

BETWEEN:

ALUMINUM GOODS LIMITEDPETITIONER;

AND

THE REGISTRAR OF TRADE MARKS } RESPONDENT.

1953
 Dec. 21
 1954
 Feb. 1

Trade Marks—The Unfair Competition Act, 1932, 22-23 Geo. V, c. 38, ss. 2(m), 26(1)(c), 29—Application to register a trade mark under s. 29 of the Act—“Wear-Ever” used in connection with cooking utensils—Whether purely or merely laudatory—Whether descriptive—Distinction to be drawn between descriptive words and words purely laudatory—Registration of trade mark “Wear-Ever” not a cause of substantial difficulty or confusion in view of right of user by other traders—Judicial decisions not to rule out words from s. 29 of the Act if onus to establish distinctiveness in fact satisfied—Application allowed.

Petitioner’s application is one for the registration in Canada under the provisions of s. 29 of the Unfair Competition Act, 1932, of the mark “Wear-Ever” used in connection with cooking utensils. It was opposed by the Registrar of Trade Marks on the ground that the word “Wear-Ever” is not a word which is “adapted to distinguish” the wares of one person from those of another. On the evidence the Court found that the trade mark “Wear-Ever” had become distinctive of its wares and that the petitioner had satisfied the onus cast upon it by s. 29.

Held: That “Wear-Ever” is, *prima facie*, descriptive of the character or quality of the wares with which it is used and therefore unregistrable under s. 26(1)(c) of the Unfair Competition Act, 1932. There is nothing in the opinions of the majority of the Supreme Court of Canada in the *Super-Weave* case, *Registrar of Trade Marks v. G. A. Hardie and Co. Ltd.* [1949] S.C.R. 483, which would indicate that descriptive words as such can never qualify for the declaration provided in s. 29 of the Unfair Competition Act, 1932. If it had been the intention of Parliament to exclude such words from the provisions of the section it would have said so in clear terms.

2. That if descriptive words are not to be barred as a class, then a distinction must be drawn between such words and other words which are purely laudatory. *In the matter of an Application by J. and P. Coats Ltd. for Registration of a Trade Mark (the Sheen case)* (1936) 53 R.P.C. 355 referred to and followed.
3. That in the instant case the registration of the trade mark “Wear-Ever” would cause no substantial difficulty or confusion in view of the right of user by other traders, not only because of the nature of the word itself but also because, on the evidence, the exclusive and long user thereof by petitioner and its predecessors has limited the possibility of other traders safely or honestly using the word.
4. That taking into consideration the opening words of s. 29 of the Unfair Competition Act, 1932—“Notwithstanding that a trade mark is not registrable under any other provisions of this Act it may be registered . . .”—judicial decisions should not rule out a great body of words from the section if, in fact, the petitioner has satisfied the onus

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cast upon him to establish distinctiveness in fact. In so far as descriptive words are concerned, the exclusions should be limited to those words which are purely laudatory and commonly known as such.

5. That "Wear-Ever" is not within that class of words which by their very nature are incapable of qualifying for a declaration under s. 29 of the Unfair Competition Act, 1932. It is not purely or merely laudatory but descriptive.

APPLICATION for registration of a trade mark under provisions of s. 29 of the Unfair Competition Act, 1932.

The application was heard before the Honourable Mr. Justice Cameron at Ottawa.

Dr. Harold G. Fox, Q.C. and *Christopher Robinson, Q.C.* for petitioner.

W. P. J. O'Meara, Q.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (February 1, 1954) delivered the following judgment:

This is a petition by Aluminum Goods Limited for a declaration:

THAT this Honourable Court may be pleased to declare that it has been proved to its satisfaction that the word "WEAR-EVER" has been so used by your petitioner and its predecessor in business as to have become generally recognized by dealers in and users of cooking utensils as indicating that your petitioner assumes responsibility for the character and quality of cooking utensils in association with which the said word is used, and that, having regard to the evidence adduced, your petitioner is entitled to registration thereof, and that such registration should extend to the whole of the Dominion of Canada.

The application is made under s. 29 of The Unfair Competition Act, 1932, which, in part, is as follows:

29. (1) Notwithstanding that a trade mark is not registrable under any other provision of this Act it may be registered if, in any action or proceeding in the Exchequer Court of Canada, the Court by its judgment declares that it has been proved to its satisfaction that the mark has been so used by any person as to have become generally recognized by dealers in and/or users of the class of wares in association with which it has been used, as indicating that such person assumes responsibility for their character or quality, for the conditions under which or the class of person by whom they have been produced or for their place of origin.

(2) Any such declaration shall define the class of wares with respect to which proof has been adduced as aforesaid and shall specify whether, having regard to the evidence adduced, the registration should extend to the whole of Canada or should be limited to a defined territorial area in Canada.

The petitioner is a body corporate having its head office at Toronto. The evidence establishes that the petitioner and its predecessor in title have for approximately fifty years sold throughout Canada cooking utensils marked with the trade mark "Wear-Ever". The value of such sales have been very substantial, the value in 1951 totalling over three million dollars. The goods are sold in retail and departmental stores and by house-to-house canvassers employed directly by the petitioner. Goods bearing the trade mark have been widely advertised in Canada, the costs of such advertising in 1951 being in excess of \$128,000.

Cooking utensils made of aluminum and bearing the trade mark "Wear-Ever" were first manufactured and sold by the Aluminum Cooking Utensil Company of New Kensington, Pennsylvania, in the year 1903, and that company sold such goods in Canada continuously from 1905 until 1910. In 1910 it sold and assigned the goodwill of its business in Canada, and the trade mark "Wear-Ever" used in connection therewith, to Northern Aluminum Company, Ltd., having its head office at Toronto. The latter company in 1925 changed its name to Aluminum Company of Canada, Ltd. and in 1931 assigned to the petitioner all the goodwill of its business in Canada, and the trade mark "Wear-Ever" used in connection therewith. From 1904 to 1951, the Aluminum Cooking Utensil Company of New Kensington (which I assume to be the parent company) advertised the said wares in association with the trade mark "Wear-Ever" in magazines and periodicals published in the United States, many of which have a wide circulation in Canada. The annual cost of such advertising at times has been in excess of \$450,000 and in 1950 exceeded \$275,000.

In my view, it is not necessary to consider in great detail the evidence led on behalf of the petitioner to establish that *in fact* the trade mark "Wear-Ever" has become distinctive of its wares. I have already referred to the fact that the petitioner and its predecessors in title have used the trade mark continuously in Canada for almost fifty years, that the sales of cooking utensils bearing that trade mark have been very extensive and that very substantial amounts have been expended in advertising such goods in Canada and in American publications having a wide circulation in Canada.

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1954 The petitioner sells its goods to wholesalers, to retailers and
 ALUMINUM to householders direct by house-to-house distributors,
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 v. such outlets were as follows:
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		1939	1950
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	Retail outlets	153	661
	House-to-house distributors	147	561

Then there is the evidence of N. E. Russell, President of the petitioner company, who has been associated with it and its predecessors continuously since 1925, that "Wear-Ever" has been used by the company and its predecessors for the purpose of indicating to dealers in and users of such cooking utensils that cooking utensils bearing the said word have been manufactured and sold by the petitioner. He further states that throughout the entire period of his employment with the company, its use of the trade mark in association with cooking utensils has been exclusive and undisputed and that during that period no other manufacturer has objected to the company's exclusive right to the trade mark or attempted to place upon the market any utensils bearing the trade mark "Wear-Ever" or a similar trade mark. Further, he states that he is advised and believes that the same facts apply in respect to the petitioner's predecessors in business.

The most important part of the evidence relates to the report (Ex.1) of a survey conducted on behalf of the petitioner in 1951 by the firm of Elliott-Haynes Limited to ascertain the consumer and dealer knowledge of the word "Wear-Ever". That organization was completely independent of the petitioner and conducted the survey throughout Canada by its own employees who, in personal interviews, submitted a series of non-leading questions to 3007 housewives and 505 dealers in cooking utensils in 64 cities, towns and rural communities. The questions submitted to householders differed somewhat from those submitted to dealers, but in each case I am satisfied that no objection could be taken to the form of the questions or to the manner in which the survey was conducted. I am satisfied that the report indicates a fair sampling of both consumer and dealer knowledge throughout Canada.

I do not propose to state in detail the contents of the report and the accompanying documents. It is sufficient to state that as a result of the questioning, 91 per cent of 3007 housewives and 96.5 per cent of 505 dealers identified "Wear-Ever" as a brand. It is a significant fact that while 44 per cent of the dealers questioned did not deal in "Wear-Ever" utensils, 96.5 per cent of all identified "Wear-Ever" as a brand, thus indicating the widespread knowledge among dealers of the manner in which the word was used.

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On the whole of the evidence I have no hesitation whatever in reaching the conclusion that the petitioner has satisfied the onus cast upon it by s. 29, and were it not for the consideration which I must give to the word itself, I would at the hearing have made the declaration asked for in the petition and would have directed that such registration when made should extend to the whole of Canada. It is true, as pointed out by counsel for the Registrar of Trade Marks, that the recognition by dealers and users is not perhaps universal, a small percentage of those questioned stating that they thought the word referred to a quality of the wares and was not used as a brand. The section, however, requires only that the trade mark be *generally* recognized in the manner stated. To borrow a phrase used by the Master of the Rolls in the *Sheen* case—*In the Matter of an Application by J. & P. Coats Ltd. for Registration of a Trade Mark* (1)—the distinctiveness in fact in this case is as wide and as long continued as one could expect to find in any case.

The application is opposed by the Registrar and his main objection is on the ground that the word "Wear-Ever" is not a word which is "adapted to distinguish" the wares of one person from those of another. Counsel for the Registrar submitted that the word indicates that the product with which it is used has a special characteristic of very great durability, that it will wear forever; that durability in cooking utensils is a quality much desired by their users and that to describe kitchen utensils by a word which indicates that they will last forever is to praise or eulogize them, and that therefore "Wear-Ever" is a laudatory word and, on authority, cannot be the subject of a declaration

(1) (1936) 53 R.P.C. 355 at 381.

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under s. 29. He relies on the *Super-Weave* case, *Registrar of Trade Marks v. G. A. Hardie & Co. Ltd.* (1), as well as on the *Perfection* case, *Joseph Crosfield & Sons, Ltd. Application* (2), and the *Sea-lect* case, *C. Fairall Fisher v. British Columbia Packers Ltd.* (3).

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In the *Super-Weave* case, the Supreme Court of Canada considered for the first time the interpretation to be placed on s. 29. The majority of the Court—Kerwin, Taschereau and Estey JJ.—seem to have been of the opinion that no distinction should be drawn between the Canadian Act in which a trade mark is defined as meaning a symbol which *has* become adapted to distinguish, and the English Act in which “distinctive” means “adapted to distinguish”. They therefore held as stated in the headnote:

that the compound word “super-weave” is a laudatory epithet of such common and ordinary usage that it can never become adapted to distinguish within the meaning of s. 2(m) of The Unfair Competition Act, 1932. It being impossible to bring the word within the meaning of “trade mark” as defined by s. 2(m), an application under s. 29 cannot succeed.

In the result the appeal was allowed and the application dismissed. The other two members of the Court—Rand and Kellock JJ, while of the opinion that the appeal should be allowed, reached that conclusion only on the ground that the onus of proof imposed on an applicant by s. 29 had not been met; they would have referred the matter back to this Court in order to permit the applicant to produce further evidence. As I read their judgments, they were both of the opinion that to satisfy the requirements of s. 29 was to establish, in fact, that the trade mark “has become adapted to distinguish” and is therefore within the definition of a trade mark in s. 2(m).

I am bound, of course, by the decision of the majority in that case and it becomes necessary, therefore, to examine it with care in order to ascertain the limitations placed upon the words found in s. 29. In view of that case and of the *Perfection* case (*supra*) which was there followed, there can now be no doubt that certain words by their very nature are incapable of qualifying for a declaration under s. 29. Examples of such words are “perfection”, “best”, “classic”,

(1) [1949] S.C.R. 483.

(2) (1909) 26 R.P.C. 837.

(3) [1945] Ex. C.R. 128.

“universal” and “artistic”, which, as noted by Kerwin J. at p. 489, are merely laudatory words. On the same page he stated the principle to be applied in these words:

Turning again to section 29, while the Court is empowered to grant the declaration mentioned, notwithstanding that a trade mark is not registrable under any other provision of the Act, the original idea underlying such legislation, as it has been developed in England, should be followed here, with the result that, if a word is held to be purely laudatory, no amount of use or recognition by dealers or users of words as indicating that a certain person assumes responsibility for the character or quality of the merchandise would be sufficient to take such an expression out of the common domain and enable the user thereof to become registered as the owner of a trade mark under The Unfair Competition Act.

It is apparent, I think, that the decision in the *Super-Weave* case was arrived at because of the use of “super”, an abbreviation of the word “superior”, which, of course, is a purely laudatory word. It will be noted that Kerwin J. in that part of his judgment which I have quoted, used the expression “purely laudatory”. Estey, J. in summing up the principles to be followed, said at p. 509: “It follows that words commonly used and appropriately described as laudatory epithets cannot become registrable as trade marks.”

Now “Wear-Ever”, it must be conceded, is, *prima facie*, descriptive of the character or quality of the wares with which it is used and therefore unregistrable under s. 26(1)(c). I do not find anything in the opinions of the majority of the Court of the *Super-Weave* case which would indicate that descriptive words as such can never qualify for the declaration provided for in s. 29. If it had been the intention of Parliament to exclude such words from the provisions of s. 29, I think it would have said so in clear terms.

Now however unwise a person may be in choosing as a trade mark a word which is descriptive of the character or quality of his goods, I think he would almost invariably as a practical measure select a trade mark which would describe a quality of his wares which users would desire to find in them. Would such words be considered as purely laudatory words and therefore outside of the provisions of s. 29 as that section has been interpreted? It seems to me

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that if descriptive words are not to be barred as a class, then a distinction must be drawn between such words and other words which are purely laudatory.

I find considerable support for that distinction in the *Sheen* case much relied on by the petitioner (*supra*). That was an application to register the trade mark "Sheen" in respect of "Machine Twist being Sewing Cotton", under the provisions of s. 9(5) of the English Act, and it was refused by the Registrar. Luxmoore, J. allowed an appeal from the Registrar's decision and a further appeal to the Court of Appeal was dismissed, that Court directing that the application should proceed. In that case "Sheen" was admittedly, *prima facie*, descriptive of the quality of sewing cotton, namely, shininess, a quality which was much desired by its users. In the Court of Appeal great stress was laid by counsel for the Comptroller on the *Perfection* case and the Court was asked to consider the decision in that case as not being limited to laudatory words, but as including common, descriptive words. On p. 373 of the report there are two comments made by the members of the Court which I think are very significant, although they do not form part of the actual decision. The Master of the Rolls (Lord Wright) said: "Best, Perfection, etc., are words of general approbation, but 'Sheen' describes a quality. It may not be registrable, but for other reasons." And Romer L.J. said: "Lord Justice Farwell says that no amount of user could withdraw 'Perfection' from its proper use, he might decline to believe a large number of affidavits but I do not believe that judicial decisions can rule out a great body of words from subsection 5."

At p. 380 the Master of the Rolls disposed of the argument that there was something in the nature of the word "Sheen" itself which rendered it incapable of registration as a trade mark, as follows:

I do not think, dealing with the particular circumstances of this case, as I must, as a practical question, that any such argument is made out. The word "sheen" in this connection is clearly not a merely laudatory word like "perfection" or "best" or "classic" or "universal" or "artistic". To use the words which are the subject of discussion in *Sharpe, Limited v. Solomon Brothers, Limited* (1915) 32 Reports of Patent Cases, page 15, they are words which describe the character of the goods, but they are not the only or natural words which would be chosen for that purpose. With regard to the "Orlwoola", one of the cases referred to in the *Crosfield* case from

which I have just read, "Orlwoola" was a simple description of the character of the goods, apparently not correct, with the laudatory observation that the goods were all wool, the words being mis-spelled. There you had an attempt to monopolise the natural description of woollen goods—that and nothing else. In the same way the word "diamine" was rejected as being a possible trade mark because it simply described the ordinary chemical constitution of an article of ordinary commerce; similarly the word "gramophone" was not admitted to registration as a trade mark because it simply described what we all know as a gramophone with a disc. It is perfectly true that in the gramophone case there was evidence that in the trade it was necessarily identified with the products of the applicants; but against that was the admitted fact that in the eyes of the public it meant, and only meant, a machine whether made by the applicants or not. The word "sheen" in this case does not appear to me to assimilate itself to any of those categories. As I have already said, so far as the trade is concerned, the natural word to use and the word normally and habitually used in connection with glossiness is "lustre". Therefore, the use of the word "sheen" is something special; it is not merely a colour description, a description of something by a mere colour such as "blue" or any word of that sort; it is the peculiar use of a word which is rather poetic and obsolete or in unfamiliar use and which is not customary in this particular connection. So that so far as the word is concerned, it does not appear to me to come within those cases in which a word has been rejected on the grounds which I have stated; nor is there any danger of it failing to satisfy the test which has been put, namely: Is it a word which is likely to harass or embarrass an honest trader in the exercise of his rights to use an ordinary word under Section 44 in order to describe something in which he is dealing? Is it likely to impede an honest trader in the use of the word "sheen" if he wants to use it as a *bona fide* description of the character or quality of his goods? It seems to me very unlikely that any such contingency would arise, but, if it did arise, so far as I can judge, there is no probability at all that the danger which has been complained of would follow, . . .

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Again at p. 381, after referring to the *Liverpool Cable* case (1) he said:

The particular ground as to why the monopoly was held to be undesirable there does not apply here. There is no evidence that anybody has ever wanted or desired to use the word "sheen" in connection with goods of this character or on any textile, and I see no reason at all why this word, which has established itself as the trade mark associated with the name of *Coats* so that anyone asked for "Sheen" thread or Machine Twist would naturally and inevitably be taken to be asking for the manufacture of a twist or thread manufactured by *Coats*, should not be accepted and given the status of a trade mark.

In the same case, Romer L.J. said at p. 384-5:

It is said, and really the appeal is based upon this contention, that the Courts have laid down that, even though a word having direct reference to the character or quality of the goods has lost its primary signification and has obtained a secondary meaning, that is to say, is descriptive of

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some particular manufacturer's goods, and although the use of that mark will cause no confusion whatsoever, nevertheless the mark must be refused by the Registrar because it is not registrable.

I know that when the Legislature introduces a change, especially a striking change in the law, there is always a tendency in the Courts to put that construction upon the amending legislation that makes the change in the law as small as possible, but in all these cases the Act with which the Court is dealing is capable, or, at any rate, is thought by the Court to be capable of the restricted construction that the Court places upon it. In the present case the words of the Section are not capable of that construction. If there be any such limitation upon the power of the Registrar as is suggested by the arguments on behalf of the Appellants in this case, that limitation must be found in the Act, and it cannot be imposed under the guise of an exercise of discretion either on the part of the Registrar or on the part of the Court.

In view of those circumstances, I confess that I felt very sceptical as to whether I should find that any Court has laid down any such proposition as that for which the Appellants are contending. At this stage I do not propose to go through the decisions at length. I do venture to say this, however, that in not a single one of the cases to which our attention has been called, if they be really critically examined, will any authority be found for the proposition. In every case the question is a question of fact, that is to say, where evidence proves conclusively that a descriptive word has lost its primary meaning, and has acquired a secondary meaning, it is a question of fact whether the registration of that mark will or will not cause confusion. The word is not merely by reason of the fact that it is a descriptive word incapable of registration. The Act, in my opinion, says in plain words that it is registrable. When we come to look at the evidence in this case it seems to me to be perfectly plain that, applying the test which Lord Justice Fletcher Moulton and Lord Parker said should be applied, no one can *bona fide* use the word "sheen" by itself as descriptive of his goods, honestly. He may want in the future to say that his cotton thread has a nice sheen. The registration of this mark will not prevent him from doing so. But I do assert in view of the evidence that no one can wish in the future to describe his cotton as "sheen" cotton if he has an honest intention. That being so, it appears to me that there can be no confusion in the future by any *bona fide* use by the public or other traders of the word "Sheen" in connection with cotton.

It may be well to note also that in the same case the Master of the Rolls disposed of the argument that if a word is proved to be descriptive, then it has been proven that it cannot be distinctive, and quoted from the judgment of Lord Justice Moulton in the *Perfection* case at p. 145 as follows:

Much of the argument before us on the part of the opponents of the Board of Trade was based on an assumption that there is a natural and innate antagonism between distinctive and descriptive as applied to words, and that, if you can show that a word is descriptive, you have proved that it cannot be distinctive. To my mind this is a fallacy. Descriptive names may be distinctive and vice versa.

I turn now to a consideration of the word "Wear-Ever". While it is made up of two common words, each of which is in ordinary use, neither of its component parts is of a laudatory nature. In combination, however, as I have stated above, it is *prima facie* a descriptive word describing, in this case, the quality of durability of kitchen utensils. The word itself, however, is not one which is in common use and, in fact, it does not appear in any dictionary at my disposal and to a somewhat limited extent, therefore, it may be considered as an invented word. It is not a word which dealers in such goods would generally or naturally use in describing their goods and the uncontradicted evidence is that during the fifty years it has been used by the petitioner, no other firms have used or attempted to use it in describing their kitchen utensils. Then, too, it differs from purely laudatory words such as best, perfection, etc., which as Lord Wright pointed out are words of general approbation. Words of that type are words which any dealer would normally and naturally desire to use in describing his goods. It is significant to note that in the *Sheen* case, Lord Wright at p. 375 referred to the fact that "Sheen" was to be found in dictionaries, trade dictionaries and specifications, and was in more or less common use as describing a bright or shiny surface of a fabric, but that it was not on the evidence a word generally used in that connection in the sewing cotton trade. In the present case, "Wear-Ever" is not a word in common usage and has never been used in the trade. The test was laid down by Lord Justice Fletcher Moulton in the *Perfection* case at p. 148 in these terms:

Will the registration of the trade mark cause substantial difficulty or confusion in view of these rights of user by other traders? If the answer is in the affirmative, the Court will probably hesitate to allow the word to be registered. But if the answer be in the negative, either by reason of the nature of the words, or because past user has limited the possibility of other traders safely or honestly using the words, the Court may well grant the desired permission.

In the instant case I have no hesitation in arriving at the conclusion that the registration of the trade mark in question would cause no substantial difficulty or confusion in view of the right of user by other traders and I do so not only because of the nature of the word itself, but also

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because, on the evidence, the exclusive and long use thereof by the petitioner and its predecessors has limited the possibility of other traders safely or honestly using the word.

I am of the opinion, also, that, taking into consideration the opening words of s. 29—"Notwithstanding that a trade mark is not registrable under any other provisions of this Act it may be registered . . ."—judicial decisions should not rule out a great body of words from the section if, in fact, the petitioner has satisfied the onus cast upon him to establish distinctiveness in fact. In so far as descriptive words are concerned, the exclusions in my opinion should be limited to those words which are purely laudatory and commonly known and used as such, of which "good", "perfection", "best" and "classic" are but a few examples.

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My opinion, therefore, is that "Wear-Ever" is not within that class of words which by their very nature are incapable of qualifying for a declaration under s. 29. It is not purely or merely laudatory, but rather descriptive. In my opinion, it does not fall within the principles laid down by the majority of the Court in the *Super-Weave* case, but rather within those stated in the *Sheen* case. Having already found that I accept the evidence that it has in fact acquired the secondary meaning required by s. 29, it must follow that the petitioner is entitled to succeed.

For these reasons, the application will be allowed and there will be a declaration that it has been proved to the satisfaction of the Court that the mark "Wear-Ever" has been so used by the petitioner and its predecessors in title as to have become generally recognized by dealers in and users of cooking utensils as indicating that the petitioner assumes responsibility for the character and quality of cooking utensils in association with which the said word is used, and that having regard to the evidence adduced, the registration should extend to the whole of Canada.

Following the usual practice in such cases, there will be no order as to costs.

Judgment accordingly.