
BETWEEN:

1943
 May 11
 1945
 Aug. 30
 — —

C. FAIRALL FISHER, carrying on business under
 the name and style of Fisher Bros. Reg'd.,

PETITIONER.

AND

BRITISH COLUMBIA PACKERS LIMITED,

RESPONDENT.

Word mark "Sea-lect"—The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, secs. 2 (c), 2 (m), 2 (o), 26 (1) (c), 26 (1) (d), 29, 52—First registration prevails over first user—Distinctiveness—"Adapted to distinguish"—Descriptive words may by user acquire secondary meaning and become adapted to distinguish—Laudatory epithets cannot be or become word marks—Not permissible to find distinctiveness in a word mark from the appeal which its form makes to the eye—Corruption or misspelling of a word cannot change its character.

In 1940 petitioner commenced using the word "Sea-lect" on canned fish and lobster and sold such goods under such mark widely and extensively throughout Canada, but did not apply for registration of it. In 1941 respondent with no knowledge of the petitioner's use of the word used it on fresh and frozen fish and obtained registration of it as a word mark for fish and fish products, either canned or fresh or frozen. On the respondent's refusal to cancel the registration the petitioner brought these proceedings for an order to expunge the respondent's registration and to obtain a declaration that he was himself entitled to registration for canned fish and lobster.

Held: That the petitioner cannot succeed in attacking the registration on the ground that the respondent was not the first user of it. *Canada Crayon Company Limited v. Peacock Products Ltd.* (1936) Ex. C. R. 178) followed.

2. That distinctiveness is an essential requirement of a trade mark.

3. That the word "Select" as applied to goods is a laudatory epithet that is incapable of distinctiveness; it cannot become adapted to distinguish the goods of one person from those of another; and it should not be registered as a word mark.

4. That it is not permissible under section 2 (o) to find distinctiveness in a word mark from the appeal which its form makes to the eye.

5. That the corruption or misspelling of a descriptive word cannot change its character. *Kirstein Sons & Co. v. Cohen Bros.* (1907) 34 Can. S.C.R. 286 and *The "Orwoola" Trade Mark Application* (1909) 26 R.P.C. 850) followed.

6. That the word "Sea-lect" is merely a corruption or misspelling of the laudatory epithet "Select" and as such is incapable of distinctiveness and ought not to be registered as a trade mark.

7. That a laudatory epithet such as "Select", including any corruption or misspelling of it such as "Sea-lect" should not be made the subject of a declaration of registrability as a word mark under section 29, no matter what the extent of its user may be.

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PETITION for an order expunging the respondent's registration of the word "Sea-lect" as a word mark for fish and fish products either canned or fresh or frozen and for a declaration that the petitioner is entitled to registration of it for canned fish and lobster.

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

R. S. Smart, K.C. and *Eric L. Medcalf* for petitioner.

E. H. Charleson for respondent.

The President now (August 30, 1945) delivered the following judgment.

These proceedings are taken under sections 52 and 29 of The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38. The petitioner seeks both an order expunging the respondent's registration of the word "Sea-lect" as a word mark for fish and fish products, either canned or fresh or frozen, and also a declaration that he is himself entitled to registration of it for canned fish and lobster.

The facts are not in dispute. The petitioner has places of business in Montreal and Charlottetown with distributing agents throughout Canada, his business consisting principally of canning and marketing various kinds of fish and lobster. Since the early part of 1940 he has marked canned fish and lobster with the word "Sea-lect". He intended to register it as a word mark in 1940 and inter-

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viewed an official in the office of the Registrar of Trade Marks who advised him that the word, being a misspelling of the word "Select", was descriptive and could not be registered. In view of this advice he did not apply for registration but continued to use the word on his canned fish and lobster. Since he commenced using it his sales of canned fish and lobster have been widely made throughout Canada and have amounted to approximately \$900,000.

In June 1941 the respondent thought of using the word "Sea-lect" for fish products, canned, fresh or frozen, and instructed its Vancouver solicitors to register it. It had no knowledge, direct or indirect, that the word "Sea-lect" was in use by the petitioner. The respondent's solicitors caused a search to be made in the office of the Registrar of Trade Marks at Ottawa and reported that there was nothing on the register to prevent its registration. The respondent then sold fish products, both fresh and frozen, under the word "Sea-lect" from its Vancouver and New Westminster plants, such sales being on July 8, 9 and 10, 1941, and applied for registration on July 16, 1941. The word was registered as a word mark in the name of the respondent in the Trade Marks Office on July 24, 1941 as No. N. S. 15313, Register 58, for use in association with fish and fish products, either canned or fresh or frozen. The respondent has made no use of the mark beyond the sales mentioned but explains this by government regulations under which its pack of herring and salmon was required for export to Great Britain and none of it was available for distribution in Canada. It says that it intends to use the mark as soon as the governmental restrictions which render its present use impossible are removed. The respondent does a very extensive business in fish and fish products, including canned fish such as herring and salmon. There has been no abandonment of user of the mark by it. When the petitioner learned of the respondent's registration he requested it to cancel the same and on its refusal to do so took the present two fold proceedings.

The attacks on the registration are based upon section 52 of The Unfair Competition Act, 1932, on the ground that it does not accurately express or define existing rights of the respondent.

It was contended for the petitioner that the respondent was not entitled to registration of the mark because it was not the first user of it. While it is a fact that the petitioner used the word "Sea-lect" before the respondent made even its limited use of it, this does not enable the petitioner to succeed in his attack on this ground in view of the decision of this Court in *Canada Crayon Company Limited v. Peacock Products Limited* (1). In that case the petitioner commenced the use of the word "Peacock" and the representation of a peacock as a trade mark in July, 1926, but failed to apply for registration of it until April 7, 1934. On February 21, 1933, the respondent, acting in good faith, obtained registration of its trade mark, similar in appearance to that of the petitioner, which it had been using since December, 1932. The petitioner moved for an order expunging the respondent's registration but Angers J. dismissed the motion. He held that, under the circumstances of the petitioner's failure to register his mark, his prior use of it was immaterial and that the respondent's prior registration was in order and should not be disturbed. No appeal was taken from this judgment. It must, I think, be regarded as conclusive in this Court against the petitioner's contention that the registration was invalid because the respondent was not the first user of the mark.

The major attack on the registration was on quite a different line. Counsel for the petitioner contended that the word "Sea-lect" was excluded from registration under section 26 on the ground that it was a misspelling of the word "Select" and as such was descriptive of the quality of the wares in connection with which it was proposed to be used. The relevant portions of section 26 read as follows:

26. (1) Subject as otherwise provided in this Act, a word mark shall be registrable if it

- (c) is not, to an English or French speaking person, clearly descriptive or misdescriptive of the character or quality of the wares in connection with which it is proposed to be used, or of the conditions of, or the persons employed in, their production, or of their place of origin;
- (d) would not if sounded be so descriptive or misdescriptive to an English or French speaking person;

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The New English Dictionary gives the following meanings for the word "Select": "1. Selected, chosen out of a larger number, on account of excellence or fitness; picked. 2. Hence, Choice, of special value or excellence; composed of or containing the best, choicest or most desirable; superior." And Webster's New International Dictionary gives these meanings: "1. Taken from a number of the same or an analogous kind by preference; selected; picked; 2. Of special value or excellence; choice;"

The word "Select" is clearly descriptive of quality and would be excluded from registration by section 26 (1) (c). And, it seems to me, the word "Sea-lect" is excluded by section 26 (1) (d), for when sounded it would be as descriptive to an English speaking person as the word "Select". On this ground alone the petitioner is entitled to an order for expungement.

There is a stronger reason for expunging the registration than the one thus put forward by counsel. Section 26 (1) provides that a word mark "shall be registrable" if it does not come within any of the categories specified in the succeeding paragraphs. But it is essential to registration that a word shall be a "word mark" as defined by the Act. Since word marks are a class of trade marks it is necessary to look at the definition of a trade mark as well as that of a word mark. Section 2 (m) defines a trade mark as follows:

2. (m) "Trade mark" means a symbol which has become adapted to distinguish particular wares falling within a general category from other wares falling within the same category, and is used by any person in association with wares entering into trade or commerce for the purpose of indicating to dealers in, and/or users of such wares that they have been manufactured, sold, leased or hired by him, or that they are of a defined standard or have been produced under defined working conditions, by a defined class of persons, or in a defined territorial area, and includes any distinguishing guise capable of constituting a trade mark;

And section 2 (o) gives the definition of a word mark:

2. (o) "Word mark" means a trade mark consisting only of a series of letters and/or numerals and depending for its distinctiveness upon the idea or sound suggested by the sequence of the letters and/or numerals and their separation into groups, independently of the form of the letters or numerals severally or as a series.

It is clear from these definitions that distinctiveness is an essential requirement of a trade mark. It is also clear

that such distinctiveness is a quality that can be acquired, even although originally lacking in the mark, for the definition speaks of a symbol which has "become" adapted to distinguish. It is also implied that the mark must be capable of distinctiveness for without such capability it can never "become adapted to distinguish". There are some words which, because of their nature, are common property and cannot be made the subject of monopoly. They are incapable of distinctiveness. Laudatory epithets are of such a nature. They are, it is true, descriptive of quality. But, while merely descriptive words may acquire distinctiveness by user of them in association with the goods of a particular person in such a way that they have become adapted to distinguish his goods from those of another person, no amount of user of laudatory epithets can give them the quality of distinctiveness that is essential to a trade mark. If a mark cannot be distinctive it cannot become adapted to distinguish and no amount of user of it can make it a trade mark. This principle is strikingly laid down in *Joseph Crosfield's & Sons Ltd's Application* (1), commonly referred to as the *Perfection Case*. The applicants sought to register the word "Perfection" as a trade mark for common soap. They had used it for thirty years. Prior to the Trade Marks Act, 1905, the word was not registrable, but under section 9 (5) of that Act a wide discretion was given to the Board of Trade and the Court to allow the registration of words not previously registrable. The Court of Appeal held that the word "Perfection" was not a distinctive mark, notwithstanding its long user by the applicants, was not adapted to distinguish their goods from those of other persons and could not, therefore, be registered as a trade mark. Cozens-Hardy M. R. said, at page 854:

It is apparent that no word can be registered under this paragraph unless it is "distinctive"—that is to say, is "adapted to distinguish" the goods of the proprietor from the goods of other persons. There are some words which are incapable of being so "adapted" such as "good", "best" and "superfine". They cannot have a secondary meaning as indicating only the goods of the applicant. There are other words which are capable of being so "adapted", and as to such words the tribunal may be guided by evidence as to the extent to which use has rendered the word distinctive. It is easy to apply this paragraph to geographical words, and it is possible to suggest words having direct reference to

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character or quality which might be brought within it. But an ordinary laudatory epithet ought to be open to all the world and is not, in my opinion, capable of being registered.

In a most illuminating judgment Fletcher Moulton L. J. dealt with the subject of distinctive and descriptive terms. In his view it was a fallacy to assume that there is a natural and innate antagonism between distinctive and descriptive as applied to words and that if a word is descriptive it cannot be distinctive. Words originally descriptive and as such not registrable as trade marks could acquire distinctiveness and, in a proper case, become entitled to registration. He thought that under the Act of 1905 the Court had power to allow descriptive words to be registered if a case on the merits was proved before it sufficiently strong to induce it to do so. In his opinion the new Act recognized that distinctiveness—that is, being adapted to distinguish the goods from those of other traders—was not the innate quality of the word but might be acquired. Then at page 858, he said:

The extent to which the Court will require the proof of this acquired distinctiveness to go will depend on the nature of the case. If the objections to the word itself are not very strong it will act on less proof of acquired distinctiveness than it would require in the case of a word which in itself was open to grave objection. I do not think, for instance, that any amount of evidence of user would induce a Court to permit the registration of ordinary laudatory epithets, such as "best", "perfect", etc. On the other hand, in the case of a peculiar collocation of words it might be satisfied with reasonable proof of acquired distinctiveness even though the words taken separately might be descriptive words in common use.

Fletcher Moulton L. J. thus also took laudatory epithets out of the class of descriptive words that could by user acquire distinctiveness. Farwell L. J. expressed similar views. At page 862, he said:

I cannot myself see how words which are simply a direct statement of quality, for example "good" or "best" can ever lose their primary meaning and come to mean not good or best but the articles made by A. B.

In my opinion, a similar view should be taken with regard to the word "Select". When used in connection with goods it simply means that they are picked goods—that they are "choice" or "choicest" or "superior" or "better" or "best" goods. I am unable to distinguish in principle the word "Select" from the words held incapable

of distinctiveness in the *Perfection Case* (*supra*). In my view, the word "Select" as applied to goods is a laudatory epithet that is incapable of distinctiveness; it cannot become adapted to distinguish the goods of one person from those of another; and it should not be registered as a word mark.

Counsel for the respondent contended that section 26 (1) (c) excluded the registration of a word mark only if it was clearly descriptive or misdescriptive and that if there was any doubt as to it being "clearly" of such a character the registration should remain. His argument was that "Sea-lect" was more than merely a misspelling of "Select", that there was in it a reference to the place of origin of the wares but not enough to make it clearly descriptive of their place of origin, that the mark was a smart mark with its oblique reference to the sea, that it was to be distinguished from the adjective on the ground that this other meaning could be given to it, and that it had distinctiveness.

I have given these arguments the careful consideration they merit, but have come to the conclusion that they cannot be accepted. Counsel relied upon the last sentence in the passage from the judgment of Fletcher Moulton L. J. in the *Perfection Case* (*supra*) which I have cited but, in my view, the word "Sea-lect" cannot be regarded as a collocation of words within the meaning of that sentence. Nor can I agree with the suggestion that distinctiveness is not as essential to a trade mark in Canada as it is in the United Kingdom. Counsel also relied upon the judgment in *New York Mackintosh Co. v. Flam et al* (1). There it was held that the word "Bestyette" was sufficiently distinctive to constitute a valid trade mark for waterproof capes and cloaks, but was not infringed by the use of the word "Veribest" by a defendant on similar garments. District Judge Holt said, at page 572:

"Bestyette", when spoken, sounds the same as "Best Yet", and undoubtedly the claim that is merely a descriptive word has much weight. But, in trade-marks, the impression produced on the sight of the buyer is the main thing; and, upon the whole, I think that the compounded and fantastically spelled word "Bestyette" is sufficiently distinctive to be a trade-mark.

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This opinion runs counter to that expressed by Cozens-Hardy M.R. in the *Perfection Case* (*supra*). At page 855, he said:

There is one important distinction between word marks and other marks. The former appeal to the ear as well as, and indeed more than, to the eye. The latter appeal to the eye only. It seems to follow that a word, not being an invented word, ought not to be put on the Register, if the spelling is phonetic and resembles in sound a word which in its proper spelling could not be put on the Register.

There is a wide divergence in these views, but, in my opinion and in so far as either case may be considered in view of the terms of the Canadian Act, the latter authority is to be preferred. Under it, if "Select" is a word that should not be put on the register, neither should the word "Sea-lect" be. In sound it resembles "Select", as frequently and commonly pronounced, and phonetically is not distinguishable from it. It then is excluded, as I have said, by section 26 (1) (*d*).

There is another important reason for not accepting the arguments of counsel in support of the registration. It appears from the remarks of Cozens-Hardy M. R., which I have just cited, that in England a word mark may appeal to the ear as well as to the eye, but that the appeal is more to the ear than to the eye. If this should be authority for the rejection of "Sea-lect" as being similar in sound to "Select", the case for its rejection is even stronger under The Unfair Competition Act, 1932. That Act divided trade marks into design marks and word marks and defined the distinctiveness that each must possess. By section 2 (*c*) a design mark must depend for its distinctiveness upon its form and colour, or upon the form, arrangement or colour of its several parts, *independently* of any idea or sound capable of being suggested by the particular sequence of the letters and/or numerals, if any, forming part, thereof, or by their separation into groups; whereas by section 2 (*o*), which I have cited, a word mark must depend for its distinctiveness upon the idea or sound suggested by the sequence of the letters and/or numerals and their separation into groups, *independently* of the form of the letters or numerals severally or in series. From these statutory definitions it would seem that in the case of a design mark the appeal is only to the eye but that in the case of a word

mark the appeal which its form may make to the eye must be excluded from consideration in determining whether it is distinctive or not. Its distinctiveness depends not upon its form but only upon the idea or sound suggested by the sequence of the letters and/or numerals and their separation into groups. It is not permissible under section 2 (o) to find distinctiveness in a word mark from the appeal which its form makes to the eye. This difference in distinctiveness between a design mark and a word mark resulting from the statutory definitions in The Unfair Competition Act, 1932, must constantly be kept in mind in considering the effect that should be given to English or American decisions on word marks in a Canadian case. In view of this difference alone, it is difficult, to say the least, to see how such a decision as *New York Mackintosh v. Flam et al (supra)* could have any bearing on the present case.

Whatever distinctiveness the word "Sea-lect" may lay claim to, including the oblique reference to the sea, is by reason of its form and the separation of "Sea" from "lect" by a hyphen but when its form is eliminated from consideration in determining whether it has distinctiveness because of the statutory definition in section 2 (o) no distinctiveness remains and it must be regarded merely as a corruption or misspelling of the word "Select".

It is well established that the corruption or misspelling of a descriptive word cannot change its character. This was decided by the Supreme Court of Canada in *Kirstein Sons & Co. v. Cohen Bros.* (1). In that case the action was to restrain the defendants from continuing an alleged infringement of the trade mark "Shur-on" claimed by the plaintiffs as their registered trade mark for eye-glass frames sold by them as traders in optical goods by the use of the term "sta-zon" for similar goods sold by the defendants. The Court held that the terms were merely corruptions of words descriptive of the eye-glass frames to which they were intended to be applied and as such could not be trade marks. A similar view was taken by the English Court of Appeal in *The Orlwoola Trade Mark Application* (2). There the word "Orlwoola" was held to be not registrable

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(1) (1907) 34 Can. S.C.R. 286.

(2) (1909) 26 R.P.C. 850.

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as being merely a misspelling of "All Wool" which was clearly not registrable. At page 860 Fletcher Moulton L. J. said:

This case presents no difficulty. It is in substance a case of registration of the words "All Wool", grotesquely mis-spelt, as a Trade Mark for textile fabrics. When a Trade Mark consists solely of words it will be used orally as well as in writing, and to be proper to constitute a trade mark such words must be suitable, whether spoken or written. The mis-spelling does not affect the words when spoken, so that we have only to decide whether the words "All Wool" are proper for registration in respect of such goods. To this there can be but one answer. If the goods are wholly made of wool the words are the natural and almost necessary description of them. If they are not wholly made of wool it is a misdescription which is so certain to deceive that its use can hardly be otherwise than fraudulent. In either case the words are utterly unfit for registration as a Trade Mark.

And Farwell L. J. expressed similar views. At page 863, he said:

"All Wool" or "All Woolly" cannot possibly be regarded as adapted to distinguish woollen goods; they are purely descriptive of their nature. I doubt if any amount of evidence could prove that they had lost their primary and acquired a secondary meaning. It can make no difference whether the words are spelt phonetically, fantastically, or conventionally; they are registered in respect of all wool goods and to the ear they mean all wool. It is said that to the eye "Orlwoola" and "All Wool" are quite distinct; but that is not enough; the mark is not pictorial but verbal, and the words are meant to be spoken as well as read, and the pronunciation of words of the British public is at the present day somewhat various.

These decisions should be followed on this point, the statutory requirements being also kept in mind. "Sea-lect" is as much a corruption of "Select" as "Orlwoola" was of "All Wool". It was registered not as a design mark but as a word mark. Consequently, its form must be eliminated as a test of distinctiveness with the result that the idea or sound suggested by it is the same whether it is spelled correctly or not. Nor does it matter whether "Sea-lect" is pronounced with a long "e" for the first syllable or the accent thrown upon it or not, for "Select" is also often so pronounced by the Canadian public. It should therefore, be held that the word "Sea-lect" is merely a corruption or misspelling of the laudatory epithet "Select" and as such is incapable of distinctiveness and ought not to be registered as a word mark. If the word were given registration it might mean that no person other than the registered owner of it would be entitled to use the word

"Select" in association with fish or fish products. Such a possibility should not be permitted. No person is entitled to a monopoly of such a common laudatory epithet as "Select", whether corrupted or misspelled or not. It is public property and cannot be made the subject of exclusive private use. There will, therefore, be an order for the expungement of the registration of the word mark "Sealect", as No. N.S. 15313, Register 58.

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While the petitioner succeeds in the first part of his proceedings, his success is such as to disentitle him to success in the second part. He seeks a declaration of the Court under section 29 of the Act, which reads in part 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 purpose of the section is somewhat similar to that of section 9 (5) of the English Trade Marks Act, 1905, under which it was sought to register the word "Perfection" for common soap in the *Perfection Case (supra)* and a considerable number of declarations have been made by the Court under it. The section recognizes that there is no "natural or necessary incompatibility between distinctiveness and descriptive in the case of words used as trade marks", to use the words of Fletcher Moulton L. J. in *The Perfection Case (supra)*. Indeed, his judgment, in my opinion, is an excellent guide to follow in dealing with applications under the section. Marks which are excluded from registration by some section of the Act, such as section 26, may acquire such secondary meaning by user and general recognition that they have become adapted to distinguish the goods of the owner of the mark from those

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of other persons and in such cases the mark may be registered if the Court makes the necessary declaration. The Court has a wide discretion under the section and could, in a proper case, make such declaration in the case of a descriptive word, excluded from registration by section 26 (1) (c), where the requirements of the section have been met.

There are a number of reasons why the discretion ought not to be exercised in favour of the petitioner, even if its exercise were otherwise permissible. It would not be possible to limit the registration to a defined territorial area in Canada and there is nothing in the evidence to warrant such a limitation. Nor would it be fair to give the mark exclusively to the petitioner for the whole of Canada, in view of the respondent's use of it in good faith, even although limited, since such limited use has been reasonably explained. Nor would it be fair to divide the mark and allow it to the petitioner only for canned fish and lobster for even although the respondent's user was only in respect of fresh and unfrozen fish and did not extend to canned fish it might well be argued, although I need not decide the matter, that such user by it carried the right of user on canned fish as well, as being similar wares.

In my judgment, however, this case falls outside section 29 altogether. If a word were merely descriptive of quality and nothing more, or a corruption or misspelling of such a word, the Court would have to decide whether it should, having regard to the evidence of user placed before it, exercise the discretion vested in it. The section provides for the registration of a trade mark and it is implied that the mark has acquired, although it may have lacked it originally, the quality of distinctiveness and has become "adapted to distinguish". *The Perfection Case (supra)* decided that laudatory epithets are incapable of distinctiveness and cannot be adapted to distinguish no matter how much evidence of user has been adduced. Farwell L. J. put the matter in a striking way when he said, at page 862:

My own opinion is that no amount of user could possibly withdraw the word "Perfection" from its primary and ordinary meaning and make it mean "Crosfield's" instead of "Perfect".

The authority of that case should be followed and it should be held that a laudatory epithet such as "Select", including any corruption or misspelling of it such as "Seallect", should not be made the subject of a declaration of registrability as a word mark under section 29, no matter what the extent of its user may be. Such an epithet is incapable of being or becoming a word mark. The petitioner's application under section 29 must, therefore, be dismissed. There being divided success, neither party is entitled to costs.

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Judgment accordingly.