H. C. OF A. 1909.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION. EX PARTE BROKEN HILL PROPRIETARY CO. LTD.

that overtime shall be paid for at a higher rate in respect of any work at Port Pirie which was not immediately before 31*st December* 1908 *recognized and treated as overtime work.* (3) *In so far as the award directs that no contracts shall be set by the company except as to work for which contracts have been usually set by the company since* 11*th December* 1906. *No order as to costs.*

Solicitors, for Broken Hill Proprietary Co. Ltd., *Minter, Simpson & Co.*

Solicitors, for Amalgamated Miners Association, *Anthony Hall* by *A. W. E. Weaver.*

Solicitor, for Arbitration Court and Commonwealth, *Commonwealth Crown Solicitor.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

IN RE THE APPLICATION OF THE AUSTRALIAN MILK FERMENT PROPRIETARY FOR A TRADE MARK.

H. C. OF A. 1909.

MELBOURNE, *June* 16, 17.

ISAACS J.

Trade Mark—Application—Opponent—Security for costs—Jurisdiction of High Court—Matter pending before Registrar—Residence out of jurisdiction—Trade Marks Act 1905 (*No.* 20 *of* 1905), *sec.* 46.

The jurisdiction given respectively to the Registrar, the Law Officer and the Court by sec. 46 of the *Trade Marks Act* 1905 to order a party to give security for costs is referrable only to matters pending before the Registrar, the Law Officer and the Court respectively.

Held, therefore, that where an application for the registration of a trade mark and an opposition thereto were pending before the Registrar, the Court had no jurisdiction to order the opponent to give security for costs.

Semble, there is no jurisdiction under sec. 46 to make an order for security for costs against a party on the ground that he is resident out of the jurisdiction of the Courts of a particular State, although within the Commonwealth.

Quære, whether a decision based on such a distinction is a hearing and determination according to law.

SUMMONS.

Charles James Carroll, George Reginald Hall and Arthur Griffith, all of Sydney, New South Wales, trading under the name of the Australian Milk Ferment Proprietary, applied for a trade mark, and their application was opposed by La Société Anonyme Le Ferment, a foreign corporation not resident in Australia. An application was made by the applicants for an order that the opponents should give security for costs. This application was heard by the Deputy Registrar of Trade Marks at Melbourne, and he ordered that the opponents should within ten days lodge the sum of £20 in cash at the Trade Marks Office as security for costs, provided that if within that time the applicants did not also lodge a like amount, for a like purpose, in like manner, the order should be dissolved. The opponents lodged £20 within the prescribed time, but, as the applicants failed to lodge £20 within the prescribed time, the Deputy Registrar released the security given by the opponents. The applicants now by summons asked for an order of the High Court directing the respondents to give security for the costs of and occasioned by their opposition, on the ground that the opponents were not registered or carrying on business within the Commonwealth.

One of the applicants appeared in person.

Schutt, for the opponents.

Cur. adv. vult.

ISAACS J. read the following judgment:—

H. C. OF A. 1909.

IN RE THE APPLICATION OF THE AUSTRALIAN MILK FERMENT PROPRIETARY FOR A TRADE MARK.

June 17.

A firm of three persons, Messrs. Carroll, Hall and Griffith, trading in Sydney in co-partnership as "The Australian Milk Ferment Proprietary," are applicants for a trade mark. The application No. 5729 is still pending before the Registrar and is opposed by La Société Anonyme Le Ferment, a foreign company admittedly not residing in Australia. An application has been made to me under sec. 46 of the *Trade Marks Act* 1905 on behalf of the applicants for an order that the opponent company shall give security for costs.

Some minor objections were raised, which may be passed by having regard to the view I take of the meaning of sec. 46. Mr. *Schutt* for the opponents contended broadly that the Court has no jurisdiction in the circumstances to make the order asked for, because there is no appeal to the Court pending, and the matter is so far within the domain of the Registrar's authority. Mr. Griffith urged that the Court has an alternative power.

Now sec. 46 must be read with all the other sections of Division 3. Secs. 38 to 42 inclusive provide for notice of opposition, and the procedure down to the hearing before the Registrar and his decision. Sec. 43 allows an appeal from the Registrar to the Law Officer who then necessarily has control of the matter until his decision is given. Sec. 44 provides for an appeal from the Law Officer to the Court, which in that case must have exclusive control. Sec. 45 permits a direct appeal from the Registrar to the Court. Then comes sec. 46 which is in these terms:—"If a person giving notice of opposition or appeal does not reside in Australia, the Registrar Law Officer or the Court may order him to give security for costs, and if the order is not complied with the opposition or appeal shall be deemed to be abandoned."

Now it is plain to me that the expressions "notice of opposition" and "appeal" are referable to the foregoing provisions in which they occur, and the jurisdiction given to the Registrar, the Law Officer, and the Court must be ancillary to the proceedings pending before those respective tribunals. It cannot be that, where an appeal is pending before the Court, the Registrar could interfere, and make an order which, if not obeyed, would take the whole matter out of the hands of the Courts. Particularly is this so where no pro-

vision for any appeal from such an order is made. And on the applicant's suggestion, where an appeal is made direct from the Registrar to the Court, completely passing by the Law Officer, nevertheless the Law Officer could intervene and make the order. That cannot be, and therefore, referring the powers of each designated tribunal to action in connection with some main matter depending before it, the section gives no power to the Court to make an order intercepting the proceedings before the Registrar. This ends the case, and on this point I decide.

It appears, however, that a previous application of the same nature was made to the Deputy Registrar, who granted it, but upon condition that the applicants themselves lodged security, the condition being rested on the one fact that the applicants resided beyond the jurisdiction of the Victorian Courts, that is to say, in New South Wales.

The Deputy Registrar thought he was justified in this by the case of *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer* (1), where *Stirling* J. similarly required an opponent and an applicant to give mutual security, because both were outside the jurisdiction of the English Courts. Mr. *Griffith* urged me to disregard entirely the order so made by the Deputy Registrar, as such a condition on such grounds was unauthorized, and rendered the whole order nugatory. Mr. *Schutt* on the other hand contended that the order was made, and still remained, and there was no appeal provided from such an order. As I have no power to make the order asked for by the applicants, even if no former application had been dealt with by the Registrar, that latter contention is not really material. But in view of the importance of the matter I think I ought to take this opportunity of saying that the distinction upon which the Deputy Registrar founded his condition was quite erroneous, and is not even supported by the case relied upon. The analogy to English jurisdiction for this purpose is not State but Australian jurisdiction. And, further, I would observe that, if within proper time and by proper means the Court were called upon to consider the validity of such an order, it would, in my opinion, raise a serious question as to whether a decision depending upon such a

(1) (1891) 3 Ch., 451, at p. 458.

H. C. OF A. 1909.

IN RE THE APPLICATION OF THE AUSTRALIAN MILK FERMENT PROPRIETARY FOR A TRADE MARK.

distinction could be regarded as a legal decision at all. This distinction amounts to this: that upon a general provision in a Federal Statute, the section itself differentiating only between the Australian and non-Australian residence of the opponent, an applicant may be subjected to a special disability merely because he does not reside in one particular State. It is very arguable whether such a decision is a hearing and determination at all according to law. See *Reg.* v. *De Rutzen* (1). Though I have not to deal by way of decision with this phase of the matter, it should, if necessary, in future receive careful consideration.

The summons will be dismissed with £4 4s. costs.

Summons dismissed with costs.

Solicitors, for the applicants, *Woolcott & Drysdale.*
Solicitor, for the opponents, *F. B. Waters.*

B. L.

(1) 1 Q.B.D., 55.