant *might* voluntarily discontinue the use of said trade-mark and would adopt another in substitution thereof."

If Singer was temporizing with the situation, so was Hollander. It is apparent that Singer thought it had the right to use the alleged offend-

ing mark; Hollander was not so certain of its position as that it desired to bring the matter to an issue.

There is no suggestion in the bill or in the correspondence that there was any intent on Hollander's part to hold Singer to accountability for all the profits it might make either by the use of the alleged offending mark or derived from the dressing and dyeing of muskrat to resemble seal. Negotiations were pending between the parties and Hollander did not advise Singer that, unless it did what Hollander desired, Hollander would attempt to obtain an accounting for what transpired during the progress of the negotiations.

The letter of September 26, 1934, threatens suit for an "*injunction*" and nothing is suggested as to an accounting. And nothing was said about an accounting until application was made to settle the decree. The memorandum opinion of the Vice Chancellor (p. 42) says nothing with respect to accounting and indicates that, up to that time, the matter had not been discussed. It is significant that this opinion states that *an injunction will go*, and indicates that, *on the settlement of the decree, the matter of counsel fee will be passed upon*, a matter of minor importance, but does *not* say anything with respect to the important matter of accounting.

During these negotiations, which apparently continued almost to the date of the filing of the bill, Singer had the right to assume that no accountability would be required of it for the time during which the negotiations were pending.

While the bill, as filed, prays for an accounting, neither Singer nor its counsel realized that an accounting would be required and neither in the oral argument nor in the briefs submitted to the court on the main case was a word said as to an accounting.

The situation was directed to the attention of the court and an application was made orally to permit Singer to put in proofs, as is apparent from the briefs filed on the application to settle the decree, but the court made its decree in the form in which it now appears and there is now pending in the Court of Chancery a formal application to reopen the decree and to permit proofs to be put in.

There is, we submit, no justification in the proofs for the statements of the Vice Chancellor (p. 68) to the effect that Singer's promises and assurances (its promises only amounted to this, *i. e.*, that it would *think* about the matter) were not given in sincerity and were given to string the complainant Hollander along and that Singer "chose to stall along."

Just what useful purpose could be accomplished by "stalling" is not apparent. Nor is there any justification, we submit, for the statement of the Vice Chancellor that Singer "did not during those eight months alter its position prejudicially as a result of the passage of time."

It altered its position *most* prejudicially, for, according to the decree, Singer may be obliged to account for every dollar of profit which, during that period of time, it received as a result of the dressing and dyeing of muskrat to resemble seal, a considerable part of its business, irrespective of whether any part of that profit was the result of the use of the mark, and of any damage to Hollander, and, more important, Singer will be obliged to disclose to Hollander its innermost secrets both with respect to its formulae and its financial concerns.

There could be nothing, it seems to us, more prejudicial.

In *International Silver Co. v. Rogers*, 66 N. J. Eq. 140, the *only* matter involved was the expenditure of money.

What is involved in the instant case cannot be measured in terms of money.

In *National Biscuit Co. v. Pacific Coast Biscuit Co.*, 83 N. J. E. 369, relied upon by the Vice Chancellor on the main issue, notwithstanding the fact that the Chancellor (Walker) granted an injunction, he denied an accounting for the same reasons stated by Vice Chancellor Stevens (the report names "Stevenson" in error) in *International Silver Co. v. Rogers*, 66 N. J. E. 140.

In *P. E. Sharpless Co. v. Lawrence*, 213 Fed. 423, at page 426, C. C. A. (3rd), Gray, Circuit Judge, delivering the opinion of the court, said:

"In theory, a technical trade-mark, like a patent right, is a species of property, and when it is invaded or appropriated, the owner thereof is entitled, not only to protection from further trespass, but, to the recovery of the profits issuing therefrom, as incident to and a part of his property right. In suits for unfair competition, on the other hand, the complaint is not of an appropriation of a property right, but of a *tort* committed by the defendant, in that his conduct has been unlawful by reason of the consequential injury to the plaintiff. In such a case, it is contended the recovery should be for *damages* actually suffered by the plaintiff, and for those only, the wrong complained of being somewhat analogous to that which would be the basis of an action on the case at common law.

It is true, however, as contended by the plaintiffs below, that courts of equity, in granting injunctive relief in cases of unfair competition, have *sometimes* decreed that the plaintiffs should recover of defendant, not only damages, but the profits, gains and advantages that have accrued to the defendant by reason of his unfair competition. Such an enlargement of the scope of the decree is generally made on the ground that the unfair competition is adjudged to have been *wilful*

*and fraudulent*, and the recovery of profits in such cases is a *punitive addition to the ordinary decree of compensatory damages*. A number of cases have been cited in the brief of plaintiffs below, where, under these circumstances, an accounting of profits has been allowed in cases of unfair competition. We have examined all of them, and it is to be observed that in almost every case the recovery of such profits was included in the decree in addition to the recovery of damages, and in none of them was the precise question here presented discussed. The distinction between the recovery of damages and profits was thus recognized."

In Nims on "Unfair Competition and Trade-Marks," section 431, page 1078, the author says:

"Good faith as an excuse for relieving defendant from accounting. The question has several times arisen whether inadvertence on the part of a defendant, or even the utmost good faith, in regard to the use of a name, mark or other indicia complained of will excuse him to the extent of giving him exemption from an accounting of profits and damages.

"An accounting will not be ordered where an infringing party acted innocently and in ignorance of the plaintiff's rights, provided such party stops his illegal practices after he discovers the truth."

In *Regis, et als., v. Jaynes*, 191 Mass. 245, 77 N. E. 774, the court said at page 775:

"The defendants argued that in such a case as this, while an injunction may be granted to protect the rights of the plaintiffs in their trade-name, yet the defendants should not be held for the profits which they have realized by selling articles bearing a name like the one used by the plaintiffs, in the absence of any fraudulent intention on their part, when it was found that they had acted in ignorance

of the plaintiff's rights, and it did not appear that substantial injury had been done to the plaintiff before the filing of their bill. There is some conflict in the decisions; but we think that the weight of modern authority is in favor of the rule that an account of profits will not be taken where the wrongful use of a trade-mark or a trade-name has been merely accidental or *without any actual wrongful intent to defraud a plaintiff or to deceive the public.*"

In *Pease v. Scott County Milling Co.* (U. S. District Court, District of Missouri), 5 Fed. (2d) 524, a trade-mark infringement case, at page 526 the court said:

"Plaintiffs may have a decree for an injunction as prayed, and for an accounting as to damages and profits, since the filing of their bill of complaint herein, on the 13th day of December, 1922, and to this end a master will be appointed, if requested. The court thus limits the right of the potential recovery of damages and profits, because *the facts and situation do not disclose any actionable recalcitrancy, or any malicious or intentional infringement.* The circumstances, as already forecast, indicate that the parties *honestly believed that they had the right to use the trade-mark in question.*"

**And so here.**

In *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 45 L. Ed. 365, the Supreme Court of the United States held that, in infringement cases, as distinguished from unfair competition cases, the fraudulent intent is presumed, but it *may be rebutted in diminution of damages.* At page 380 of 45 L. Ed. the court said:

"If a plaintiff has the absolute right to the use of a particular word or words as a trade-mark, then, if an infringement is shown, the

wrongful or fraudulent intent is presumed, and *although allowed to be rebutted in exemption of damages*, the further violation of the right of property will nevertheless be restrained.’’

In *W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.*, 100 Me. 461, 62 Atl. 499, at page 506, the Court said:

“It has been seen that, in the light of the decisions, the unauthorized simulation of the plaintiff’s trade-mark and trade-name by the defendant corporation constituted an infringement of the plaintiff’s exclusive right to the use of a technical trade-mark, without other proof of a fraudulent intent on the part of the defendant; but the decision of the presiding judge that such conduct on the part of the defendant corporation, prior to the change of its name to Lunn & Lynn Shoe Company, constituted unfair competition, involved a finding that there was in fact a fraudulent intent on its part to convey to the trade an impression that its shoes were the Auburn-Lynn shoes, product of the plaintiff. This finding was not required to authorize the injunction against the use of the plaintiff’s trade-mark by the defendant corporation, but it was **nevertheless relevant and material upon the question of damages; since the presumption of wrongful intent in cases of technical trade-mark may be rebutted upon the question of liability for profits and damages.** *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 674, 21 Sup. Ct. 270, 45 L. Ed. 365.’’

*The Clark Thread Co. v. The William Clark Co.*, 55 N. J. E. 658, reversed on measure of damages in 56 N. J. E. 789, mentioned by the Vice Chancellor (p. 69), was a case of wilful fraud. This court reversed the Court of Chancery on the measure of damages and said (p. 790):

“In this condition of things it seems to us inequitable to hold the defendant responsible

to the complainant for *all* the profits realized by the defendant from the wrongful conduct. *Its responsibility to the complainant should be confined to such profits as were diverted from the complainant*, and such damages as the complainant otherwise sustained, leaving the defendant answerable to the Mile-End company for the profits unlawfully diverted from it.”

*L. Martin Co. v. L. Martin & Wilckes Co.*, 75 N. J. E. 257, mentioned by the Vice Chancellor (p. 69), involved names and the conduct of the defendant had been willful and fraudulent. In that case the Court of Chancery (75 N. J. E. 39) had, in addition to profits, allowed damages. This court did not agree with the Vice Chancellor and said (75 N. J. E. 259):

“In *Eggers v. Anderson*, 63 N. J. Eq. (18 Dick.) 264, the jurisdiction of equity was sustained in the case of fraud, and it was held that the value of goods furnished might be ascertained by a master, but that case comes short of sustaining the jurisdiction to ascertain unliquidated damages for a tort. The difficulty of applying that rule to the present case arises out of the fact that the rule for ascertaining the compensation of the complainant in equity in cases of this kind is not the damages suffered by the complainant, but the profits realized by the defendant. The proper rule in such cases is the rule which has been adopted in cases for infringement of patents. That rule allows the complainant to recover the profits made by the defendant, including in profits the advantage derived by the defendant from the use of the invention. *Tighman v. Proctor*, 125 U. S. 136, 31 L. Ed. 664, where Mr. Justice Gray said: ‘The general rule has been sometimes said to be based upon the theory that the infringer is converted into a trustee for the owner of the patent, as regards the profits made by the use of his invention. But, as has been re-

cently declared by this court, upon an elaborate review of the cases in this country and in England, it is more strictly accurate to say that a court of equity, which has acquired upon some equitable ground the jurisdiction of a suit for the infringement of a patent, will not send plaintiff to a court of law to recover damages, but will itself administer full relief by awarding, as an equivalent or substitute for legal damages, a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage.' Citing the case of *Root v. Railway Company*, 105 U. S. 189. The distinction between an account of profits made by the defendant and an ascertainment of the damages suffered by the complainant is well illustrated in the case of *Elizabeth v. The American Nicholson Pavement Co.*, 97 U. S. 126, where the court held, in an opinion by Mr. Justice Bradley, that the city of Elizabeth, having made no profit, could not be held for compensation in the equity suit, although it had made itself liable for damages in an action at law."

That case does not meet the situation here. The court was considering a limitation upon the amount which could be recovered in equity.

In *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251, 60 L. Ed. 629, mentioned by the Vice Chancellor (pp. 70, 71), the alleged infringer was found guilty of actual fraud. The court (at 60 L. Ed., p. 635) said:

"Assuming the asserted analogy to patent cases to exist, a sufficient reason for not requiring complainant in the present case to make an apportionment between the profits attributable to defendant's use of the offending mark and those attributable to the intrinsic merit of defendant's shoes is that such an apportionment is inherently impossible. Certainly, no formula is suggested by which it

could be accomplished. The result of acceding to defendant's contention, therefore, would be to deny all compensation to complainant. *And it is to be remembered that defendant does not stand as an innocent infringer.* Not only do the findings of the court of appeals, supported by abundant evidence, show that the imitation of complainant's mark was fraudulent, but the profits included in the decree are confined to such as accrued to defendant through its persistence in the unlawful simulation in the face of the very plain notice of complainant's rights that is contained in its bill."

It then quoted the language from *Graham v. Plate*, 40 Calif. 593, 599, quoted by the Vice Chancellor at page 71. *Graham v. Plate*, 40 Calif. 593, 599, was a case of actual fraud.

*Dickinson v. O. & W. Thum Co., O. & W. Thum Co. v. Dickinson* (C. C. A. 6th) 8 Fed. (2nd) 570, mentioned by the Vice Chancellor at page 72, was another case of actual fraud. The facts, as stated by the court, preceding that portion of the opinion which is quoted by the Vice Chancellor at page 72, are indicated by the following (8 Fed. (2nd), p. 573):

"Defendant's main complaint is that the master charged him with the entire profits accruing from the sale of any infringing goods during this period. It is insisted that the burden was on plaintiff to prove that defendant had made profits attributable in whole or in part to the infringing use of its trade-mark, and that the evidence does not support a finding that there were any so attributable. It would seem that this contention is precluded by our former opinion. *If it had been otherwise, an accounting of profits and damages would not have been ordered.* Be this as it may, the master was plainly right in finding that defendant had made profits attributable in whole or in part to the

use of plaintiff's trade-mark. It had already been *conclusively established that defendant was a willful infringer of a valid trade-mark. He had made use of that trade-mark in marketing his product.* In this situation he cannot urge successfully that his sales were due exclusively to the merit of his product, or that no one can say what part was due to the use of the infringing trade-mark and what part due to the merit of his goods and thereby escape liability."

Notwithstanding the deliberate fraud involved, which is well expressed in the 8th headnote in a preceding opinion of the court (245 Fed., p. 609):

"Where the action of a defendant in imitating the trade-marks and trade dress of complainant was progressive, new features of similarity being added from time to time, complainant is not chargeable with laches in delaying to bring suit, which deprives it of the right to an injunction, *although the delay may affect its right to an accounting for the full period*";

the court limited the accounting as hereinbefore indicated, and we observe that, before the court allowed *any* accounting, it found that there *was* profit attributable to the infringing use of the trade-mark, and in 8 Fed. 2nd 570, at page 573, it says that, *if there had not been such evidence, "an accounting of profits and damages would not have been ordered."*

In the case at bar, we have no charge in the bill, and therefore no admission by Singer, that there is any profit whatever attributable to the use of the alleged infringing mark.

We have no charge of loss to Hollander, except the general charge contained in paragraph 14, page 20.

Nevertheless, without that kind of proof, in the absence of which the Circuit Court of Appeals for

the 6th Circuit stated in 8 Fed. 2nd, 573, no accounting would have been allowed, the court below in the instant case has made a decree for an accounting, which may well have the effect of compelling Singer to account for *all* of the profit which it has made from the dressing and dyeing of skins upon which the alleged infringing mark was placed.

We submit that, before a decree should be made which would compel discovery and an accounting, under the circumstances of this case, there should be *some* evidence before the court that, as matter of fact, Singer did make, or at least could have made, some profit which could be attributed to the use of the offending mark.

The books of account of Singer will not help Hollander on *this issue*, for those books will only disclose the profit made upon the dressing and dyeing of the skins. They will *not* show anything with respect to any profit attributable to the use of the infringing mark.

If there were such profit, it could be shown by proof that Singer had obtained orders for the dressing and dyeing of skins which it would not have obtained had it not used the infringing mark, and that is the *only* kind of proof which would be of importance.

We repeat that there is not only any absence of proof to that effect, but there is no charge in the bill to that effect.

Under the case of *Dickinson v. O. & W. Thum Co.*, 8 Fed. (2nd) 570, upon which the court below relies, we submit, no accounting should be allowed unless *in the first instance there is proof that the use of the offending mark in some way profited Singer.*

*Then*, if there be any such profit and it be impossible to allocate the amount of the profit due to the use of the infringing mark, there may be

some play for the principle that the infringer should suffer because his act created the impossibility.

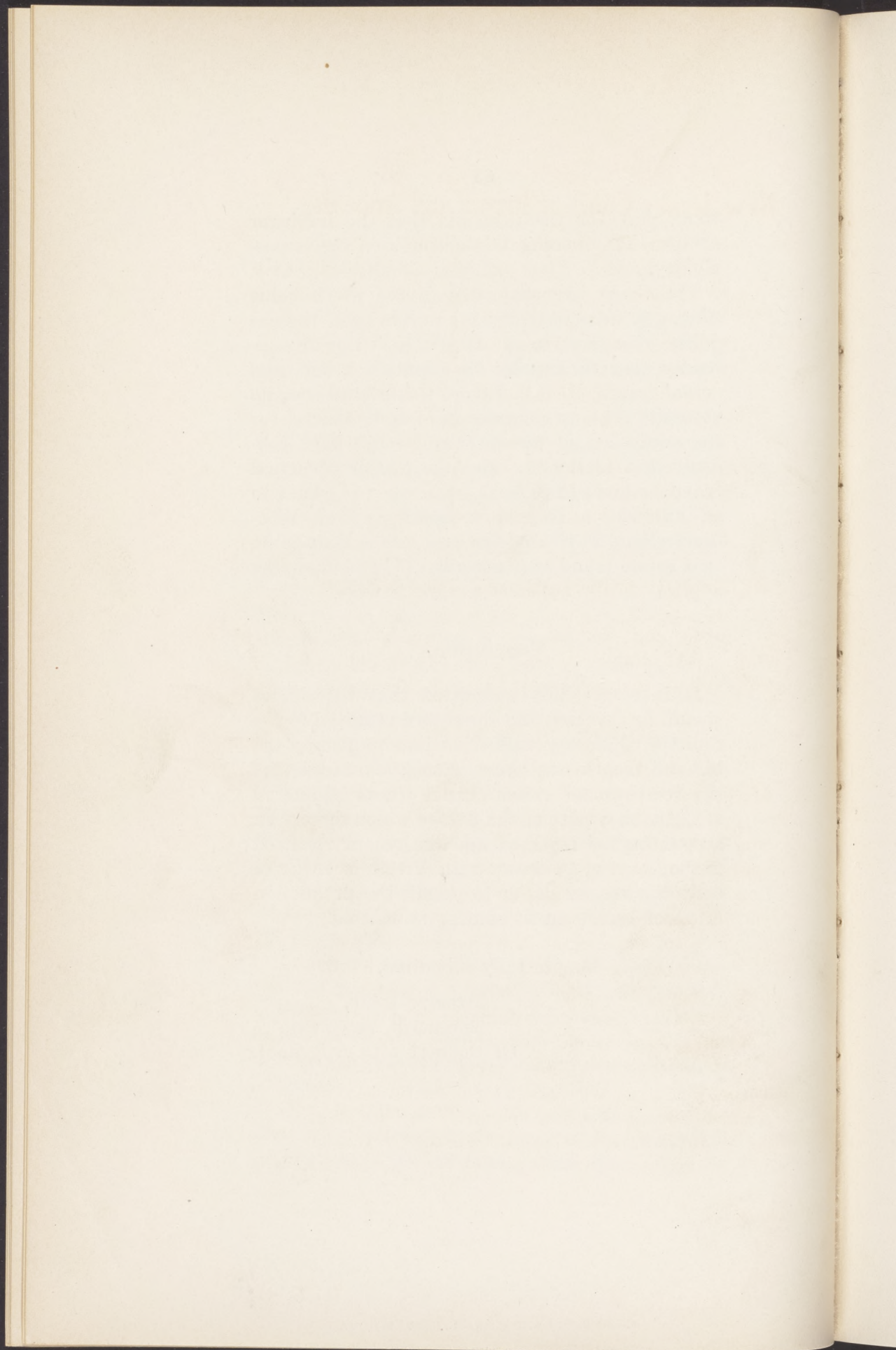
The Court has advised a decree which holds Singer to accountability for profits as if it were guilty of *actual* fraud. Can it be seriously contended that Singer, by its stipulation, admitted *actual* fraud? If it had there would have been no necessity for any comparison of trade marks, for the admission of *actual* fraud would have condemned it forthwith. But the matter of actual fraud or good faith is at issue when it comes to an application for an accounting. The Vice-Chancellor has treated the case on the main issue as if actual fraud were *not* admitted and, upon the application for accounting, as if it were.

### Conclusion.

It is respectfully submitted that the decree should be reversed and the record remitted to the Court of Chancery with directions to dismiss the bill and that, in any event, if this Court feels that the decree to the extent that it grants injunction is right, that part of the decree which directs an accounting be reversed and the record remitted to the Court of Chancery with directions either to deny the accounting or to permit the production of proof before an accounting is ordered.

Respectfully submitted,

MERRITT LANE,  
EDWARD R. MCGLYNN,  
Of Counsel with Appellant.



# New Jersey Court of Errors and Appeals

No. 145, October Term, 1935.

*Between*

A. HOLLANDER & SON, INC.,  
a corporation,  
*Complainant-Respondent,*

*and*

PHILIP A. SINGER & BRO., INC.,  
a corporation,  
*Defendant-Appellant.*

*On Appeal  
from Court  
of Chancery.*

## BRIEF OF COMPLAINANT-RESPONDENT.

(Italics and the like ours unless otherwise stated. All numbered references are to State of Case unless otherwise noted.)

### Statement of the Record.

With one exception the introductory statement of the record appearing in appellant's Brief is correct. That exception relates to what is there said concerning complainant's demand for an accounting of profits. It is stated (p. 3 of Appellant's Brief) that: "Nothing was said with respect to an accounting. \* \* \* Not until application was made for a final decree was the matter of accounting mentioned. Then, for the first time, counsel for Singer realized that Hollander was insisting upon an accounting and that the case of neither party upon that issue had been fully developed." The author of appellant's Brief, Mr. Lane, was not present on the occasion when the cause was first submitted to Vice-Chancellor Stein for decision and argument was had

for and against the relief sought. On that occasion counsel for complainant made many references to and read excerpts from two volumes, one published by the National Biscuit Company containing a collection of its adjudicated trademark cases, and the other published by the Coca-Cola Company, being a compendium of its adjudicated trademark and trade name cases. It was pointed out to the Court that in some of those cases where an injunction was allowed but profits were refused, there was present either the circumstance of laches or an express waiver by the complainant. Complainant's counsel emphasized the opinion of Chancellor Walker in *National Biscuit Company v. Pacific Coast Biscuit Company*, 83 N. J. Eq. 369, and suggested to the Court that if complainant carried a decree, that decree should be substantially like the one awarded by Chancellor Walker in the National Biscuit case, *except that in the instant case an accounting of profits should be directed*, because the instant case differed from the National Biscuit case in that in the *latter* there had been inexcusable delay in bringing suit whereas in the instant case laches neither appeared on complainant's showing nor was suggested by the defendant. On that occasion the solicitor for the defendant did not challenge complainant's demand for an accounting, except only as such challenge inhered in his contention that the respective trademarks of the parties to the suit were dissimilar and that, therefore, complainant was not entitled to *any* relief (pp. 24-25 of Memorandum and affidavits filed at this Term by respondent in opposition to appellant's motion for a stay). It will also be observed that an accounting was prayed by complainant in prayers Nos. 3 and 4 of the Bill (S. C. p. 21) and

was additional to the prayer for injunction contained in prayer No. 2 of the Bill. Then too, before the submission of the cause the defendant had agreed by written stipulation that upon the Court's comparison of the respective trademarks "the Court shall finally determine complainant's *right to relief* and shall enter its Final Decree accordingly" (S. C. p. 41). In an earlier provision (par. 2 of Stipulation) the defendant admitted all the allegations of fact contained in the Bill of Complaint, reserving from the admission:

1. Conclusions of law.
2. The allegation that defendant's mark infringes complainant's, and
3. "The allegation that complainant is entitled to *the relief prayed for.*"

No distinction is drawn in the Stipulation between the main relief of injunction and the ancillary relief of accounting. It was not until the Court announced its decision in favor of complainant that defendant by its solicitor for the first time raised the question of its accountability for profits as distinguished from its amenability to injunctive process. Present counsel for Singer have informed this Court that the belief of Singer's counsel in the Court below that an accounting would not be required and that all Hollander was concerned with was to prevent the use of the mark "*is perhaps without warrant*" (p. 6 of Memorandum in support of motion for stay made to this Court at this term).

### Statement of Facts.

The only facts in the case are those appearing in the **Bill of Complaint**, all admitted by **Stipulation** (p. 40), supplemented by five exhibits received into evidence at the final hearing. Those exhibits consisted of the following:

Exhibit C. 1 is "Singer's Hudson Seal skin after stretching" and was so marked in the Court below.

Exhibit C. 2 is complainant's Hudson Seal skin after stretching and is so marked.

Exhibit C. 3 is the Commissioner of Patent's Certificate of Registration of complainant's trademark.

Exhibit D. 1 is defendant's Hudson Seal skin before stretching.

Exhibit D. 2 is complainant's Hudson Seal before stretching.

*The contract of August 6, 1928 and the letter under the same date, both printed by appellant in its Supplemental State of Case, were not offered in the Court below and were not before it.* A passing reference to a contract between the parties appears in paragraph 8 of the Bill. The purpose of that reference was to support the allegation that from 1922 to July 1, 1934 the defendant produced no Hudson Seal. The detailed provisions of the contract were not involved in the instant litigation nor was the production of the contract demanded by the defendant nor did it seek to have the Court receive its copy in evidence. Respondent, therefore, respectfully submits that the Supplemental State of Case contains matter which forms no part of the case. Aside from this, the relevancy of that matter nowhere appears in Appellant's Brief. The rel-

evant fact is that defendant was under contract with complainant not to produce Hudson Seal between September 1928 and July 1, 1934. That fact is admitted by the defendant's Stipulation. All other terms of the contract are not pertinent to the controversy.

### **The Admitted Facts.**

The facts that we now succinctly state will all be found in paragraphs 1 to 14 of the Bill (S. C. pp. 9-20). The following paragraphs are numbered to conform to the corresponding paragraphs in the Bill. We will refer to complainant as "Hollander" and to the defendant as "Singer."

1. Hollander is a Delaware corporation organized in 1929 and since that year has possessed authority to transact business in this state. Its principal factories and officers are here located.

2. Hollander's business was founded in 1896 and was carried on from that year until 1919 by the predecessor copartnership of A. Hollander & Son. In 1919 the copartnership sold and transferred its business and assets, including its trademarks, trade designs and good-will, to complainant company.

3. Hollander's business has been conducted continuously from 1896 to the present time and it consists of dressing and dyeing various kinds of fur skins and pelts. For some years past Hollander has been in its field the largest concern in the world. Its particular business consists of receiving raw fur skins from its customers (dealers in raw skins or manufacturers of fur garments). Such skins are subjected to highly skilled labor, employed in connection with

secret recipes, formulae and methods, the result of which is a finished fur product ready for conversion into garments. Hollander's products have enjoyed a reputation for excellence in quality, which excellence has for more than twenty-five years been recognized universally by dealers, manufacturers, department stores and retailers and also by *ultimate users*, so that women buying furs have been thereby induced to purchase Hollander's products. It is a common practice for purchasers to have the inner lining of a fur garment opened for inspection of the dyer's trademark appearing on the reverse side of the skin. (Our adversary argues on page 17 of his Brief that this allegation of practice is in reality an allegation of a conclusion, which should be based upon specific instances of a kind which would support the inference that such practice exists. The most that this can possibly mean is that the Bill expresses a *conclusion of fact*. Such conclusions were not reserved in the Stipulation admitting the Bill. It will be observed that the Stipulation reserves only "conclusions of law" and does not mention conclusions of fact. That conclusions of fact were intended to be admitted by the Stipulation is manifest not only from the omission of reference thereto but also by the express reservation of the allegation of infringement, which latter is nothing more than a conclusion of fact. Moreover, the "specific instances" which our adversary conceives should appear in the Bill constitute the *evidence* necessary to prove the fact of the practice, if the fact itself were not admitted. Counsel's criticism can mean no more than that we have failed to plead evidential, not ultimate, facts.) The Hollander trademark has for more than twenty-five years been impressed on the skins processed by

it. This practice is not peculiar to complainant "but is common and general in the fur industry, each dyer impressing upon the skins dyed by him his own distinctive trademark or device." By such marking the ultimate purchaser is enabled "to recognize the product of any particular dyer whose trademark is known to such purchaser," and the dealer is enabled to distinguish between the products of various dyeing concerns. This means of differentiation generally operates to avoid confusion and deception.

4. One of Hollander's principal products is the skin "*commonly called* Hudson Seal. It consists of a muskrat sheared and dyed black so as to resemble Alaskan seal." (Singer in his brief argues that the resemblance is a very close one but there is nothing in the record that indicates the degree of resemblance.) That product was imported from France until 1908 and has been produced in this country ever since by a number of concerns. From 1913 until the present time complainant has been producing it. Within a few years following 1913 Hollander's product "became very generally and favorably known and denoted excellence in quality" and Hollander's trademark (shown in par. 5 of the Bill) "on the reverse side of the skin became known to the purchaser and was associated in her mind with the Hollander product."

5. From 1913 continuously to the present time all skins processed by Hollander into Hudson Seal have been impressed on the reverse side with the trademark which the decree under review protects (mark shown in par. 5 of the Bill. It is also shown elsewhere below in this brief for comparison with Singer's mark).

6. In 1932 Hollander applied for registration of its said mark, which registration was granted by the U. S. Patent Office in February 1933 by Certificate of Registration which it now holds (Exhibit C. 3).

7. Hollander's Hudson Seal product has been extensively advertised from 1913 to the present time by trade publications, trade circulars and letters, broadcasting sheets, placards and window exhibits and within the last sixteen years by means reaching the ultimate consumer, viz., exhibits in department stores, museums and educational institutions and by advertisements in daily newspapers and in magazines read by the general public. *In all such literature there appeared prominently displayed the Hollander mark and it has been observed by many millions of persons.* The trademark has been impressed on more than 75,000,000 muskrat skins. Since 1913 there has obtained in the mind of the buying public a general impression and recollection of the Hollander mark, which mark has during all those years been associated in the mind of the buying public with the Hollander Hudson Seal product and with the Hollander factories as its *place of origin.*

8. Singer has been in business since 1921. In 1922 it commenced to produce Hudson Seal, stamping on the skins the mark shown in paragraph 8 of the Bill. Singer discontinued this product in 1922 and from then until July 1934 it produced no Hudson Seal. For the first six years, although free to do so, it did not choose to produce that article. From 1928 to December 31, 1934 it was under contract with Hollander not to produce that article. From June 1929 to July 1, 1934 it was under an injunction of the

Court of Chancery restraining it from producing Hudson Seal prior to July 1, 1934.

9. In July 1934 Singer commenced producing Hudson Seal and has done so until the present time. In its advertising literature and on the reverse side of skins processed by it Singer employed or stamped the trademark restrained by the Court below (shown in par. 9 of Bill. This mark is shown elsewhere below in comparison with the Hollander mark).

10. Between July 1, 1934 and the date of the filing of the Bill (March 13, 1935) many thousands of skins had been stamped by Singer with its said mark. Those skins were converted into fur garments, which in turn were distributed widely throughout the country.

11. Early in July 1934 and again the following month Hollander protested to Singer against the latter's use of the Singer mark, Hollander insisting that that mark was an infringement of its own mark. Singer's president assured Hollander that Singer would discontinue the mark objected to. (At this point we mention that Singer's counsel argues on page 7 of his Brief that the allegation of the "assurance" is a statement of a conclusion, "not of a fact." What we have already said concerning the allegation of the purchasers' practice of having the lining opened applies equally to counsel's contention concerning the "assurance." The statement of "assurance" is a statement of ultimate fact, which need not be supported with detailed evidence in the Bill. If the Court should, however, regard it as a conclusion of fact, then as such conclusion it falls within the admissions of the Stipulation. Our point stands emphasized by the fact that in the affidavit annexed to the

Bill (S. C. p. 30) appears the evidence in support of the ultimate fact. About the 1st of July the affiant, Fenning, spoke to Singer's president concerning the Singer trademark and told the latter that Hollander regarded it as a decided infringement upon the Hollander trademark, that Hollander wanted no trouble or litigation and expected Singer to discontinue using the mark. Singer's president expressed regret that he should have given Hollander cause to complain and promised to change the mark. The following month he was again spoken to by Fenning and he again promised to make the change. Are not these facts probative of the ultimate fact alleged, viz., that Singer *assured* Hollander that the former would discontinue the use of the offending trademark?)

Singer failing to keep its promises, Hollander's counsel wrote the letter appearing in paragraph 11 of the Bill. That letter demanded the discontinuance by Singer of the use of the offending mark and notified Singer that Hollander "will be driven to resort to the courts for relief." That letter, too, reminded Singer of the unkept promises made to complainant's officer, Fenning. After the letter was sent there were several conferences between Singer's president and Hollander's counsel and one or more conferences between counsel for the two parties, all held for the purpose of prevailing upon Singer to discontinue using the mark. Three months before the Bill was filed Singer's president stated that he was considering the abandonment of the mark and the adoption of a new trademark "which could not possibly offend." As recently as two weeks before the Bill was filed Singer stated to Hollander that it was considering a voluntary discontinuance of the use

of the mark and the adoption of another in its place. Singer failed to discontinue the use of the mark.

12. Singer's trademark is so similar to Hollander's mark in size, geometrical design and in general features as to confuse, mislead or deceive or tend to confuse, mislead or deceive the ordinary purchaser, having but a *general recollection* of complainant's trademark and not having presented to him at one and the same time the two marks. In addition to purchasers being so affected "dealers and persons in the trade *are being confused*" and are likely in the future to be confused in selecting skins of Hollander, mistaking them for those of Singer. The close similarity between the two marks *now* enables and will enable unscrupulous dealers, manufacturers, middlemen and retailers to palm-off Singer's product as Hollander's.

13. From 1913 to February 1935, whenever Hollander used or impressed its mark, it added thereto and immediately underneath the mark the words "Dyed Muskrat." Singer did the same with respect to its mark (see also par. 5 of Bill, p. 12).

In February 1935 Hollander altered the language within its trademark, substituting for the word "Seal" the word "Dyed" and placing the word "Seal" immediately before the words "Dyed Muskrat." The result is shown on page 20 of the State of the Case. In all other respects, geometrically and otherwise, Hollander's trademark remains unchanged from what it has been since 1913.

14. Because of the defendant's conduct and the resulting confusion and deception Hollander

“has lost and will continue to lose custom” which otherwise would flow to it. Such loss is incapable of ascertainment, because Hollander can at no time have the means of proving the identity or the number of persons who were confused, misled or deceived by the similarity of the two marks.

### **Prayers of Bill.**

In addition to the usual prayers for process, general relief, etc., the Bill prayed that Singer be restrained from marking skins with its said trademark (par. 2), that it make discovery of the skins upon which it stamped the mark and of the profits realized from the work on those skins (par. 3), and that Singer account and pay to Hollander the former's profits realized from July 1, 1934 from the work on those skins upon which it stamped the offending trademark.

### **ARGUMENT.**

The Vice-Chancellor who sat in this case dealt in his opinion with the following questions:

1. Defendant's infringement and unfair competition (S. C. pp. 48-64).
2. Defendant's accountability for profits (S. C. pp. 64, 69-73).
3. Defendant's contention that relief should be denied because Hollander advertised its product as “Hollander Seal” or “Seal” (S. C. pp. 65-66).
4. The defendant's suggestion of laches (S. C. pp. 67-68).
5. The challenge to the counsel fee allowed to complainant (S. C. p. 73).

Of the foregoing, items 4 and 5 are eliminated from the appeal. The claim of laches is not made in appellant's brief and is, therefore, abandoned. The challenge to the counsel fee is expressly withdrawn (pp. 4-5 of Singer's brief). That leaves three points of contention advanced by Singer on this appeal. The Court below in its opinion dealt with those points so thoroughly and persuasively, both in point of logic and precedent, that there is hardly any necessity to add reasons or authorities. Every reason and authority there furnished we urge, without repetition, in support of the decree. In this brief we shall, in the main, limit ourselves to answering the points presented by our adversary in his brief, adopting and following his order of presentation.

#### **POINT I OF SINGER'S BRIEF.**

Our adversary argues that the two trademarks are not so similar as to tend to confuse and this because, as he asserts,

- A. Neither Hollander nor Singer sells anything,
- B. Both parties traffic only with dealers and that the latter cannot be confused,
- C. That the marks are not used for the purpose of indicating the origin of the manufactured garment nor as sales advertising, nor are visible to the ultimate purchaser unless the lining is opened, and
- D. The ultimate purchaser who requires the opening of the lining is so discriminating as not to be capable of being deceived.

The assertion is made (p. 15 of Singer brief) that in effect Hollander treats the case as if

Hollander were entitled to the exclusive right to shear and dye skins to the type of Hudson Seal. This is obviously an error on the part of counsel. The Bill of Complaint most clearly states that the article was produced in France prior to 1908 by Chapal Freres and since 1908 in this country by at least four named concerns. Nowhere in the Bill appears any complaint concerning either the production of Hudson Seal or its identification by that name. The Vice-Chancellor appropriately said: "The complainant does not claim any exclusive or superior right in the use of the trade name 'Hudson Seal.' That trade name seems to be common property, used by all producers of 'Hudson Seal' since 1908" (S. C. p. 53).

The question of similarity may be very quickly disposed of. As was said by Vice-Chancellor Van Fleet in *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164: "Where, as in this case, the subject matter of the controversy is labels, and the question is, whether one is a fraudulent simulation of the other, the decision must always, to a large extent, be controlled by the evidence furnished by the labels themselves. As a general rule, they constitute the very best evidence of which the case is susceptible."

It will be remembered that the contest in the case at bar relates *solely* to conflicting geometrical designs and not to trade words. It would, therefore, seem that all that is required is submission to the judicial eye for inspection and comparison of the designs held by the Vice-Chancellor to be conflicting. In doing so, we furnish Hollander's two trademarks, the one used up to February 1935 and the one used since February 1935, and also the Singer infringing mark.

Hollander Trade Mark

From 1913 to Feb. 1935 (S. C. p. 13)



Singer Trade Mark

From July 1, 1934 to entry of injunction  
(S. C. p. 16)



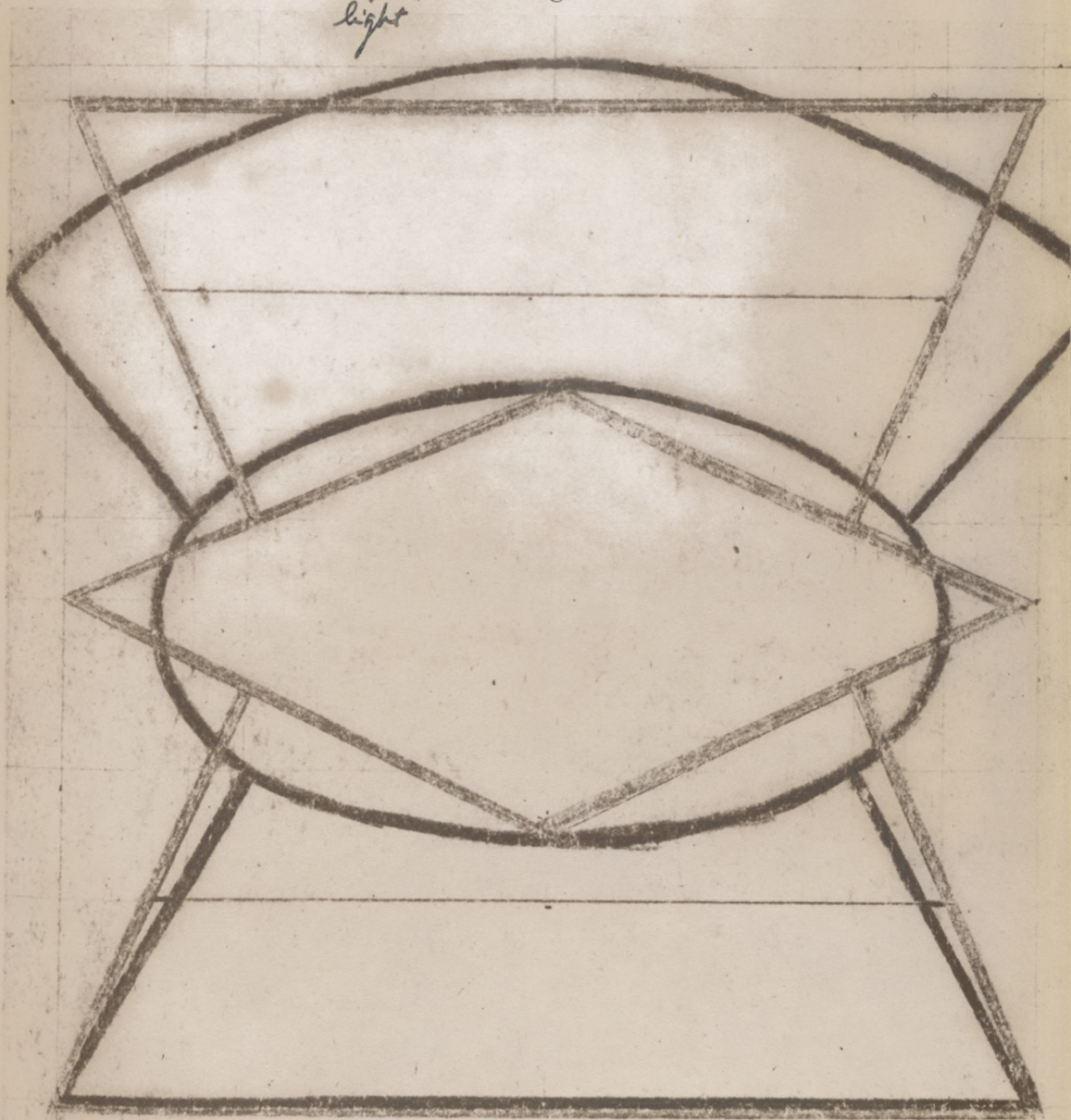
Hollander Trade Mark

From February 1935 to present time  
(S. C. p. 20)





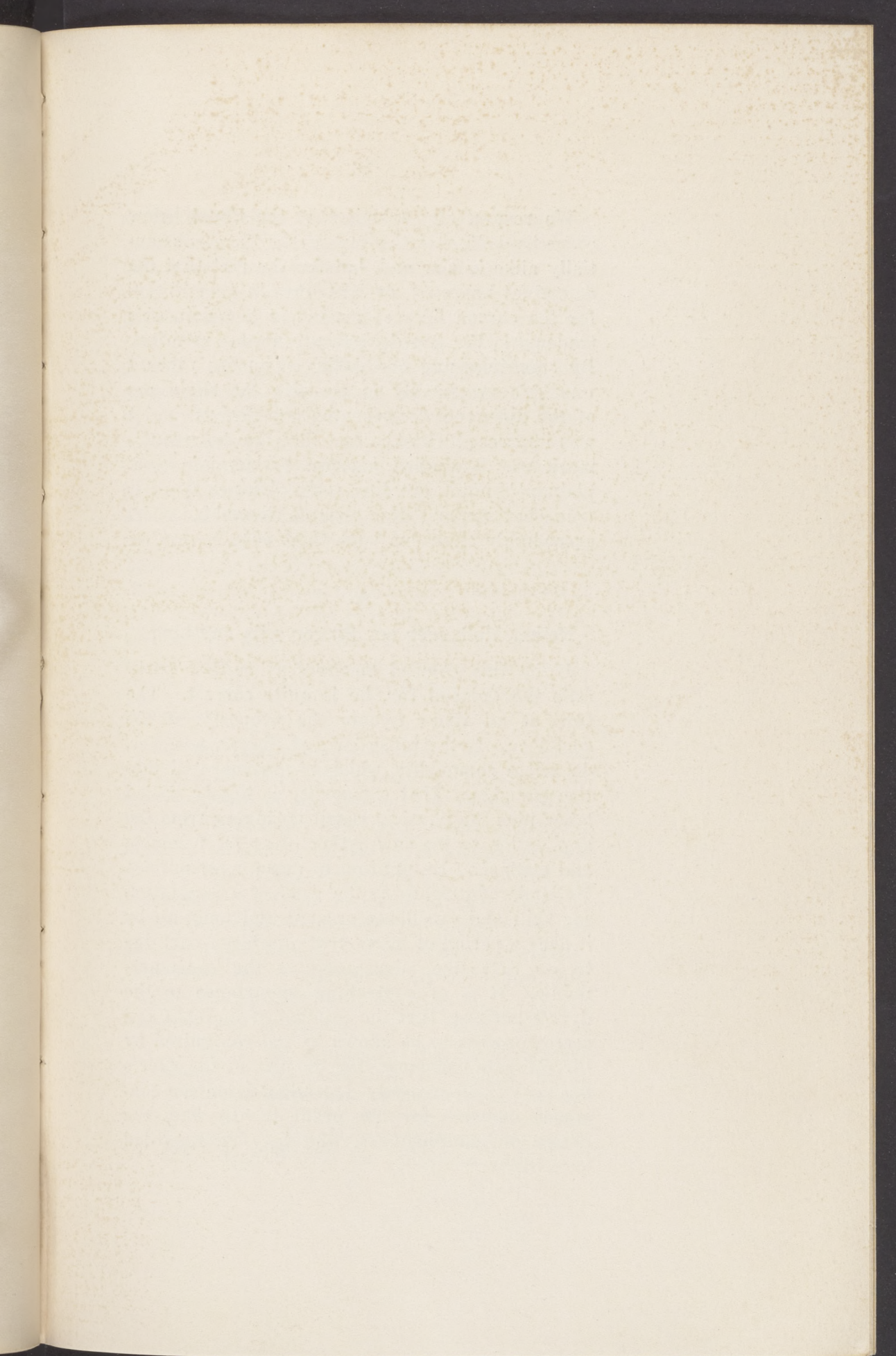
At the oral argument in the Court below we presented on an enlarged scale a diagram or graphic representation of the two marks, one superimposed on the other. That diagram on a somewhat smaller scale, is here reproduced. The design outlined in ~~red~~ <sup>heavy black</sup> is the Hollander mark and the one in <sup>light</sup> black the Singer mark.



Complainant's Mark

Defendant's Mark





We respectfully submit that the Court below correctly held that the two marks "are substantially alike in size and, but for the fact that the defendant has used straight lines in substitution for the curved lines appearing in complainant's trademark, the two designs are almost identical. By superimposing one design upon the other I was able graphically to perceive the slightness of the difference between the two designs and I was impressed with the fact that the defendant's mark was a studied attempt to simulate complainant's mark, creating some differences—it is true—but making the general resemblance an exceedingly close one" (S. C. p. 55).

**A.**

**Neither Hollander nor Singer sells anything.**

If by this counsel means that neither party sells the finished fur, he is quite correct. The furs at all times remain the property of the customer. Both Hollander and Singer, however, do sell a commodity which is incorporated into the raw skin. That commodity is highly skilled labor plus the physical result springing from the application to the raw article of secret formulae and methods. In addition to those contributions Hollander furnishes to the product a reputation for skill and excellence created and built up by it over a period of many years, in large part due to its extensive advertising to the consumer-public. It is of controlling importance to the dyer's business that the product of his skill and secret process to be known to and recognized by the ultimate consumer, for the size of the dyer's business is of necessity dependent upon the consumer demand for his product. In fine, the dealer or manufacturer, who may be regarded

as the middleman between the dyer and ultimate purchaser, will send his furs to be processed by that dyer whose work is most in demand. The main reason why skins are stamped with the dyer's mark is to indicate to the consumer their origin in point of dyeing process. There is, of course, another but altogether subordinate purpose in stamping the skins, and that is that those dyers who send their skins to two or more dyers should have an easy means of differentiation so that only the skins of one dyer shall be incorporated into a finished garment. Of course, the dealer or manufacturer cannot be deceived by the Singer mark but he can be *confused* thereby. That is why the Bill charges deception and confusion on the part of the ultimate purchaser but only confusion on the part of the dealer. It is well to note here that the allegation of confusion on the part of dealers and persons in the trade (S. C. p. 19, l. 15) is admitted by force of the Stipulation.

It is not required as a condition to protecting the integrity of a trademark that it shall denote the ownership of the merchandise offered to the ultimate purchaser. The true function of a trademark is to convey to the buyer knowledge concerning the origin, or source, or ownership, or *manufacture* or the *handling* of the article to which the mark is applied "*or some labor that has been performed in connection therewith*" (HOPKINS on Trademarks, Tradenames and Unfair Competition, 4th Ed., Sec. 9, p. 17). It has also been held that:

"It is not necessary that a trademark should on its face show the origin, manufacture or ownership of the articles to which it is applied. It is sufficient that by association with such articles in trade it (the mark) has acquired with the public an understood

reference to such origin, manufacture or ownership." *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. Rep. 651, 656.

### B.

#### **Counsel argues that dealers cannot be confused.**

Of course the dealer that deals with but one dyer cannot be confused but if he sends his skins to Hollander and Singer the risk of confusion is present. It is not always possible or convenient in selecting skins for a garment (which is made up of a great many skins) to examine each skin closely to guard against commingling. *The fact is that the Bill charges such confusion and the Stipulation admits it.*

### C.

#### **Singer argues that mark does not denote origin of manufacture since it is not visible to purchaser.**

There is no basis to support Singer's statement that the marks are not used to indicate the origin of the manufactured garment. We have already shown that that is precisely the function of the trademark. It cannot possibly serve any other purpose. Singer argues that dealers and manufacturers do not rely on the mark, they already know the origin. If that is so, the only one to whom the mark can possibly be addressed is the ultimate purchaser. Furthermore, under Point II of his brief, Singer's counsel argues that the use of the Hollander trademark has been a fraud on the buying public. It could not possibly be that without being visible. How can that argument be reconciled with the contention that the mark does not denote to the buying public origin

of manufacture? Aside from all this, the Bill alleges and the Stipulation admits that from 1913 to the present time there has obtained in the mind of the *buying public* a general impression and recollection of the Hollander mark and has been associated by the buying public with Hollander's Hudson Seal product and its factories as the *place of origin* (S. C. p. 14, ll. 20-28).

Singer asserts that the marks are not used as sales advertising. The contrary was admitted by him. The Bill charges a most extensive course of advertising by complainant to the buyer-public (S. C. p. 13) and that in all such advertisements of the Hollander product "there appeared prominently displayed complainant's said trademark, which trademark has been observed by many millions of persons" (S. C. p. 14). Singer has used its own mark for sales advertising (S. C. p. 16) and stamped his mark on many thousands of skins.

Counsel further says that the marks are not visible to ultimate purchasers unless the lining is ripped. The admitted fact is that it is the *common practice* for the sellers of fur garments to open the inner lining and exhibit to the purchaser the dyer's trademark, stamped on the leather side of the skin (p. 10).

#### D.

Counsel argues that the purchaser who requires the exhibition of the mark is so discriminating as to be beyond deception.

The Court below dealt with this contention when it said that the question must be considered "from the angle of the *ordinary* purchaser, un-

aware of the differences existing between the two trademarks and without his attention directed to such differences. It is hardly conceivable, certainly not likely, that both trademarks would be exhibited to him by the dealer or middleman so as to enable him to exercise discretion and make selection. Such a purchaser is moved solely by his general impression and recollection" (S. C. p. 58). The Vice-Chancellor referred to the *Prichard & Constance* case in which the Federal Court held that the question of similarity of sound or appearance or significance must be determined "with reference to the impression made on the ordinary purchaser by recollection, not by comparison of the two words, placed side by side" (S. C. p. 59).

Singer argues that the purchaser who causes the lining of a garment to be opened in order to see the dyer's mark cannot possibly believe that she is buying a Hollander skin when the name Singer appears within the mark. Of the millions of persons who have come across complainant's advertising literature in the public press and magazines and elsewhere (by which were advertised complainant's name *and* mark) there must be a large proportion who have not retained a mental imprint of both name and design but only of the latter. Such persons, relying only on a general recollection of the Hollander design, would be easily misled when seeing the Singer mark into regarding it as complainant's mark and, in consequence of the error, purchasing the Singer product instead of Hollander's. Nor is the risk of such confusion avoided by the circumstance that within the Singer mark appears the name "Singer." That would be informative only to the purchaser who had retained in his mind the name "Hollander"

with or without a recollection of the design and who, when shown a skin with the dyer's name blurred, insisted upon seeing a skin with the name "Hollander" clearly stamped thereon. Such a purchaser would hardly be the *ordinary* purchaser, but rather a most wary and discriminating one. The fact is that the ordinary purchaser, seeing the distinctive outline, does not bother to read, first because the print is blurred, secondly because, unaware of the existence of a similar mark, he is without suspicion, thirdly because, by very reason of the fact that he believes he knows the Hollander mark and relies upon his recollection of it, the experience of recognition is readily anticipated and quickly satisfied by similitude—a glance is sufficient—whereas one who had seen no marks but relied on a name solely, might inspect more carefully. The Court below was aware of this risk of injury when it said (S. C. p. 54):

"The defendant contended that such infringement as might appear from a comparison of the two trade-marks and such harm as might otherwise result was neutralized by the fact that within complainant's trade-mark appeared the name 'Hollander' and in the defendant's trade-mark the name 'Singer.' I do not believe that the presence of the name 'Singer' within the defendant's trade-mark can justify the use of the mark itself if geometrically it too closely resembles the complainant's mark. It is conceivable that there are many persons who might recall the mark and not the name. The defendant's stipulation carried with it the admission that in the mind of the general buying public complainant's trade-mark is well imbedded (paragraph 7 of bill). I cannot perceive why in reason and fair dealing one trader should be permitted to adopt and use another trader's mark, simply because he annexes to that mark his own name. Were

courts to permit that, it would put an end to private property in a trade-mark, a right which the courts have, independent of statute, zealously guarded. Apart from the foregoing considerations, an inspection of the four skins received in evidence demonstrates that on the two skins where the 'stretching process' had already been applied the names of the respective concerns are greatly blurred, causing the outstanding thing to be the geometrical design and not the name."

Again the Court said, speaking of the resemblances of the two marks (S. C. p. 59):

"The psychological effect upon the mind of the customer, relying on his general recollection of complainant's trade-mark, would be such that upon seeing the defendant's trade-mark on the back of the skin he would be easily misled into regarding and accepting it as the complainant's trade-mark, particularly if the name within the trade-mark were blurred or obliterated. Even if the name of the dyer were legible it would in many instances be meaningless, where the customer's mind has retained an impression of the design but not of the name of the designer. There are other likely situations in which either deception or confusion would result on the part of the unsuspecting buyer. It is against *all* such situations that complainant is entitled to be protected."

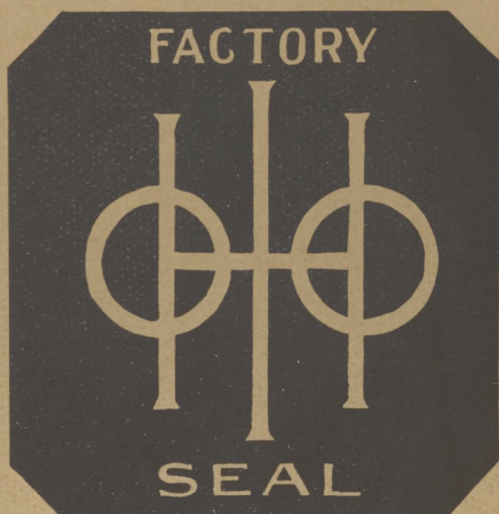
The books are full of cases in which a defendant was restrained from using a trademark, closely resembling complainant's, notwithstanding the fact that the defendant annexed to the mark his name or other clear distinguishing language. We shall mention only three of such precedents.

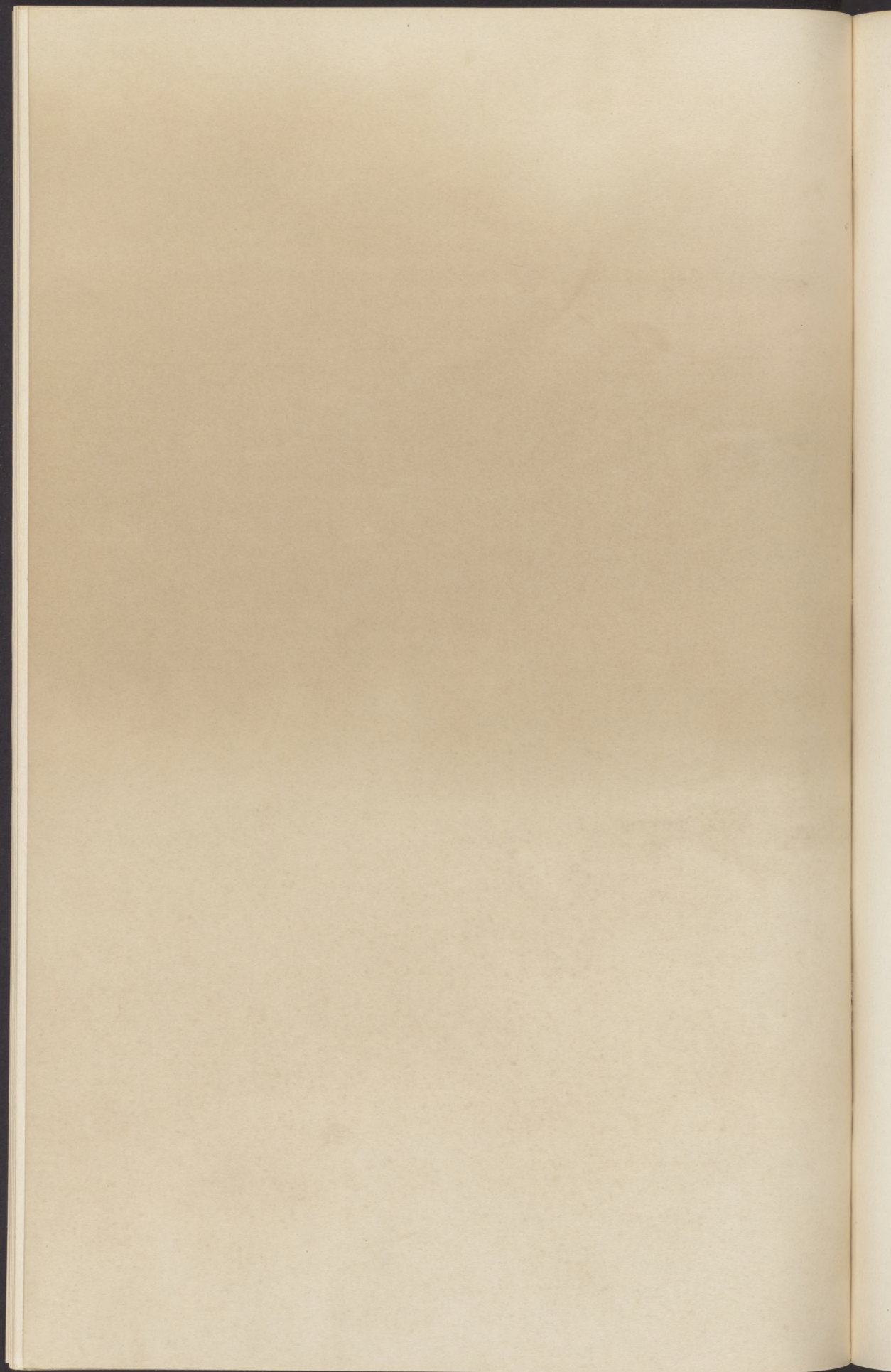
In the case of *National Biscuit Co. v. Ohio Baking Co.*, 127 Fed. Rep. 160, the Circuit Court considered the alleged infringement of the defendant's mark upon that of complainant. The two marks are shown in the report of the case on appeal (127 Fed. Rep. 118) and were as follows:

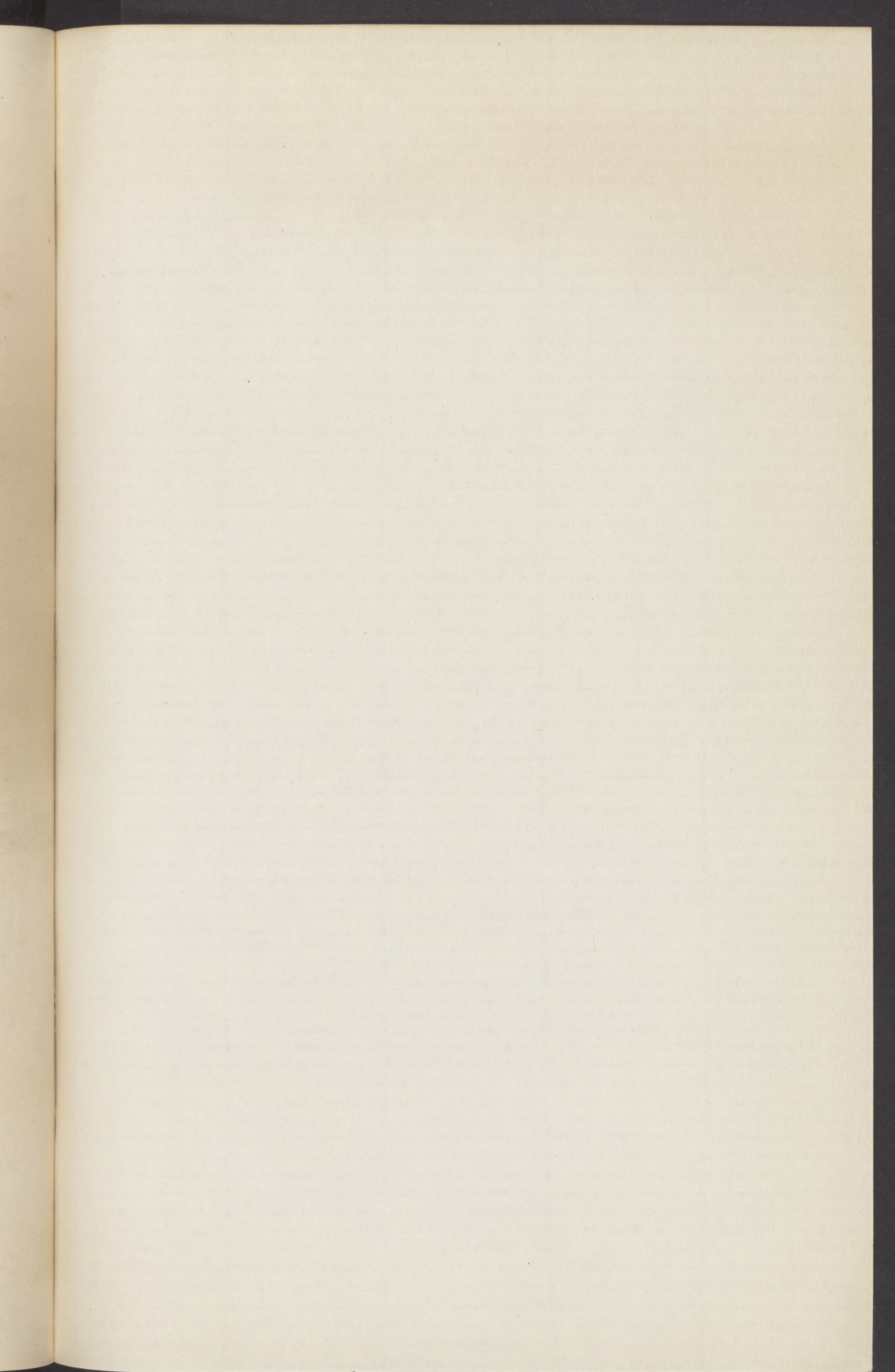
Complainant's Mark



Defendant's Mark







The Court held the defendant's trademark to be an infringement and allowed a preliminary injunction against the defendant notwithstanding the fact that on all sides of its cartons appeared in very large letters the name "Ohio Baking Co.," whereas on all sides of complainant's cartons appeared in like size lettering the name of complainant's factories where the cartons were produced, viz., those from the Toledo plant were marked "WORTS-KIRK-BIGELOW." Those from the Chicago plant were marked "KENNEDY." Others were marked "BREMNER," etc. One looking at a carton of the Ohio Baking Company, with that name prominently printed on all sides thereof would be less likely to mistake it for a carton upon which appeared with like prominence the names "Worts-Kirk-Bigelow," than would a purchaser of a skin with the Singer mark mistake it for a skin with the Hollander mark. Yet, in the Ohio Baking Co. case the Circuit Court held that the defendant's Factory Seal was not only calculated to mislead and deceive the *ordinary purchaser* but that it was designed, adopted and used for that purpose (127 Fed. Rep. 116). Certiorari to the United States Supreme Court was sought by the Ohio Baking Co. at the October Term, 1904. The petition for certiorari was denied (case No. 382, October 1904 Term). It will be observed that the configuration of the lines and circles of the defendant's Factory Seal created four letters, viz.: two "O's," an "H" and an "I," in their ensemble standing for "Ohio," thus furnishing a point of dissimilarity. Notwithstanding this the defendant's design was held to be geometrically in close resemblance to the complainant's In-cr-seal.

In the case of *National Biscuit Co. vs. Swick* (121 Fed. Rep. 1007) the last two mentioned seals of the two baking companies were involved. The defendant's bakery product was manufactured for him by the Ohio Baking Co. The defendant contended that complainant's rights were limited strictly to the precise design of its trademark. The Circuit Court for the District of New York said that if by this contention is meant that complainant is restricted to the use of the precise trademark and "has obtained no exclusive right in the collocation of its parts and the distinguishing features by which the trademark has become known to the public, such contention is without merit. The gist of the complaint is a violation of a trademark, which is composed of a peculiar configuration of lines and combination of other features."

The Court further said:

"That complainant's trademark and manner of displaying the same attracts the public attention cannot be successfully disputed. Undoubtedly, complainant's manufactured product has become extensively known to the public solely by its peculiar trademark. I have no doubt that an intending purchaser of complainant's product using ordinary care is attracted to the arbitrary trademark design, and not to any printed words on the sides of the packages, or even to the nomenclature of the manufacturer of the product."

Speaking of a witness in the case, the Court said:

“By the testimony of the defendant’s witness Gaiser, a grocer, it appears that an intending purchaser must make a close examination of both packages in order to distinguish defendant’s packages and cartons from complainant’s. The witness was unable at the hearing, when both packages were exhibited to him, to discover much difference, and *was compelled to look for the name of the manufacturer to distinguish the product of complainant from that of defendant.*”

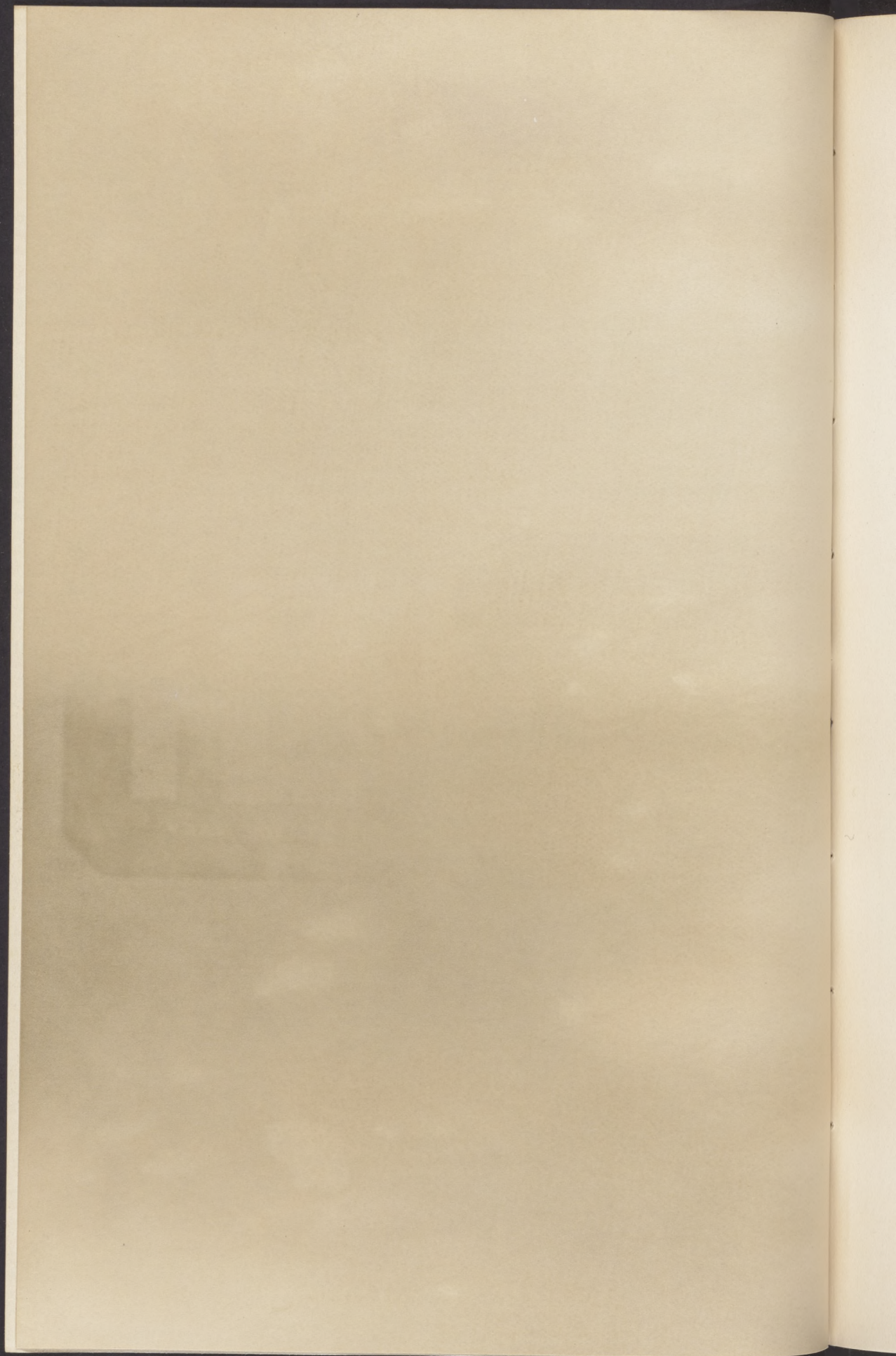
The In-er-seal of the National Biscuit Co. was protected by our own Court of Chancery in the case of *National Biscuit Co. vs. Pacific Coast Biscuit Co.*, 83 N. J. E. 369. The two seals there involved were the following:

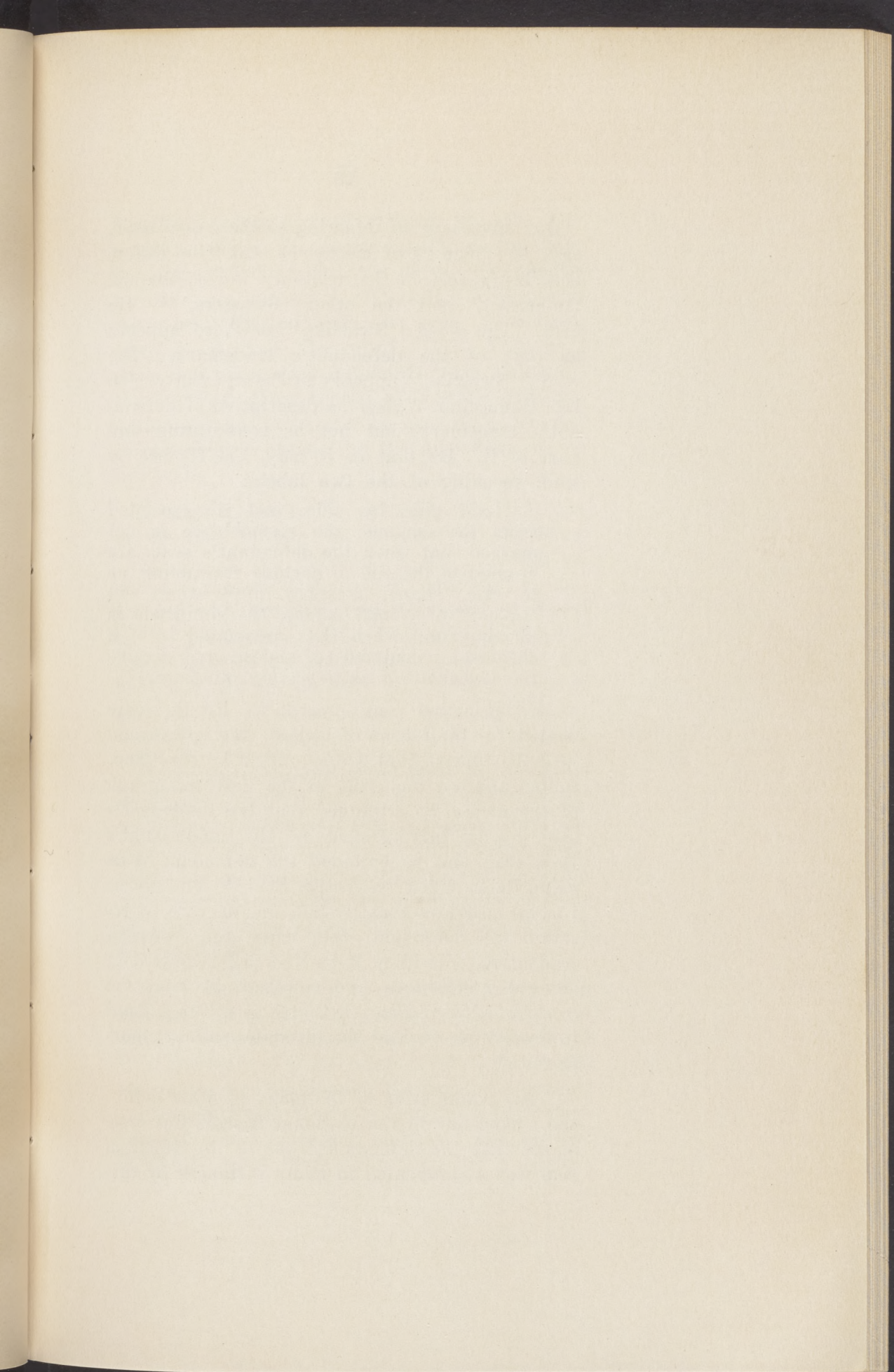
Complainant's Seal



Defendant's Seal







Our adversary in referring to these two seals, says (on page 27 of his brief) that "the difference being only in the arbitrary words, the one 'In-er-seal,' and the other 'Swastika.'" He errs. The word "Swastika" nowhere appears as part of the defendant's trademark. The word "Swastika" appears in the opinion of the late Chancellor Walker as descriptive of defendant's trademark, but not as constituting any part of it. Be that as it may, the Chancellor said, speaking of the two labels:

"Laid side by side, and disassociated from the cartons, the resemblance is not marked, but when the defendant's seals are applied to the end of cartons resembling, as to size, shape, wrapper application and euphony of coined names, the similitude is striking, and when thus associated is of a character calculated to mislead and deceive the *unwary and unsuspecting* purchaser."

An injunction was awarded. Profits were denied, for the reason of laches. We have examined the formal final decree signed by the Chancellor, and we find that in the first paragraph of the decree he adjudged that the defendant's seal was an infringement on the complainant's In-er-seal, and he enjoined the defendant from using its so-called "Swastika Seal." The decree further provides that it shall not operate to restrain the defendant from using the Swastika trademark, providing it be "so differentiated in general appearance and application from the complainant's trademark that it is not calculated to deceive or mislead the ultimate ordinary purchaser."

An examination of the many exhibits before the Chancellor in the National Biscuit Co. case, shows that the defendant's use of its Swastika seal was accompanied in many instances by dif-

ferentiating language of striking import. For example, where the complainant's carton bore the name "Nabisco," some of the defendant's cartons bore the word "Parfait," and others the word "Fiesta." On one type of package, complainant had the word "Fig Newtons," while defendant used the words "Fig Sultana." Nevertheless, these words of decided differentiation did not overcome the general impression of resemblance created by the inspection of the two seals.

It may therefore be earnestly insisted that in the case at bar the presence of the name "Singer" in the defendant's mark is not an adequate differentiation when considered in connection with the fact that the skins produced by the parties are, to the ordinary eye, "indistinguishable in the color, luster and feel of the hair side and in the color and general appearance of the reverse or leather side." (See opinion in S. C. p. 62.)

It may also here be noted what the Court in its opinion pointed out (S. C. p. 63) that the conflicting trademarks are stamped with the same color (black ink) on the same color background (light brown) "so that the unsuspecting purchaser has not even the opportunity of color differentiation to assist him in giving effect to his recollection."

In the *Cauffman* case mentioned in the opinion below (S. C. p. 61) the complainant's label contained the word "Cauffman's," and the word "Celebrated." On defendant's label, the Cauffman name was eliminated, the word "Imperial" being substituted therefor, and the word "Celebrated" was altogether omitted. On the defendant's label there also appeared a caution

notice dissimilar to that appearing on the complainant's label and the name subscribed to the defendant's caution notice was dissimilar to that of complainant's. Nevertheless, the Circuit Court for this district, enjoined the defendant's use of the label.

The distinguishing features in the defendant's mark in the Cauffman case were more extensive and arresting than the dissimilarity in the Singer mark, which dissimilarity consists only in the presence of the one word "Singer".

Our adversary invokes (on page 20 of his brief) the language of the Wirtz case, that the resemblance must be such as to mislead "ordinary purchasers, buying with the care usually exercised in such transactions", and that "the court must take into consideration the degree of care which buyers usually exercise in buying such an article as that which is the subject of the distinguishing mark." Counsel then adds a statement of fact concerning which there is not the slightest bit of evidence in the record. He says (page 20 of his brief): "Hudson Seal while not as expensive as Seal is by no means inexpensive."

Perhaps we are not free to controvert an unproven fact. If we are not, then there is nothing before the Court to form the basis for a comparison between the cost of Hudson Seal and Alaskan Seal. If we are free to meet counsel's assertion, then we amplify his statement by saying that Hudson Seal is one of the cheap furs and by reason of its price alone could not be mistaken for the much more expensive Alaskan Seal which is comparatively little known and less used by the buying public. There are Hudson Seal coats that sell for less than what the woman

purchaser has to pay for an ordinary cloth coat and the purchase of a Hudson Seal garment does not call for that degree of care exercised in the purchase of the more expensive furs. We submit that the ordinary care exercised in the transaction of buying a moderate priced coat does not call for that circumspection and discrimination which would enable the unwary purchaser to avoid falling into error.

Then too the marks so closely resemble each other that an unscrupulous dealer is furnished easy means of deceiving an unwary purchaser.

Suppose a woman, having some weeks before seen a Hollander "ad," enters a furrier's store, tells the dealer that she is interested in buying a Hudson Seal coat such as she has seen advertised in the New York press or in some magazine, but does not recall the name of the advertiser. If however she recalls the general outline of the trade mark that she had seen prominently displayed in the advertisement, it becomes a simple matter for the dealer to sell her a Singer skin in the belief on her part that she is buying the fur she saw advertised. This is not a remote possibility, for the courts have dealt with situations where honest manufacturers were afforded protection against the retailer's use of an unlawful instrument (opportunity of deception), which enables the retailer to increase his own sales for dishonest goods, thereby lessening the market for the honest product. It is for that reason that the Court below quoted (S. C. p. 57) from the case of *International Silver vs. Rogers* that "the law is well settled that if the manufacturer puts it in the power of the retailer to misrepresent, he is answerable for the probable consequences."

Our adversary, in his insistent that the presence of the name "Singer" in the defendant's mark was an important element of differentiation, refers to *International Silver vs. Rogers* to show "the part that lettering plays". He points out that in the cited case, the Court permitted Rogers to use that name if he would stamp upon the articles the words "not the original Rogers" or "not connected with the original Rogers". We submit that that case has no pertinency to the point for which it is urged. That case did not involve any design or device; it involved solely the right to the use of the name "Rogers" on silverware. Obviously, the most efficient way to differentiate in the use of language is to use differentiating language.

It is further significant that the very day that Singer was freed from the Chancellor's injunction under which he could not produce Hudson Seal, he re-entered the field by adopting a trademark so closely parallel to that which its competitor has used for almost a quarter of a century. Singer's field for the selection of a trademark was virtually unlimited. An infinite variety of combinations of lines and figures and designs was his, from which to make selection. The fact that he selected the mark that was held to be an infringement, and no other, is in itself strong evidence that he wanted no other, and that he wanted that particular one because he perceived the established value that inhered in its close resemblance to complainant's mark, and because there resided in its use untold opportunity of reaping that benefit which an unscrupulous trader may reap from palming off his article as that produced by an older and better established competitor.

The injury to complainant is not a fancied one, nor did it bring its suit because it is litigious. The Bill indicates the persistent efforts that complainant made to avoid, by persuasion and peaceful means, the injury being done to it and threatened to be continued. It was only after eight months of such effort and much protest that it sought relief in the Court of Chancery. It is not believable that a concern which is the leader in its field, would seek injunctive protection unless the injury done and threatened to be done were of gravest consequence to its business interests.

## POINT II.

Singer here argues that the use of the mark in connection with the terms "Seal" or "Hudson Seal" has such a tendency to deceive the ultimate purchaser as to the nature of the fur as to close the door of a court of equity to Hollander.

Singer argues that the use of the words "Hudson Seal" is deceptive for a number of reasons given by him. One is that the word "Hudson" suggests to the ordinary purchaser that the seal comes from Hudson Bay because "Hudson Bay is known as a fur producing country" (p. 38 of brief). There is nothing in the record to indicate that the word "Hudson" has reference to Hudson Bay. It might refer just as well to the Hudson River, nor is there anything in the record to prove that seals are found in Hudson Bay. The Court will perhaps judicially notice that seals are not found in Hudson Bay. Reference to any standard encyclopedia will indicate the fact. Seals are found principally off the Pribilof Islands in Alaska.

However, if the use of the word "Hudson" should be deemed objectionable, the fact remains that it is no part of the Hollander trademark, protected by the injunctive decree, and never was part of the mark. Whenever used in the Bill the word "Hudson" was merely descriptive of a type of skin which for twenty-five years has been *commonly* known as "Hudson Seal." The Bill says it was so *commonly* known (S. C. p. 11) and the defendant has admitted it. The word "commonly" means "usually," "ordinarily" and "generally." "Hudson Seal" being ordinarily and generally known and accepted as the trade name for muskrat dyed to resemble Alaskan fur, there can be no vice in the use of that name. It cannot be deceptive if it is *commonly understood*. In its long continued use the name has become generic and denotes universally the true character of the article to which it is affixed.

Singer's counsel, on page 39 of his brief, makes reference to an order of the Federal Trade Commission and states that that order was annexed by Hollander to its Reply Memorandum in the Court below. It is the fact that a copy of that order was attached to one of our briefs. *That brief was in reply to a statement appearing in Singer's earlier brief to the effect that the trademarks of both Hollander and Singer were a misrepresentation.* Singer said in his brief:

"Thirdly, and as it seems to the defendant, most importantly, both the trademark of the complainant and the trademark of the defendant were, so far as the public was concerned, fraudulent and a pure misrepresentation, because neither concern affixed the trademark to Hudson Seal. The skins which were treated by both the parties and

to which this stamp was attached were rabbit or muskrat skins. This is a matter of public record because the Federal Trade Commission, for a long time, had endeavored to compel both the complainant and the defendant to cease using the trademarks in question, not because of their similarity but because the Federal Trade Commission claimed that the word 'seal,' used in connection with furs signified and meant to the purchaser and consuming public that the furs so designated were furs of the animal usually found in high altitudes (Sic), known as 'seal' or 'fur seal' and that the use of the word by the complainant and the defendant in connection with the skins which they were dressing and dyeing was false, misleading and deceptive to the trade in (Sic) public. Eventually, the Federal Trade Commission filed a complaint against both the complainant and the defendant, although in separate proceedings, and the complainant filed a consent answer to the complaint and was restrained and agreed to change the form of its trademark so that, in type and letters just as large as the other letters and type, the public would note that the skins so stamped were dyed muskrat. The defendant likewise consented to be restrained by the Federal Trade Commission and as a matter of fact not only changed its trademark prior to the filing of the bill of complaint herein but at the time of the filing of the bill of complaint and since then has not used, and does not intend to use, the trademark which was the subject matter of the bill of complaint filed herein, so that so far as the injunction is concerned the defendant has no objection to the entry of the same, reserving, of course, any legal rights it may have. Our courts have universally held that if an alleged trademark involves any material untruth, misrepresentation or bad faith, it will not be protected against infringement."

In reply to the foregoing, Hollander's counsel said in his Reply Memorandum:

"In making his third point, in which our adversary refers to a certain Order of the Federal Trade Commission, he alleges facts that have not been proved and which cannot, even if true, be judicially noticed. We respectfully submit that the instant case has already been decided on the facts presented and cannot be decided *de novo* on facts appearing nowhere except in counsel's brief. Notwithstanding what we have said about Points Two and Three, we will demonstrate that there is no truth in those points. In order to do so we, too, must step out of the closed record of this case and offer facts not proved. This in itself demonstrates the inherent vice of any practice that permits counsel to argue on facts extra the record. *After we shall have stated our facts the only proper course open for the Court is to reject all the statements of fact except those appearing in the Bill of Complaint and in the Stipulation in the instant case.*

\* \* \* \* \*

"Our adversary misunderstands the action of the Federal Trade Commission. It insisted that the word 'seal' should be used as an adjective to describe the word 'dyed,' so that the words 'seal' and 'dyed' would be compounded into one descriptive. Attached hereto is a copy of the Order of the Federal Trade Commission. It will be observed (see paragraph 3) that it permits the use of the word 'seal' or the words 'Hudson Seal' whenever compounded with the word 'dyed,' as 'seal-dyed muskrat' or 'Hudson-Seal-dyed muskrat.' It will also be observed (paragraph 5 of the Order) that while the word 'seal' may be used by rabbit dressers, the word 'Hudson' may not be used by them. The word 'Hudson' and the words 'Hudson Seal' may be used only in connection with muskrats.

“We had the privilege of arguing this question recently before the full Federal Trade Commission. The Commission recognized and conceded that the words ‘Hudson Seal’ had acquired a secondary significance and were generally understood to mean dyed muskrat. It was also conceded that the presence of the word ‘muskrat’ eliminated all risk of fraud but it was contended by counsel for the government that the word ‘seal’ should receive no greater prominence than the word ‘muskrat’ and should be used as an adjective to describe the dye on the muskrat. This, the government contended, would eliminate the remotest possibility of confusion. We agreed to the Order. The government did not contend that any fraud had been practiced in the stamping and we do not accede to the defendant’s self-condemnation, expressed in its brief. The defendant is too ready to admit its fraud but the purpose in its so doing is obvious. It hopes thereby to tar the complainant with the same stick. The fact is that no Hudson Seal dyer in this country committed any fraud upon anyone if he stamped his skins ‘Dyed Muskrat.’”

We respectfully submit that *the proceedings before the Federal Trade Commission are no part of the record in this case*. Those proceedings were not proved as a fact in the Court below. The first reference to them was made by Singer after the case was closed and then only by way of argument. We at that time objected to the consideration of matters extra the record, and while we made some reply to what was said by Singer about the order of the Federal Trade Commission, we insisted that “the only proper course open for the Court is to reject all the statements of fact except those appearing in the Bill of Complaint and in the Stipulation in the instant case.” The very irregularity that we

complained of in the Court below reappears in the brief on appeal, but in altered guise. Now it is injected into the present argument as something that has been brought out by Hollander in the Court of first instance. The record of the proceedings before the Federal Trade Commission and the several orders made by it were *neither pleaded nor proved nor offered* in evidence below, *and constituted no part of the issues between the parties*. It is too late, we think, to enlarge the controversy by matter dehors the record. Singer points out (S. C. p. 40 of his brief) that the order of the Federal Trade Commission was entered on June 25, 1935. It will be observed that long before that, in February of 1935, complainant had made certain changes in its trademark (par. 13 of Bill; p. 19 of S. C.), which completely conformed to requirement No. 3 of the consent order thereafter entered (p. 40, Singer brief).

**Hollander's trademark was at no time deceptive.**

From 1913 until February, 1935, "whenever complainant used or impressed its said trademark, it added thereto and immediately underneath the same, the words 'Dyed Muskrat'" (S. C. p. 19; mark on p. 13). From February, 1935, to the present time complainant has not used the words "Hollander Seal," but in lieu thereof, the words "Hollander Dyed," adding immediately beneath the trademark the words "Seal Dyed Muskrat" (S. C. pp. 19-20). These facts are admitted by the defendant's Stipulation, *so that at the time of the filing of the Bill on March 13, 1935, Hollander was no longer using the trademark shown on page 13 of the State of the Case, but only the one appearing on page 20, so that whatever objection Singer now makes to*

the use of the words "Hollander Seal" or "Seal" are not available to him against the trademark in use by Hollander at the time of the filing of the Bill.

Upon the foregoing facts we advance the following points:

- (a) The presence of the words "Dyed Muskrat" as part of the Hollander trademark prevented that trademark from operating deceptively.
- (b) The long period of time during which dyed muskrat was sold and advertised as Hudson Seal (admitted by Singer, S. C. p. 11; Singer's brief, p. 8) has resulted in the term becoming generic so that in the public mind today it signifies the article itself in its true character as a muskrat dyed to resemble seal.
- (c) The misrepresentation alleged by Singer ceased to exist before the filing of the Bill.

#### A.

The presence of the words "Dyed Muskrat" as part of the Hollander trademark prevented that trademark from operating deceptively.

Assuming first of all that the term "Hollander Seal" or "Hudson Seal" or "Seal" taken by itself is misleading, obviously an explanation accompanying that term and describing with exactness what is meant by that term would prevent deception. For example, in *Centaur Co. v. Robinson*, 91 Fed. Rep. 889, it was shown that the wrappers in which a medicine was placed on the market contained a false statement that the compound was purely vegetable,

whereas in fact certain effective minerals and mineral compounds were essential ingredients. However, the same wrapper, in stating the formula used in preparation of the medicine, stated the ingredients truthfully. The Court said: "If there was any such misrepresentation in that regard the wrapper carries the 'antidote with the bane' because in describing the ingredients as they are compounded in the medicine it appears that the ingredients are truthfully stated." Complainant's trademark was protected by injunction against infringement.

Now Singer's counsel argues (S. C. p. 38) that if the words "Dyed Muskrat" are effective to warn the purchaser then also the name "Singer" on the trademark would be equally effective, forgetting at the same time that if all the lettering is blurred (as the exhibits before the Court below showed) the "bane" is invisible also, so that there can be no deception to which the words "Dyed Muskrat" serve as the "antidote." But counsel misconceives Hollander's position which is that wherever in the past it has used the term "Hollander Seal" or "Seal" (as well as in the present), the descriptive words "Dyed Muskrat" were used in conjunction therewith. These usages include the extensive advertising heretofore referred to (S. C. p. 13), and admitted by the Stipulation and include printed representations of the Hollander mark identical with those appearing on the back of the skins dyed by it. It is when these skins reach the ultimate purchaser that the mark, due to essential processing by the manufacturer of the garment, is little more than a design of a most distinctive nature but with the wording obscure. It was in this connection that Hollander used in the Court below that section of its memorandum

quoted by Singer on page 15 of its Brief here. The *entire* passage reads:

“So in the case at bar, the elements composing the respective designs are somewhat different though similar. The wording is almost entirely different. These marks, as was stated above, are stamped on the back of fur skins. It is there and not upon advertisements that the mischief lies. The wording of the respective marks, transferred to leather, is not as legible as it would appear printed upon paper. Further, manufacturers of fur garments stretch and pull these skins and so work them that by the time they are incorporated into a garment the wording contained thereon is even less easily read and the ultimate purchaser carrying in his mind an impression produced by the long continued and expensive advertising of the complainant and seeing upon the reverse side of such a skin a mark of the same general outline, feels at once that he recognizes it as that of the complainant and is misled, if the furs happen to have been dressed and dyed by the defendant.”

Nor is Singer's argument (p. 39 of Appellant's Brief) that “if the Court may assume, upon a comparison of the trademarks, that they are of such a nature” as to create confusion, so the Court may likewise assume that the term “Hudson Seal” or “Hollander Seal” to designate dyed muskrat would tend to deceive the ultimate purchaser well made. This, for the reason that comparison of the marks *is the main test of the alleged resemblance* and the ultimate one, regardless of whether or not there is testimony on the point, *Liggett & Meyers Tobacco Co. v. Finzer*, 128 U. S. at 184; *Weyman v. Soderberg*, 108 Fed. Rep. 63 at 65; moreover, no proof of actual deception is necessary to be shown, *Hilton v. Hilton*, 90 N. J. Eq. 564 at 567; *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164

at 168, etc.; and, finally, by the Stipulation Hollander was equally with Singer precluded from presenting the testimony of witnesses. In the latter connection, if the Chancellor had decided that the Singer mark was not an infringement upon the Hollander mark and not productive of deception, could the complainant below now appeal and assert here that it had been given no opportunity to show by witnesses that despite the Court's finding to the contrary purchasers had actually been deceived? As for the defense of "unclean hands," *that must affirmatively appear from the case as presented*; what Singer's counsel has in mind is the fact that "unclean hands" need not be urged in fact or in name but that upon its appearance in the case as presented the Court may *sua sponte* deny relief to the complainant.

Apparently in support of his "unclean hands" theory Singer urges (S. C. p. 40) the case of *Perlberg v. Smith*, 70 N. J. Eq. 638, quoting a paragraph thereof appearing at page 647. It should be observed that the quoted paragraph although correct in all respects, is merely apposite to the rationale of the decision and in no true sense does it form a part thereof for the reason that the case is not one of "unclean hands" but is grounded in the fact that the complainant failed to show that there was any particular thing to which his tradename "Eagle Shoes" could apply, within the rule that a tradename to be valid as such must designate a particular brand, manufacturer or origin. The Court said, of the complainant: "Since he utterly fails to show that there was any particular thing to which this name was applied he is without redress. I will advise a decree dismissing the bill with costs."

The truth of our observation is apparent from a comparison of that case with *Bear Lithia Spring Co. vs. Great Bear Spring Co.*, 71 N. J. Eq. 595, next advanced, which is a true "unclean hands" case. There the complainant had advertised its water as "bottled at the spring," when in fact it was bottled at a city warehouse, and also that its water was a cure for certain diseases, which also was contrary to the truth, upon proof of which facts relief was denied it by the Chancellor. The Court reasoned that the statement "bottled at the spring" (which the evidence showed referred to complainant's source of supply in Elkton, Va.) was a material inducement to the sale of the water in that the public would suppose it less subject to contamination when handled so. As for the second misrepresentation the Court said: "None of the experts or physicians called by either side pretend that this water would cure any of the diseases named." The Court cited in support of the general rule applicable in cases of this class, *Manhattan Company v. Wood*, 108 U. S. 218; *Worden v. California Fig Co.*, 102 Fed. Rep. 334. (The latter case, since appealed and reported in 187 U. S. 516, differs in no way in the nature of the misrepresentation made, viz., as to the ingredients contained in a medical preparation, from *Centaur v. Robinson*, discussed above, but provided no satisfactory explanation of the admittedly false statements on the label of the "fig syrup" bottle.) Notwithstanding, on appeal, this Court, in 72 N. J. Eq. at p. 872, although it affirmed the judgment of the Court below, expressed dissatisfaction with its application of the "unclean hands" doctrine, deciding that on the merits the complainant was disentitled to relief.

In *Johnson & Johnson v. Seabury & Johnson*, 71 N. J. Eq. 750, this Court evidently considered the misrepresentation as more than "mere puffing." Singer argues (p. 41 of his brief) that mere puffing was there involved. This Court there said: "The greatest difficulty we have had has been with the right of the complainant to claim relief in equity," finding that the complainant had in the past made false representations in stating that the American National Red Cross Society had conferred upon complainant the right to use its (the former's) red cross mark exclusively, and as the reward of excellence. This Court held that in the *absence of proof* that the trade name was due to false representations and upon proof that the false representations had ceased, the complainant is entitled to protection. (See p. 754 of report.)

We agree, of course, with the general rule taken from *N. Y. and N. J. Lubricant Co. v. Young*, 77 N. J. Eq. 321 at page 324, (quoted p. 41 Singer's brief). That application thereof is less easily made is illustrated by the reversal of that case by this Court (84 N. J. Eq. 469), solely on the fact of material misrepresentation.

## B.

The term "Hudson Seal" or "Hollander Seal" has become generic and signifies the article in its true character.

The Bill charges that the muskrat, sheared and dyed black so as to resemble Alaskan seal, is *commonly* called "Hudson Seal". The term "Hudson Seal" has been used for over a quarter of a century by several dyers in this country and the term "Hollander Seal" has been used for

twenty-two years by complainant. The Bill also charges that since 1913 the public has associated complainant's mark, upon which has appeared the name "Hollander Seal" with its "Hudson Seal" product. Every person who has seen complainant's trademark, either in advertisements or on the backs of skins, has been told, as plainly as human language can certify, that the article is "dyed muskrat." The presence of the words "dyed muskrat" has been used uniformly as a synonym of "Hollander Seal". The latter term, therefore, connotes the former and the two have meant the same thing to the buying public. We therefore submit that the term "Hollander Seal" or "Hudson Seal" has become a generic term, signifying not "seal" but "dyed muskrat." We venture the opinion that if the members of this Court were to interrogate the ladies of their families concerning the meaning of the terms in dispute the information would be forthcoming that the terms denote either a dyed muskrat or some skin that resembles seal, but is not seal. This, too, would demonstrate the fact that the terms have become generic and that in their present acceptance denote the article as it in fact is. But whether this be true or not, certain it is that the "unclean hands" theory is not to be applied except to one who *intends* to deceive the public by misrepresenting the character of the article put on the market. Such intention should not be presumed and cannot be said to be present where *always* in connection with the challenged name (which he believes to be universally understood) the manufacturer annexes the true name of the article.

In *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, it appeared that the patents for the Singer sewing machines had expired. During the life

of the patents the name "Singer" had become generically descriptive of the machines manufactured by complainant company and came to indicate, in its primary sense to the public, the class or type of machine made by the Singer companies. The United States Supreme Court held that upon the expiration of the patents the identifying and generic name of the thing patented passed to the public and anyone could thereafter use the word "Singer" to identify machines of that type, providing that the name be accompanied with such indications that the thing manufactured is the word of the one making it, as would inform the public of that fact.

See also *Holzappel's Co. v. Rahtzen's Co.*, 183 U. S. 1, at 10.

In *Lambert Pharmacal Co. v. Bolton Chemical Corp.*, 219 Fed. Rep. 325, the plaintiff sought to restrain infringement of its trade name "Listerine." The defendant had adopted the name "Listogen". The Court held that the burden was on the plaintiff to show that confusion would result but that this burden was met by merely showing that the defendant adopted its arbitrary name for a compound similar to that of plaintiff, as in selecting an arbitrary name the defendant should have selected one about which there could be no question, and, having selected one bearing some resemblance to plaintiff's trade name, any possible doubt of the likelihood of damage should be resolved in plaintiff's favor. The defendant, however, invoked the "unclean hands" doctrine, contending that "Listerine" is a deceptive name itself, and suggests derivation from Lord Lister. Judge Learned Hand held that there was some

basis for this contention when the name originated. He said:

“Yet I am not disposed at the end of 34 years to say that it carries any longer any such implication. The record shows that the sales for now many years have been of many millions of bottles, and that it has become an article of very common use in many countries. We should rather assume that the name has become identified with the thing and has long since lost its connotation of Lord Lister’s association. We need not go back for so long to find in the origin of the word a suggestion not altogether truthful, but long since cured by time. Of course, no court will protect a man in the perpetration of a deception; but, where the trade-name has ceased to be deceptive, it is pharisaical to visit the sins of one generation upon the next in the aid of those who now seek to trade upon the efforts of the present. I shall not therefore decide how far the suggestion of ‘Listerine’ is so deceptive as to have forbid any protection in 1881.”

### C.

**The misrepresentation alleged by Singer ceased to exist before the filing of the Bill.**

Assuming again that there was misrepresentation in the mark, such misrepresentation ceased before the filing of the Bill (S. C. p. 19). It is a fact that from the date mentioned in the Bill of Complaint (par. 13, p. 19) whenever complainant used the words “Hollander Seal” or “Seal”, it added the words “Dyed Muskrat”.

The legal rules applicable to this situation are such as to make the assertion of “unclean hands” unavailable to the defendant. This is indicated in *Bear Lithia Spring Co. v. Great Bear Spring Co.*, *supra*. In that case the defend-

ant invoked the "unclean hands" doctrine. It was shown that on all of the labels used on complainant's bottled water appeared the untrue statement, "bottled at the springs". The objection was made *during the progress of the trial*, whereupon complainant gave orders to discontinue the use of the labels containing the false statement. Vice-Chancellor Bergen held that "repentance came too late", and in this connection said:

"The condition (that of the false representation) existed when the bill of complaint was filed, and the discontinuance of the misrepresentation when discovered and exposed is entitled to but little consideration in determining the *bona fides* of the complainant's position when it applied for equitable assistance." (See 71 N. J. Eq. at 602.)

The Vice-Chancellor who heard the cause dismissed the Bill without regard to its merits, basing his dismissal upon the "unclean hands" doctrine, and holding that there was present both proof of false representation and the existence thereof at the time of the filing of the Bill. On appeal, this Court said that it was not convinced that that doctrine had been properly applied to the circumstances of the case, but entered into no extended discussion of the subject, and this for the reason that this Court affirmed the Chancellor upon the merits which he declined to consider. We believe that the opinion of this Court, written by Mr. Justice Garrison, is strongly suggestive of the idea that complainant's discontinuance of the misrepresentation, *even in the progress of the trial*, was such repentance as made unavailable to the defendant the objection of "unclean hands."

Similarly, in *Johnson & Johnson v. Seabury & Johnson*, *supra*, this Court said:

“To afford relief does not, as the case stands, give prolonged life to the misrepresentation, for the publication had been discontinued before this suit was begun.”

This Court held, in the *Johnson* case, that the complainant is entitled to protection (a) in the absence of proof that the trade name was due to false representations, and (b) upon proof that the false representations had ceased. The case at bar meets the test. There is an utter absence of proof that the trade name is due to the false representation and there is proof in the Bill itself that the representation ceased before it, the Bill, was filed.

Mr. Justice Holmes, speaking for the Supreme Court of the United States in *Coco-Cola Co. v. Koke Company of America, et al.*, 254 U. S. 143; 41 Supreme Court 113, said (pp. 147 and 114 of the U. S. and Supreme Court reports, respectively), upon the defendant-infringer asserting by way of defense that the complainant was guilty of such fraud as precluded him from equitable relief, “*the plaintiff’s position must be judged by the facts as they were when the suit was begun, not by the facts of a different condition at an earlier time.*”

*Recamier Mfg. Co. v. Harriet Hubbard Ayer, Inc.*, 59 Fed. 2nd 802, is illuminating. The plaintiff urged the “unclean hands” doctrine against the defendant’s counterclaim. There the District Court for the Southern District of New York held (p. 808):

“In applying the ‘unclean hands’ rule, the situation as it exists at the time of suit is the guide. A party is not penalized because of misrepresentations that have been aban-

done before that time, even though they may have been effective in building up his business. *Coca-Cola Co. v. Koke Co.*, 254 U. S. 143, 41 S. Ct. 113, 65 L. Ed. 189; *Moxie Nerve Food Co. v. Modox Co. (C. C.)* 153 F. 487; *Johnson & Johnson v. Seabury & Johnson*, 71 N. J. Eq. 750, 67 A. 36, 12 L. R. A. (N. S.) 1201, 124 Am. St. Rep. 1007, 14 Ann. Cas. 840. Consequently, the false statements made by the defendant at various times prior to 1931, but not now persisted in, cannot be taken into account in determining whether the defendant should be given relief."

In the case of *Vortex Mfg. Co. v. Ply-Right Contracting Co.*, 33 Fed. Rep. (2nd Ser.) 302, the District Court said that it was well settled that to preclude a plaintiff from relief, "his misrepresentations must be both *intentional and material* so as to constitute a *deliberate* fraud upon the public." It was held that the defense of "unclean hands," to prevail, must usually be based upon conditions existing at the time when equitable relief is sought. Citing *Coco-Cola Co. v. Koke Co.*, 254 U. S. 143 and *Moxie Nerve Food Co. v. Modox Co.*, 153 Fed. Rep. 487 (C. C.); 162 Fed. Rep. 649 (C. C. A.).

In *Moxie Nerve Food Co. v. Modox Co.*, 153 Fed. Rep. 487, the Circuit Court held that "the defense of unclean hands, to avail, must be based upon conditions existing at the time when the party applies for equitable relief." The Court points out that more than 15 months had elapsed since the discontinuance by the complainant of labels which contained misrepresentations. The Court said that while it is doubtless true that complainant's present business was built in part upon misrepresentation, that was not a sufficient reason for denying relief where the complainant has removed the objectionable repre-

sentations and has endeavored to conduct its business making only such representations as are considered warranted. The injunctive order was affirmed on appeal (162 Fed. Rep. 649).

In *Fox v. Best Baking Company*, 201 Mass. 251, 95 N. E. 747, the Supreme Court of Massachusetts held that where the plaintiff had, before the filing of its Bill, stopped its untrue advertisements, it would be going too far to deny it relief. Relying upon the *Moxie Nerve Food Co.* case, *supra*, it reversed the lower Court and awarded relief to the complainant.

Hollander therefore submits that if its former trademark should be deemed untrue, its use ceased before relief was sought.

### POINT III.

Singer under this point argues the Court should have declined to direct an accounting until some proof had been presented either that Singer had made some profit as a result of the use of the marks or that Hollander had been injured and that the duty rested on Hollander to adduce proofs to that effect.

Under this point it is first argued that Hollander seeks inspection of all the books of Singer whereby it will learn and appropriate Singer's trade secrets, including its formulae. This assumes a fact for which there is no basis. The decree under review directs the examination of the *books of account*. That is not intended and does not have the effect of entitling either Hollander or the Special Master to an examination of *formula books*. The accounting is limited strictly to fiscal books. It is not shown how the examination of ledgers and payroll will result

in the disclosure of secret formulae. In the absence of an effort to show that, we do not consider ourselves free to indicate that such result is quite impossible.

Singer argues that it is impossible for him to show how much of its entire profit is due to the use of the mark but it insists that *none is so due* and that it is impossible for him to prove the negative. It is also argued that in all of the cases in which the Court awarded to the complainant the infringer's full profit, (because of impossibility of segregation) the infringer did make a profit as a result of the use of the mark.

Our adversary cites the case of *International Silver Company v. William H. Rogers Corp.* There an accounting was denied (66 N. J. Eq. 140). The accounting was denied for the sole reason that complainant was guilty of laches *and upon no other reason*. What our adversary italicizes in the excerpt from the case (p. 49 of his brief), was said merely to indicate that there was no justification for the delay, sought to be excused on the ground that the complainant was looking for evidence of deception.

On page 52 of the Singer brief appears the statement that: "There is no suggestion in the Bill or in the correspondence that there was any intent on Hollander's part to hold Singer to accountability for all the profits it might make either by the use of the alleged offending mark or derived from the dressing and dyeing of muskrat to resemble seal." A complete answer to this assertion is found in prayers 3 and 4 of the Bill (S. C. p. 21). It is true that the letter (S. C. p. 17) threatens a suit for an injunction, but this can hardly be regarded as an undertaking that no other relief would be sought. The

last sentence of the letter does not speak of "injunction" but generally of "relief." Subsequently, the prayers in the Bill fully apprised Singer that *discovery and accounting* were being claimed. Counsel argues that neither Singer nor his solicitor "*realized*" that an accounting would be required. We respectfully submit that their failure so to realize is in no way attributable to complainant or to any infirmity in its Bill. No such infirmity is suggested.

The same contentions made under Point III in this Court were made by Singer in the Court below before the decree was signed. They did not persuade the Court that there was any valid reason why the accounting prayed for should not be allowed, once the fact of infringement had been found and adjudged.

Counsel, on page 54 of his brief, refers to the *National Biscuit Case* mentioned in the opinion of the Court below. It will be noted that there an accounting was denied by Chancellor Walker *solely* because of laches, not present or suggested in the case at bar.

Singer refers, on page 54 of his brief, to the case of *Sharpless v. Lawrence*, 213 Fed. 423. The excerpt furnished by counsel draws a distinction between a violation of a technical trademark (which the court says is like a patent right) and unfair competition. The Court says that in cases of a technical trademark the owner is entitled not only to protection from further trespass but also "to the recovery of the profits issuing therefrom, as an *incident* to and as a part of a property right." It is further said that in suits of unfair competition the wrong is in the nature of a tort and that courts *sometimes* decree that the defendant shall pay not only the plaintiff's damages

but also the defendant's profits. The Court suggests that the latter kind of relief is generally made where the unfair competition is adjudged to be willful and fraudulent. The cited case is far from helpful to Singer's position. The Bill in the instant case charges not only the infringement of a registered trademark but also unfair competition. By the very test of the cited case plaintiff is entitled not only to an injunction but also to profits as an incident to the major relief. The cited case, however, runs in one respect *contra* the decision of our Court of Appeals in *L. Martin Co. v. L. Martin & Wilckes Co.*, 75 N. J. Eq. 257. That was a suit to enjoin unfair competition and this Court held that in such suits *damages* are not allowable in equity to the complainant but *only the defendant's profits*. It will be observed that in the *Martin* case the Court of Chancery was reversed because its decree directed the Master to ascertain both profits *and damages*. This Court held that it was better to follow the rule of the English Courts and of the United States Supreme Court and limit the accounting to the profits made by the defendant. In passing, it should be noted that in the several English cases and those from the United States Supreme Court cited in the opinion in the *Martin* case an accounting was directed as to any profits which the defendant *might have realized* because of its wrongful conduct.

It will also be observed that in the *Sharpless* case, cited by our adversary, the question was not whether profits could or should have been awarded. The Appellate Court said that it was dealing merely with the question whether the meaning of the decree could be practically altered by a decretal order, instructing the Master as to

the measure of damages. All else that the Court said was *obiter*.

Singer on page 55 of his brief reads from *Nims* on "Unfair Competition and Trademarks" to the effect that an accounting will not be ordered where the infringer acted "innocently and in ignorance of the plaintiff's rights, providing such party stops his illegal practices after he discovers the truth." We accept this statement as correct. Applied to the admitted facts in the case it becomes manifest that Singer can derive no comfort from the rule. He did not act innocently because he was at once advised of his wrong-doing and Hollander's objection thereto. He persisted until enjoined. In this he was neither innocent nor ignorant. The lower Court said so. In saying so the Vice-Chancellor construed Singer's conduct as would any reasonable and fair-minded person.

Singer cites on page 55 of its brief the case of *Regis v. Jaynes* (Mass.). This case, too, stands for the point that profits should not be awarded when it is found that the infringer acted in *ignorance* of plaintiff's rights and without any fraudulent intent. The answer to this case is the same as our answer to the contention based on the excerpt from *Nims*. By authorities that we cite elsewhere below in this brief it will be shown that the test of the plaintiff's right to profits is not the presence or absence of ignorance or fraudulent intent on the part of the infringer. *The test is the infringer's wilfulness.* However, there is no valid reason for drawing a distinction between wilfulness and fraudulent intent. In either situation the injured party gets only that which was taken from him, viz., profits diverted.

Singer cites the case of *Pease v. Scott County Milling Co.* (p. 56 of its brief). A reading of that case shows that the defendant had used the mark in dispute for some twenty years on one kind of merchandise and the plaintiff had used it more than thirty years on a different kind of merchandise. The Court said that there was such difference between the kinds of merchandise upon which the parties used the mark that neither one necessarily invaded the field of the other. The mark of each was upheld with respect to his particular article. The Court, however, *did* give profits to the plaintiff, limiting him to the period after the filing of the Bill, and this because up to the filing of the Bill the parties *under the circumstances of that case* (the Court so says) believed that they had the right to use the mark. The circumstances there meant are continued user for over twenty years. The cited excerpt from that case should be read in the light of the facts there present.

What is quoted (p. 56 of Singer's Brief) from the *Elgin National Watch Co.* case can have no application here. The case here is one of both infringement of trademark and unfair competition. Then, too, the cited case holds that the fraudulent intent may be rebutted in diminution of *damages*. Damages were not sought in the case at bar and are not recoverable in equity (*L. Martin v. Martin & Wilckes, supra*). It will be observed that in the *Elgin* case no *profits* were sought *but only damages* (p. 668 of report).

What counsel quotes from the *Lynn Shoe Co.* case (p. 57 of his brief) merely stands for the point that in cases of *technical trademark* the presumption of wrongful intent may be rebutted upon the question of liability for profits and damages. The instant case is not alone of tech-

nical trademark but one of unfair competition (see first sentence of opinion below, p. 48). However, we find material in the *Lynn Shoe Co.* case which is most helpful on other questions. We quote from that case:

“The rule which now prevails in the equity courts, respecting the wrongdoer’s accountability for the ‘profits and damages’ resulting from his unlawful acts, requires the master, not only to take an account of all the profits made by the defendant, but also to make an inquiry in regard to all damages sustained by the plaintiff on account of the defendant’s wrongful acts; and, *since it cannot be ascertained with any reasonable certainty how much of the profit is due to the trademark and how much to the intrinsic value of the commodity, the whole will be awarded to the plaintiff. It is equally well settled that the profits recoverable in equity for unfair competition are governed by the same rule as in cases of infringement of trademarks, and are not limited to such as accrue from sales in which it is shown that the customer is actually deceived, but include all made on the goods sold in the simulated dress or package, and in violation of the rights of the original proprietor.* Fairbank Co. v. Windsor (C. C.) 118 Fed. 96; Benkert v. Feder (C. C.) 34 Fed. 534; Williams v. Mitchell, 106 Fed. 168, 45 C. C. A. 265; Sawyer v. Kellogg (C. C.) 9 Fed. 601; Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; Graham v. Plate, 40 Cal. 593, 6 Am. Rep. 639; Avery v. Meikle, 85 Ky. 435, 3 S. W. 609, 7 Am. St. Rep. 604; McLean v. Fleming, 96 U. S. 437, 24 L. Ed. 828.”

The *Clark Thread Co.* case mentioned in the opinion of the Vice-Chancellor and referred to on page 57 of the Singer Brief, was one where

an accounting of profits was awarded as a mere incident to the major relief of injunction. There was no evidence that profits in fact had been made by the defendant. On appeal this Court thought that the defendant should not be held responsible to the *complainant* for *all* the profits realized by the defendant, and this for the reason that another concern (Mile-End Co.), as well as the complainant, had the right to the use of the infringed word. This Court said:

“In this condition of things it seems to us inequitable to hold the defendant responsible to the complainant for *all* the profits realized by the defendant from its wrongful conduct. Its responsibility to the complainant should be confined to such profits as were diverted from the complainant, and such damages as the complainant otherwise sustained, leaving the defendant answerable to the Mile-End company for the profits unlawfully diverted from it.” (56 N. J. Eq. at 790.)

In the case at bar *complainant alone* is entitled to the infringed trademark and it *alone* is entitled to the profits awarded.

Singer, on page 58 of his Brief, attempts to make some use of the case of *Martin Co. v. Martin & Wilckes Co.* All that that case stands for is that profits are recoverable in equity and damages are not. That and that alone was the point of this Court's reversal of the decree of the Chancellor. *It should, however, be noted that in the Martin case the accounting of profits allowed was without any evidence that profits had in fact been made by the defendant. That is the customary thing and was not questioned in that case. What was questioned was the additional award of damages.*

Our adversary quotes from *Dickinson v. Thum* (p. 60 of Singer brief). We accept the quoted language. It clearly sustains our contention that *wilful infringement* alone is sufficient to warrant the accounting for profits. The Court plainly grounded its opinion in the fact of wilful infringement. However, in introducing the excerpt, counsel says that the *Dickinson case* was one of *actual fraud* and refers to the earlier case in 245 Fed. 609. We quote from that earlier case:

“It is not necessary to the maintenance of a charge of infringement of a trademark to prove a distinct intent on the part of the infringer; it is the fact of infringement and the consequent invasion of the good will and business of the owner of the mark that is controlling; the intent will be presumed.”

Citing the following cases:

*DeVoe Snuff Co. v. Wolff, supra*, 206 Fed. at page 424, 124 C. C. A. 302;

*McLean v. Fleming, supra*, 96 U. S. at pages 253, 254, 24 L. Ed. 828;

*Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 525, 549, 11 Sup. Ct. 396, 34 L. Ed. 997;

*Samson Cordage Works v. Puritan Cordage Mills, supra*, 211 Fed. at page 608, 128 C. C. A. 203, L. R. A. 1915F, 1107;

*W. A. Gaines & Co. v. Turner-Looker Co.*, *supra*, 204 Fed. at page 556, 123 C. C. A. 79;

*Hygeia Distilled Water Co. v. Consolidated Ice Co.*, 144 Fed. 139, 141, 142 (C. C., opinion by present Circuit Judge Buffington);

*Hutchinson, Pierce & Co. v. Loewy*, 163 Fed. 42, 90 C. C. A. 1 (C. C. A. 2);

*Layton Pure Food Co. v. Church & Dwight Co., supra*, 182 Fed. at page 33, 104 C. C. A. 464;

*"Singer" Machine Manufrs. v. Wilson*, 3 App. Cas. 376, 391.

Counsel, on page 61 of his brief, speaking of the *Dickinson* case says that deliberate fraud was involved. The Court did not so find. The headnote that counsel furnishes merely declares the rule that is well settled here as elsewhere, that laches (not present or claimed in the instant case) does not bar the injunctive remedy but only the accounting.

Our adversary argues that in the *Dickinson* case an accounting of profits would not have been ordered had there not been evidence that profits in fact had been made. That is not a correct statement of what the case holds. On appeal the defendant complained that the Master charged him with the entire profits, that the burden was on the plaintiff to prove that the defendant had made profits attributable in whole or in part to the infringing use and, "that the evidence does not support a finding that there were any so attributable." *The evidence so referred to was the evidence before the Master, after the accounting had been ordered.* The Court said that the defendant's contention is precluded by the Court's former opinion, meaning by that the opinion in which wilful infringement was found. The Appellate Court then said: "*If it had been otherwise*, an accounting of profits and damages would not have been ordered." By the words, "If it had been otherwise," the Court could mean only if its opinion had been otherwise. Certainly, if the lower Court had not found the fact of infringement,

an accounting would have been altogether denied. We believe that counsel has fallen into error in the interpretation of the word "otherwise" appearing in the Court's opinion.

Singer argues (p. 62 of brief) that before the accounting was directed in the case at bar there should have been *some* evidence before the Vice-Chancellor that Singer did make or could have made some profit which could be attributed to the use of the offending mark. This contention involves necessarily two notions, viz.:

- (a) That in the contest for injunctive relief should also preliminarily be tried the question whether the alleged infringer made any profit attributable to the infringement; and
- (b) That the complainant should do what Mr. Justice Pitney said was *impossible*, viz., to prove how much of the defendant's profits resulted from the intrinsic value of the commodity and how much from the credit given it by the trademark. "*In the very nature of the case it would be impossible to ascertain to what extent he could have effected sales and at what prices except for the use of the trademark.*" *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U. S. 251.

*Our adversary does not present a single case from any jurisdiction in which it was held that before Final Decree the fact of profit, attributable to the infringement, must be found. The allowance of profits is ancillary to the award of an injunction. It is refused only in the presence of laches. It is never allowed until infringement is first found and when allowed, an inquiry is directed to determine what profits, if*

any, have been made. Under our adversary's theory, there should be tried out in the first instance the question of profits, notwithstanding the fact that the Court might find no infringement to be present and dismiss the Bill. The ancient and well settled practice of postponing the matter of profits until *after* complainant's right to an injunction is first established is not only logical but possesses the added virtue that the Chancellor is not obliged to conduct an accounting, the result of which is meaningless if the Bill be dismissed because of no infringement shown.

Then, too, the evidence as to whether or not the defendant made profits resides in his own books of account. If the plaintiff had to prove the fact of profit as part of his main case, he would have to do it by means of the defendant's books. Thereby a plaintiff might learn his competitor's fiscal affairs, although his own Bill might thereafter be dismissed. Such a situation would present the very evil which Singer now contends flows from the accounting which was ordered *after* an injunction was decreed. It seems to us that whatever Singer says in objection to the accounting herein allowed, indicates good reason why the fact and extent of his profits were not a proper subject of inquiry until after decree entered.

In addition to the cases appearing in the opinion of the Vice-Chancellor, we cite a few cases upon which we rely in connection with the points under consideration:

In *Prest-O-Lite Co. Inc. v. Acetylene Welding Co., et al.*, 259 Fed. 940, District Judge Haight said:

“There can be no doubt of his liability to respond for any profits which he received

during the time that the business was under his control. *It is true that he testifies, as does his son and Bournonville, that no profits were realized.* Of course, if such is the case, an accounting would be a useless formality and an unnecessary burden to place upon that defendant; *however, as I stated during the trial, in the absence of any books or means at hand whereby the plaintiff could at that time refute their testimony in this respect, I feel that an accounting should be ordered if the plaintiff desires it, so that the latter may there have the opportunity of establishing, if possible, that any profits were realized. If, however, on such an accounting, it is not established that Leonard Lorentowitz received profits, the cost of the reference must be borne by the plaintiff.*"

We quote from the following cases:

*Oakes v. Tonsmierre*, 49 Fed. Rep. 447, 453  
(trade-mark case):

"The use, however, of the name 'Peter Oakes' stands upon different principles, and it is not claimed by counsel that they had any right to use this name, *but that it was used by reason of an inadvertence or mistake, was not intentional, and, in point of fact, it was used to a very limited extent.* The rule, however, is that trade-marks are protected, not exclusively on the ground of fraud, but also on the ground of property. The testimony shows that Peter Oakes is making and selling candies in his own name, and designating them in the market by the name of 'Peter Oakes.'; so that, *if insisted upon, the case may go to a master for an account of gains and profits, on account of the unauthorized, though not intentional and fraudulent, use by respondents of the name of Peter Oakes.*"

*Campbell Printing Press Co. v. Manhattan R. Co.*, 49 Fed. Rep. 930, 932 (Circuit Court, Southern District of N. Y.—Patent case):

“To the complainant’s application for an accounting before a master it is objected that it has not given specific evidence of damages sustained. But under the pleadings it is not necessary for the complainant to give such proof. Infringement is admitted, and from infringement damage and deprivation of profits are presumed. *Wooster v. Muster*, 20 Fed. Rep. 162. To what extent, and whether nominal or substantial, is a matter to be settled on the accounting. Complainant has shown all that is necessary to entitle it to a decree sending the case to a master, when it has shown infringement of a valid patent owned by itself.”

*Fisk v. Mahler*, 54 Fed. Rep. 528 (Patent case):

“If the defendants had not denied infringement before the suit was commenced, and had made an offer to pay complainants the established royalty for the use of the inventions, they might properly urge that they should not be subjected to the costs of the suit, and to the expense of an accounting. But they did not do this. They denied infringement until after the suit was brought. \* \* \* If the complainants choose to take a decree upon the basis of the royalty upon the 18 dozen neck scarfs sold by the defendants, they are entitled to do so. *But, if they prefer to go to an accounting, it is their right to do so.* If it should turn out that the defendants have not sold any more than that number, the question will arise whether the costs of the accounting should not be imposed upon the complainants. *The usual decree is ordered.*”

*Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*,  
240 U. S. 251; 36 S. Ct. Rep. 269:

“Having reached the conclusion that complainant is entitled to the use of the words ‘The American Girl’ as a trade-mark, *it results* that it is entitled to the profits acquired by defendant from the manifestly infringing sales under the label ‘American Lady’—at least to the extent that such profits are awarded in the decree under review. The right to use a trade-mark is recognized as a kind of property, of which the owner is entitled to the exclusive enjoyment to the extent that it has been actually used. *McLean v. Fleming*, 96 U. S. 245-252, 24 L. ed. 828; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 224, 27 L. ed. 706, 708, 2 Sup. Ct. Rep. 436. The infringer is required in equity to account for and yield up his gains to the true owner, upon a principle analogous to that which charges a trustee with the profits acquired by wrongful use of the property of the cestui que trust. Not that equity assumes jurisdiction upon the ground that a trust exists. As pointed out in *Root v. Lake Shore & M. S. R. Co.*, 105 U. S. 189, 214, 26 L. ed. 975, 984; and *Tilghman v. Proctor*, 125 U. S. 136, 148, 31 L. ed. 664, 668, 8 Sup. Ct. Rep. 894 (patent cases), *the jurisdiction must be rested upon some other equitable ground—in ordinary cases, as in the present, the right to an injunction—but the court of equity, having acquired jurisdiction upon such a ground, retains it for the purpose of administering complete relief, rather than send the injured party to a court of law for his damages. And profits are then allowed as an equitable measure of compensation, on the theory of a trust ex maleficio.*”

In *Wallace & Co. v. Repetti, Inc.*, 266 Fed. Rep. 307 at 310, Circuit Court Judge Manton said:

“The acts of the appellant here were indulged in, not only before, but after, full warning and with knowledge of the appel-

lee's rights and its intentions. The appellant did not at any time modify the business conduct, but continued to infringe; and this was without the acquiescence or consent of the appellee. We think that under these circumstances the appellee was entitled to an accounting. *Garrett & Co. v. Schmidt, etc. Co.* (D. C.) 256 Fed. 943; *Layton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 35, 104 C. C. A. 475, 32 L. R. A. (N. S.) 274."

*Dickinson v. O. & W. Thum Co.*, 8 Fed. Rep. 2nd Ser., 570 at 573:

"Under the facts found and proved, the rule of *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629, is applicable. *The infringer must account for the entire profits derived from the sale of the infringing goods. The recovery will not be limited to such amount as can be shown by direct and positive evidence to have resulted from the use of the infringing mark. The burden is not cast upon the plaintiff to attempt the impossible task of showing what part of defendant's profits are attributable to the use of the infringing mark and what part to the intrinsic merit of his goods or other causes. Whatever conflict in the previous decisions might be found was put at rest by that decision.*"

*Prest-O-Lite Co. v. Bournonville, et ux.*, 260 Fed. Rep. 442 at 443:

"It is, however, entirely well settled that, so far as an infringement of a technical trade-mark is concerned, the owner thereof is entitled not only to protection from further trespass, but to the recovery of *all* the profits realized by the infringer from the sale of articles under color of the infringing trade-mark, *as an incident to and part of his property right.* *Sharpless Co. v. Lawrence*, supra; *Rowley v. Rowley*, supra."

An examination of our adversary's cases does not disclose a single one in which the Court held that intentional fraud *must* be shown as a prerequisite to an accounting. On the contrary, in the following cases, which are merely representative of the settled rule, *wilfulness was the sole test*.

*Garrett & Co., Inc. v. A. Schmidt, Jr., etc.*, 256 Fed. 943 at 948:

“Nor is complainant barred by laches from its right to an accounting. Defendant in the early stages of its conduct was promptly notified and warned. A suit was brought in due time, and, while it did not proceed to a final hearing, was none the less a pending action, giving ample notice of complainant's rights and of its intention to insist upon them. The dismissal later for want of prosecution does not diminish the force of these considerations; hence it appears that all defendant's acts were indulged in after full warning, and with full knowledge of complainant's rights and of its intentions. Nothing appears herein to indicate that the defendant has at any time altered its situation, modified its course of conduct, indulged in expenditures, or did anything in reliance upon a belief induced by any act of complainant or its predecessor that complainant or its predecessor was acquiescing in defendant's conduct, course of business, or waiving any of its legal or equitable rights to redress. *Defendant began and persisted in its methods of doing business upon its own responsibility, without being misled by any act of complainant or its predecessor, and must now be held to full responsibility for the consequences.*

“A decree awarding an injunction and for an accounting will be entered in conformity herewith.”

It will be observed that although the quoted matter speaks of laches, nonetheless the *wilful persistence* of the defendant was the basis for

the relief of injunction plus the accounting decreed against it.

In another opinion in *Thum v. Dickinson*, 254 Fed. 219 at 220, the Court said:

“The finding of the Circuit Court of Appeals that defendant has been a *willful and persistent trespasser* upon plaintiff’s rights is binding upon this court, and constitutes the *controlling* rule of decision in this case. At best, defendant occupies the position of a trustee *ex maleficio* and must account as such. The primary object of requiring an unfaithful trustee ‘to bring in his account is to compel discovery from him as to the details of the transaction under investigation.’ Defendant is not entitled to protection against the consequences of his own malfeasance, and if the full and fair disclosure, which the law requires him to make, incidentally involves some personal loss or business disadvantage, the blame therefor rests upon himself alone. Courts should not be so tender of his claimed rights as to destroy the very purpose which the rule was designed to accomplish, or to jeopardize or sacrifice the adjudicated rights of plaintiff.”

Hollander therefore respectfully submits that there is nothing in Point III of Singer’s brief which warrants the disturbance of the Court’s decree to account.

#### CONCLUSION.

Singer consented to the awarding of an injunction and in that respect the decree is not appealable.

On page            of this brief we quoted from Singer’s brief, deposited with the Vice-Chancellor before he advised the decree challenged on this appeal. In that brief Singer informed the Court that “*it does not intend to use the trade-*

*mark which was the subject matter of the Bill of Complaint filed herein, so that so far as the injunction is concerned the defendant has no objection to the entry of the same, reserving, of course, any legal rights it may have."*

The concluding paragraph of the brief reads as follows:

"The defendant therefore respectfully submits, for the reasons set forth herein, that there should not be incorporated in any final decree in this matter any provision for a reference to a Master to ascertain any questions of profit. The final decree should merely restrain the defendant from using the trademark, tradename or symbol in question which, as has already been stated, has been discontinued."

We respectfully submit that by force of the consent expressed by Singer to the Court below it is estopped from questioning the propriety of the decree *insofar as it awards an injunction*. Singer is free, however, to question the accounting feature of the decree. Its efforts in the latter respect, we believe, have been fully met by the reasons and authorities in this brief set forth.

We respectfully submit that complainant's trademark is of long usage, known to the public by 25 years of extensive advertising and by its appearance on more than 75,000,000 skins. Defendant's use of the offending trademark was short-lived and persisted in notwithstanding prompt protest from Hollander. The defendant has asserted that it has discontinued the use of its mark and does not intend to use it and made no objection below to the awarding of an injunction. As against the defendant's indifference to its use of the mark, its alleged discontinuance of such use and its consent to a re-

straint against such further use, we mention the injury to complainant's business and good-will if the injunction be not sustained and the defendant be allowed to resume a use which apparently is of no value to it except as such use may harass and injure the complainant.

The Chancellor was most careful in limiting the accounting. In this respect his decree was consonant with all the authorities, particularly that of the United States Supreme Court in the *Hamilton-Brown Shoe* case. His action should be approved.

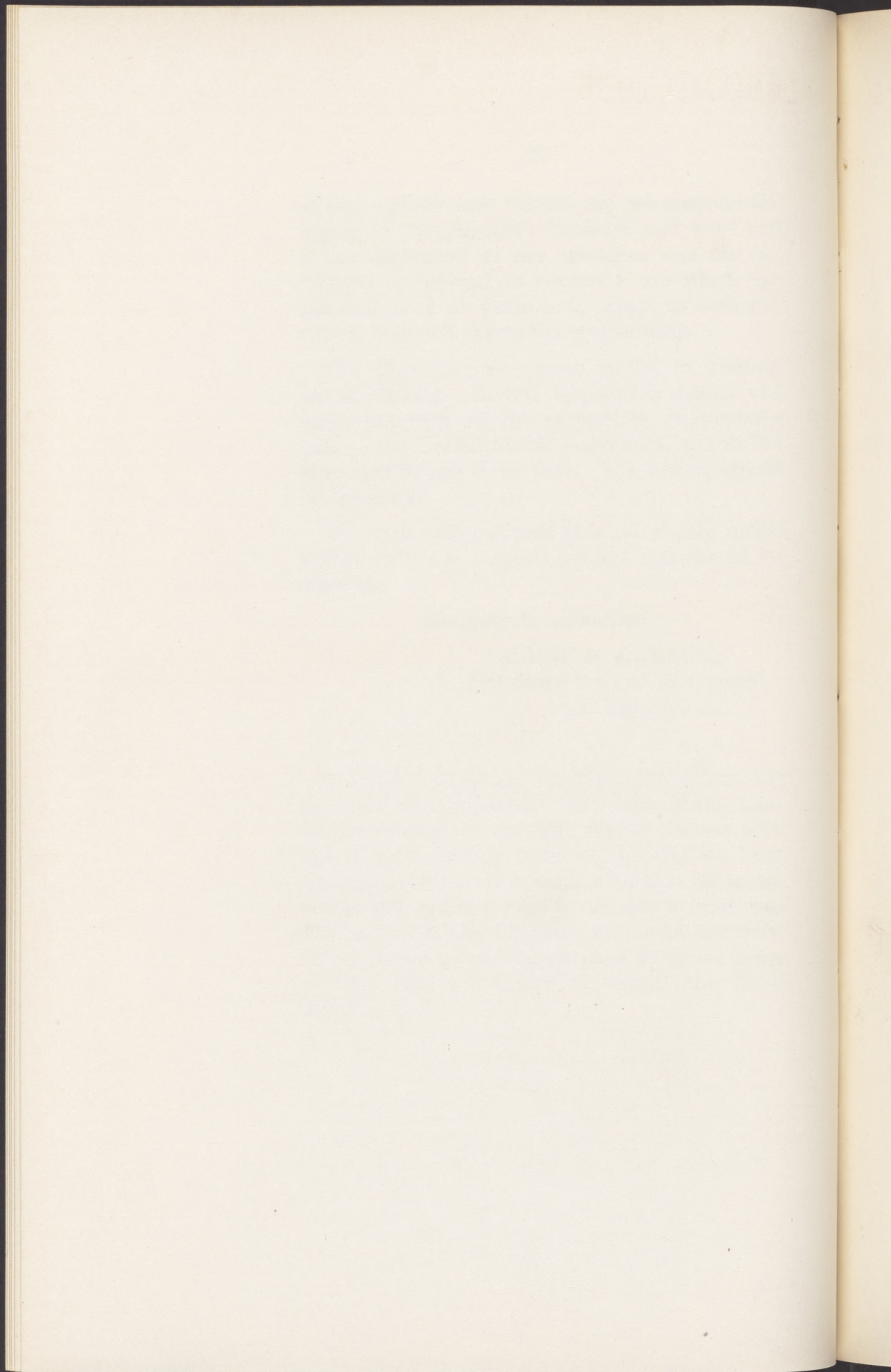
We respectfully submit that the decree under review is in all respects correct and should be affirmed.

Respectfully submitted,

LEBER & RUBACK,  
Solicitors for and of Counsel  
with Respondent.

*Notation:* Mr. Lane has stipulated with us that we need not supplement the State of the Case by the printing of the brief filed by Singer with the Vice-Chancellor, from which brief we have quoted excerpts. It is stipulated that those excerpts are given correctly. Singer's brief was filed with the Vice-Chancellor after he had written the letter appearing on page 42 of the State of the Case but before he signed the Final Decree.

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**New Jersey Court of Errors and Appeals**

No. 145—OCTOBER TERM, 1935.

Between

A. HOLLANDER & SON, INC.,  
a corporation,  
Complainant-Respondent,

and

PHILIP A. SINGER & BRO., INC.,  
a corporation,  
Defendant-Appellant.

On Appeal  
from Chancery.

**REPLY BRIEF OF DEFENDANT-  
APPELLANT.**

(Italics and the like ours, except where otherwise noted.)

1. The best proof as to whether the matter of accounting was considered on the argument on the main case is probably found in the memorandum opinion of the Vice-Chancellor under date April 17, 1935 (p. 42), in which he says:

“This matter is presented on complainant’s motion for entry of a final decree granting the relief prayed for in the bill of complaint. The prayer is *for injunction* against the defendant corporation \* \* \*. I have read and considered the briefs of both parties and the cases cited and have come to the conclusion that *the injunction should go*. \* \* \* On the settlement of the decree the matter of counsel fee, if any, will be passed upon.”

It is hardly to be conceived that, if the matter of accounting had been mooted, the Vice-Chancel-

lor would have said nothing about it, and would have reserved *only* the matter of "counsel fees". The opinion of the Vice-Chancellor, which appears on page 47, was prepared and filed after the making of the final decree, which bears date August 20, 1935, and which was filed on the same date. The opinion of the Vice-Chancellor bears the note "Decided September 23, 1935". All of the argument with respect to accounting was had *after* the letter of the Vice-Chancellor of April 17, 1935. As stated in the main brief, the Vice-Chancellor signed the decree which directs an accounting notwithstanding the suggestion that the matter of accounting required proofs, and that, upon *that* issue, Singer should not be concluded by the stipulation, and an application for rehearing is now pending in the Court of Chancery.

2. At page 4 of its brief Hollander refers to the contract of August 6, 1928 and the letter, printed as a supplemental state of the case, and says that that contract and letter were not offered and were not before the Court below. The justification for considering the contract and letter a part of the state of case is the reference to the contract in paragraph 8 of the bill of complaint (p. 14). At the bottom of page 9 of its brief and the top of page 10, Hollander refers to affidavits attached to, but not made a part of the bill (p. 22, State of Case), as supplying evidence in support of the ultimate fact which it says is alleged in the bill. The statements contained in these affidavits are not admitted by the stipulation (p. 40).

3. Under its subdivision 2 at the bottom of page 12 of its brief, Hollander say that the Vice-Chancellor dealt with "defendant's accountability for profits." He did, but in his opinion filed after the decree (p. 47).

4. At the top of page 13 of its brief Hollander says that the claim of *laches* "is not made in appellant's brief and is, therefore, abandoned". The claim of *laches* is *not abandoned*. It is included under Point III (p. 43), Singer's brief, under the argument that "A discovery and an accounting for profits of all of the skins upon which Singer affixed its mark is not justified under the circumstances of this case". We have referred to the cases in which accountings have been denied on the ground of *laches* and estoppel (pp. 48, 49, 50), and we do not abandon the claim.

5. There is considerable on pages 16 and 17 and elsewhere of Hollander's brief as to the reasons why the mark is used, but little in the state of the case to support the assertions of Hollander. The fact remains that neither Hollander nor Singer sell anything, and that those with whom they deal cannot possibly be deceived. Hollander impliedly admits this (p. 17), but says that the dealer can be *confused* by the mark. It is not apparent *how* he could be confused. But mere "confusion," unless it results in deception, is not sufficient, because such "confusion" could not injure Hollander.

6. At the bottom of page 18 of its brief Hollander suggests that the supposed argument that the use of the Hollander trade-mark has been a fraud on the buying public cannot be reconciled with the contention that the mark does not denote to the buying public origin of manufacture. We have indicated in our main brief (p. 38) that, if the marks denote to the ultimate purchaser what Hollander says they do, *then* it can hardly be said that they do not *also tend to deceive*. On the matter of deception, *now* being considered, the *origin* of manufacture is not important. What *is* of im-

portance is whether the article is what it purports to be, whatever its origin. The deception is not only in the use of the mark, but in the production of the "Hudson Seal" and the use of the mark in connection therewith, which has a tendency to indicate to the public that the product is seal and not dyed muskrat.

On pages 20 and 21, and at other points in the brief, Hollander indicates that the discriminating purchaser (who is the only one who would insist upon the lining being ripped and the mark disclosed) could be deceived. We have fully considered this in our main brief (p. 18). It would be more to the point if there had been produced, or alleged, a single *concrete* instance of such deception. See *Rosenthal vs. Blatt*, 80 N. J. Eq. 90.

On page 19 of its brief, Hollander says that Singer asserts "that the marks are not used as sales advertising". We do not read the statement of Singer (p. 14) to that effect. We again refer (p. 15) to the fact that, in its memorandum filed with the Vice-Chancellor, Hollander conceded that its complaint was with respect to the marks which were stamped on the back of fur skins stating—"It is there, *and not upon advertisements*, that the mischief lies."

7. On page 14 of its brief Hollander directs attention to the fact that the "contest in the case at bar relates *solely* to conflicting geometrical designs and not to trade words." If by this Hollander means that, in the determination of the case, the words which appear upon the marks used by the respective parties cannot be considered, we submit that Hollander is wrong. If the geometrical designs are not precisely the same, the test is the tendency to deceive (and this is so whether the case be one of technical trade mark or unfair competition) so that the respective

marks must be considered *as a whole* and nothing on the marks, including the language, can be ignored.

Vice-Chancellor Stevenson very clearly indicated in *Hill Bread Co. v. Goodrich Baking Co.*, 89 Atl. 863 (not officially reported), mentioned at the bottom of page 24 of our original brief, how differentiation can be accomplished and said (top of p. 25)—“In considering details in respect to the law of unfair competition, it must be determined whether the two details, which perhaps resemble each other, *in connection with all the other features* and in connection with the known customs of the trade, lead to deception and fraud.”

One of our complaints is that the Vice-Chancellor below considered similarity (p. 59) but did not consider the dissimilarities whereas, the fact is, that *both* must be considered and we submit that Hollander in its brief has fallen into the same error.

8. Much of what Hollander says at the bottom of page 20, pages 21 and 22 of its brief, ignores the fact that only the extraordinary purchaser can possibly see the mark and only a “most wary and discriminating one.” It taxes our credulity to believe that such a purchaser would be deceived any more than he would be deceived by the ordinary label which usually is placed on the inside of a garment, plainly visible, indicating in some instances the manufacturer and in some the seller, and all geometrically about the same, distinguished only by the names which appear on the respective labels.

The cases mentioned, pages 23 to 33 of Hollander’s brief (*National Biscuit Co. v. Ohio Baking Co.*, 127 Fed. 160; *National Biscuit Co. v. Swick*, 121 Fed. 1007; *National Biscuit Co. v. Pacific Coast Biscuit Co.*, 83 N. J. E. 369), all in-

volved baking products, the labels denoting the source of manufacture, sales being for small amounts and were cases in which the courts held that the labels, as such, had acquired secondary meanings, but even with respect to *this* class of cases see *Hill Bread Co. v. Goodrich Baking Co.*, 89 Atl. 863 (not officially reported), mentioned on page 34 of our original brief. *Cauffman v. Schuler*, 123 Fed. 205, mentioned at the bottom of page 29 of Hollander's brief, involved bottling of ginger brandy and the case fell within the class of the baking cases. We have considered this case at the bottom of page 32 of our main brief.

9. On page 30 Hollander criticises our statement that "Hudson Seal while not as expensive as Seal is by no means inexpensive," and states that "Hudson Seal is one of the cheap furs and by reason of its price alone could not be mistaken for the much more expensive Alaskan Seal which is comparatively little known and less used by the buying public \* \* \*." We assume that a fact, which may be proven by merely entering an ordinary department store and making an inquiry, can be considered one of which judicial knowledge may be taken. We believe that if inquiry be made at any reputable department store it will be found that Hudson Seal coats may be purchased at prices from \$179 to \$400 and that Alaskan seal may be purchased from \$425 to \$700. There is no such discrepancy in price as that price *alone* will indicate that one product is imitation seal and the other seal. The sole purpose of using the process which produces Hudson Seal is to make the muskrat look like seal and Hollander takes great pride in the perfection of its process. While \$179 may not have been a large sum in the *normal* years 1926 to 1929, it was a considerable sum in the *abnormal* year with which we are concerned, July

1934 to July 1935, and, if our recollection serves us correctly, was considered to be not a small sum in the *abnormal* years of 1910 to 1914. Certainly, a purchaser who intends to spend upwards of \$100 will be a little more discriminating than one who intends to buy a ten cent loaf of bread.

Hollander, at the bottom of page 31 of its brief, indulges in suppositions which are not supported by proof or by any charges in the bill. Whatever charges are made in the bill are of a most general character and really conclusions. There is much in the argument that taxes our credulity to the limit. It would have been more to the point, we submit, if either the bill had contained a charge of a specific instance of deception, or attempted deception, or of confusion, or if there were some proof in the case to that effect. We have none such. **And the burden is on Hollander, the complainant, not upon Singer, the defendant. Any failure or deficiency of proof operates against Hollander.**

10. At the bottom of page 32 of its brief Hollander directs attention to what it claims to be the fact that the very day that Singer "was freed from the Chancellor's injunction under which he could not produce Hudson Seal, he reentered the field by adopting a trademark so closely parallel to that which its competitor has used for almost a quarter of a century." In the first place the "Chancellor's injunction" was granted as the result of a *settlement* of a litigation brought, not to prevent infringement of trademarks, but to compel specific performance of a contract which had been made between Hollander and Singer, August 6th, 1928, (Supp. State of Case, p. 1). The inference which may be conveyed by the statement of Hollander above indicated is, we submit, not justified, for in the year 1922 Singer had produced

Hudson Seal and had used the mark which appears on page 15 of the state of case. That mark is just as close (if there be any closeness) to the mark used by Hollander (p. 13) as is the mark adopted by Singer in July, 1934 (p. 16). So far as any allegations in the bill are concerned, Hollander never objected to the use by Singer in 1922 of the mark which appears upon page 15, although Hollander and its predecessor had been using the mark which it now claims to have been infringed from 1913 (p. 12). **All that Singer did was to resume using substantially that which it had been using before it made its contract with Hollander not to manufacture Hudson seal for a period of years.**

11. At the bottom of page 33 of its brief Hollander suggests that no one with any intelligence could possibly believe that there are seals in Hudson Bay, and also that there is nothing in the record which would indicate that the word "Hudson" has reference to Hudson Bay, and suggests a reference to any standard encyclopedia and that "seals are found principally off the Pribilof Islands in Alaska," and, on page 34, that the word "Hudson", in connection with seal, "has become generic and denotes universally the true character of the article to which it is affixed." Many intelligent people do not have access to an encyclopedia. Most have access to a dictionary. Reference to Funk & Wagnalls New Standard Dictionary under the word "seal" will indicate that "Seals are marine and mostly of high latitudes and congregate usually in great numbers on rocks, ice-floes, etc. to breed; a few inhabit tropical or subtropical seas \* \* \*." The Alaskan seal is defined as the "fur seal; the most valuable commercially of the various fur seals." We then have a Caribbean seal described as one "whose habitat is the Atlantic Ocean north of New-

foundland." We have French seal defined as a "variety of leather used in bookbinding." We do not find the Pribilof Islands mentioned nor do we find anything which would indicate that seals may not inhabit Hudson Bay. We do not find the word "Hudson Seal" nor will reference to "Hudson" in the dictionary indicate that there is such a generic word as "Hudson Seal." We should not suppose that anyone would imagine that seals would come from the Hudson River but it does not stretch our credulity to suppose that some persons might think that seals might come from Hudson Bay—a cold fur producing country.

12. Under its Point III (p. 51), Hollander suggests that inspection of the books of Singer will not permit Hollander to get at the formulae of Singer. Let us see. Dyeing is accomplished by the use of chemicals. The business of fur dyeing, and most dyeing, is built up upon the use of secret processes. These processes are of such a nature as that they cannot be protected except by secrecy. To get at profit one must ascertain cost. To get at cost one must know, among other things, the cost of materials. It is impossible to get at the cost of materials without knowledge as to what materials are used and the quantities purchased. If Hollander would take the word of Singer with respect to the cost of its dyes, in bulk, no harm would be accomplished. But Hollander will not do that. It wants the books of account of Singer and, if it gets the books of account, it will ascertain, and it *must* ascertain if it is to verify the account, the names of the chemicals, the amounts used and the prices paid. It will also have to know the number of skins dyed by the process. Is it not obvious that a person skilled in the business with this information could, without any difficulty, work out the formulae. Not only that, but it is necessary to know the cost of labor. By getting at the cost of labor

the time of the various processes may be gotten at.

13. On page 53 of its brief Hollander criticizes the construction which we put upon the language of the court in *Dickinson v. O. & W. Thum Co.* (C. C. A. 6th), 8 Fed. (2nd) 570, taken in connection with the same case 245 Fed. 609 mentioned on page 60 of our main brief. We submit that the construction which we have put upon the language of the court in that case is correct.

14. In its conclusion (p. 68) Hollander insists that, because of statements contained in the brief of Singer below it waived its right to challenge the injunctive part of the decree. The brief mentioned was submitted on the argument on the settlement of the decree and after the court had concluded (p. 42) to grant an injunction. It is significant that, while Singer said that it had no objection to the "entry of the decree" with respect to the injunction, it reserved "of course any legal right it may have".

It is apparent that what was meant by this was that the decree, so far as it granted an injunction, was in accord with the decision of the court. No re-argument was asked with respect to the grant of an injunction. The legal objections, however, were reserved. The matter only went to the *form* of the decree. When it came to the accounting, however, Singer attempted to indicate to the court below that an account should not be ordered and that the matter of accounting had not been disposed of by the prior opinion of the court. We repeat what was said upon the oral argument that, if this decree had granted an injunction only, we would not be here, not because we believe that the decree is right but because the mark is of no importance to Singer and it has abandoned its use and the amount of costs and counsel fee involved was not sufficient to justify an appeal. But,

being here, we have the right to insist, and we do insist, that the decree below, in-so-far as it grants an injunction, is wrong, and we further insist that, even if it is right, with respect to the grant of an injunction, it is wrong with respect to the direction for an accounting, and we have the right to rest upon both contentions.

15. From page 55 to the conclusion of its brief Hollander cites cases upon the matter of accounting, but there is no case cited with its facts like that at bar.

The underlying theory upon which accounting for profits rests is the idea that, if the infringer had not been guilty of the conduct charged against him, the owner would have derived the profit. He has, therefore, been injured to the extent of the profit. This theory was first applied in patent cases. In a patent case, the article produced or sold *could not have been produced without the use of the patent*. The patent is the property of the patentee. If one then uses the patent belonging to another, without the use of which he could not have produced the article, it is fair that he should account for the profits, for otherwise the owner of the patent would have reaped the profit. The rule was then extended to technical trade-mark cases. There may be considerable doubt as to whether it should have been so extended. But all of the cases in which it was so extended were cases involving the manufacture and the sale of a product to the public generally and the theory was that, if the infringer had not used the trade-mark his product would not have been sold, and theoretically, the owner of the mark would have reaped the profit. There is a fallacy in this reasoning. The same article could have been produced without the use of the trade-mark. That is not the case where a patent is involved.

But the rule has not been extended to such a case as is here involved, where the label or mark

is not used in connection with the sale of an article but is only used by a processor, who does not buy or sell and who deals only with those who know with whom they are dealing, and where, if the ultimate purchaser is to see the mark, he must insist upon a lining being ripped. The bill does not charge, nor has it yet been suggested by counsel, that, if Singer had not used the mark on the skins which he processed, Hollander would have obtained the business of processing the skins. It *cannot* be so suggested for it is palpable that it is not the fact. The reasoning upon which the rule which permits an accounting for profits rests therefore does not apply in a case such as we have here and, if the reasoning does not apply, the rule should not be extended to this class of cases.

Justice requires that the owner of the label infringed be made good for any loss which has been occasioned to him as a result of the act of the infringer but does *not* require that the owner of the mark should be permitted to take to himself the profits made by the infringer, not as a result of the use of the mark but as the result of the processing, without any proof whatever that the owner of the mark would have dyed a single skin more than he did dye had the infringer not infringed.

Nor can the Court overlook, we submit, that during all of the course of the negotiations between the parties, not a single word was said about accounting until after the Court had delivered its opinion of April 17, 1935 (p. 42) except what is contained in the bill in the prayer for relief.

Respectfully submitted,

MERRITT LANE,  
EDWARD R. MCGLYNN,  
Of Counsel with Appellant.



