

For these reasons I am of opinion that the appeal from the Full Court should be allowed.

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1912.

WILSHIRE
v.
GUARDIAN
ASSURANCE
CO. LTD.

Appeal dismissed with costs.

Solicitors, for the appellants, *M. L. Moss & Dwyer*, Perth.

Solicitors, for the respondents, *James & Darbyshire*, Perth.

N. McG.

[HIGH COURT OF AUSTRALIA.]

ABRAHAM HANSMAN APPLICANT;

AND

REGAL SHOE COMPANY RESPONDENTS.

MOTION FOR RECTIFICATION OF REGISTER OF TRADE MARKS.

Practice—Trade Mark—Rectification of register—Disclaimer—Exclusive and concurrent rights—Trade Marks Act 1905 (No. 20 of 1905), secs. 6, 8, 25, 28, 71.

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On an application for rectification of the register of trade marks under sec. 71 of the *Trade Marks Act 1905*, the Court cannot entertain a motion under sec. 28 to direct the Registrar to register a mark on the ground of honest concurrent user, the preliminary procedure of applying to the Registrar in the first instance not having been followed.

SYDNEY,
Nov. 14.
Isaacs J.

MOTION.

This was an application on behalf of Abraham Hansman, boot and shoe manufacturer of Sydney, that the Register of Trade Marks might be rectified under the provisions of sec. 71 of the *Trade Marks Act 1905* by adding to the registration of Trade Mark No. 5382 in Class 38, a note stating that the registered

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proprietors, the Regal Shoe Company, the respondents to the motion, do not claim the exclusive right to the use of the word "Regal" so as to prevent the applicant from stamping the said word in the linings of boots and shoes of his manufacture and made in the particular shape or upon the last which bears that name in the applicant's factory, or upon the cartons containing such boots or shoes, or from using the said word to denote the shape of such boots and shoes, or from otherwise using the said word in connection with the said boots and shoes in the manner in which the same was used by him prior to and at the date of the registration of the said trade mark or for any other legitimate purpose; or by the insertion in the said register of such other exception or limitation affecting the registration of the said trade mark as in the opinion of the Court ought to be inserted.

Upon the hearing of the motion the applicant applied to add the following to his original notice of motion:—"Or that the word 'Regal' should be registered as a trade mark of the applicant in respect of boots and shoes the manufacture of the applicant so as to confer on the applicant concurrent rights in the said trade mark."

Leverrier K.C. and *R. H. Long-Innes*, for the applicant. We ask for relief also under sec. 28 of the *Trade Marks Act* 1905. The order of this Court is necessary to enable the Registrar to register the applicant under sec. 28: See sec. 25. We ask for an order directing the Registrar to register the applicant on the ground of honest concurrent user. If we are bound to go first to the Registrar and then to the Court the process is circuitous. We do not ask for a final order.

Langer Owen K.C. and *J. A. Ferguson*, for the respondent company, submitted that the Court had no jurisdiction to make such an order on this application, since the preliminary procedure on trade mark applications had not been followed.

ISAACS J. referred to *In re Australian Milk Ferment Proprietary* (1). The Court cannot direct the Registrar to register,

and so deprive the public of the right to be heard. Sec. 25 does not give an independent and summary jurisdiction to the Court, but is a restriction on the Registrar. Application must be made to him in the first instance and the ordinary procedure on trade mark applications followed, and the Registrar may refer the matter to the Court ultimately under sec. 25. Otherwise the protection intended by the Act to be given to the public by means of publication and notice would be lost.

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Leverrier K.C. In deference to your Honor's ruling we withdraw our application under sec. 28 for leave to amend.

Application withdrawn.

Solicitors, for applicant, *Mark Mitchell & Forsyth.*
Solicitors, for respondents, *Barnes & Laurence.*

[*Ex relatione* J. A. Ferguson, Esq., Barrister-at-Law.]

Foll
Dillon v Chin
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[HIGH COURT OF AUSTRALIA.]

HEDBERG APPELLANT;
INFORMANT,

AND

WOODHALL RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
TASMANIA.

H. C. OF A.
1913.
HOBART,
Feb. 17.
Griffith C.J.,
Barton and
Isaacs JJ.

Information—Offences—Charge of having in “possession or control”—One offence only—Information disclosing more than one offence—Right of election—Duty of magistrate—Fisheries Act 1889 (Tas.) (53 Vict. No. 11), sec. 36—Magistrates Summary Procedure Act 1855 (Tas.) (19 Vict. No. 8), secs. 1, 10.