TRADE-MARK: Articles need not be classified in application for registration.

8-23

August 31, 1934.

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Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

This is to acknowledge your letter as follows:

> "Referring to conversation with you and Mr. HornBostel today regarding trade-mark applications which we received from the firm of Ryland, Stinson, Mag & Thomson of Kansas City for the Katz Drug Company, will you please render us an opinion on the question brought up by Judge Seddon regarding statutory classifications of merchandise as prescribed in federal trade-mark law, which we have been using as a basis of trade-mark classifications in Missouri."

The answer to your question depends upon the interpretation to be given Section 14339, R. S. 1929, which reads as follows:

> "If any mechanic, manufacturer, association or union of workingmen, or other persons shall wish to adopt any particular name, term, design or device as his or their trade-mark to designate, make known or distinguish any article or goods, wares, wares or merchandise by him or them manufactured or prepared, or any union

> of workingmen desire to designate or make known the place in which union labor is employed, he or they may write out a description of such name, term, design or device, describing the same accurately, and sign and acknowledge the same before some officer competent to take acknowledgment of deeds, and file same, together with a facsimile of the same, term, design or device for registration, in the office of the secretary of state; said secretary shall deliver to said mechanic, manufacturer, association or union of workingmen, or other persons so filing the same, a duly attested certificate of the filing of the same, for which he shall receive a fee of one dollar; such certificate shall, in all suits and prosecutions under this artide, be sufficient proof of the adoption of such label, trade-mark or form of advertisement, and of the right of such mechanic, manufacturer, association or union of workingmen or (other) persons to adopt the same. No label, trade-mark or form of advertisement shall be registered that in any way resembles or would probably be mistaken for a label or trade-mark already registered; and no trade-mark duly registered in the office of the commissioner of patents of the United States shall be registered under this section by (any) person other than the owner thereof."

I.

The facts before us show that the Katz Drug Company, a corporation, presented to your office four separate applications for registration under the above section. Each of the applications are similar as to the articles or classes of merchandise sought to be registered, the design or trade-mark being the only difference between the four applications. Each of the applications recite that each of the designs is "to be applied to articles or classes of merchandise manufactured, prepared and sold", namely "chemicals,

medicines, pharmaceutical preparations and compounds, drugs, druggists' sundries and supplies, paper, stationery, paints, painters' materials, food products, ingredients of food, oils, greases, cutlery and machinery, tools, hardware, sporting goods, wearing apparel, toys, fountain drinks and products, tobacco, tobacco products, beverages, liquors, rubber goods, household and electrical appliances, cosmetics, and all other goods, wares or merchandise manufactured, prepared or sold in connection with a retail business."

One of the questions presented herewith is "whether an application should be made for a trade-mark on each article or whether one application is sufficient on all articles as listed by Katz Drug Company." In other words, should the applicant classify the articles mentioned in its application. The answer to this question depends upon the interpretation to be given to the word "or" found in Section 14329, supra, between the words "any article" and "goods, wares," etc. The statute reads in part as follows:

> "***** make known or distinguish any article or goods, wares, or merchandise by him or them manufactured or prepared, *****."

Thus, if we interpret the words"or" as separating "article" from "goods, wares or merchandise", then the application must be refused. However, if we interpret the word "or" as meaning a continuation of articles, goods, wares or merchandise, then the application must be accepted. In other words, if we construe "or" to mean "and" then the applications as far as the classifying of the articles, goods, wares or merchandise in separate application is not necessary. We hold that the application cannot be limited to one article or goods, wares or merchandise but that such may contain as many articles, goods, wares or merchandise that the applicant seeks to have registered.

Corpus Juris, Volume 46, page 1134, has this to say about the word "or":

> "The monosylable 'or' is a disjunctive particle that marks an alternative generally corresponding to 'either' as 'either this or that.' The term is difficult to define. It is not a technical one and it has no technical meaning. In law it is said it re-

> ceives the same meaning as it carries in common parlance. ******* While in its strict signification the term expresses a disjunctive meaning and marks an alternative, it may be used or construed in a conjunctive sense and it may also be used in an explanatory sense. *****."

And further at page 1125,

> "While in its primary signification the term 'or' marks an alternative, and in its ordinary disjunctive sense it imports 'one or the other,' but not 'both,' it is said that it is often used in the sense of 'both' in common parlance and written instruments."

And further at page 1126,

> "***** However, 'or' being a disjunctive conjunction, should ordinarily be given its disjunctive meaning; it should be construed as 'and' only when necessary to give effect to the intention, as ggathered from the context and the surrounding circumstances. The substitution should not be made where such construction would be inconsistent with the intent as shown by the whole context and the circumstances, nor unless its literal meaning renders the sense dubious."

And further at page 1127,

> "When used to connect a series of words in the permission or the prohibition of a given act, 'or' may be construed to mean 'and' when necessary to make the statute express the true legislative intent, but only when so necessary; and

similarly 'or'may be construed as meaning 'and' in constitutional provisions and ordinances."

Dodd v. Independence Stove & Furnace Co., 51 S. W. (2d) 114.

If the Legislature intended to have applicants classify articles sought to be registered, it would have provided for such, and, absent action on the part of the Legislature, your department may not promulgate something not found in the statutes. The interpretation heretofore given to the word "or" bears out, in our opinion, that the Legislature never intended an applicant to classify the articles, goods, wares or merchandise manufactured or prepared when registration was sought for trade-mark.

However, in this connection we might add that your Department would have a right to require proof if it so desired that the articles, goods, wares or merchandise mentioned in the application were actually manufactured or prepared by the applicant.

In this case, an affidavit is made as to the facts contained in the application which would be about all the proof necessary as far as your department is concerned that the applicant actually manufactured or prepared the articles, goods,wares or merchandise sought to be trade-marked.

II.

Your office, however, should refuse to give your attested certificate for the reason that said applications recite more than is prescribed by the statute for registration. The statute specifically pertains to articles, goods, wares or merchandise manufactured or prepared. The application says:

" Goods ***** by it manufactured, prepared or sold."

The word "sold" is not used in the statute. We appreciate that this is no fault of the applicant for the reason that it followed your printed form which had the word "sold" therein. The word "sold" found in your form should be deleted therefrom.

In conclusion, it is our opinion that if the word "sold" is deleted from the four applications presented then your certificate should issue. We are returning herewith your files that accompanied your letter.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney-General.

OWN/afj
Encls.

Approved:

ROY McKITTRICK
Attorney-General.