[HIGH COURT OF AUSTRALIA.]

BRUCE AND ANOTHER . . . . . PLAINTIFFS;

AND

THE COMMONWEALTH TRADE MARKS LABEL ASSOCIATION AND OTHERS } DEFENDANTS.

H. C. OF A. 1907.

MELBOURNE, *Sept.* 13.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Practice — Declaratory order — Consequential relief — Validity of Commonwealth Statute — Rules of High Court 1903, *Part I., Order III., r.* 1 — *Trade Marks Act* 1905 (*No.* 20 *of* 1905), *Part VII.*

Notwithstanding the provisions of Part I., Order III., r. 1 of the Rules of the High Court 1903, the High Court will not entertain abstract questions of law or give an opinion as to the power of the Commonwealth to enact certain legislation where the opinion cannot be followed up by an effective order.

Therefore, where, an action having been brought in the High Court to restrain the registration of a trade mark under Part VII. of the *Trade Marks Act* 1905, the application for registration was withdrawn before the action came on for hearing, on a reference to the Full Court of the question whether the Parliament had power to enact Part VII. of that Act, that Court refused to entertain the question, and ordered the case to be struck out.

QUESTION of law referred to the Full Court.

W. Bruce and D. R. Davies brought an action in the High Court against the Commonwealth Trade Marks Label Association, Stephen Barker, on behalf of the members of the Association, and the Registrar of Trade Marks. The plaintiffs alleged that the defendant Association and the defendant Barker had in October 1906 made an application to register a certain mark or label, described as a workers' trademark, in respect of all articles of commerce and trade, under Part VII. of the *Trade Marks Act* 1905. They further alleged that the registration and user of the

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mark or label would injure them in their business as printers and stationers, and they contended that the Commonwealth Parliament had no power to enact Part VII. of the *Trade Marks Act* 1905. They asked for a declaration that the defendant Association and the defendant Barker were not entitled to register the mark or label, and for an injunction against its registration.

Neither the defendant Association nor the defendant Barker delivered a defence. But the Registrar by his defence, *inter alia*, alleged that after action brought, viz., on or about the 1st March 1907, the application for registration of the mark or label had been withdrawn.

Upon motion for judgment, *Barton* J. directed that the question of law, whether the Commonwealth Parliament had power to enact Part VII. of the *Trade Marks Act* 1905, should be referred to the Full Court.

The question now came on for argument.

Mitchell K.C. (with him *Glynn* and *Starke*), for the plaintiffs.

[GRIFFITH C.J.—The application for registration having been withdrawn, the plaintiffs have now nothing of which to complain. This Court will not decide abstract questions of constitutional law, or give an opinion as to the validity of a Commonwealth Statute which cannot be followed up by an effective order.

ISAACS J.—The plaintiff must show that he has personally suffered or may personally suffer an injury before he can have the constitutionality of a law tested: *Turpin* v. *Lemon* (1); *Tyler* v. *Judges of Court of Registration* (2).]

The plaintiffs are entitled under Part I., Order III., r. 1 of the Rules of the High Court 1903 to a declaratory order.

[HIGGINS J.—Under that rule you must show that the action is properly brought.]

Under an almost identical English rule, Order XXV., r. 5, it has been held that, where no substantive relief can be given at the time, a declaratory order will be made: *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (3).

(1) 187 U.S., 51, at p. 60.
(2) 179 U.S., 405.
(3) (1892) 3 Ch., 242.

[HIGGINS J.—The declaration should be ancillary to the putting in suit of a legal right: *Williams* v. *North's Navigation Collieries (1889) Ltd.* (1). Only one of the defendants consents now, and the plaintiffs are not interested parties.

ISAACS J.—The Privy Council refuses to give speculative opinions on hypothetical questions of law, but will only answer questions which arise in concrete cases involving private rights: *Attorney-General for Ontario* v. *Hamilton Street Railway* (2). See also *Barraclough* v. *Brown* (3).

O'CONNOR J.—The duty of this Court "is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. . . . But the Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the Court or in any other case, can enlarge the power, or affect the duty, of the Court in this regard": *California* v. *San Pablo and Tulare Railroad Co.* (4).

BARTON J.—I should not have made the order of reference if I had known that the application for registration of the trade mark had been withdrawn.]

Groom, A.-G. for the Commonwealth (with him *Duffy* K.C. and *McArthur*), for the Registrar of Trade Marks, were not called on.

GRIFFITH C.J.—We are all of opinion that the case should be struck out of the list.

Case struck out.

Solicitors, for plaintiffs, *Derham & Derham* Melbourne.

Solicitor, for defendant Registrar of Trade Marks, *Powers*, Commonwealth Crown Solicitor.

B. L.

(1) (1904) 2 K.B., 44, at p. 49.
(2) (1903) A.C., 524.
(3) (1897) A.C., 615.
(4) 143 U.S., 308, at p. 314.