

[HIGH COURT OF AUSTRALIA.]

ASHTON AND PARSONS LIMITED . . . APPELLANTS;
 APPLICANTS,

AND

GOULD RESPONDENT.
 OPPONENT,

ON APPEAL FROM THE SUPREME COURT OF
 TASMANIA.

H. C. OF A. *Trade Mark—Expunging mark—Validity of registration—Merchandise Marks Act*
 1909. 1864 (*Tas.*), secs. 1, 7—*Patents, Designs and Trade Marks Act* 1893 (*Tas.*),
 — secs. 1, 4, 6, 7, 87, 88, 115—*Trade Marks Act* 1905 (No. 20 of 1905), sec. 7—
 HOBART, *Practice—Appeal to High Court from Supreme Court of State—Affidavit of*
Feb. 15, 16, 17. *appealable nature of judgment—Final judgment—Judiciary Act* 1903 (No. 6 of
 — *1903*), sec. 35—*Rules of High Court* 1903, Part II., Sec. III., Rule 7A.
 Griffith C.J.,
 Barton and
 Isaacs JJ.

The respondent in 1894 obtained the registration under the *Merchandise Marks Act* 1864 (*Tas.*) of the word “Phosferine” as a trade mark in respect of a medical preparation manufactured by him. The appellants in 1907 applied to expunge the mark from the register. The High Court found that the word “Phosferine” by itself was not at the time of registration lawfully used by the respondent to denote that the preparation was the manufacture of the respondent, and, therefore, ought not to have been registered.

Held, that the mark should be expunged from the register notwithstanding the lapse of time.

In an affidavit under the *Rules of the High Court* 1903, Part II., Sec. III., Rule 7A, as to the appealable nature of a judgment, the statement that the judgment involves indirectly a question respecting property at the value of £300 is, in the absence of evidence to the contrary, a sufficient statement of the value.

A judgment of the Supreme Court of a State dismissing an application to expunge a trade mark from the register is a final judgment from which an appeal lies to the High Court without leave.

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APPEAL from the Supreme Court of Tasmania.

An application on summons, dated 1st July 1907, was made to the Supreme Court of Tasmania, under the *Patents, Designs and Trade Marks Act 1893*, by Ashton and Parsons Limited, manufacturing chemists, of London, England, calling upon Henry Thomas Gould, chemist, of Hobart, to show cause why a mark consisting of the word "Phosferine" should not be expunged from the register of trade marks.

The trade mark in question was in respect of a medical preparation for weakness and lassitude, and had been registered on 1st April 1894, but the application for such registration was pending at the time the *Patents, Designs and Trade Marks Act 1893* came into force.

The medical preparation in respect of which the mark was registered was manufactured and sold by Gould in Tasmania, and was similar in character and in the manner in which it was put up to a medical preparation also called "Phosferine," manufactured and sold by Ashton and Parsons Limited, the directions for use being almost identical in both cases.

The facts as to the use of the word "Phosferine" by the parties are sufficiently stated in the judgments hereunder.

The matter first came on for hearing before the late Mr. Justice *Clark* on 8th August 1907, and on his death the matter came before *Dodds C.J.*, who found that both parties had been using the word "Phosferine" in Tasmania for about the same length of time, viz., since 1882, and that both of them were probably entitled to be registered under the "three mark" rule. He also found that the opponent had seen and copied the label of Ashton and Parsons Limited, but not fraudulently. He further held that the mark was one capable of registration, and that Ashton and Parsons Limited had no proprietary right to the use of it. He therefore dismissed the application with costs. The judgment was given in 1908.

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From this judgment Ashton and Parsons Limited now appealed to the High Court.

The affidavit filed by the appellants pursuant to the *Rules of the High Court* 1903, Part II., Sec. III., Rule 7A, stated that "the said judgment or decision involves indirectly a question respecting property of the value of three hundred pounds."

Lodge (with him *Crisp*), for the appellants.

Ewing and *Walch*, for the respondent, took preliminary objections. The affidavit in support of the appeal in so far as it deals with the value of the property in dispute is insufficient. It should show facts upon which the Court can determine whether the estimate of the value is correct. See *Rules of High Court* 1903, Part II., Section III., Rule 7A.

[GRIFFITH C.J.—There is no affidavit contradicting the statement of value or suggesting that it is not correct.]

There was no jurisdiction in the State Court to hear the case, and therefore there is no order against which an appeal lies to this Court. The order sought to be appealed from is interlocutory, and no leave to appeal has been obtained: *In re Rivière's Trade Mark* (1); *Nolan v. Clifford* (2); *Standard Discount Co. v. La Grange* (3); *In re Jerome* (4).

[ISAACS J. referred to *Bozson v. Altrincham Urban Council* (5); *International Financial Society v. City of Moscow Gas Co.* (6); *McDonald v. Belcher* (7)].

GRIFFITH C.J.—There is nothing in any of the points that have been raised.

Lodge. The delay on the part of the appellants to take steps to have the mark expunged does not disentitle them to relief, for the registration of the mark is one which cannot in law be justified: *Paine & Co. v. Daniells & Sons' Breweries*; *In re Paine & Co.'s Trade Marks* (8); *In re the Trade Mark of La Société Anonyme des Verreries de l' Etoile* (No. 2) (9); *Perry Davis v.*

(1) 26 Ch. D., 48.

(2) 1 C.L.R., 429, at p. 432.

(3) 3 C.P.D., 67.

(4) (1907) 2 Ch., 145.

(5) (1903) 1 K.B., 547.

(6) 7 Ch. D., 241.

(7) (1904) A.C., 429.

(8) (1893) 2 Ch., 567, at p. 584.

(9) (1894) 1 Ch., 61.

Harbord (1). Long continued user by the respondent of the mark, which he must have known belonged to the appellants, can give him no right to have the mark retained on the register. The "three mark" rule does not help the respondent, for it can only apply where the use by the parties is in different districts and where there is no evidence as to which party used the mark first: *Kerly on Trade Marks*, 3rd ed., pp. 207, 214. The evidence shows that, prior to the registration and prior to the time when the respondent first used the word "phosferine," it was used by the appellants, and therefore the respondent could not have acquired any exclusive right to the use of it. The word "phosferine" alone was never used by the respondent to indicate, and it never did indicate, that the article in question was his manufacture.

[They also referred to *Maxwell v. Hogg* (2); *In re Hicks's Trade Mark* (3); *In re Remfry's Trade Mark* (4); *Eno v. Dunn* (5); *In re the Trade Mark of John Dewhurst & Sons* (6); *Sebastian on Trade Marks*, 4th ed., p. 14; *Kerly on Trade Marks*, 3rd ed., p. 232.]

Ewing. In order to have the mark expunged, the appellants must show that at the date of first user by the respondent or at the date of registration they had acquired such a position that they could have restrained the respondent from using the mark. The evidence does not support such a position. If a mark has been registered by a trader who honestly believes that he has invented and is entitled to it, even although in fact it belonged to another trader, and if it has been largely used by the registered proprietor, the Court will not remove it: *Mouson & Co. v. Boehm* (7). The question of the validity of the registration is in this case entirely one between the two parties, and the delay on the part of the appellants disentitles them to any relief. The public is not concerned as to whether this mark belongs to the appellants or to the respondent. The mark was properly registered under the *Merchandise Marks Act* 1864. It had up to the time of registration been lawfully used by the respondent to

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(1) 15 App. Cas., 316.

(2) L.R. 2 Ch., 307.

(3) 22 V.L.R., 636; 18 A.L.T., 229.

(4) 23 V.L.R., 44; 18 A.L.T., 253.

(5) 15 App. Cas., 252.

(6) (1896) 2 Ch., 137.

(7) 26 Ch. D., 398.

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denote that the article was his manufacture. At the time the respondent began to use this word it did not, so far as Tasmania is concerned, belong to the appellants. Even if the mark had been similarly used by the appellants in Tasmania, the respondent was entitled to be registered under the "three mark" rule.

Even if as between the parties the respondent should not have been on the register, he is barred by acquiescence and delay, see *Kerly on Trade Marks*, 3rd ed., p. 421; *Blogg v. Anderson* (No. 2) (1).

[ISAACS J. referred to *In re Chesebrough's Trade Mark* "Vaseline" (2).]

Counsel also referred to *Ashton & Parsons Ltd. v. Marshall's Chemical Co.* (3); *In re Linotype Co.'s Trade Mark* (4).

Lodge, in reply, referred to *Columbia Mill Co. v. Alcorn* (5); *Encyclopædia of the Laws of England*, 1st ed., vol. XII., p. 223; *In re Jelley, Son & Jones's Application* (6).

February 19.

GRIFFITH C.J. This was an application made by summons, dated 1st July 1907, to expunge from the register of trade marks the mark "Phosferine" registered by the respondent on 1st April 1894. Owing to various circumstances, one of which was the lamented death of Mr. Justice *Clark*, before whom the summons was heard, judgment was not given until the year 1908, when the matter was brought on again before the learned Chief Justice, who refused the application.

The application was made under the provisions of the *Patents, Designs and Trade Marks Act* 1893. Sec. 115 of that Act provides that, on the application of any person aggrieved by any entry made without sufficient cause in the register, a Judge may make an order for expunging or varying the entry. The case was treated before the learned Judges of the Supreme Court as a case of a trade mark originally registered under the Act of 1893, and so the matter was treated before us until the appeal had been partly heard, when it was discovered, on re-

(1) 21 N.S.W. L.R. (Eq.), 238, at p. 243.

(2) (1902) 2 Ch., 1.

(3) 23 N.Z.L.R., 762.

(4) (1900) 2 Ch., 238.

(5) 150 U.S., 460, at p. 463.

(6) 51 L.J. Ch., 639 (n).

ference to the certificate of registration put in evidence before the Supreme Court, that the trade mark was registered, not under that Act, but under the provisions of a previous Act, the *Merchandise Marks Act* 1864. That certificate, though granted on 1st April 1894, was granted on an application made under the Act of 1864, which was kept in force by the Act of 1893 notwithstanding the repeal of the former Act. By the Act of 1893 the register of trade marks kept under any Act repealed by that Act is to be deemed part of the same book as the register of trade marks kept under the Act of 1893 (sec. 6), and "trade mark" means "a trade mark registered in the register of trade marks kept under this Act, and includes any trade mark which, either with or without registration, is protected by law in the United Kingdom or in any British possession or foreign State to which the provisions of sec. 103 of the Act of the Imperial Parliament, shortly intituled the *Patents, Designs and Trade Marks Act* 1883, are under Her Majesty's Order in Council for the time being applicable" (sec. 4). By sec. 88 "all trade marks duly registered under any Act hereby repealed shall be deemed to be registered under this Act as from the day of the commencement thereof, without prejudice however to the order of priority in which they were respectively registered; and shall be renewed before the expiration of 14 years from the aforesaid commencement." Sec. 115 without any doubt applies to such trade marks, but the question whether the mark should be expunged or not depends primarily, not upon the conditions prescribed by the Act of 1893, but upon those prescribed by the Act of 1864. The latter Act was substantially the same as an Act of the same name passed in 1862 in England, but with this exception, that the English Act made no provision for registration of trade marks. As a matter of history such a provision was contained in the English Bill as originally submitted, but Parliament did not accept it, and the Act contains only penal provisions. "Trade mark" is defined in sec. 1, and, omitting unimportant words, the definition is as follows:—"Trade Mark" shall include any word lawfully used by any person to denote any chattel or any article of trade, manufacture or merchandise to be an article or thing of the manufacture, workmanship, production or merchandise of such

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1909. and the effect of registration was defined by sec. 7 :—"A certificate of registration of any trade mark shall be evidence of the right of the person named in such certificate or of the registered transferee of any trade mark to use such trade mark," and that was all.

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Before the Act of 1864 the law of trade marks was regulated by the common law. The right to the exclusive use of a trade mark was a sort of incorporeal right, the origin and nature of which were discussed in *Attorney-General for New South Wales v. Brewery Employés Union of New South Wales* (1), recently before this Court. A right to that kind of property was acquired by user, and according to the definition in the Act of 1864, a "trade mark" was a mark lawfully used by any person to denote any article of manufacture, &c., to be an article of the manufacture, &c., of such person. In order, therefore, that a mark should be entitled to be registered under that Act the applicant must have been able to establish affirmatively that the mark in question was so used. In the present case a good deal of evidence was given, not for the purpose of establishing that the mark was used in that sense in 1893, but for the purpose of establishing that the applicant was the proprietor of that mark and its inventor. But the evidence given from that point of view is equally applicable to the objection in the form it now takes, that is, that the word was not a mark used by the respondent to denote the article in question to be an article of his manufacture, &c. Among other evidence to which I do not think it necessary to refer in detail it appeared that as early as 1873 the appellants advertised in chemical journals an article of their manufacture called "Phosferine," of which word they apparently were the inventors; and we are told, though there is no evidence upon the subject, that it is their registered trade mark in England. It is immaterial whether that is so or not. The appellants also advertised a preparation of that name in chemical journals of the year 1876. All these journals were put in evidence, and it appeared that they circulated in Tasmania in those years. So there is no doubt that in 1873 it was known

(1) 6 C.L.R., 469.

to the chemical trade in Tasmania that there was an article of that kind made and sold by the appellants by that name. The respondent says that he was not aware of that fact, and that in 1882 or 1883 he himself devised an article which, it is suggested, contains the same ingredients, and hit upon the same name, and that he has ever since continued to make and sell it in Tasmania. He called witnesses to establish these facts. There is evidence that as early as 1882 or 1883 he made the article under this name. There is also evidence, as to which there is no question of its credibility, that as early as 1883 the appellants' "Phosferine" was commonly sold in chemists' shops, in Hobart. The question, then, is this, whether the word "Phosferine" as used in Tasmania in 1893 was a word that was lawfully used to denote that that substance was manufactured by the respondent. Two witnesses who had formerly been in the employment of the respondent were called, who, so far from substantiating that proposition, flatly negatived it. The witness Fred. Holmes in his affidavit of 2nd August 1907, says:—"I have known Messrs. Gould & Co.'s preparation 'Phosferine' for about 20 years, during which period it has been extensively advertised and sold in Tasmania as 'Gould's Phosferine.'" Another witness, H. V. Morey, says that "the preparation known as Gould's Phosferine was sold by H. T. Gould at Hobart aforesaid in the year 1884 when I assisted him in his business of chemist and druggist." The whole of the evidence and the packages in which the medicine is put up show that it was called "Gould's Phosferine" and that the labels bore the name "Gould's Phosferine." I come to the conclusion as a matter of fact that the word "Phosferine" alone never at any time denoted in Tasmania that the article "Phosferine" was the respondent's manufacture, and moreover that that word was never used by him by itself to denote that fact. It never distinguished the respondent's article from that of anyone else.

The use contemplated by the *Merchandise Marks Act* 1864 was a use so general that the mere use of the word by another person would amount to a representation that the goods to which it was applied were the goods of that other person. That never was the case in respect of this word. Moreover, that Act was a highly penal Act, and it would be very strange if under it a person could get an

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exclusive right to use a word which he was not, in fact, the first to use. The claim to property in a trade mark is a claim founded on priority of user, and it is clear that a man could not appropriate a word already in use by another person for the same goods. For these reasons I am of opinion that this mark was not properly registered under the Act of 1864, and is removeable under the Act of 1893.

It may be suggested that the power to remove is discretionary, and, that if it appeared that the mark could properly be registered under the Act of 1893, the Court should refuse to remove it from the register. But in the present case I think it would be impossible to show that the respondent was the proprietor of the mark, even if in some sense he was the inventor of it, that is to say, if when he adopted the name he was not aware that it was used by anyone else—which I take leave to doubt. As *Chitty J.* said in *In re Salt & Co's Application* (1), if that were so the more ignorant a person was the easier it would be for him to acquire a trade mark. In this connection I take leave to quote the remarks of *Holroyd J.* in *In re Hicks' Trade Mark* (2):—"A person cannot be properly registered unless he is the proprietor. Proprietor is the person who at the moment he makes application to be registered is entitled to the exclusive use of the name, whether he then or before publicly adopted it. A man cannot be said to have adopted a name if someone else has done so before him." I venture to express my concurrence in that proposition. The respondent therefore does not suffer any hardship by the case being dealt with under the Act of 1864.

A curious point then arises. Under the *Federal Trade Marks Act* 1905 it is provided (sec. 7) that:—

"The registration of a trade mark under a *State Trade Marks Act* shall cease either—

"(a) at the expiration of fourteen years from the commencement of this Act, or

"(b) at the time when, under the *State Trade Marks Act*, the trade mark would, if after the commencement of this Act no fee for the continuance of its registration

(1) 63 L.J. Ch., 756.

(2) 22 V.L.R., 636, at p. 639; 18 A.L.T., 229.

were paid, first become liable to removal from the register,

“whichever first happens.”

Now, under sec. 87 of the local Act of 1893, if that section applies, that period would have expired on 1st April 1908. If sec. 88 applies, it would have expired on 1st January 1908. So that in either view the registration had ceased to be effective when the judgment appealed from was given.

It may be said that it would be idle to order the expunging of an entry on the register which had already ceased to be effective. But the answer to that argument is that, so long as that entry remains upon the register, it is evidence of the right of the proprietor to the trade mark up to the date when the registration ceased to be effective. Persons may have infringed the trade mark before that date, and as against them the registration would still be evidence. Moreover, under the *Federal Trade Marks Act 1905* the fact that a trade mark is registered under a *State Trade Marks Act* confers substantial privileges upon the applicant for a trade mark under the Federal Act, and we are told that the appellants as well as the respondent are such applicants. If an applicant's mark is registered under a *State Trade Marks Act* he is not bound by the definition contained in the Federal Act of the essential particulars required in a trade mark. The appellants, therefore, have a very substantial right, notwithstanding that the respondent's registration has ceased to be effective, to have the question determined.

For these reasons I think that the order asked for should be made. But, in order that it should not be apparently futile, I think we should follow the practice adopted by the Courts in former days of making an order *nunc pro tunc*. I suggest a day not later than the last day on which the matter was dealt with by the late Mr. Justice *Clark*.

The learned Chief Justice was not asked to apply his mind to the real question in this case, but from the notes which we have of his reasons, I think that, if he had been, he would have come to the same conclusion.

BARTON J. I am entirely of the same opinion, and think it unnecessary to add anything.

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ISAACS J. read the following judgment. The question is whether the respondent Henry Gould is rightly or wrongly entered upon the Tasmanian register of trade marks as the proprietor of a trade mark consisting of a word "Phosferine" in respect of a medicinal preparation for weakness and lassitude. This ultimately resolves itself into the question of the propriety of the original registration under the *Merchandise Marks Act* 1864.

Was the word "Phosferine" in March 1894 Henry Gould's trade mark within the meaning of that Act? In other words, was it so used in his trade as to denote that the medicine referred to was manufactured or sold by him? Was that one word alone, and unassisted by any other word or symbol, used as a trade mark, as distinguished from its use to describe the medicine? The difference between the two kinds of use is pointedly referred to and explained by Lord Selborne L.C., in *In re Leonard and Ellis's Trade Mark; Leonard and Ellis v. Wells* (1). There the claim to have the word "Valvoline" registered as an old mark was rejected on the ground that it had not been used alone as a trade mark. The words of the English Act of 1875, sec. 10, are not identical with those of the Tasmanian Act, but they are sufficiently similar to make the decisions a guide. They are "any special and distinctive word or words or combination of figures or letters used as a trade mark before the passing of this Act may be registered as such under this Act," and the Lord Chancellor said:—"I am also of opinion that there was not, and I may say, even now upon the interlocutory application there is not, any evidence satisfactory to my mind that the word 'Valvoline' had ever been used alone as a trade mark, even in the United States, before 1875. What is the meaning of 'used as a trade mark' as distinguished from the use of the words to describe an article. I do not at all mean to say that it is impossible that a word which is used to describe an article, may also, if the proper means are taken at the proper time, be used as a trade mark; but when any such double use takes place, it is most important to remember the difference between the use of a name as a trade mark and the use of it as a descriptive term." If then this word

(1) 26 Ch. D., 288, at p. 296.

“Phosferine” alone was used by Gould as a trade mark the registration should stand—otherwise not. H. C. OF A.
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I agree with Mr. *Ewing's* contention that the onus of establishing the invalidity of the registration rests on the appellants—and the more heavily by reason of the lapse of time: *In re Chesebrough's Trade Mark "Vaseline"* (1). But it is only a question of more or less difficulty in satisfying the Court, and delay *per se* raises no legal or equitable bar. ASHTON &
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And, even though the onus is on the appellants, the respondent's evidence may suffice to support it: *In re Leonard & Ellis's Trade Mark; Leonard & Ellis v. Wells* (2).

Now I have no hesitation in arriving at the conclusion that Gould never relied solely on the word “Phosferine” to indicate that the medicine was manufactured and sold by him. He appears always to have employed his own name in conjunction with the word “Phosferine.” I may particularly refer to two portions of the evidence. Frederick Holmes in his affidavit of 2nd August 1907, filed on behalf of the respondent, says (par. 2):—“That I have known Messieurs Gould and Company's preparation Phosferine for about 20 years during which period it has been extensively advertised and sold in Tasmania as ‘Gould's Phosferine.’”

And another of his witnesses said in par. 1 of his affidavit of 25th June 1908:—“That the preparation known as ‘Gould's Phosferine’ was sold by Henry Thomas Gould at Hobart afore-said in the year 1884 when I assisted him in his business of chemist and druggist.”

It was only natural that in conjunction with the word “Phosferine” Gould should use his name or some other words indicating that the preparation was his. As early as 1873 and 1876 the appellants had advertised a similar preparation as manufactured and sold by them under the term “Phosferine,” and the *Chemists and Druggists Journal* published in England had in those years been received in Tasmania by Mr. Ash, a chemist in Hobart, as also one of their quarterly bulletins dated October 1876 referring to the medicine as one of their commodities. Mr. Gould only commenced business as a chemist in 1881—the month is uncertain

(1) (1902) 2 Ch., 1.

(2) 26 Ch. D., 288.

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—and it is difficult to conceive that immediately and independently of any acquaintance with the preparation of Ashton and Parsons Limited or its designation, he happened at once to devise the same or a very similar combination of phosphorus and iron, to compose directions for use of a strong family character and individual resemblance, and to invent the identical trade word “Phosferine,” exhibiting even the same remarkable omission of one letter “r” from the portion of the word derived from the Latin word “ferrum.” I emphasize these considerations only for the purpose of leading up to the conclusion that, though Mr. Gould has now apparently forgotten the debt he originally owed to the information obtained from the advertisements of Ashton and Parsons Ltd., and though I do not think he had any improper design in selling his own preparation as phosferine, yet his knowledge as a practising chemist of what was passing in his business world must have included this item of the appellants’ production; and further, as an honest business man and a careful trader he must have taken the precaution to call his medicine not phosferine simply, but “Gould’s Phosferine.” Otherwise he would have created confusion, because, as he himself testifies, the word “Phosferine” is a descriptive word signifying a mixture of phosphorus and iron.

For many years even on his showing he traded without registering any word as a trade mark, although the preparation of Ashton and Parsons Ltd. was being stocked and sold side by side with his—openly and with the word “Phosferine” attached, and a label worded similarly to his own. It is inconceivable therefore that he ever used the word “Phosferine” alone as his trade mark, and in that case his registration of that word alone was unauthorized by law, and the application to rectify the register should succeed.

I would add that in view of the pending application by the appellants to register the word “Phosferine,” I have carefully avoided any reference to the question whether that word became *publici juris* in Tasmania, or how far concurrent user of a trade mark by two persons *per se* affects the rights of either of them.

The registration under the State Act ceased by force of sec. 7 of the Commonwealth *Trade Marks Act* 1905 at a date between

the issue of the summons and the judgment appealed from. That determines the effect of the Tasmanian registration for the future, but the mark still remains on the register and, as threats have been made and questions may arise with regard to alleged infringements prior to the cesser of the registration, the appellants are entitled to proceed and ask for a formal order of removal from the register in order to protect themselves and their chemists from possible claims.

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Appeal allowed. Order appealed from discharged. Order that the mark be expunged from the register. Judgment to take effect as from 6th September 1907. Respondent to pay the plaintiffs' costs in this Court and in the Supreme Court. Certify for counsel.

Solicitors, for the appellants, *Murdoch, Jones & Cuthbert.*
Solicitors, for the respondent, *J. B. Walker, Wolfhagen & Walch.*

B. L.