

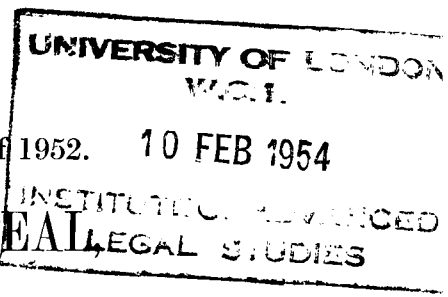
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8, 1953

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In the Privy Council.

No. 2 of 1952. 10 FEB 1954



ON APPEAL FROM THE COURT OF APPEAL
MALTA

BETWEEN

EDGAR STAINES nomine (*Plaintiff*) APPELLANT

AND

VICTOR LA ROSA nomine (*Defendant*) RESPONDENT.

CASE FOR THE APPELLANT

RECORD.

1.—This Appeal is from a Judgment dated 13th December 1950 of the Court of Appeal, Malta, which by a majority (Sir George Borg, The Chief Justice dissenting) dismissed an Appeal by the Appellant from a Judgment dated 31st March 1950 of Mr. Justice Gauci in the Commercial Court, Malta.

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p. 47.

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2.—The question for decision before the Commercial Court and in the Court of Appeal, Malta, was whether the word BATA should be registered as a trade mark in Malta in the name of the Bata National Corporation of Zlin, Czechoslovakia, in respect of "Tyres and Tubes," "Technical Rubber," "Footwear and Stockings," "Shoe Polish" and "Shoe Laces" pursuant to five applications made by the Respondent to the Comptroller of Industrial Property, Malta.

3.—These applications for registration were opposed by the Appellant who is the Custodian for Enemy Property of Malta and who in pursuance thereof commenced proceedings in the Commercial Court in this capacity, representing The Bata Overseas Shoe Company Limited of Valletta, Malta. The Respondent who was the Defendant in those proceedings is a member of the firm of La Rosa Company of Malta and purported to represent The Bata National Corporation but there was no evidence that he was authorised by The Bata National Corporation to make the applications in question nor any evidence of what is the nature, title or business of the "Corporation."

pp. 3, 4

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p. 3

4.—The opposition to registration was instituted by writ of summons dated 29th September 1947 in which the Appellant was Plaintiff and the Respondent was Defendant. Evidence was adduced from time to time between 1947 and 1949 and finally Mr. Justice Gauci by a reserved Judgment dated 31st March 1950 dismissed the Plaintiff's action and accordingly dismissed the Opposition with costs. The Plaintiff appealed to the Court of Appeal (Sir George Borg, C.J., Camilleri and Harding, JJ.) and the appeal was dismissed by a Judgment dated 13th December 1950. The Plaintiff was granted on 31st January 1951 leave to appeal to the Privy Council, and the Chief Justice by letter to the Registrar dated 7th February 1951 gave his reasons for dissenting from the Judgment of the Court of Appeal and for deciding that the applications to register ought to have been refused. 10

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5.—Although the Defendant contended at the commencement of the proceedings that the Plaintiff was not entitled to be heard as representing The Bata Overseas Shoe Company Limited, this plea was withdrawn on 13th January 1948. The only question for decision is accordingly whether the word BATA ought to be registered as a trade mark in the name of The Bata National Corporation of Zlin, Czechoslovakia.

6.—The Bata National Corporation, which is it not in dispute was not in existence prior to the last war, must not be confused with a company "Bata a.s. Zlin," which was carrying on business at Zlin, Czechoslovakia, in the manufacture of footwear before the war. No evidence was given as to the constitution of The Bata National Corporation and in particular there is no evidence that The Bata National Corporation has had assigned to it or vested in it any of the goodwill or other assets of Bata a.s. Zlin or, in particular, any goodwill or any assets owned by Bata a.s. Zlin outside Czechoslovakia. So far as this case is concerned there is no evidence that The Bata National Corporation has ever acquired any rights which Bata a.s. Zlin might have had in the Trade Mark "BATA" in Malta, nor is there any evidence that The Bata National Corporation is an organisation capable of owning a trade mark. 20 30

p. 5, l. 18

Record (Exts.)

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7.—The Bata Overseas Shoe Company Limited of Valletta, Malta, was formed in Malta on 24th November 1937, and by an Agreement in writing dated 3rd August 1938 purchased from British Bata Shoe Company Limited of East Tilbury, Essex, England (hereinafter called the "Tilbury Company") the full benefit of the business previously carried on by the Tilbury Company in footwear in Malta together with the assets of such business. There was no condition in such agreement limiting The Bata Overseas Shoe Company Limited to trading in any particular make of footwear or purchasing footwear from any particular source. 40

Record (Exts.)

pp. 7, 8

p. 12

8.—Prior to 1939 Bata a.s. Zlin manufactured footwear at Zlin in Czechoslovakia. The name BATA was the name of the founder of such firm. There was no agreement between Bata a.s. Zlin and The Bata

Overseas Shoe Company Limited which controlled in any way the activities of the Maltese Company, but prior to the war it did in fact purchase footwear from Bata a.s. Zlin for sale in Malta. The Bata Overseas Shoe Company Limited was declared an enemy business after the outbreak of the last war and thereafter was controlled by the Custodian. Since that date footwear from the Tilbury Company was imported into and sold in Malta by arrangement with the Custodian.

RECORD.

p.13, l. 15

p. 10

p. 17, l. 10

9.—The relevant local statute is the Industrial Property (Protection) Ordinance Chapter 48, the material sections of which are set out in the Annexure hereto.

10.—It is submitted that the trade mark applied for does not contain any of the essential particulars of section 83 (a), (b) and (c) of the Ordinance and ought therefore not to be registered.

As to Section 83 (a), the name BATA is the name of an individual, and is not printed or impressed in any manner which is “particular and distinctive.” The words “particular and distinctive” must signify some special representation sufficient to distinguish BATA as represented in the trade mark sought to be registered from any other normal representations of BATA by other individuals having a similar name including The Bata Overseas Shoe Company Limited. There is no such special representation in the trade mark sought to be registered and further the trade mark applied for was not in fact proved to be distinctive of the goods of The Bata National Corporation.

As to Section 83 (b), the trade mark applied for is not a written signature.

As to Section 83(c) it is submitted that this Section does not apply as the word BATA is the name of an individual and falls under Section 83 (a). If the Appellant is wrong in this submission, then it is submitted that the word BATA is not distinctive of the goods of The Bata National Corporation for reasons which appear more fully below.

11.—It was essential for the Respondent, the Applicant for Registration, to establish that the mark applied for ought to be registered and accordingly the Respondent had to prove “distinctiveness” as a prerequisite to registration. The Respondent in order to prove “distinctiveness” would have had to prove that :—

(a) prior to the war the trade mark BATA was in Malta distinctive of the goods of Bata a.s. Zlin.

(b) The Bata National Corporation was the same as Bata a.s. Zlin or was its successor in title.

(c) The Bata Overseas Shoe Company Limited and the Tilbury Company were prior to the war the agents of Bata a.s. Zlin and accordingly could not claim any independent right to use the trade mark BATA.

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Record (Exts.)
p. 7

(d) Although Bata a.s. Zlin had granted by letter dated 22nd June, 1939, to the Tilbury Company the exclusive right to use the trade mark BATA throughout the British Empire, which included Malta, yet such agreement determined on 31st December, 1949, and accordingly The Bata National Corporation were entitled at least from after 1949 to the exclusive right to the trade mark BATA in Malta.

(e) In the above circumstances The Bata National Corporation would be entitled to registration of the trade mark BATA at the date of the applications in 1946.

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Record (Exts.)
pp. 5-7

12.—As to contention (a) above, it is submitted that there is no evidence that the word BATA was before the war distinctive of the goods of Bata a.s. Zlin. The Bata Overseas Shoe Company, Limited, has had dealings with various other suppliers and not only with Bata a.s. Zlin and the word BATA in Malta would in these circumstances have indicated the goods of the Maltese Company. It must also be taken into account that by the letter of 1939 Bata a.s. Zlin agreed with the Tilbury Company not to trade thereafter in the British Empire under the name BATA for 10 years, as a result of which The Bata Overseas Shoe Company, Limited, was the only person from between June, 1939, and 31st December, 1949, entitled to use the name BATA in Malta. Bata a.s. Zlin's acquiescence in the trading by the Maltese Company under a name including BATA and its agreement not to use the name BATA in Malta was an abandonment of any goodwill it might have had in BATA as a trade mark in Malta.

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Record (Exts.)
p. 7

As to contention (b) above, there is no evidence to support this contention. Any attempt by the Respondent to support this contention would have been met by the Appellant seeking to establish that Bata a.s. Zlin is still in existence, that The Bata National Corporation had not succeeded to any assets of Bata a.s. Zlin, but, if they had, then only to a limited extent which did not include any goodwill in the trade mark BATA in Malta, and further in the alternative that such assets as it did acquire from Bata a.s. Zlin were obtained by confiscatory legislation and in any event did not have any legal effect upon any assets of Bata a.s. Zlin in Malta.

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As to contention (c), there is no evidence to support this and the correct inference from the evidence is to the contrary.

Record (Exts.)
p. 7

As to contention (d), the agreement between the Tilbury Company and Bata a.s. Zlin in June, 1939, could not and did not affect the rights and assets assigned to The Bata Overseas Shoe Company, Limited, in 1938. The only relevance of this agreement is to establish the abandonment by Bata a.s. Zlin of any rights it might have in the trade mark BATA in Malta, and it cannot in any way make The Bata Overseas Shoe Company, Limited, agents of Bata a.s. Zlin.

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Record (Exts.)
p. 14

As to contention (e), even if the Respondent succeeded in establishing contention (d), the fact that the agreement continued until 31st December,

1949, would be a bar to the acceptance of the Respondent's applications made in 1946.

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13—Further in the above circumstances The Bata Overseas Shoe Company, Limited was legally entitled to use the mark BATA upon its goods including footwear and accordingly the mark applied for should not be registered having regard to the provisions of Section 84 (1).

14.—The application by the Respondent does not comply with the terms of Section 86, as an application must be made by the person in whose name registration is sought. Alternatively evidence must be adduced to show that the person making the application was authorised to make such application. If the Respondent made the application as a person claiming under the alleged proprietor, The Bata National Corporation, then he did not comply with Section 101 for the reasons set out in the next paragraph.

15.—In the present case it was an essential prerequisite to the applications being accepted for the Respondent to prove that The Bata National Corporation was entitled as successor in title in Malta to Bata a.s. Zlin of the trade mark BATA. Accordingly by Section 101 the Respondent would have to comply with the provisions relating to the assignment of patents so far as possible and would have to produce a certified copy of the assignment of the trade mark (see Section 39 (1) (a)). No such assignment was put in evidence and accordingly the applications ought to have been refused upon this ground also.

16.—Mr. Justice Gauci dismissed the Plaintiff's claim on the grounds set out in the following extracts from his Judgment :—

(a) “ the Trade Mark BATA . . . represents the name of the
 “ Founder of the Firm ‘ Bata ’ of Zlin, which manufactures
 “ various rubber goods, including shoes, accessories and other
 “ goods. The word ‘ Bata ’ however has now acquired goodwill p. 25, l. 29
 “ value and is well known in connection with shoes manufactured p. 26, l. 1
 30 “ at Zlin ; and since it is printed and impressed in a particular
 “ and distinctive manner, such as to render it distinguishable
 “ from others, the trade mark is acceptable for registration
 “ (Section 83 (a), Chap. 48, Laws of Malta).

“ It is further established in evidence that the firm represented
 “ by the Defendant nomine has been exporting its goods to Malta
 “ under the name ‘ Bata ’ since the year 1924 ; and that it
 “ continued so to export its goods up to the outbreak of war
 “ in 1939.”

The “ firm ” which exported its goods to Malta from Czechoslovakia
 40 up to the outbreak of war in 1939 was Bata a.s. Zlin. Mr. Justice Gauci
 assumed contrary to the fact that this “ firm ” was the same as The Bata

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National Corporation. The finding that the word " BATA " had " acquired " goodwill value and is well known in connection with shoes manufactured " at Zlin," even if correct, does not in any way decide whether The Bata National Corporation has acquired any goodwill in the word BATA in Malta.

Record (Exts.)
pp. 5-7

Mr. Justice Gauci had no evidence before him upon which he could find that the representation of BATA in the trade mark applied for was in a particular or distinctive manner but it appears he came to that conclusion because he thought it was inherently distinguishable. It is submitted that he was in error in so deciding.

p. 26, ll. 4-12

(b) " Meantime, by an arrangement made by the firm at Zlin in 1932, the import and sale in Malta of ' Bata ' goods was taken over by the British Bata Shoe Company, Limited, of Tilbury ; and, in 1938, the latter firm surrendered that business to the firm represented by the Plaintiff. They, however, were but the representatives of the firm at Zlin and the trade carried on by them was trade in the goods produced by the firm represented by the Defendant nomine, as clearly shown by the document, filed at fol 26 of the Record. (Letter Bata/Zlin to Bata/Tilbury, 22nd June 1939.) "

The " firm at Zlin " was Bata a.s. Zlin who was the signatory to the letter dated 22nd June 1939 and Bata a.s. Zlin was not represented by the Defendant. Mr. Justice Gauci has again confused Bata a.s. Zlin with The Bata National Corporation.

p. 26, ll. 12-19

(c) " The firm at Tilbury, and, therefore, the Plaintiff firm, held only the trading rights in Malta of the ' Bata ' goods produced by the concern at Zlin, and they did not hold any rights in respect of the ownership of the ' Bata ' trade mark—which had not been transferred. In fact, according to the arrangements made, the Tilbury firm, and therefore the Plaintiff firm, had to give preference to the goods produced by the Defendant firm, and to make no purchases of similar goods from other firms in Czechoslovakia, . . . "

Record (Exts.)
p. 7

The " arrangements " referred to in the above extract from the Judgment are those the subject of the agreement in the said letter dated 22nd June 1939 made between Bata a.s. Zlin and the Tilbury Company which cannot in any way limit the right of The Bata Overseas Shoe Company Limited of Malta to use the word BATA. It is accordingly incorrect to state that " In fact according to the arrangements made the Tilbury firm and *therefore* the Plaintiff firm . . . " and to assume that The Bata Overseas Shoe Company Limited was in the same legal position as the Tilbury Company.

Further Mr. Justice Gauci was in error in his statement as to the effect of the said letter, because by it (a) the Tilbury Company was entitled to purchase footwear, hosiery, tyres, rubber toys, and machinery from Czechoslovakian competitors of Bata a.s. Zlin, if Bata a.s. Zlin were unable

to deliver sufficient quantities at a competitive price and (b) Bata a.s. Zlin agreed not to transact any business in such goods under the name BATA "in any combination" in Great Britain and the British Empire excluding the Far East and Canada.

Mr. Justice Gauci failed to take into account that BATA was not a registered trade mark and that accordingly any exclusive right to its use would persist only so long as that word was recognised by the public in Malta as being the exclusive trade mark of Bata a.s. Zlin or their successors in title and would determine as soon as any other person became entitled
10 to use BATA in relation to their own goods. It is submitted that at all material times The Bata Overseas Shoe Company Limited was entitled to use the word BATA in relation to its own goods in Malta, or alternatively in relation to the Tilbury Company's goods. If Mr. Justice Gauci had taken the above into account he should have given judgment in favour of the Plaintiff.

17.—The majority judgment of the Court of Appeal was founded upon p. 37 the same misconception that The Bata Overseas Shoe Company Limited of Malta was bound contractually to Bata a.s. Zlin and that its rights to use the mark "Bata" were limited by the letter of 22nd June 1939, as
20 appears from the following extract:—

"The Agreement in question" (being that of 22nd June 1939)
"cannot be construed to mean that the Defendant firm had
"abandoned the use of the 'Bata' trade-mark in connection
"with its products on the local market, or that that firm had p. 41, ll. 6-20
"made over and conveyed that trade-mark to the firm at Tilbury
"or to any other firm. All that happened was that the Bata
"Company at Zlin granted the exclusive rights of its sole agency
"to another firm. In so granting its sole agency, and granting
"it for a determinate period, the Bata Company at Zlin, far from
30 "forfeiting the right to use the 'Bata' trade-mark, actually
"retained its right to the use thereof through its sole representative.
"Consequently, as rightly held by the Court below, whilst the
"Defendant firm held the lawful use in Malta of the Bata trade-
"mark since the year 1924, without having at any time
"surrendered it to any other firm, the Plaintiff firm, and the
"firm at Tilbury, had been using that trade-mark solely because
"they were the representatives in Malta of the Defendant firm."

It is submitted that this extract from the majority Judgment of the Court of Appeal falls into the same errors as were made by Mr. Justice
40 Gauci and are set out in paragraph 16 above.

18.—The majority Judgment of the Court of Appeal deals with the Respondent's submission "that the Respondent firm cannot be regarded
"as the assignee and successor of any such rights as may have been held

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“ here in Malta by the original ‘ Bata ’ Company of Zlin ” in the following passage :—

p. 41, ll. 22-32

“ As regards the other grievance complained of by the Appellant nomine, no evidence has been produced to show that the Bata Company at Zlin has been nationalised by the Czechoslovak Government, and that, for political reasons, the nationalisation of the Company was of a confiscatory nature. The Appellant made those allegations in connection with the contention that, in the circumstances, no recognition can be extended to the Defendant firm. However, in default of any evidence in substantiation, no necessity arises for a pronouncement thereon. For that question to arise at all, it is necessary in the first place that evidence be produced in substantiation of the allegations made.” 10

It is submitted that it was in fact necessary for the Respondent to adduce evidence to show that The Bata National Corporation was the assignee of and successor in title to any rights in the trade mark BATA in Malta owned by Bata a.s. Zlin, and that until such was proved any evidence by the Appellant to prove that such assignment should not be recognised as being of a confiscatory nature would have been premature. 20

19.—The Chief Justice gave as his main reason for dissenting from the majority judgment of the Court of Appeal that it was the duty of

p. 48, ll. 32-36

“ the Applicant for the registration of a Trade Mark (to) produce documentary evidence as to the existence of the firm, the right of the firm to carry on trade and the right of the Applicant to represent the firm in Malta. No such evidence was submitted by the Defendant.”

It is submitted that this is right and that accordingly the application for registration failed in limine. The Chief Justice did not consider, as such was not in his view necessary, whether it would have been necessary, if the Respondent had adduced such evidence, to prove that The Bata National Corporation was the assignee of Bata a.s. Zlin but it is submitted that he would have so decided. 30

20.—In paragraph 7 of his dissenting Judgment the Chief Justice states :—

p. 48, ll. 37-39

“ No rights were conferred or restored to the Defendant firm when the arrangements made in 1932 and 1938 terminated in 1939—for such rights had elapsed.”

It is submitted that the Chief Justice was applying the right principle in deciding that once an owner of a common law trade mark agrees to another person using the trade mark, his rights in the trade mark will not be restored to the original owner when the agreement determines, for the rights have lapsed altogether. 40

21.—The Appellant humbly submits that the majority Judgment of the Court of Appeal (Malta) and of Mr. Justice Gauci was wrong and ought to be reversed, and that Judgment ought to have been entered for the Appellant for the following among other

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REASONS

1. BECAUSE it was not proved that The Bata National Corporation had any interest in the trade mark BATA.
2. BECAUSE the word BATA is not a registrable mark under Section 83 of the Industrial Property (Protection) Ordinance (Chapter 48 Part III.
- 10 3. BECAUSE the word BATA is not distinctive or was not proved to be distinctive of any goods of The Bata National Corporation and in particular of the goods for which registration was sought.
4. BECAUSE The Bata Overseas Shoe Company Limited was at the date of the applications the subject of these proceedings already legally using the word BATA, and registration of such word by the Applicant as a trade mark would be contrary to Section 84 (1) of the said Ordinance.
- 20 5. BECAUSE any rights that Bata a.s. Zlin might have had to the exclusive use of the trade mark BATA in Malta have lapsed or otherwise determined.
6. BECAUSE The Bata National Corporation was not proved to be the assignee or successor in title of the goodwill of the business of Bata a.s. Zlin in Malta and further did not comply with Section 101 of the said Ordinance.
7. BECAUSE the Courts below confused The Bata National Corporation with Bata a.s. Zlin.
8. BECAUSE the Courts below wrongly placed the onus of proof on the Appellant.
- 30 9. BECAUSE the Respondent did not prove that he was authorised or entitled to make the said applications.
10. BECAUSE the Judgments of Mr. Justice Gauci and of the majority of the Court of Appeal were wrong.
11. BECAUSE the dissenting Judgment in the Court of Appeal of the Chief Justice Sir George Borg was right.

PHINEAS QUASS.
GUY ALDOUS.

ANNEXURE.
INDUSTRIAL PROPERTY (PROTECTION) ORDINANCE.

PART III

TRADE MARKS.

83.—Marks intended to distinguish the produce of any industry or articles of trade are considered to be trade marks, provided they contain at least one of the following particulars :—

- (a) a name of an individual or a firm name of a commercial partnership, printed, impressed, or woven in some particular and distinctive manner ; or 10
- (b) a written signature or copy of a written signature of the individual applying for registration thereof as a trade mark ; or
- (c) a distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use.

84.—(1) The marks and words referred to in the last preceding section must be different from those already legally used by other persons.

(2) There may be added, in a trade mark, to any one or more of the particulars stated in the last preceding section any words or figures, or combination of words and figures. 20

85.—Any person may have the exclusive use of a trade mark provided he complies with the provisions of the following sections of this Part.

86.—Any person who is desirous of securing for himself the exclusive use of any trade mark, must present to the Comptroller an application in the form annexed hereto, and accompanied by :—

- (a) two representations of the trade mark ;
- (b) a declaration, in duplicate, stating the kind of articles to which it is intended to affix the mark, and whether the mark is to be affixed to articles produced by the declarant, or to goods of his trade ; 30
- (c) a description, in duplicate, of the mark ;
- (d) a receipt or a declaration from the Treasurer proving the payment of the fee prescribed in Schedule B annexed hereto, for registration of trade marks.

* * * * *

90.—Every application for registration of a trade mark shall, as soon as may be, be advertised by the Comptroller in the Government Gazette and in other two periodical newspapers.

91.—(1) Any person may, within two months from the publication of the advertisement referred to in the last preceding section, give notice, in duplicate, at the office of the Comptroller of opposition to the application for registration. Such notice shall contain a statement of the grounds upon which he objects to the registration, and one copy of such notice shall be sent to the applicant with an intimation that he may send a counter-
10 statement in duplicate of his grounds against the opposition.

(2) If the applicant fails to send such counterstatement, his application shall be considered as abandoned; but, if he sends such counterstatement, it shall be communicated to the person who gave notice of opposition.

(3) The opposition shall be deemed to be withdrawn if the opponent fails to bring an action, by writ of summons, before His Majesty's Commercial Court, demanding that the registration be not granted, and fails to give, together with the writ of summons, sufficient security for the costs of the suit.

* * * * *

20 101.—Where a person claiming under the proprietor of a trade mark, or being his successor in business or trade, intends to retain the use of such mark, he must comply with the provisions contained in Title IV of Part I relating to the assignment of patents in so far as they may be applicable.

102.—The assignment of a registered trade mark shall not be valid unless such assignment includes also the right to trade in the goods or in the class of goods in respect of which the mark has been registered.

PART I—TITLE IV.

39.—(1) To effect such registration the person in whose favour the assignment has been made shall, together with the application, present or
30 cause to be presented—

- (a) a certified copy of the act of assignment ;
- (b) a receipt showing that the fee payable under this Ordinance for the registration of an assignment of a patent has been paid in the Treasury ;
- (c) if there be an attorney, the power of attorney in any of the forms as provided in paragraph (d) of Section 10.

(2) As soon as the registration is effected, the certified copy of the act of assignment shall be returned to the applicant.

40.—The publication of an assignment of a patent in the Government Gazette shall consist in the insertion therein of an abstract of the act of assignment, signed by the Director of the Public Registry, containing :—

- (a) the name, surname, and place of residence of both the assignor and the assignee ;
- (b) the rights so assigned ;
- (c) the date and nature of the act by which the assignment was made, and, if made by a notarial deed, the name of the notary 10 who received it.

The Form referred to in Section 86 above is Scheduled to the Ordinance as Form D and is in the following form :—

FORM OF APPLICATION FOR REGISTRATION OF TRADE MARK.

“ You are hereby requested to register the accompanying trade mark (.....) in the name of (a)....., who claims to be the proprietor thereof.

Registration Fees enclosed £ s.

To the Comptroller of Industrial Property.

.....(Signed) 20

(a) Here insert legibly the name, address, and business of the individual or firm.”

In the Privy Council.

No. 2 of 1952.

ON APPEAL FROM THE COURT OF APPEAL,
MALTA.

BETWEEN

EDGAR STAINES

nomine (*Plaintiff*) APPELLANT

AND

VICTOR LA ROSA

nomine (*Defendant*) RESPONDENT.

CASE FOR THE APPELLANT

ASHURST MORRIS CRISP & CO.,
17, Throgmorton Avenue, E.C.2,
Solicitors for the Appellant.