

1938
 June 24.
 June 30.

BETWEEN:
 T. S. SIMMS & COMPANY LIMITED . . . APPELLANT;
 AND
 THE COMMISSIONER OF PATENTS . . . RESPONDENT.

Trade mark—Appeal from decision of Registrar of Trade Marks—Design Mark including representation of Imperial Crown—Unfair Competition Act, 22-23 Geo. V, c. 38, s. 14 (1).

Held: That the Unfair Competition Act forbids the use in a design mark of a crown forming part of the Royal Arms or Crest, or of the arms or crest of a member of the Royal Family, or of a crown so nearly resembling them that it may lead to mistake.

APPEAL from the refusal of the Registrar of Trade Marks to register a design trade mark including the representation of the Imperial Crown.

The appeal was heard before the Honourable Mr. Justice Angers, at Ottawa.

O. M. Biggar, K.C. for appellant.

W. P. J. O'Meara, K.C. for respondent.

The facts are stated in the reasons for judgment.

ANGERS J., now (June 30, 1938) delivered the following judgment:—

This is an appeal from the decision of the Registrar of Trade Marks, dated May 31, 1938, refusing to register a design trade mark described in the application as follows:—

A shield surmounted by a gold crown, the shield being divided into diagonally opposed panels of red and blue respectively, and having an inclined gold band across its face bearing reading matter.

The application, bearing Serial No. 172,119, was filed on November 17, 1937. It states that the applicant has used the said mark since the 20th of September, 1937, in association with wares ordinarily described as brushes and brooms, for the purpose of indicating that such wares were sold by the applicant.

On March 2, 1938, the Commissioner wrote to the attorneys for the applicant saying (*inter alia*):—

The representation of the Design Mark includes the representation of the Imperial Crown which is not permissible. Attention is directed to section 14 of the Unfair Competition Act.

On March 8, 1938, the attorneys for the applicant replied to the Commissioner of Patents; the second paragraph of their letter, which is the only one relevant to the question in issue, reads thus:—

Concerning the remarks to the effect that the design includes the representation of the Imperial Crown, which is held not to be permissible in view of section 14 of the Unfair Competition Act, it is pointed out first of all that the crown disclosed is not the Imperial Crown. On the other hand, there appears to be no provision under section 14 of the Unfair Competition Act to prevent registration of the Imperial Crown or any crown as a part of a trade mark and, in consequence, it is believed that the application is clearly registerable.

On April 27, 1938, the Registrar of Trade Marks wrote to the attorneys for the applicant, as follows:—

I would refer to application No 172,119, filed by you on behalf of T. S. Simms & Company, Limited.

I am directed to inform you that the representation of the crown shown in the drawings submitted is considered as a Royal Crown, and, as such, as barred from registration, under the provisions of section 14 (1a) of the Act

I shall be glad, however, before finally disposing of the matter, to receive any further suggestions which you may desire to make.

In reply to this letter the attorneys for the applicant, on May 19, 1938, wrote to the Registrar of Trade Marks; their letter reads in part as follows:—

The provision in question prohibits the registration of the Royal Arms, Crest or Standard. The Office was perhaps under the impression that the Royal Crest consists of the Crown. In fact, however, it consists of the representation of the Royal Crown surmounted in a distinctive fashion by a crowned lion. Section 14 (1) (a) could not, therefore, constitute a bar to the registration of a mark consisting of the Royal Crown alone.

* * * * *

Applicant's trade mark includes an elongated shield surmounted by a crown, the whole being set out in a distinctive colour combination. Even if the representation of the Royal Crown were barred by statute, it is still thought that, because of this combination, the mark would warrant registration

On May 31, 1938, the Registrar of Trade Marks replied in part as follows:—

I have again discussed this application with the Under Secretary of State. Registration of this application is refused, because it is considered to be barred by the provisions of section 14 (1) (a) and (b) of the Unfair Competition Act.

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Sections 26 and 27 of the Unfair Competition Act indicate respectively the word marks and the design marks which are registrable.

Section 14 enumerates the emblems or symbols, the use of which is forbidden as trade marks; the relevant part of section 14 reads as follows:—

14. (1) No person shall be entitled to adopt for use in connection with his business, as a trade mark, or otherwise, any symbol consisting of, or so nearly resembling as to be likely to be mistaken for,

(a) the Royal Arms, Crest or Standard;

(b) the arms or crest of any member of the Royal Family;

It was submitted on behalf of the appellant that section 14 does not apply in the present case, because the design mark which the appellant is seeking to register does not consist of the royal arms, crest or standard nor of the arms or crest of any member of the royal family; counsel's contention is that section 14 does not prohibit the use of a crown.

I do not believe that section 14 forbids the use of a crown in general; in my opinion, however, it does forbid the use of the crown forming part of the Royal Arms or crest or of the arms or crest of a member of the Royal Family or of a crown so nearly resembling them that it may lead to mistake.

After comparing the crown forming part of the appellant's trade mark with the crown included in the royal crest, I am satisfied that it so closely resembles the royal crown as to be likely to be mistaken for it.

Counsel for the appellant filed certain trade marks including a crown; the fact that the Registrar may have granted trade marks which perhaps should not have been issued, a question on which I do not express any opinion, is, to my mind, wholly immaterial.

Counsel for the respondent, on the other hand, produced various exhibits showing that the crown alone is sometimes used, instead of the crest, by His Majesty the King and by His Excellency the Governor General.

I do not think that the decision in *B. Houde Company Limited v. Commissioner of Patents* (1), cited by counsel for appellant, has any bearing on the present case.

After careful perusal of the evidence adduced and of the arguments submitted by counsel, I have reached the

conclusion that the Registrar of Trade Marks was right in refusing the appellant's application; the appeal is accordingly dismissed.

There will be no order as to costs.

Judgment accordingly.

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