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VESS JONES ET AL. . . . . PLAINTIFFS;  
 VS.  
 HYMAN TEICHMAN ET AL. . . . . DEFENDANTS.

1930  
 Jan. 29.

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*Industrial designs—Infringement—Interim injunction—Expunging—Duties of Departmental Officer—Registration*

*Held*, that the applicant for the registration of an industrial design has no absolute right to have the same registered. To allow the registration is within the discretion of the departmental officer charged with duty of administering the Act, but no registration should be lightly made. The exercise of the discretion to register must always contemplate the interests of the public which ought not to be unduly restricted in matters of trade.

This is an action to restrain the defendants from using a certain shape and model of bottle in the sale of its beverages, alleged to be an infringement of the plaintiffs' registered design, and to expunge the defendants' industrial design which was also registered. On the 14th of January, 1930, the plaintiffs moved before the Honourable Mr. Justice Audette for an Interim Injunction against the defendants, and after hearing counsel for both parties, the Court intimated it was of opinion that the injunction should be granted; but that if the defendants preferred, the application for an interim injunction would be continued to the trial, provided defendants gave security in the sum of \$5,000 to meet any damages or costs which the defendants might, by final judgment, be condemned to pay to the plaintiffs. The defendants failing to furnish said security within the

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time ordered, the plaintiffs would have leave to then renew their application for Injunction.

On the 29th January, 1930, counsel for both parties came again before the Court, and declared they had come to an agreement as to the final judgment to be rendered. Counsel for plaintiffs thereupon, by consent of counsel for defendants, converted his motion for Interim Injunction into one for permanent injunction, and for judgment pursuant to prayer of their Statement of Claim, save as to damages and costs which plaintiffs waived; the Injunction only to become operative six weeks from date, to allow defendants to use up so much of the stock on hand as they could, and any then remaining to be delivered over to be destroyed.

The motion was heard by the Honourable Mr. Justice Audette at Ottawa.

*R. S. Smart, K.C.*, for plaintiffs.

*W. L. Scott, K.C.*, for defendants.

After hearing counsel for both parties, the learned Judge said:—

*Per Curiam:*—

I really think the blame of the whole thing rests with the officials of the Department, who are charged with watching over the interests of the public. As Mr. Scott has consented to Judgment as intimated by Mr. Smart, there will be Judgment accordingly.

There will be judgment pursuant to the conclusions of the Statement of Claim as explained by Mr. Smart. I need not repeat them. It is a case that appealed to my sympathy as I thought the defendant was placed in a wrong position, without being guilty of any dishonesty whatsoever; and I cannot conclude without alluding to a matter which I conceive to be of great moment both to the trades and the general public in Canada, and that is the necessity of safeguarding the Register of Industrial Designs from being used to extend monopoly to designs which are not clearly entitled to it. To allow a design to be registered is entirely within the discretion of the departmental officer who is charged with the duty of administering the Act. The applicant has no absolute right to registration. This is abundantly clear under the authorities (See *The Law Times*, Vol.

163, p. 229). No registration should be lightly made; and the exercise of the discretion to register must always contemplate the interests of the public which ought not to be unduly restricted in matters of trade.

The case before me is obviously one where registration of the defendant's design should have been refused; and the result of allowing it has given rise to litigation and its attendant burden of costs which a sound discretion on the part of the departmental officer would have rendered unnecessary. The plaintiffs' design having already been registered, they should not have allowed the registration of the other. I never saw two designs more alike. As was said at the time of the application they were alike, but the test is not when they are near one another but when they are far apart; it is impossible to tell one from the other.

*Judgment accordingly.*

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 Audette J.