

1931
 Nov. 19.

IN THE MATTER OF

The Petition of The C. Turnbull Co. Limited for an order permitting it to register certain Trade-Marks;
 Petitioner;

AND

IN THE MATTER OF

The specific Trade Mark consisting of the device of a sheep standing on grass as applied to cloths and stuffs of wool; and other trade-marks.

Practice—Trade-marks—Joinder of demand to expunge in Petition to Register—Rules 299 and 300

T. presented a petition for leave to register a trade-mark and joined with it in his petition a demand to expunge certain trade-marks alleged to stand in his way, objection being made that the two issues could not be so joined in such a petition;

Held that, inasmuch as the present case is not clearly covered by the Rules of the Court, that the rules in England are not applicable to this case, and that to force the petitioner to take a second action to expunge would only be multiplying actions to no purpose, contrary to the spirit of modern law, the Court availing itself of the power vested in it by rules 299 and 300, gave leave to the petitioner to present his petition as libelled. The rules not being quite definite upon the subject, the application was dismissed without costs.

MOTION by the Dominion Woollens and Worsteds Limited whose Trade-Mark it was sought to expunge, for an order to dismiss the above petition as against it.

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

George F. Macdonnell, Esq., for Dominion Woollens and Worsteds Limited.

W. L. Scott, K.C., for the petitioners.

The questions of law discussed and the facts are stated in the Reasons printed below.

AUDETTE J., now (November 19, 1931), delivered the following judgment.

I have no hesitation in coming to a conclusion upon this application, after having again looked over the rules. Rule 34 provides for a separate application for registration by Petition, and by Statement of Claim for expunging; and

rule 39, which provides for joining an infringement action and expunging, does not extend to the present case which is not provided for by any rule. Rule 42 provides that the practice and procedure not provided by statute or these rules shall be regulated by the English rule. There is no rule *consimili casu* in England because of the differences in the legislation of the two countries.

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IN THE
MATTER OF
PETITION OF
THE C.
TURNBULL
CO. LTD.

Audette J.

There is no doubt rule 34 should be so amended as to allow the two questions to be tried together; because if I were to make an order to-day allowing the application it would result in the petitioner having to take a petition for registration and another action, by statement of claim to expunge; that would set up a multiplicity of actions which is against the very spirit of modern law. Furthermore, the result would be that these cases would have to be consolidated and tried together in order for the Court to be seized of the justice that should be done the parties.

Under the circumstances, and availing myself of rule 299 which says that no proceedings in the Exchequer Court shall be defeated by any merely formal objection, and rule 300 which vests the Court with power to excuse any party from complying with any of the provisions of these rules, which adds to the Judge's powers. Under such circumstances, I certainly will dismiss the application and by special leave the plaintiff or petitioner is hereby allowed to join in his application to register by petition a demand for expunging certain registered trade-marks which may stand in his way for such registration; but considering that the rule as it now stands lends itself to the construction placed upon it by the applicant, and it is a case of first impression, I will dismiss the application without costs to either party.

The Dominion Woollens and Worsteds Limited will have between this date and the 7th December next to file their objections or plea to the present case.

Judgment accordingly.
