

# In the Privy Council.

No. 40 of 1937.

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## ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

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BETWEEN

THE CANADIAN SHREDDED WHEAT COMPANY  
LIMITED (Plaintiff) - - - - - *Appellant*

AND

10 KELLOGG COMPANY OF CANADA LIMITED and  
SOLOMON BASSIN, carrying on business under  
the name, style and firm of BASSIN'S CUT-RATE  
STORES (Defendants) - - - - - *Respondents.*

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## CASE FOR THE APPELLANT.

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1. This is an Appeal from the Order of the Court of Appeal for Ontario, dated the 30th November 1936, dismissing an appeal from a judgment of Mr. Justice McTague in the Supreme Court of Ontario dated the 30th March 1936 whereby he dismissed with costs an action in which the Appellant was Plaintiff and the Respondents were Defendants. Record.  
p. 190.  
p. 184.

### THE ACTION.

20 2. The Appellant's action was commenced by Writ on the 1st June 1934 and was brought in respect of alleged infringement of registered trade marks and passing-off. By its Statement of Claim the Appellant claimed an injunction restraining the Respondents from infringing the Appellant's registered trade marks consisting of the words "Shredded Wheat" by the use of the words "Shredded Wheat" or "Shredded Whole Wheat" or "Shredded Whole Wheat Biscuit" or any words only colourably differing therefrom, in connection with the sale of biscuits or crackers or cereal foods cooked or prepared for consumption, and from using or selling any biscuit, whether made of wheat or otherwise, in the form and pp. 2-9.  
p. 8.

Record. appearance of the product manufactured and sold by the Appellant or any form or appearance only colourably differing therefrom or any form or appearance calculated to deceive the purchasing public. The Appellant also claimed damages.

pp. 9-16. **3.** By their Defence the first named Respondents admitted the manufacture and sale by them, and the second named Respondent admitted the offer for sale and sale by him, of a food product under the name "Kellogg's Shredded Whole Wheat Biscuit." Both Respondents denied infringement of the registered trade marks and alleged that the trade mark registrations were invalid. The Respondents further denied the allegations of passing-off. 10

p. 184. **4.** The action was tried by Mr. Justice McTague who, in his judgment, held that the Appellant's registrations were invalid and that there had been no passing-off. He therefore dismissed the action with costs. This judgment was upheld by the Court of Appeal consisting of Latchford, C.J.A., p. 190. Riddell, Middleton, Masten and Henderson, J.J.A. From the said decision of the Court of Appeal the Appellant brings the present Appeal.

#### HISTORY OF THE APPELLANT'S BUSINESS AND TRADE MARKS.

p. 2, l. 20  
*et seq.*  
p. 193. **5.** In or about the year 1893 Cereal Machine Company, a company incorporated under the laws of the State of Colorado, U.S.A., commenced the manufacture and sale in the United States of America of a whole wheat 20 biscuit, and continued the same until the year 1900. In or about the year 1898 the said company commenced the sale of the whole wheat biscuit in the Dominion of Canada and continued the same until the year 1900. On or about the 17th May 1900 the name of the Cereal Machine Company was changed to Shredded Wheat Company.

p. 2, l. 28. **6.** In or about the year 1900 The Natural Food Company, a company incorporated under the laws of the State of New York, acquired and succeeded to the business and goodwill of the said Shredded Wheat Company, and thereafter continued the manufacture of the said whole wheat biscuit in the United States of America and the sale of the biscuit throughout the 30 United States of America and the Dominion of Canada under its name of The Natural Food Company. In or about the year 1908 the name of The Natural Food Company was changed to Shredded Wheat Company.

p. 109, l. 32. **7.** The Appellant was incorporated under the laws of the Province of Ontario in the year 1904 and by an Agreement dated the 11th February 1905 and made between the Appellant and The Natural Food Company, the Appellant acquired from The Natural Food Company the goodwill of its business in Canada.

**8.** In the year 1905 the Appellant opened a factory for the manufacture of whole wheat biscuits at Niagara Falls, Ontario. Since the acquisition by the Appellant of the Canadian goodwill of The Natural Food Company the Appellant has continuously carried on and is still carrying on the business of manufacturing the said whole wheat biscuits at its plant at Niagara Falls, and selling the biscuits throughout the Dominion of Canada.

Record.  
p. 3, l. 1  
*et seq.*

**9.** From the time of the first sale of whole wheat biscuits by Cereal Machine Company in Canada in the year 1898 and continuously down to the present time, such whole wheat biscuits have been sold under and known by the name "Shredded Whole Wheat Biscuit" or "Shredded Wheat Biscuit" or "Shredded Wheat."

**10.** The Appellant's biscuits have been very extensively advertised under the names "Shredded Whole Wheat Biscuit," "Shredded Wheat Biscuit" and "Shredded Wheat" and sales of such biscuits have reached very large figures. It was given in evidence that from 1898 to 1934 a total of over six million cases of biscuits had been sold, the figure for the year 1934 being 280,015. The total value of the six million cases was over 22 million dollars. The advertising expenditure from 1906 to 1934 amounted to nearly four million dollars. For the years 1898 to 1909, inclusive, each case contained 50 packages of biscuits; from 1918 to 1934 each case contained 36 packages of biscuits. Each package contained twelve biscuits.

p. 203.  
p. 110.

**11.** By reason of the extensive advertisement and sale of the Appellant's biscuits, the names "Shredded Whole Wheat Biscuit," "Shredded Wheat Biscuit" and "Shredded Wheat" became very well known to the trade and public, and evidence taken on commission and used at the trial from numerous members of the trade and public establishes conclusively, in the Appellant's submission, the association in the minds of members of the trade and public of the names "Shredded Whole Wheat Biscuit" and "Shredded Wheat" with products of the Appellant's manufacture exclusively. The Respondents called no members of the trade or public to controvert such evidence.

pp. 43-109.

**12.** The mark "Shredded Wheat" was registered by the Appellant in Canada as a trade mark to be applied to the sale of biscuits and crackers on the 20th March 1928. The same mark was also registered by the Appellant in Canada as a trade mark to be applied to the sale of cereal foods cooked or prepared for consumption on the 3rd July 1929. These are the two registrations which are relied upon by the Appellant.

p. 270.

p. 272.

**13.** From the beginning of the manufacture of whole wheat biscuits by the Appellant's predecessor in business and continuously until the

p. 4, l. 10.

Record. present time, the biscuits have been manufactured and sold in a particular form and a particular shape known as "pillow shape." The biscuit is substantially rectangular with rounded top and bottom surfaces. The evidence establishes, in the Appellant's submission, that the form and shape of the biscuit is distinctive and has become identified in the trade and with the purchasing public with the product of the Appellant exclusively.

**14.** Until the use by the Respondents of the name "Shredded Whole Wheat Biscuit" of which the Appellant complains in these proceedings, no one other than the Appellant and its predecessors had manufactured or sold any food product in the shape or form of the Appellant's product, or under any name which contained the words "Shredded Wheat."

#### THE ALLEGED INFRINGEMENT AND PASSING-OFF.

p. 9.  
p. 173. **15.** In April 1934 the first-named Respondent Kellogg Company of Canada Limited commenced to sell in the province of Ontario, Canada, a biscuit made of whole wheat under the name "Kellogg's Shredded Whole Wheat Biscuit" and made in the same form and in the same pillow shape as that of the product of the Appellant, although the Respondents' biscuit was somewhat shorter than the product of the Appellant. Some of the first-named Respondent's biscuits were sold to the second-named Respondent and offered for sale and sold by him to the public. As soon as the Appellant learned that the Respondent Kellogg Company's product was being offered for sale and sold in Canada, the Appellant commenced this action.

p. 270.  
p. 272. **16.** The Appellant contends that the use of the name "Shredded Whole Wheat Biscuit" is an infringement of its registrations of the mark "Shredded Wheat."

p. 349. **17.** The Appellant further contends that the sale of the Respondents' biscuit is calculated to cause deception and confusion and lead to passing-off by reason of its similarity to the Appellant's product and the absence of any distinguishing feature in its shape and get-up. The name "Kellogg" appears upon the Respondents' packages of biscuits, but not on the biscuits themselves.

pp. 146-147 **18.** It was established in evidence that the Appellant's product is served to customers in practically all hotels and restaurants in Canada and that when so served, it is served in a dish separately from its package and that the customer does not have an opportunity of seeing the package. The consumer must therefore rely upon the distinctive appearance of the biscuit in order to satisfy himself that he has the product he desires. The Appellant contends that if the Respondents' biscuit were served in similar circumstances, confusion with the Appellant's product and deception would inevitably follow.

## VALIDITY OF THE APPELLANT'S REGISTERED TRADE MARKS.

Record.

19. The Respondents attacked the validity of the Appellant's registered trade marks on the ground that the words "Shredded Wheat" were descriptive of a food product made of wheat in the form of shreds or filaments and that the exclusive right to use such words as a trade mark was incapable of being obtained by any manufacturer for the purpose of distinguishing his product from that of other manufacturers. The Respondents alleged that the words "Shredded Wheat" had been used by the Appellant up to the year 1927 only in a descriptive sense, and not as a trade mark, and that the words "Shredded Wheat" had been since the beginning of the manufacture of the product "the popular, common, universally used name of products of the kind in question."

pp. 11-14.

20. Evidence was given at the trial as to the process by which the Appellant's and Respondent Kellogg Company's biscuits are made. The process is substantially the same in each case. Photographs showing some stages of the Respondents' process form the subject matter of exhibits. Stated shortly, the process consists in taking the wheat in berry form, putting it through certain cleaning and boiling operations, drying it and then passing it between a pair of compression rollers, one of which is provided with a series of fine circumferential grooves, whence the wheat is discharged in light porous and tender threads or filaments. Layers of these threads or filaments are built up upon a travelling band and can then be cut into separate biscuit shapes as desired. The biscuit shapes are passed through an oven which browns the outside layers, and after a drying operation in another oven, the product is ready for use.

pp. 117-121.

pp. 329-351.

21. Although it is the fact that the process of passing the wheat berries through the beforementioned rollers has been referred to in patent specifications and in other literature as a "shredding" process and the resulting filaments have been called "shreds," the Appellant contends that the terms "shredding" and "shreds" are misapplied, that the wheat is really rolled or extruded in long threads or filaments and that the process is similar to the process employed in the rolling of steel, paper, glass or other materials, and is unlike any shredding process.

Exhibits 36  
and 37,  
p. 353.

pp. 123-4

22. The Appellant contends that the phrase "Shredded Wheat" is not a phrase purely descriptive of a particular kind of biscuit. The Appellant submits that the question whether the phrase is regarded as being purely descriptive or as constituting a distinctive mark is a practical question of fact upon which evidence from members of the trade and public is relevant. In the present case such evidence entirely supports the Appellant's contentions. It is further submitted that even a word or phrase which, according to its primary signification, is descriptive, may be registered as a trade mark if it can be proved that, in the course of trade, such word or

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Record.

phrase has acquired a secondary distinctive meaning. The Appellant submits that, even if the words "Shredded Wheat" are to be regarded as having some primary descriptive reference to the form in which the wheat emerges from the rollers, those words by reason of long usage by the Appellant to denote its product have long since acquired in the minds of the trade and public a secondary meaning, namely, that products bearing such name emanate from the Appellant and from no one else.

#### THE ISSUE OF PASSING-OFF.

**23.** In answer to the Appellant's allegations of passing-off, the Respondents alleged that the apparatus which the Kellogg Company used for the production of its food product in question was very similar if not identical with that shown in the Specification of Canadian Patent No. 72695 which was applied for on the 13th August 1901 and has long since expired. The Respondents alleged that their product was that which was the inevitable result of the operation of such apparatus, and that nevertheless the Respondent the Kellogg Company had differentiated the appearance of its product from that of the corresponding product manufactured by the Appellant in so far as it was possible.

**24.** Patent No. 72695 was granted to one Henry D. Perky who was the founder of the Cereal Machine Company referred to in paragraph 5 hereof. Perky had previously, in the year 1896, taken out a patent No. 52428 in Canada for the process of producing wheat in the form of porous filaments or threads, such process being similar to that practised by the Appellant and the Respondent Kellogg Company up to the stage of receiving the filaments or threads on a moving belt. The process described in the specification stops far short of the production of a biscuit similar to the Appellant's product. The process described in the specification covers only the cleaning, some cooking and drying of the wheat berry and passing the resultant material through a pair of rolls. The patentee states that the berries are forced into the grooves of the roller or rollers whence the resultant food is discharged by means of a comb or scraper in light, porous and tender threads or filaments into a pan or other receptacle, or upon a moving receiver whereby they may be disposed in layers. The patentee then states that the food as discharged from the rolls is ready for use without further cooking, or can be shaped for baking in various ways.

**25.** Patent Specification No. 72695 describes a machine for making biscuit and other articles and shows in substance the machine used by the Appellant and the Respondent Kellogg Company for the production of biscuit shapes from the layers or filaments or threads which come from the rollers on a travelling band.

**26.** The Appellant submits that it was established by the evidence that while the machine as described in Patent Specification No. 72695 would produce a biscuit in the same shape and form as the Appellant's biscuit, at the same time, by a slight alteration in the shape of the cutting knives of the machine, the biscuit could be produced in many forms which would be easily distinguishable from the Appellant's biscuit.

Record.  
p. 31.  
p. 38-9, 41-2.  
p. 116, 121,  
136-140.  
p. 158-163,  
164-6.

**27.** Patent No. 52428 expired in May 1914, and Patent No. 72695 expired in August 1919. For fifteen years after the latter date no one other than the Appellant made use of the machine covered by patent No. 72695 to produce a product in any way similar to the product of the Appellant. It is submitted that even if the public, upon the expiration of the said patent, became entitled to use the machine covered by the patent for the purpose of putting on the Canadian market a product similar to the Appellant's product, no one in fact did make use of such a machine for such a purpose until the Respondent Kellogg Company put its whole wheat biscuit on the Canadian market in the Spring of 1934. During the interval of fifteen years which elapsed between the expiry of the said patent and the commencement of this action the association of the distinctive character of the Appellant's biscuit with the Appellant became confirmed in the minds of members of the trade and public, giving the Appellant, it is submitted, a new legal right to be protected against the results of confusion and deception arising from the placing upon the market of another product having the distinctive characteristics of the Appellant's product.

**28.** The Appellant contends that the Respondent Kellogg Company's biscuit has all the distinctive characteristics of the Appellant's biscuit and is liable to be confused therewith. The slight shortening of the Respondent's biscuit is, in the Appellant's submission, immaterial.

#### THE JUDGMENTS IN THE COURTS BELOW.

**29.** In the first Court, Mr. Justice McTague held that the Appellant's registered trade marks were invalid, because the words "Shredded Wheat" were descriptive of the article to which they were applied and were common words and had not acquired a secondary meaning denoting the product of the Appellant. He also held that the "very name of the article manufactured by the Plaintiff is 'Shredded Wheat,' and that the Appellant could not retain the exclusive right to such a name."

**30.** The learned Judge appears to have entirely discounted the evidence from members of the trade and public because of observations made by Lord Davey in the case of *Cellular Clothing Company Limited v. Maxton and Murray* [1899] A.C. 326 at page 343. Lord Davey in that case said "Where a man produces or invents, if you please, a new article and attaches a descriptive name to it—a name which, as the article has

p. 178.

p. 181.

Record. not been produced before, has of course not been used in connection with the article—and secures for himself either the legal monopoly or a monopoly in fact of the sale of the article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the plaintiff's goods alone is of a very slender character, for the simple reason that the plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to, or no merchant or manufacturer to resort to except the plaintiff.”

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**31.** The Appellant submits that Lord Davey's observations apply only in cases where the name in question is a purely descriptive name. “Shredded Wheat” is, the Appellant contends, not a purely descriptive name, even though it might suggest a process which is not in fact the process by which the product is made. The Appellant further submits that every case of this kind must be considered upon its own facts and in the light of the evidence given, and that in the present case the evidence shows that the name “Shredded Wheat” has, during a period of fifteen years since the expiration of any monopoly rights that might be material, meant to the trade and public and now means a product of the Appellant's manufacture, 20 and not merely a product made by a particular process. It was given in evidence that thousands of persons a year visit the Appellant's factory at Niagara Falls, Ontario, as well as the factory of the Appellant's associated American Company on the American side of the Niagara Falls to see “Shredded Wheat” biscuits being made. Evidence was given by persons in the wholesale and retail grocery trades and by members of the public throughout the Dominion of Canada other than the Provinces of Ontario and Quebec as to the meaning of the term “Shredded Wheat.” The Respondents admitted that, if wholesale and retail grocers and consumers of the Appellant's product “Shredded Wheat” in the Provinces of Ontario 30 and Quebec were examined as witnesses they would testify that the same conditions exist in those provinces as exist in the other Provinces of Canada as described by the witnesses who had been examined on commission in such other provinces, and that the same effect should be given to this admission as would be given to the evidence of such persons if they had been examined as witnesses and had so testified. As above mentioned, no evidence was tendered by the Respondents to contradict the evidence of the Appellant's witnesses, and in fact, throughout the trial and the argument in the Court of Appeal Counsel for the Respondents admitted that the facts were as stated by the Appellant's witnesses. 40

**32.** The Appellant submits that the learned trial Judge was wrong in rejecting the Appellant's evidence as affording no proof of distinctiveness of the mark “Shredded Wheat” in relation to the Appellant's product.

pp. 43-109.

p. 193.



**33.** On the issue of passing-off or the probability of deception of the public, the learned trial judge pointed out that the cartons in which the Respondents' product is packed are quite dissimilar from the Appellant's carton, except for the use of the words "Shredded Whole Wheat Biscuit," and that there was no probability of passing-off or deception when the product is sold in the carton. He held further, however, that "No doubt there is probability that a customer of a restaurant expecting to receive the Plaintiff's product, when asking for 'Shredded Wheat,' would be deceived on receiving the Defendants' 'Shredded Whole Wheat Biscuit.'" He, however, gave no relief to the Appellant to prevent such probability of deception. The Appellant submits that having regard to the learned judge's finding of fact, he should have granted to the Appellant such relief.

**34.** In the Court of Appeal, reasoned judgments were delivered by Middleton and Masten, J.J.A.; Latchford, C.J.A., agreed with Masten, J.A.; Henderson, J.A., agreed with Middleton, J.A. Riddell, J.A., said "Recognising that we are bound to administer the law as we find it, and are not at liberty to apply our own views of what would be right, I find myself unable to differ from the conclusions of the learned Trial Judge, and think that the Appeal must be dismissed with costs." With regard to such remarks, the Appellant submits that, if the learned appeal judge had come to the conclusion that what the Respondents were doing was calculated to deceive and that they ought to be stopped, there is nothing in Canadian law which would prevent the learned appeal judge from giving effect to such a conclusion.

**35.** The judgments of Middleton and Masten, J.J.A., are based upon their finding that the Appellant's product has been manufactured under certain patents which have long since expired and that upon the expiry of such patents the public became entitled to make the product and was equally entitled to call it by the name given to it by its inventor.

**36.** The said Appeal Judges also held that upon the expiration of Canadian Letters Patent No. 72695 on 13th August 1919, the public became entitled to use the machine which was the subject of that patent and that the natural result of the use of such machine was to produce a biscuit in the pillow shape of the Appellant's biscuit. Masten, J.A., also held in effect that the reduction in size of the Respondents' biscuit and the "get-up" of their cartons was sufficient to prevent deception.

**37.** Masten, J.A., further held that the term "Shredded Wheat" is not descriptive of the process of manufacture for the wheat is mashed not shredded, but is descriptive of the product. The Appellant does not appreciate the distinction and it is submitted that if the word "Shredded" is not descriptive of the process, neither is it descriptive of the product.

Record.  
p. 189.

**38.** The Appellant contends that the Court of Appeal was wrong in holding that the term "Shredded Wheat" is purely descriptive. The Appellant contends, as Masten, J.A., held, that the wheat is not shredded, and that if the term is not purely descriptive, the reported cases relied upon by the learned judges have no application to the present case. The Appellant further contends that the Court of Appeal, as also the learned trial judge, did not give sufficient weight to the evidence from the trade and public and wrongly rejected the view (which the Appellant submits is the right view) that the term "Shredded Wheat" by long usage, after the date of expiry of any relevant monopoly, had come to be recognised in practice by wholesalers, retailers and the consuming public as a mark which distinguished the manufacture of the Appellant and not merely as descriptive of a kind of biscuit, even assuming that the term ever had any primary descriptive meaning. 10

**39.** As regards the issue of passing-off, the Appellant contends that the Court of Appeal was wrong in holding that the Respondent Kellogg Company's biscuit was only the natural result of the use of the machine the subject matter of the expired Canadian Patent No. 72695 but that the evidence showed that products distinguishable from the Appellant's product could readily be made by the said machine. The Appellant further contends that the Court of Appeal did not consider at all, or at any rate sufficiently, the possibility of the Respondents' use of the name "Shredded Wheat" upon a biscuit substantially like the Appellant's biscuit leading to the passing-off and substitution by others of the Respondents' biscuit in place of the Appellant's biscuit. 20

p. 188.

**40.** At the end of his judgment Middleton, J.A., said "It is some satisfaction to know that this judgment is entirely in accord with the decision of the District Court of the United States in *National Biscuit Company v. Kellogg*, 11th January 1935, a copy of which has been handed to us." Since the said judgment of Middleton, J.A., was delivered, however, the decision of the District Court in the U.S.A. was taken to appeal, and after a hearing and re-hearing before the United States Circuit Court of Appeals for the Third Circuit, the latter Court delivered judgment reversing the decision of the District Court and after dealing with the facts and the law, stated :— 30

"In view of the fact that 'Shredded Wheat' is the Plaintiff's trade name, that defendant deliberately started out to acquire by unfair competition and misstatements the trade which equitably belonged to the Plaintiff and that it is practically impossible for the defendant to use the name and form of the Plaintiff's biscuit to designate its product without confusion, deception of the public, and unfair competition with the Plaintiff, a decree will be entered vacating our former decree and reversing the decree of the District Court 40

with directions to the Court to enter a decree enjoining the defendant from the use of the name ' Shredded Wheat ' as its trade name and from advertising or offering for sale its product in the form and shape of Plaintiff's biscuit in violation of its trade mark ; and with further directions to order an accounting for damage and profits."

Record.

### CONCLUSION.

**41.** The Appellant submits that upon a proper consideration of the case the conclusion ought to be reached that the Respondents' acts are bound to cause confusion and deception and damage to the valuable goodwill in the Appellant's business. After the Appellant has built up through the course of about thirty years a valuable goodwill in the manufacture and sale of their biscuit sold under the name " Shredded Wheat," the Respondents claim the right to take the same name and apply it to a biscuit made by the Respondent Kellogg Company in an almost identical form and shape as that of the Appellant's biscuit, and sell their biscuit in that manner in the Appellant's market. The Appellant submits that the Respondents have no such right to encroach upon the Appellant's goodwill and to profit by the reputation in the name " Shredded Wheat " which has been built up at enormous expense and entirely by the efforts of the Appellant, and that the relief sought by the Appellant ought to be granted.

**42.** The Appellant therefore humbly submits that the Judgments of Mr. Justice McTague and of the Court of Appeal are erroneous and that the Order of the Court of Appeal dated the 30th November 1934 should be reversed and that judgment should be entered awarding the Appellant the injunction and other relief as prayed in the Statement of Claim or such other relief as may seem proper in the circumstances, for the following amongst other

p. 190.

p. 8.

### REASONS.

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- (1) BECAUSE the words " Shredded Wheat " constitute a proper trade mark and are properly registered as such.
  - (2) BECAUSE the words " Shredded Wheat " are not descriptive of the Appellant's biscuit.
  - (3) BECAUSE the words " Shredded Wheat " do not constitute the name of the article manufactured and sold by the Appellant but are adapted to distinguish and do in fact distinguish the biscuit manufactured by the Appellant from biscuits manufactured by other persons.

- (4) BECAUSE, even if the words "Shredded Wheat" were originally descriptive, they have acquired a secondary meaning and to the trade and to the purchasing public denote the product of the Appellant.
- (5) BECAUSE even if the public and rival manufacturers would have been entitled to use the term "Shredded Wheat" in relation to biscuits immediately after the expiration of the monopoly granted by Letters Patent to the Appellant's predecessors, the Appellant has by its efforts in the succeeding fifteen years established the term "Shredded Wheat" as meaning articles of its manufacture and is consequently now entitled to protection for those words. 10
- (6) BECAUSE the form, shape and appearance of the Appellant's biscuit is distinctive and has become identified to the trade and to the purchasing public with the Appellant's product.
- (7) BECAUSE the use of the phrase "Shredded Whole Wheat Biscuit" by the Respondent is an infringement of the Appellant's registered trade marks consisting of the words "Shredded Wheat." 20
- (8) BECAUSE the use of the phrase "Shredded Whole Wheat Biscuit" by the Respondents is calculated to deceive and cause confusion and to pass-off or lead to the passing-off of the Respondents' product for the Appellant's product.
- (9) BECAUSE the form, shape and appearance of the Respondents' biscuit, whether taken alone or in conjunction with the use of the phrase "Shredded Whole Wheat Biscuit," is calculated to deceive and cause confusion and to pass-off and lead to the passing-off of the Respondents' product for the Appellant's product. 30

W. N. TILLEY.

STAFFORD CRIPPS.

R. C. H. CASSELS.

GEOFFREY W. TOOKEY.

**In the Privy Council.**

No. 40 of 1937.

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*On Appeal from the Court of Appeal for  
Ontario.*

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BETWEEN

THE CANADIAN SHREDDED  
WHEAT COMPANY LIMITED  
(Plaintiff) - - - - *Appellant*

AND

KELLOGG COMPANY OF  
CANADA LIMITED and  
SOLOMON BASSIN carrying  
on business under the name, style  
and firm of BASSIN'S CUT-  
RATE STORES (Defendants) - *Respondents.*

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APPELLANT'S CASE.

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BLAKE & REDDEN.

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