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validity of those propositions. They involve reading out of the statute a legal right conferred upon the prior applicant, and also involve the imposing of correlative duties upon the registrar. They are not supported by ss. 16, 25, 33 or 47, or any other provisions of the Act or regulations thereunder, and are wrong in law. The judge treated the prior application in the nature of a caveat from which sprang certain duties. Even if the Act does not contain any solution of the problem other than that adopted by the judge of first instance, it is not for this Court to legislate but to interpret. Adapting to the words of s. 25 his Honour's proposition that in the event specified the registrar is under a legal duty to refuse to register a later application before the disposal of a prior application results, in effect, in the insertion of a new sub-section in that section. The judgment cannot be supported except upon reading into s. 25 additional words. The appellant's rights are determined by what the Act and the regulations provide. There cannot be any legal right or duty other than is conferred or imposed by express words in the Act itself: *Craies on Statute Law*, 3rd ed. (1923), pp. 81, 83. It is not sufficient that a right or duty sought to be imposed should satisfy the test of reasonableness; it must be clearly necessary to give effect to other provisions of the Act. A mark is not wrongly registered, nor does it wrongly remain on the register within the meaning of s. 71 (1) (b) of the Act unless it, or the manner of its use, can be shown to offend against the provisions of (i) the Act, other than s. 71, or (ii) some regulation validly made under the Act. That being so the appellant is entitled to succeed as its mark has not offended or infringed the Act or any regulation made thereunder (*In the Matter of Applications by Pan Press Publications, Ltd. for Rectification of the Register* (1)). The observations by the court in that case (2) apply *a fortiori* to the Act now under consideration as the only authority given to the court in determining whether there has been a wrongful entry; that must be found in the provisions of the Act itself there not being any other Commonwealth law. *James A. Jobling & Co. Ltd. v. James McEwan & Co. Pty. Ltd.*: *In re James A. Jobling & Co. Ltd's Trade Marks* (3) was brought within the provisions on the ground that the subsequent user contravened s. 18 of the Act. Section 25 does not refer to the date of application but refers to the act of registration—after acceptance the relevant time is when the act of registration takes place. The court is bound to construe the Act without being influenced by any ideas as to what might be fair or just. The general rule is not to import

(1) (1948) 65 R.P.C. 193.

(2) (1948) 65 R.P.C., at pp. 197, 201.

(3) (1933) V.L.R. 168.

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into a statute words which are not to be found in it (*Fredericks v. Payne* (1); *King v. Burrell* (2); *Re an Arbitration between Perry and London Passenger Transport Board* (3); *Craies on Statute Law*, 4th ed. (1936), pp. 71, 72, 104, 110). Statutes are, generally, construed in the same manner as other documents: *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 479, par. 594. The principles followed as to when implications will be made in written documents are shown in *Heimann v. Commonwealth of Australia* (4); *Scanlon's New Neon Ltd. v. Tooheys Ltd.* (5) and *Luxor (Eastbourne), Ltd. v. Cooper* (6). Section 47, upon which the judge of first instance mainly rested his conclusions, does not in any way deal with any question of competing priorities, nor with conferring rights between competing applicants, nor with imposing any duties upon the registrar except as specifically indicated. In the absence of any regulation providing a different date, the date of the application is the date from which the registration dates. It was so dated back to provide protection for the proprietor of the mark in an action for infringement in respect of his application unless otherwise provided. Section 47 applies whether or not there has been opposition and whether or not it comes before the registrar only or before the law officer or a court, so if the judge's implication is to be made, it must be made in all those circumstances. The fact that opposition to the matter can take place in any one of the three ways provided by Div. 3 and the matter can be litigated certainly before the registrar before registration, is itself a very powerful argument against reading into s. 47 an obligation upon the registrar to deal with the first application before he proceeds to deal with the second. The words "otherwise prescribed by the regulations" in s. 47 provide such elasticity as to prevent reading into that section those rights and obligations. The section does not deal at all with the question of competing priorities. If it stood alone the section does not support the judge's view, but from other sections, particularly ss. 25, 27, 28, 31, 33, 36 and 105, and reg. 42 made under s. 94, it is clear that that view is wrong. Section 25 is limited to comparison with marks already on the register. The words "shall not register" and "already on the register" in s. 25 refer to the time when the actual registration takes place (*In the Matter of a Trade Mark "Palmolive"* (7)). Sections 27 and 28 of themselves contemplate concurrent or co-pending applications and they are the only sections

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(1) (1862) 1 H. & C. 584, at p. 589
[158 E.R. 1016, at p. 1018].

(2) (1840) 12 Ad. & E. 460, at p. 468
[113 E.R. 886, at p. 889].

(3) (1939) 2 All E.R. 421, at p. 423.

(4) (1938) 38 S.R. (N.S.W.) 691, at
pp. 695, 696.

(5) (1943) 67 C.L.R. 169, at p. 195.

(6) (1941) A.C. 108, at p. 137.

(7) (1932) 49 R.P.C. 269, at p. 276.

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that deal with it. Those sections apply irrespective of point of time and negative the inference which has been drawn from s. 47 that the application which is first in point of time must be dealt with first. If the judge's conclusion be correct then there would not be any need for those sections because each application would have to be dealt with in the order in which it was lodged. Whether or not a mark is registered depends solely upon the terms of the Act. The legislature intended s. 27 to apply to certain types of applications. That section applies although neither claimant may be the proprietor (*In the Matter of Hudson's Application for a Trade Mark* (1)).

[RICH J. referred to *In the Matter of De Maid's Application to Register a Trade Mark* and *In the Matter of Rothschild's Application to Register a Trade Mark* (2).]

So, having deliberately applied itself to the matter of competing claims, s. 27 is what the legislature intended to provide, or it is a *casus omissus* for which the court has not any remedy. Section 27 applies even after acceptance of an application under s. 33 (*Innes v. Lincoln Motor Co.* (3)). A consideration of s. 105 shows that to imply necessarily from s. 47 the structure of rights and obligations suggested by the judge, would be wholly unreasonable because it would mean that a person who had applied in certain circumstances would never know when his mark was beyond challenge (*R. (on the Prosecution of Waters) v. Registrar of Trade Marks* (4)). There is nothing inconsistent in *James A. Jobling & Co. Ltd. v. James McEwan Pty. Ltd.* (5) and the argument now put to the Court. In that case: (i) the extent of the jurisdiction was not argued although considered by the judge therein; (ii) deception upon the public was found; (iii) the registration of the mark sought to be expunged did interfere with the right of a person under s. 53A; and (iv) it was no longer in that case a registrable trade mark. The judgment in that case did not purport to find authority for the striking-off the register, a test to be found outside the Act itself; and if it did, it should not be followed. The judgment appealed from is not supported by any authority. The Court has discretion under s. 71 as to whether it will or will not rectify the register (*Paine & Co. v. Daniell & Sons' Breweries, Ltd.* (6); *In the Matter of the Magneta Time Co. Ltd.'s Trade Mark* (7); *Scott Paper Co. v. Drayton Paper Works Ltd.* (8); *In the Matter of Roskill's Trade Mark* (9)). The

(1) (1907) 24 R.P.C. 582.

(2) (1914) 31 R.P.C. 305.

(3) (1921) 29 C.L.R. 277.

(4) (1908) 5 C.L.R. 605.

(5) (1933) V.L.R. 168.

(6) (1893) 10 R.P.C. 217, at p. 232.

(7) (1927) 44 R.P.C. 169.

(8) (1927) 44 R.P.C. 529.

(9) (1915) 32 R.P.C. 577.

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rule in each particular case is as to whether there are circumstances which justify the court in exercising its discretion one way or the other. In all these matters the overriding consideration always is the public interest. This is not a case of a person innocent of trade-mark law. The provision of trade-mark opposition would be reduced to very much a shadow of what it was intended to be if a company such as the respondent company which has its agents, which has in other parts of the world, as the evidence shows, had conflict between itself and the appellant company as to these respective marks, does not take opposition proceedings open to it. It had its agents here. It might be reasonably assumed that its agents saw that the application had been made by the appellant and it made no opposition whatever. In the meantime the appellant's mark, through no fault on the part of the appellant, was entered on the register. The appellant complied with the Act, and with ss. 33 and 16, and otherwise satisfied the provisions of the Act. Having the right to oppose, the respondent made no attempt to do so. If the appellant's mark be expunged it would mean that by the registration of the respondent's mark the appellant is subject automatically to an action for infringement which would date right back to the date of the application. The Court should not assist the respondent in such circumstances.

[Dixon J. referred to *Halsbury's Laws of England*, 2nd ed., vol. 32, p. 569.]

There was nothing wrong with the registration of the appellant's mark, and even though there is nothing to indicate to whom the delay was attributable the onus is on the respondent to show that expunging the appellant's mark is the right course to pursue. The word "wrongly" as used in s. 71 is inapt. It should be construed as meaning in breach of some prohibition, express or implied, in the Act, or, alternatively, some prohibition to be found *dehors* the Act.

Hardie K.C. (with him *Thomas*), for the respondent. The respondent is a "person aggrieved" within the meaning of s. 71. The entry of the appellant's mark in the register was wrongly made because of the conjoint operation of ss. 25 and 47 of the Act. Alternatively, the entry was wrongly made having regard to the conjoint operation of ss. 114 and 47. The delay in dealing with the respondent's application was, as the evidence shows, due to departmental routine and the pursuing of certain inquiries by officers of the registrar, and was not in any way attributable to the respondent. The registrar compared both marks and came to the erroneous

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conclusion that they were not deceptively similar. Because of that erroneous conclusion he permitted the appellant's mark to be registered and having obtained registration of that mark the appellant opposed the registration of the respondent's mark on the ground that the marks are deceptively similar. The appellant seeks to derive a benefit from the mistake made by the registrar. The conclusion arrived at by the judge of first instance can be justified by construing the phrase "already on the register" in ss. 25, 29 (1) and 33 (2) as meaning actually in fact on the register physically at that point of time, or notionally on the register at that date, having regard to subsequent events. The phrase should be construed as meaning "which is or is not already on the register." Section 25 is directed to the object that the same mark or deceptively similar marks belonging to different proprietors shall not be on the register at the same time, but it is not a total prohibition. The appellant's opposition is based solely on facts and matters which occurred after the date of the respondent's application, namely, user after the date of application and the registration of its mark. Section 25 cannot be used to prevent the entry on the register of the respondent's mark, even though it is actually registered after the appellant's mark. It was an application prior in point of date and events which took place after the date of application cannot be taken into account as a reason for refusing to register. Sections 27 and 28 disclose an intention that there should never be on the register two identical or similar marks belonging to different people unless there are safeguards imposed to ensure that their areas are in some way defined. This reinforces the construction sought by the respondent to be placed on s. 25. It is not contended, nor did the judge hold, that time was decisive in all cases. Sections 27 and 28, when properly understood do not in any way cut down the principle that there is an obligation on the registrar to refrain from granting a later application until he has disposed of an earlier application. If it be granted the respondent's mark is deemed to have been on the register as from the date of the application, when considering the appellant's application the registrar must treat the respondent's mark as already on the register, as he did, or, in the alternative, he must refrain from accepting the appellant's application until he has either accepted or refused the respondent's application. Under s. 25 the registrar would have to regard marks already in fact on the register but otherwise he should deal with each application in relation to marks already on the register but not with any reference to other but later pending applications. The existence of the appellant's similar mark is not a ground for

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refusing registration of the respondent's mark. In deciding whether a mark should be entered on the register the crucial date to consider is the date of the application that being the date as from which, according to the Act, the mark is deemed to be on the register (*Wilson's and Mathieson's Ltd. v. Meynell & Sons Ltd.* (1); *The Shredded Wheat Co. Ltd. v. Kellogg Co. of Great Britain Ltd.* (2); *In the Matter of Peddie's Applications* (3); *In the Matter of an Application by Ladislav Jellinek for the Registration of a Trade Mark* (4)). In considering the phrase "already on the register" the Court will have regard to the principles that have been applied in determining the validity or otherwise of a prior trade mark. The existence of the appellant's mark as a registered mark was a fact which did not exist at the date of the respondent's application. The observations in *In the Matter of a Trade Mark "Palmolive"* (5), are *obiter dicta* and are contrary to the principles established by the cases referred to above that the crucial date is the date on which the application is lodged. The reasoning for the decision in that case was wrong. Section 25 does deal with the act of the registrar in registering but s. 47 provides that the date of the lodging of the application shall be deemed to be the date of registration and therefore the registrar is presumed to be acting as at the date of registration. So, if he had examined the facts as they existed at that time he would never have seen the appellant's application. The order appealed from should be upheld on that ground amongst others. The appellant's application should have been refused because of the provisions of s. 114. In applying that section the registrar is bound to have regard to the operation of s. 47 on then pending applications for the same or a similar mark lodged before the application then being considered. It is implied in the Act that the registrar must deal with applications by refusing or granting them in the order in which they are lodged. The respondent by reason of its invention or selection of the word "Dithane," and its application to register that word as proprietor has rights as from the date of the application similar to those which would arise had the respondent used the name as from that date. That being so, the registrar had an obligation to recognize those rights and had an obligation to refrain from accepting or granting an application made after the respondent's application, until the respondent's application had been disposed of (*In re Hudson's*

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(1) (1929) 46 R.P.C. 80, at p. 91.

(2) (1940) 57 R.P.C. 137, at pp. 139,
148, 150, 155.

(3) (1943) 61 R.P.C. 31, at p. 32.

(4) (1946) 63 R.P.C. 59, at pp. 61,
62, 68.

(5) (1931) 49 R.P.C. 269, at p. 276.