Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Montreal Lithographing Company, Limited, v. *Sabiston, from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered the 8th July* 1899.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
LORD DAVEY.

[*Delivered by Lord Davey.*]

In the year 1889 a company was incorporated under Letters Patent of the Province of Quebec with the name of the "Sabiston Lithographic "and Publishing Company." That Company carried on business at the Gazette Building Montreal until the 13th April 1896 when a winding-up order was made against it and a liquidator was appointed. One Alexander Sabiston was the managing director or manager of the Company until a short time before it went into liquidation.

On the 28th April 1896 the assets of the Sabiston Company including the goodwill were sold by public auction to one Hyde who forthwith transferred the same to two persons carrying on a similar business at Toronto under the name of the Toronto Lithographing Company. Those persons on the following 30th September registered the Appellant Company with the name of the Montreal Lithographing Company Limited and transferred to them the assets including the

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goodwill of the old Company. It appears that the business continued to be carried on under the direction of the liquidator until the formation of the Appellant Company and has since been carried on by the Appellant Company at the Gazette Building Montreal.

On the 1st May 1896 the Respondent who is a brother of Alexander Sabiston signed a declaration that he intended to carry on business in Montreal as printer lithographer and publisher under the name of "The Sabiston Lithographing "and Publishing Company," and he has since carried on that business with the assistance of his brother at 457 St. Paul Street Montreal.

On the 9th December 1896 the Appellants commenced the present action by petition in which they alleged that the Respondent was fraudulently and wrongfully carrying on business as printer &c. under the name and style of the Sabiston Lithographing and Publishing Company and was fraudulently leading the public to believe that the business carried on by him was that of the dissolved and liquidated Company. The prayer of the petition was that a writ of injunction be issued to restrain the Respondent from carrying on business under the name "Sabiston Lithographic and Publishing Com- "pany" or any other name so framed as to lead to the belief that the business carried on by the Respondent is the same business as that heretofore carried on by the dissolved Company or that his business is the successor of that of the dissolved Company.

Mr. Justice de Lorimier in the Superior Court granted an injunction in the terms of the prayer of the petition. But that decree was reversed by the Court of Queen's Bench and the present Appeal is from the decree of the latter Court.

The judgment of the Court of Queen's Bench was delivered by Mr. Justice Blanchet and

proceeded on the grounds that the liquidator could not transfer the right to use the name of the dissolved Company which was a grant from the Crown and the liquidator could only give the assets as he found them and the pretended sale of the goodwill made by him even judicially authorised could not bind the shareholders and could not transfer to the now Appellants a right which had then no real and actual existence.

Their Lordships agree with the Court below that the Appellants have no right to restrain the Respondent from using the trade name under which he is carrying on his business but they are not prepared to concur in all the reasons given by the learned Judge for the judgment of the Court. They have not found it necessary to hear the Respondent's Counsel. Subject to this observation they see no reason to doubt that it was competent for the liquidator to sell the goodwill of the old Company together with its other assets. But the extent of the rights conferred by a transfer of a goodwill may depend upon circumstances. No doubt the Appellant Company could not acquire any corporate name except by grant from the Crown but the promoters of the Appellants might have applied for incorporation under the same name as the old Company subject to any objection which might be urged by the Respondent. As already stated no such application was made. The facts are that for upwards of seven months the Respondent carried on his business under the present name with the acquiescence of the liquidator of the old Company and until the present action was commenced of the purchasers of its goodwill. There appears indeed to have been some correspondence with the solicitor of the liquidator in May 1896 but it did not result in any proceedings being taken. The Appellants on the other hand were incorporated and registered and have since carried on their business under a quite different

name—and do not allege any intention of using and indeed have no right to use the old Company's name as their trade or firm name.

But the Appellants have the right to describe themselves as the successors of the old Company and as carrying on the same business and they have availed themselves of that right in their trade circulars. The Respondent on the other hand has no right to hold himself out as successor of the old Company. But their Lordships cannot find on the evidence in the case that the Respondent has done so. There is no representation to that effect in his trade circulars. The case of an order from customers named Pickford and Black was relied on by the Appellants. But it is to be observed that the order was in the first instance received by the liquidator of the old Company who opened the letter containing it and forwarded it to the Respondent —for whom he considered though wrongly it to be intended—and the customers when made aware of the facts elected to leave the order with the Respondent. In the case of Norris another customer the Respondent's manager himself caused the mistake to be communicated to the Appellants who got the order. Again the Respondent was not shown to have been responsible for the terms of the entry in Lovell's Directory. It may have been a pardonable mistake by the compiler of the directory who was not called by the Appellants to clear up the matter. The evidence and argument all come back to the mere use of the name and their Lordships have already expressed their opinion that the Appellants are not entitled to an injunction on that ground alone.

Their Lordships will therefore humbly advise Her Majesty that the Appeal be dismissed and the Appellants must pay the costs of it.