

1935
 * June 25
 * June 28.

IN THE MATTER OF TRADE MARK APPLICATION NUMBER
 D. 2304.
 BETWEEN
 THEODORE FRANK ROSE APPELLANT;
 AND
 THE COMMISSIONER OF PATENTS AND HUGH CARSON
 CO. LTD. } RESPONDENTS.

Practice—Appeal from Commissioner of Patents—Trade Mark and Design Act—Exchequer Court Rules Nos. 34 and 35.

Held: That an appeal from the refusal of the Commissioner of Patents to register an industrial design under the *Trade Mark and Design Act* must be by way of petition and not by notice of motion.

APPEAL from the decision of the Acting Commissioner of Patents rejecting an application for the registration of an industrial design.

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

E. C. Charleson for Appellant.

No one for Commissioner of Patents.

C. C. Gibson for Hugh Carson Co. Ltd.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (June 28, 1935) delivered the following judgment:

This is an appeal from the decision of the Acting Commissioner of Patents rejecting the application of one Rose for the registration of a certain industrial design of what is ordinarily called a radiator cover, in the application designated as a Radio Windbreaker.

The applicant, in his application, describes the design as consisting of "a curtain for the front grille of a car radiator of shield-like shape centrally split from the upper end and adapted to fold to open its open position and form lapels and having stud-like fasteners along the edges."

In plain language the design is that of a cover, made of some suitable material, for the radiator of an automobile, in the precise shape of the front of the radiator whatever that may be, split in the centre vertically and closed and opened by what is known generally as zipper fasteners, the whole being fastened to the outer edges of the radiator with stud-like fasteners, or dome-fasteners. When partially opened at the top the inner edges of the two sections of the cover unfold and form lapels and these are fastened backwards by buttons of the same sort to the outer portions of the cover. Covers dropping downwards from the top, covers on rollers, and solid or unbroken covers attached in one way or other to the whole front of the radiator, it was agreed by counsel, were well known, and in use long before Rose's design was sought to be registered.

The Assistant Commissioner refused the registration on the ground that he was unable to determine who, under the statute, was the proprietor of the design disclosed in the application. Accompanying the application was an affidavit made by Ralph H. Forshay in which he states that he executed the design for Auto Products Co. Ltd., for a consideration. This would show the proprietorship of the design in Auto Products Co. Ltd., if in any person, and not in Rose the applicant, and accordingly on that ground the registration was refused. An explanation was subsequently made to the effect that by error the name of Auto Products Co. Ltd. had been employed instead of

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Rose, and an assignment in writing of the design from Forshay to Rose was filed with the Commissioner. The Assistant Commissioner, on a reconsideration, refused the application on the ground that he was unable to determine who was the proprietor disclosed in the application.

The appeal is by way of notice of motion which is, I think, fatal in itself. Sec. 45 of the *Trade Mark and Design Act* contemplates a suit by any person aggrieved by any omission, without sufficient cause, to make any entry in the register of industrial designs. Rules 34 and 35 require that such a suit be instituted by petition and notice of the filing of the petition must appear in the Canada Gazette. Accordingly the motion must be dismissed. There is some doubt as to who is the proprietor of the design, and also whether the design discloses fit subject matter for registration. These issues, and others suggested, seem to be of substance, and if the applicant still desires to prosecute his appeal it must be in the manner prescribed by the statute and by the Rules. The matters in issue will be more satisfactorily disposed of in that way rather than by affidavit and statement of counsel.

Mr. Gibson appeared on the motion on behalf of Hugh Carson Co. Ltd., opposing the same, but did not raise the procedural point on which I dismiss the motion, and there will be no order as to costs. I do not propose to express any opinion on the points raised by Mr. Gibson against the motion.

Judgment accordingly.