

<p>CANADIAN WM. A. ROGERS, LIM-        ITED .....</p>	}	<p>PETITIONER;</p>
<i>vs.</i>		
<p>INTERNATIONAL SILVER COM-        PANY OF CANADA, LIMITED....</p>	}	<p>RESPONDENT.</p>

1932  
 Jan. 15.  
 Mar. 1.

*Industrial designs—Expunging—Trade Mark and Design Act—Meaning and requirement of a design.*

The respondent in its application for registration describes its design as follows:—

“The said industrial design consists of a knife wherein the handle is substantially three-fifths and the blade substantially the remaining two-fifths of the total length of the knife, the whole being of a shape substantially as shown.”

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*Held* that the registration in question being only for an outline of a table knife, distinguished by having the length of the handle and blade in the proportions mentioned, such design does not constitute a registrable design under the provisions of The Trade Mark and Design Act.

2. That an industrial design, under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture which is protected, and not the article of manufacture itself.

[*Kaufman Rubber Company, Ltd. v. Miner Rubber Company, Ltd.* (1926) Ex. C.R. 26 referred to.]

PETITION by the petitioners herein to have a certain industrial design, registered by the respondent in 1930, expunged.

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

*R. S. Smart, K.C.*, and *M. B. Gordon* for petitioner.

*R. C. H. Cassels, K.C.*, for respondent.

*Smart, K.C.*, cited the following authorities:—

*Kaufman Rubber Co. v. Miner Rubber Co.* (1926) Ex. C.R. 26; and *Chalworthy & Son, Limited, v. Dale Display Fixtures, Limited* (1928) Ex. C.R. 159, and (1929 S.C.R. 429).

*Cassels, K.C.*, cited the following:—

*Attwood v. National Radiator* (1928) 45 R.P.C. 71; *Tyler & Sons v. Sharpe Brothers & Co.*, 11 R.P.C. 35; *Mallards v. Gibbons Bros.* (1931) 48 R.P.C. at p. 315; *In re Bayer's Design* (1906) 25 R.P.C. 56; *Brompton's Application* (1926) 43 R.P.C. 55.

THE PRESIDENT, now (March 1, 1932), delivered the following judgment.

This is a petition to expunge from the Register of Industrial Designs, a design registered in February, 1930, by International Silver Company, and by it assigned to International Silver Company of Canada Ltd., in April, 1930.

In the application for registration, the industrial design is described by the applicant as follows:—

"The said industrial design consists of a knife wherein the handle is substantially three-fifths and the blade substantially the remaining two-fifths of the total length of the knife, the whole being of a shape substantially as shown."

The drawings accompanying the application simply indicate the outlines of a table knife, and the only feature peculiar to the design of the knife is that the handle and blade respectively are in the proportions, relative to the whole length of the knife, stated in the application for registration. There is no suggestion of any particular ornamentation, decoration, pattern, engraving, or anything of that nature, to be applied "to the ornamenting of any article of manufacture." In actual practice, the respondent does apply a variety of ornamental designs to the handle of the knife in question, but this does not appear in the registered design. So therefore, the sole question for determination is whether the outline of a table knife, distinguished only by having the length of the handle and blade in the proportions mentioned, constitutes a registerable design, under the provisions of The Trade Mark and Design Act. The only reference to the actual shape of the complete knife, in the application for registration, is in the use of the words, "the whole being of the shape substantially as shown"; these words have reference, I think, to the shape produced by the assembly of the handle and blade of the knife in the lengths designated in the application.

I think the registered design must be expunged. In *Kaufman Rubber Co. Ltd. v. Miner Rubber Co. Ltd.* (1) I discussed the very meagre provisions of the Trade Mark and Design Act, referable to industrial designs, and in this case I expressed the opinion that an "industrial design," under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture, which is protected, and not the article of manufacture itself. In the earlier English Design Acts it was the ornamental design only that was protected and not the article of manufacture to which it was applied, the incorporeal copyright in the design being always considered a separate entity from the corporeal substance to which it was applied. In Canada, we seem to have adhered always to this principle, at least, that is my construction of the statute. The words "for the ornamentation of" before "any article of manufacture"

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were long ago omitted from the English Acts, but we have continued them. I have no reason for departing from the opinion expressed in the case just mentioned. Even if the statute did not confine the registration of designs to ornamental designs applied to an article of manufacture, I would be of the opinion that the dimensions of the handle and blade of a table knife does not constitute subject matter for a design, and is not properly registerable as a design. Any manufacturer of table knives should be at liberty to fix the length of the blade and handle of his knife in whatever proportions he desired, and it was never intended, in my opinion, that the statute should prevent a manufacturer from so doing. I do not think the shape or conformation of the knife is claimed as the design, it is only a knife in which the handle is one-fifth longer than the blade, that is claimed as the design; any reference to "shape" in the application was merely to indicate this fact. It is true that a knife constructed in this fashion produces an effect, but an effect is not a design. The words "shape or configuration," as employed in the present English Design Act does not in my opinion relate to the shape or configuration produced by the dimensions of the different members constituting an article of manufacture; these words however are not found in our statute and English decisions based upon these words are not applicable here. The relative lengths of the blade and handle in a knife is altogether a matter of structural dimensions and not of "design," in the sense contemplated by the statute. The statutory industrial design is one thing, the dimensions of the handle and blade in a knife is another thing. The design in question is not, in my opinion, registerable as an industrial design, and should be expunged.

The petitioner therefore succeeds and costs will follow the event.

*Judgment accordingly.*

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