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IN THE MATTER OF THE UNFAIR COMPETITION ACT, 1932, 1948  
AND IN THE MATTER OF THE TRADE MARK "SUPER-WEAVE" \*June 9, 10  
\*Nov. 18

BETWEEN:

THE REGISTRAR OF TRADE MARKS (RESPONDENT).....	}	APPELLANT;	1949
			*Feb. 1
AND			
G. A. HARDIE & CO. LIMITED (PETITIONER) .....	}	RESPONDENT.	

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Trade Mark—Descriptive word—Laudatory epithet not subject of monopoly—The Unfair Competition Act, 1932, (Can.) 1932, c. 38, ss. 1, 2 (d), (k), (l), (m), (o), 26, 27 and 29—Practice—The Exchequer Court Act, R.S.C., 1929, c. 34, s. 56—The Exchequer Court Rules—rules 36, 37, 41 and 300.*

\*PRESENT:—Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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The respondent in proceedings taken under section 29 of *The Unfair Competition Act, 1932*, to register the words "super-weave" as its trade mark, obtained a judgment from the Exchequer Court of Canada declaring that it had been proved to its satisfaction that the mark had been so used by the respondent as to have become generally recognized by dealers in and/or users of textiles as indicating that the respondent assumed responsibility for the character and quality of wares bearing that mark.

In so doing the respondent complied with the practice of the Exchequer Court—under r. 35 it published notice of the filing of its petition for registration in the *Canada Gazette*; under r. 36 it served the Minister with a copy of the petition and of the notice, and no one appearing to oppose its application for registration, it then under r. 37 filed the required affidavit with the Registrar of the Court, served the Minister with notice, and moved for a declaratory order by serving notice upon the Registrar of Trade Marks whom it named as respondent in the style of cause. The latter then opposed the application.

*Held:* that the appeal should be allowed, and that (reversing the decision of The Exchequer Court), the petition be dismissed.

*Held:* also, Rand and Kellock JJ. dissenting in part, 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.

Rand and Kellock JJ. agreed with the majority of the Court that the appeal should be dismissed but only on the ground that the onus of proof imposed upon the applicant by s. 29 had not been met.

*Per* Rand J.—The expression "has become adapted to distinguish" as used in *The Unfair Competition Act, 1932*, s. 2(m), includes any case in which the word mark has in fact become the identifying badge of the article to which it is attached so that when associated with goods of a particular trade whatever primary meaning it may have had is submerged and only the trade designation remains.

*Per* Rand and Kellock JJ.—When it is proposed to withdraw an ordinary word from the common use the task of establishing the secondary meaning becomes greater according to the extent of that use.

*Per* Kellock J.—By the terms of s. 2(m) if the symbol "has become adapted to distinguish" and "is used" for any of the purposes mentioned therein that is sufficient to constitute a registerable mark provided it is not excluded under such sections as 14, 26 and 27. The Court has no discretion to exclude any word apart from the sufficiency of evidence adduced in support of its having become adapted to distinguish the wares of the applicant.

A clearly descriptive word which has acquired a secondary meaning within s. 29(1) is a word which "has become adapted to distinguish" within s. 2(m) so that in the case of such a word to satisfy the requirements of the latter part of s. 29, is to satisfy the definition in s. 2(m).

*Per* Estey J.—A survey of the relevant sections and of the Statute as a whole lead to the conclusion that the phrase "adapted to distinguish" has the same meaning in our statute as under the statute in Great

Britain. It follows that words commonly used and appropriately described as laudatory epithets cannot become registrable as trade marks. Also, that the appellant having been named as a party and so treated by the Exchequer Court, had the necessary status to appeal.

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APPEAL from the judgment of the Exchequer Court of Canada, Cameron J., (July 30, 1947), granting a declaration in the terms of s. 29(1) of *The Unfair Competition Act, 1932*, with respect to the compound word "super-weave" in relation to cotton goods, woollen goods and synthetic textiles as to the whole of Canada.

*E. G. Gouling K.C.* and *J. C. Osborne* for the appellant.

*G. H. Riches* for the respondent.

KERWIN, J.—This is an appeal by the Registrar of Trade Marks from an Order of the Exchequer Court made on the application of the Respondent, G. A. Hardie & Co. Limited, under Section 29 of *The Unfair Competition Act, 1932*. This section reads 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.

(3) No declaration under this section shall authorize the registration pursuant thereto of any mark identical with or similar to a mark already registered for use in association with similar wares by any person who was not a party to the action or proceeding in which the declaration was made.

By the Order appealed from, the Court declared that it had been proven to its satisfaction that the trade mark "SUPER-WEAVE" had been so used by the respondent as to have become generally recognized by dealers in and users of textiles including cotton goods, woollen goods and synthetic textiles, as indicating that the respondent assumed responsibility for their character and quality or

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for their place of origin. And the Court further declared that having regard to the evidence produced, any registration of the said trade mark "SUPER-WEAVE" in association with textiles including cotton goods, woollen goods and synthetic textiles should extend to the whole of Canada.

The preliminary point raised by the respondent may first be determined. Under rule 35 of the *Exchequer Court Act* notice of the application was given in the *Canada Gazette* requiring any person desiring to oppose the petition to file a statement of his objections with the Registrar of the Court within fourteen days after the last insertion of the notice, and serve a copy upon the petitioner. No objections were filed, but presumably Rule 35 was complied with by the petitioner, and a copy of the petition and notice above mentioned was served upon the Minister charged with the administration of the Act. Certainly the petitioner complied with Rule 37, which provides that if no one appears to oppose the application, the petitioner may file with the Registrar of the Court an affidavit in support thereof, and upon ten days' notice to the Minister, and upon serving him with a copy of any affidavit so filed, may move the Court for such Order as upon the petition and affidavit he may be entitled to. This was done by serving a notice upon the Registrar of Trade Marks, who was named as respondent in the style of cause, notifying him of the application for an Order setting the date for the hearing of the application. The Registrar of Trade Marks opposed the application, but the respondent complains that it had no notice of the intention of the Registrar of Trade Marks, and now takes the position that the latter never was a party to the proceedings and has no status to appeal. This objection cannot prevail, as the Registrar was named as a party and was so treated by the Exchequer Court. However, I agree with the learned trial judge that the Registrar of Trade Marks should comply with Paragraph 2 of Rule 36 and file and serve a statement of his objections to such a petition.

The evidence on the application consisted of the affidavit of the vice-president of the respondent, showing the nature of the latter's business and how it has progressed, and the

nature of its advertising, together with several affidavits from persons connected with the laundry business or hospitals in different parts of Canada. The deponents were not cross-examined and no affidavits were filed in answer. It might be pointed out that generally speaking the advertising shows that the word "SUPERWEAVE" is overlaid with the words "COTTONS Reg'd.", and no satisfactory explanation of the precise meaning of this was given. However, even accepting the findings made by the trial judge upon this evidence, I am of opinion that the appeal should be allowed. The trial judge referred to the principle laid down in what is known as the *Perfection Case*, *Joseph Crossfield's & Sons Ltd. Application* (1), that an ordinary laudatory epithet cannot acquire a secondary signification. He also referred to the decision of the President of the Exchequer Court in *C. Fairall Fisher v. British Columbia Packers, Limited*, known as the "*Sea-Lect Case*", (2), and, as a matter of fact, the trial judge, shortly after the decision in the present case, decided in *Standard Stoker Company Inc. v. The Registrar of Trade Marks*, (3) that the word "standard" used in connection with goods was of a laudatory nature and could not mean the articles made by the Petitioner.

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It might be added that this same principle was approved by the House of Lords in *A. Bailey & Co. Ltd. v. Clark, Son & Morland, Ltd.*, (4) and by the Privy Council in *The Canadian Shredded Wheat Co. Ltd. v. Kellogg Co. of Canada, Ltd., et al.*, (5).

The trial judge considered that "SUPER-WEAVE" is not an ordinary laudatory epithet such as "best", "perfect" or "select". He would have refused an application for the single word "SUPER", which, as he points out, is here used as an abbreviation of the word "superior". In his opinion, "WEAVE" is descriptive of the character of the goods as indicating that they are manufactured by the process of weaving, and "SUPER-WEAVE" in its primary sense would indicate a better quality of weaving. He considered that the word "SUPER-WEAVE" was not a common or ordinary laudatory word in ordinary use, but that it came

(1) [1909] 26 R.P.C. 837.

(2) [1945] Ex. C.R. 128.

(3) [1947] Ex. C.R. 437.

(4) [1938] 55 R.P.C. 253.

(5) [1938] 55 R.P.C. 125.

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within the statement in the judgment of the Master of the Rolls in the *Perfection Case, supra*, at p. 854, that "in the case of a peculiar collocation of words it (the Court) might be satisfied with reasonable proof of acquired distinctiveness even though the words taken separately might be descriptive words in common use." With respect, I am unable to agree. The *Oxford English Dictionary* contains the following definitions of "superior", "super" and "weave".

*SUPERIOR, a.*

6. Higher in status or quality than; hence greater or better than  
 \* \* \* more or better than, above, beyond.

*SUPER, sb.*

6.=superfine

1881 *Instr. Census Clerks* (1885) 64 woolen cloth manufacture \* \* \*  
 Super Weaver. 1885 *Times* (Weekly ed.) 5 June 7/2 of the power  
 looms, 1700 are devoted to the production of extra supers and  
 3-ply carpets.

*SUPER, a.*

2.=superfine 4.

1842 *Bischoff Woolen Manuf.* II. 187 Long wool of the best class  
 that is grown in Kent, which we term super matching, or long  
 drawing.

*SUPER, prefix*

6. prefixed to sbs. with adj. force; higher in rank, quality, degree,  
 or amount; of a higher kind or nature; superior.

*WEAVE, sb.*

2. A particular method or pattern of weaving.

The word "SUPER" is thus indicative of "superior", or "superfine" quality especially in the textile industry, and the word "WEAVE" is particularly apt to describe an important characteristic of textiles. The result is that the compound word "SUPER-WEAVE" clearly indicates and describes textiles that have a superior or superfine weave, an attribute that is unquestionably much desired by purchasers and users of such wares and, therefore, an attribute which a trader in textiles would naturally wish to emphasize in offering his wares for sale. Such a word may not be commandeered by one manufacturer and registered under *The Unfair Competition Act* so as to prevent others from claiming the same quality in their merchandise and using the same or a similar expression to describe it.

It may be advisable to say that I am dealing only with an application to register. The decision of the Court of

Appeal in the *Matter of an Application by J. & P. Coats, Ltd.* (1) for registration of a Trade-Mark (sheen), so much relied upon by the respondent, was decided, as the Master of the Rolls points out at p. 380, on the basis that the word "sheen" was clearly not a merely laudatory word like "perfection", or "best", or "classic", or "universal", or "artistic".

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It was not contended that if the Court came to the conclusion that "SUPER-WEAVE" was an ordinary laudatory expression the application should succeed, but, in view of the argument addressed to us, it is advisable to state what appears to be the proper construction of section 29 of the Act. The opening words of subsection 1 "notwithstanding that a trade mark is not registrable under any other provision of this Act" require one to examine the definition of trade mark in section 2(m). That definition states that "trade mark" means a symbol "which has become adapted to distinguish". While this wording differs from section 9 of the English Act in question in the Perfection Case, since in section 9 "distinctive" is stated to mean "adapted to distinguish", no distinction should be drawn between the uses of the different tenses. 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*.

The appeal should be allowed and the Petition dismissed, both without costs.

TASCHEREAU, J.—The learned trial Judge reached the conclusion that he was satisfied that the trade mark "Super-Weave" had been so used by the respondent, as to have been generally recognized by dealers in and users of textiles, cot-

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 ton and woollen goods, as indicating that the respondent assumed responsibility for their character or quality or for their place of origin.

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 Taschereau J. He also held that the same words were not ordinary laudatory epithets and that they may constitute a trade mark so as to be entitled to registration.

With due respect, I cannot agree, as I believe that the compound word "Super-Weave" is a laudatory epithet, and is capable of application to the goods of any one else. Of its very nature it is common property and cannot be made the subject of monopoly. It is used for the purpose of advertising the superior quality of the weaving of a particular commodity.

I agree with my brother Kerwin, that the appellant, having been named as a party, and having been so treated by the Exchequer Court, has the necessary status to lodge the present appeal.

The appeal should be allowed, but without costs.

RAND, J.—This appeal raises questions in the interpretation of the *Unfair Competition Act, 1932*, of some difficulty and they exemplify again the necessity for caution in interpreting a Canadian statute by the light of English decisions on English statutes.

Mr. Gowling invites us to attribute to "trade mark" the characteristic of being "distinctive" as defined in the English *Trade Marks Act, 1905*, and as this involves the substance of the contention on behalf of the Registrar it is desirable to consider briefly the conceptions of trade mark attributes written into these statutes.

Under section 9 of the English Act certain essential particulars are prescribed for a registrable mark and then an omnibus subsection (5) permits under certain conditions the registration of "any other distinctive mark". For that purpose, "distinctive" means "adapted to distinguish the goods of the proprietor of the trade mark from those of others"; and in determining whether a mark is so adapted the tribunal may "in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such a trade mark in fact distinctive for the goods with respect of which it is registered or proposed to be registered". From this it is seen that the determination in

each case is whether the mark is “distinctive” as defined, whether the quality and character of the word, as it is found in the body of the language, stamp it as so adapted; and it follows that for various reasons certain words will be excluded. The monopoly of a registered mark appropriates from ordinary trade use words which otherwise would be open to all; and the legislative requirement raises at once interests of the public as well as competitors. Under the English decisions it is settled that words of the normal vocabulary which a manufacturer or seller of goods would ordinarily use in either describing or appraising his wares are outside the scope of the statute; and even though by long continued and exclusive use a word may have come actually to indicate particular goods, that fact is only evidential of the character of the word mark which the statute requires.

On the other hand there can be this *de facto* distinctiveness. It is doubtful that any word can be said to be incapable, regardless of time or circumstance, of such an adaptation. We would say of such a mark that it “*has become distinctive*”; and I find that the Lord Chancellor in the *Glastonbury case*, (1) at page 258 in dealing with that aspect of adaptation, says: “It is not in dispute that the respondents in the circumstances of this case were called upon to prove by evidence that the word ‘Glastonbury’ or ‘Glastonbury’s’ alone *had become, at the date of registration, adapted to distinguish* their goods from those of other persons.” The Court there rejected the mark because in spite of the *de facto* adaptation it had not the distinctive quality specified by the statute. The difference between the two conceptions is made clear also by Lord Parker in the *W. & G. mark case*, (2) at page 637; and by Lord Justice Hamilton in *R. J. Lea Ltd.*, (3) at page 463 in this language: “Further, the Act says ‘adapted to distinguish’; the mere proof or admission that a mark does in fact distinguish does not *ipso facto* compel the judge to deem that mark to be distinctive. It must be further ‘adapted to distinguish’, which brings within the purview of his discretion the wider field of the interests of strangers and of the public.”

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(1) (1938) 55 R.P.C. 253.

(3) [1913] 1 Ch. 446.

(2) [1913] A.C. 624.

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With that distinction in mind, then, let us examine the definition of "trade mark" in section 2(m) of the Canadian Act. By this, "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 have been manufactured, sold, leased or hired by him or, etc." The word "distinctive" is seen to be absent; it appears only once in the statute, in section 28(1)(d) where it is used in relation to a foreign mark. That fact I consider significant. On the other hand, in the definition of "distinguishing guise", section 2(d), the expression "is adapted to distinguish" is used. There is, therefore, no restriction to marks which are "distinctive" in the sense of the English Act.

The expression "has become adapted to distinguish" includes then any case in which the word mark has in fact become the identifying badge of the article to which it is attached; that when it is presented to the mind associated with goods of a particular trade, whatever primary meaning it may have had is submerged, and only the trade designation remains: *J. & P. Coats, Ltd.*, (1). If, therefore, a word is used which describes or imports characteristics or qualities of goods, that connotation must have so disappeared before it can be said to have become so adapted; and when it is proposed to withdraw an ordinary word from the common use the task of establishing that exclusive secondary meaning becomes greater according to the extent of that use.

With these considerations in mind, I turn to the case before us. The mark offered is the compound word "Super-Weave". For thirteen years it has been used in connection with textiles, including cottons, woollens and synthetic fabrics, and the mode of its use has taken several forms. The elements of it are ordinary words and their sense is clearly descriptive of quality, and for that reason it was assumed, and properly so, to be excluded from section

26; but an application was made to the Exchequer Court under section 29, and it becomes necessary to give some consideration to the language of that section:—

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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.

The expression “as to have become *generally recognized* \* \* \* as indicating that such person *assumes responsibility for their character or quality, etc.*” appears in this statute, apparently, for the first time. It is contained also in section 2, subsections (k) and (l) in relation to definitions of the word “similar”. “Responsibility” seems to signify only what is imported by every trade mark, i.e. the commercial integrity and dependability of the owner of the mark. But the proof required by the section is both the fact that the mark has become adapted to distinguish certain goods from other goods of the same class as required by the definition and that the owner of it has become generally known as assuring quality or character, etc.

What, then, is the evidence of these matters offered to the Court? There are eight affidavits by customers of the applicant who are familiar with the wares and who say, incorporating the language of the section, that in effect “Super-Weave” means to them the goods of the applicant. There is also evidence of considerable advertising over the period of its use. What is asked for is the monopoly of this mark throughout the Dominion. The purchasers generally are laundries, dry cleaners, linen suppliers, hotels, hospitals and other institutions; but that the exclusiveness of the identifying sense of the word is in fact present to the minds of the customers, apart from that part of the trade which has not spoken, is by no means made out; and much less has it been shown to be recognized “generally” by Canadian dealers as attaching responsibility to the owner. Obviously, to customers purchasing these goods over some years the word would be associated with their origin; but that is short of the identification with the goods in which

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the descriptive sense of the word has disappeared. Neither that nor the general recognition required has, in my opinion, been made out and the application fails.

The respondent took the objection that the Registrar, representing the Minister, had no standing to appeal because he had not, under rule 38 of the Exchequer Court, appeared by filing a statement of objections to the application. I agree that the rule applies to the Minister. By rule 41, however, notice of trial must be served on the Minister. The effect of this is that any default under rule 38 is superseded; and notwithstanding default, the Minister continues as a party. That being so, he has a right of appeal under section 56 of the Act.

As this is the first occasion upon which this Court has been called upon to interpret the unusual language of this statute, the applicant should be given leave, if it desires, to present new evidence to the Exchequer Court to bring itself within the section. I would therefore allow the appeal without costs and refer the matter back to that Court.

KELLOCK, J.—By the judgment of the Exchequer Court (Cameron J.) in appeal, respondent has been granted a declaration in the terms of section 29(1) of the *Unfair Competition Act* with respect to the compound word “Super-Weave” in relation to cotton goods, woollen goods and synthetic textiles extending to the whole of the Dominion.

Appellant contends in the first place that as the words in question are of a laudatory character and clearly descriptive of the said goods they are incapable of registration under the statute. It is said that the Canadian Statute in this respect is to all intents and purposes the same as the corresponding provisions of the English *Trade Marks Act, 1905* and that the decisions under the last mentioned statute, excluding from registration laudatory epithets, have equal application under the Canadian Act.

The first four paragraphs of section 9 of the English statute provide certain essentials of a registrable trade mark but if a mark does not come within them it may yet be registered upon order of the Board of Trade or the court if it is “distinctive”, i.e., if, as defined by the statute, it is

“adapted to distinguish” the goods of the proprietor of the mark from those of other persons. In the determination of that question the tribunal is authorized, if the mark has been in use, to take into consideration the extent to which such user has rendered the mark in fact distinctive, but it has been held that this is a purely discretionary power.

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Bailey’s case (1), is an illustration of the well settled effect of the English statute, namely, that distinctiveness in fact is not conclusive upon the question of registrability. One extract from the judgment of Lord Maugham L. C. at p. 258 is sufficient:

It is not in dispute that the Respondents in the circumstances of this case were called upon to prove by evidence that the word “Glastonbury” or “Glastonburys” alone *had become*, at the date of registration, adapted to distinguish their goods from those of other persons, and it is further admitted, that even if that question were answered in the affirmative, the tribunal was not bound to allow registration.

By the terms of section 2(m) of the Canadian Statute however, if the symbol “has become adapted to distinguish” and “is used” for any of the purposes mentioned in the paragraph, that is sufficient to constitute a registrable mark provided it is not excluded under such sections as sections 14, 26 and 27. The court, in considering whether or not any particular word satisfies the provisions of the definition section, has no discretion under the Canadian Statute to exclude any word at the threshold of the hearing or to refuse to hear evidence designed to establish that in fact it has become adapted to distinguish. Section 26(1)(c) excludes all words which are clearly descriptive or mis-descriptive of the character or quality of the wares in connection with which it is proposed to use them and no differentiation is made as among words or classes of words whether laudatory or otherwise. In my opinion therefore it is not open to the court to exclude any word apart from the sufficiency of the evidence adduced in support of its having become adapted to distinguish the wares of the applicant.

The language used in section 2(m) is “has become” adapted to distinguish not “is” distinctive or “is” adapted to distinguish.

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In the *Perfection* case (1), Fletcher Moulton L. J. in discussing the provision in the English statute enabling the court to take into consideration the extent to which user had in fact rendered a mark distinctive, said at p. 147:

To my mind this provision can bear but one interpretation. It recognizes that distinctiveness, i.e., being adapted to distinguish the goods from those of other traders, is not necessarily an innate quality of the word. It may be acquired. There may be cases in which, if the Court says, "The word is descriptive of the goods, and cannot be distinctive solely of your make of those goods," the applicant may (if he can) reply thereto, "I will shew that it *can become* distinctive of my make of those goods by shewing that it *has actually become* so either generally or in a particular market." To use a phrase suggested by Farwell L. J. during the argument, the reply is of the type of '*solvitur ambulando*': "It can denote my goods because it actually does so."

In that case the learned Lord Justice was satisfied that the evidence showed that "the past user of the word has identified it in the eyes of the public with the goods of the applicants". Nevertheless under the English statute although a mark has become distinctive, that fact does not necessarily remove objection to a word itself if the word, considered as a word, "is" not adapted to distinguish. Under the Canadian statute however, if a word "has become" so adapted, that is sufficient.

As was said by Kindersley V. C. in *Archer v. Kelly*, (2), at 304:

The word "become" in its usual and proper acceptation imports a change of condition, that is the entering into a new state or condition by a change from some former state or condition.

"Adapted" means "fitted" or "suitable". A word not originally fitted or suitable to serve as a trade-mark may in my view become so, and I am unable to identify the expression "has become" with "is", although, no doubt it may well include it.

While section 26(1)(c) is exclusionary, nevertheless registration may be had if, on application to the court under section 29, it is proved to the satisfaction of the court that the mark has been so used 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, or for the other matters mentioned in the subsection.

(1) [1910] 1 Ch. 130.

(2) (1860) 1 Dr. & Sm. 300.

It is contended by the appellant that the applicant under this subsection is met at the outset with having to establish that he has a "trade-mark", i.e., that he must satisfy the court that the mark meets the provisions of section 2(*m*). In this view, having regard to the provisions of section 12, an applicant who is a manufacturer or vendor is required to establish under section 2(*m*) that:

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(a) his mark has become adapted to distinguish his wares; and

(b) that it is used in association with the wares for the purpose of indicating to dealers in and/or users that they have been manufactured or sold by him;

and under section 29(1):

that the mark has been so used as to have become generally recognized by dealers in and/or users as indicating that such person "assumes responsibility for their character or quality".

The words "assumes responsibility for their character or quality" in the above section are also to be found in sections 2(*k*) and (*l*) and I think that these words were intended by the draftsman to be construed as the equivalent of the words "manufactured, sold, leased or hired by him" as used in section 2(*m*). Reference to sections 26(1) (*c*) and 27(1) (*b*) would indicate that in their context the words "the character or quality of the wares" was there intended to serve a somewhat similar function.

In section 2(*m*) the use specified is use for a purpose. In section 29(1) the use is use which has produced a result. I think that whatever may be the situation in the case of other symbols, a clearly descriptive word which has acquired a secondary meaning within section 29(1) is a word which has "become adapted to distinguish" within section 2(*m*) so that in the case of such a word, to satisfy the requirements of the latter part of section 29 is to satisfy the definition in section 2(*m*).

While the approach to the construction of the Canadian statute is not, in my opinion, the same as in the case of the English Statute, nevertheless by reason of section 26(1)(*c*) I would employ the language of Fletcher Moulton L. J. in the *Perfection* case, *supra* at 858:

The tribunal before whom is brought an application to register a word under paragraph 5 is entitled to regard the word as *prima facie* unsuitable by reason of its being outside the specified classes, and it is for the applicant to show that it is proper to be registered \* \* \* The extent to which the Court will require the proof of this acquired distinctiveness to go will

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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 think that the burden of proof increases in direct ratio to the degree in which a word, or words, is in common use as descriptive of an article of trade or laudatory thereof. In *Canadian Shredded Wheat Co. v. Kellogg*, (1) Lord Russell said at 142:

But the onus on the person who attempts to establish this secondary meaning is a heavy one \* \* \* Where the words are purely descriptive and in common use it is even more difficult to conceive a case in which they could acquire a secondary meaning.

I think this language is applicable to the present statute.

Coming to the evidence, the respondent alleges that on January 1, 1933, it adopted the word "Super-Weave" as a trade-mark and applied the same to cotton, woollen and synthetic textiles and that it has since continuously used the said mark in Canada therewith. In the affidavit supporting the petition, made by an officer of the respondent, it is said that a small percentage of the goods manufactured or merchandised by the respondent is sold to the retail trade but that sales are confined principally to launderers, dry cleaners, linen suppliers and institutions such as hospitals and hotels which purchase goods from the respondent, either by the piece or manufactured into articles such as laundry bags, laundry wash mats, press cover cloths, towels, knitted padding for ironers and similar types of products. While it is said, as above mentioned, that the respondent has continuously used the words "Super-Weave" since its adoption on January 1, 1933, it is significant that on the 20th of January, 1933, the respondent registered, not the trade-mark "Super-Weave" but "Hardie's Super-Weave". While this registration was with respect to "cotton, woollen, linen and all other cloth materials and merchandise", and while the affidavit says that the petitioner's wares have always been identified by the trade-mark "Super-Weave", *simpliciter*, the exhibits show that what was in part used was "Superweave" as one word with the words "Cottons Reg'd." superimposed thereon. The affidavit also says that all stationery, invoices, wrapping paper, packages and cartons used by the petitioner in connection with the

merchandising and distribution of its products have the word "Super-Weave" prominently displayed thereon but the stationery produced bears the words "G. A. Hardie & Co. Limited Super-Weave Cotton Goods". Similarly, the sample of wrapping paper used to package small parcels has the same words in slightly different form and the same applies to the sample of cartons used in the case of large packages. Again, the purchase order form and the same applies to the sample of cartons used in the case of large packages. Again, the purchase order form uses the words "Superweave" with the words "Cottons Reg'd." superimposed, and the same is true of the invoice form, the salesman's order form and the form of desk pad. The respondent's letter-head uses "G. A. Hardie & Co. Limited Super-Weave Cotton Goods" and the office order form uses the style "G. A. Hardie & Co. Limited, Manufacturers and Wholesalers Super Weave Textiles".

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Under the provisions of section 6 a trade-mark is deemed to have been, or to be used, for the purposes of the Act. in association with wares if "by its being marked on the wares themselves, or on the packages in which they are distributed, or by its being in any other manner so associated with the wares at the time of the transfer of the property therein or of possession thereof in the ordinary course of trade and commerce notice of the association is then given to the persons to whom the property or possession is transferred". None of the exhibits produced, as mentioned above, which would appear to come within the contemplation of this section use the words "Super-Weave" alone.

In *In re Powell's Trade-Mark* (1), at 401, Lindley L. J. said:

The cases which have been referred to \* \* \* all shew that the user as a trade-mark must be the user of that which is registered as the trade-mark alone, and not in combination with something else.

See also *Richards v. Butcher* (2).

In addition to the affidavit mentioned above, the respondent filed an affidavit by officers of two laundries in Toronto, one in the city of St. John, N.B., one in the city of Winnipeg, one in the city of Montreal, one in the city of Victoria, one in the city of Calgary. There is also an

(1) [1893] 2 Ch. 388.

(2) [1891] 2 Ch. 522.

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affidavit of the superintendent of a hospital of the city of Toronto. All of these affidavits are essentially in the same form. The following are typical paragraphs:

2. That the said NEW METHOD LAUNDRY CO. LIMITED is a firm of launderers, dry cleaners and linen suppliers using various types of textile goods, including laundry bags, laundry identification tags, laundry wash nets, sheeting, press cover cloths, knitted padding for ironers, towels and towelling.

3. That I have been familiar with the trade mark "Super-Weave", as used by G. A. Hardie & Co. Limited, in association with textiles since 1933, and I am familiar with all the products of G. A. Hardie & Co. Limited by reason of receiving advertising literature correspondence and invoices describing said products which are sold under the name "Super-Weave".

4. That said NEW METHOD LAUNDRY CO. LIMITED, have since 1933 purchased from G. A. Hardie & Co. Limited many hundreds of dollars worth of textile goods bearing the trade mark "Super-Weave".

5. That the said trade mark "Super-Weave" indicates to me that textiles, including Cotton goods, Woollen goods and Synthetic textiles bearing the said trade mark are manufactured and sold by G. A. Hardie & Co. Limited, that they are of a defined standard and that G. A. Hardie & Co. Limited assumes responsibility for their character and quality. The said trade-mark has no other meaning to me.

6. Whenever I see textiles sold under the name "Super-Weave", I immediately associate the same with the products of G. A. Hardie & Co. Limited, and I am led to believe that the same are manufactured and sold by the said firm."

It is obvious that these affidavits are quite insufficient to establish the "general" recognition required by the provisions of section 29. There must be hundreds of other laundries and there are many other hospitals throughout the country, none of which are so much as mentioned in the evidence.

The statement in paragraph 5 that the trade-mark upon the goods indicates to the deponents that "they are of a defined standard" is illustrative, in my opinion, of the weight to be given to the affidavits themselves. By section 30, subsection 3, it is provided that if the mark is intended to indicate that the wares are of a defined standard, the application for registration must contain an exact definition of what the use of the mark in association with wares is intended to indicate in respect of the standard which such wares have attained. Nowhere in the affidavits is any information given as to this standard which is indicated to these deponents by the use of this trade-mark and in the absence of such information I take it that these words

were quite ignorantly used. Further, an applicant such as the respondent is precluded by section 12 from adopting a mark to indicate its goods are of a defined standard. In my opinion affidavits of this nature, without any evidence as to how they were obtained and which are limited entirely to customers of the applicant for registration, are quite insufficient to satisfy the heavy onus resting upon the person desiring to obtain a judgment under the provisions of section 29 in circumstances such as are here present.

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The proper practice to be followed in obtaining evidence of any weight for use on such an application as that here in question is indicated in *Hack's* case, (1), where questionnaires had been submitted to a large number of persons and firms for the purpose of ascertaining by question or questions, not leading in their nature, the meaning to the addressees of the particular trade-mark there in question. The evidence submitted in support of the present petition falls far short of that which is necessary under section 29.

Counsel for the respondent submitted that should the court be of opinion that the evidence was insufficient the petition should not be dismissed on that ground for the reason that no statement of objections was filed in the court below on behalf of the appellant and the respondent therefore had no notice until the actual trial that any such objection would be taken. Moreover, there is some difference of opinion between counsel as to whether any point was in fact made at the trial with respect to the insufficiency of the evidence. In view of this situation, while I think the appeal should be allowed, I think the petition should be remitted to the court below for a rehearing and that both parties may be at liberty to adduce further evidence. On such rehearing the actual use of the mark will require to be considered as well as the kind of goods with respect to which it had been used in connection with the question as to whether the use in fact made is sufficient to satisfy the requirements of section 29.

Respondent also contends that the appellant has no right of appeal to this court and that in any event as no statement of objections was filed in accordance with the

(1) (1940) 58 R.P.C. 91.

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second paragraph of rule 36 of the Exchequer Court rules, respondent should not be heard. It is said he is not properly before the court.

It is not and could not, in view of the circumstances, be contended that the appellant was not a party to the proceedings in the court below as the respondent itself made the appellant the party respondent in those proceedings. Section 56 of the *Unfair Competition Act* is accordingly sufficient warrant for appeal.

As to the necessity for filing a statement of objections even if this requirement applies to the Minister, which I am inclined to doubt, rules 37 and 41 both would require, in any event, notice to be given to the Minister of the hearing and it cannot be contended that the Minister could not at the hearing take any ground of objection because of any failure to file objections. Further, rule 300 authorizes relief to be given against such a failure and in my view it would be proper in the present case to relieve against any such obligation if it in fact exists.

I think therefore, that there is no substance in the objections of the respondent. I would allow the appeal and remit the petition to the court below to be dealt with in accordance with the principles indicated above upon any further evidence which may be adduced by either party.

ESTEY, J.—The respondent, its head office in Toronto, manufactures and distributes textiles. Early in 1933 it adopted and identified its merchandise by the compound word “super-weave” or “superweave”, and in 1947 commenced these proceedings under s. 29 of *The Unfair Competition Act*, 1932 (S. of C. 1932, c. 38), for a declaration that might lead to the registration of this word as a trade mark. The petition was granted in the Exchequer Court and the appellant appeals from that decision.

S. 29 provides:

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.

Respondent submits that "super-weave" as normally used is descriptive of the "character or quality" of textiles, and therefore not registrable under s. 26(1)(c), but that because this word "super-weave" has been continuously used since 1933 in association with its textiles, it has acquired a secondary meaning in the sense that it has "become generally recognized by dealers in and/users" as to justify the declaration provided for in s. 29.

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The appellant submits that the word "super-weave" as ordinarily used is a laudatory epithet and cannot "become adapted to distinguish," and therefore not a trade mark within the definition in s. 2(m). He cites *Leopold Cassella & Co.*, (1), *Bailey & Co. Ltd. v. Clark, Son & Morland Ltd.*, (2), and *R. J. Lea, Limited* (3). These cases, decided under the *Trade Marks Act*, 1905, in Great Britain (7 Edw. VII, c. 15, as amended in 1919) distinguish between distinctiveness in fact and distinctiveness defined in that Act as "adapted to distinguish." The proof of distinctiveness in fact is relevant but is not conclusive in determining whether a trade mark is "adapted to distinguish." In *R. J. Lea, Limited, supra*, Hamilton, L. J., (as he then was) stated at p. 463:

\* \* \* the mere proof or admission that a mark does in fact distinguish does not *ipso facto* compel the judge to deem that mark to be distinctive. It must be further "adapted to distinguish," which brings within the purview of his discretion the wider field of the interests of strangers and of the public.

The issue between the parties hereto involves the construction in our statute of the definition of "trade mark" in s. 2(m), "word mark" in s. 2(o), s. 26 under which registration of certain classes of word marks is prohibited, and the meaning and purpose of s. 29 in relation to the definition and registration of trade marks.

"Trade mark" is defined in s. 2(m):

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.

(1) (1910) 27 R.P.C. 453.

(3) [1913] 1 Ch. 446.

(2) (1938) 50 R.P.C. 253.

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This definition is divided into two main parts: First, it is required that the symbol "has become adapted to distinguish" particular wares from others within the same category, and second, it must be "used by any person in association with wares entering into trade or commerce for the purpose of indicating to dealers \* \* \*" The purpose of a dealer in adopting a trade mark is that it distinguishes his wares from those of all other dealers. A trade mark, therefore, in that sense must be distinctive. The word "distinctive," however, does not appear in definition 2(m): On the contrary, the words are "has become adapted to distinguish." The phrase here appears for the first time in our statute law, but the phrase "adapted to distinguish" has been in the statute law of Great Britain since the enactment of the *Trade Marks Act, 1905*. S. 9(5) of this latter statute provides in part "'distinctive' shall mean adapted to distinguish," and as above explained, this phrase has been given a meaning, as indicated by the quotation from *R. J. Lea, Limited, supra*, different from that of "distinctive in fact." The essential difference is that a symbol which distinguishes in fact the wares of the particular person is not sufficient to obtain registration under the British statute. It must in addition be established that the word is "adapted to distinguish" which involves wider considerations of the rights and interests of the public in the words of our language and more particularly of those commonly and ordinarily used in commendation and praise of wares. The rights of the public in these words have long been protected and dealers prevented from obtaining the exclusive right or monopoly in their use through the registration of them as trade marks both in the law of Canada and Great Britain. *Partlo v. Todd* (1).

These two phrases "adapted to distinguish" and "distinctive in fact" were both well known in the law respecting trade marks when the legislation here in question was enacted. It is therefore significant that in the definition of trade mark (s. 2(m)) Parliament adopted the phrase "has become adapted to distinguish" rather than "has become distinctive in fact." The adoption of the latter would have changed the law, while the fact that they adopted "has become adapted to distinguish" would, under the circum-

stances, indicate an intention not to change the law. In view of the foregoing it would appear that the words "adapted to distinguish" are in the phrase "has become adapted to distinguish" the dominant and important words. These words, as Lord Justice Hamilton pointed out, involve considerations of strangers and the public generally and are therefore of wider import than "distinctiveness in fact."

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That the interest of the public is always important was emphasized in this Court upon a somewhat different point in *Lightning Fastener Co. Ltd. v. Canadian Goodrich Co. Ltd.* (1), where Rinfret, J. (now Chief Justice) stated at p. 196:

\* \* \* and it should not be forgotten that legislation concerning patents, trade-marks and the like exists primarily in the interest and for the protection of the public, so much so that it could be said that the public is a third party to all patent or trade-mark litigation.

See also *Eno v. Dunn*, (2), at p. 262.

At the hearing of this appeal the two words "has become" were emphasized and it was suggested that they involved the conclusion that evidence of use would be sufficient to establish that the word mark was "adapted to distinguish." If Parliament had desired to effect so important a change in our law it would have adopted the phrase "has become distinctive in fact" or some such words as would have more clearly expressed such an intention. More particularly is this true as these phrases and their separate and distinct significance were so well known. As already indicated, the dominant words in the phrase are "adapted to distinguish" rather than "has become." Moreover, that these words "has become" were not intended to convey such a meaning finds support in the position and effect of the proof of use in the definition 2(m) and s. 29.

It is pertinent to observe that a "word mark" in the language of s. 2(o) 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." Distinctiveness founded upon idea or sound is basic in this definition and indicates that it is in the word mark itself rather than in its use that

(1) [1932] S.C.R. 189.

(2) (1890) 15 A.C. 252.

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the quality of distinctiveness must be found. It would therefore appear to be more in accord with the language of both ss. 2(*m*) and 2(*o*) that the phrase "has become adapted to distinguish" refers principally to that which is inherent in the symbol itself.

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The trade mark defined in s. 2(*m*) is registrable under the Act unless either its adoption or registration as such is therein prohibited. This is made clear by the provisions of s. 39:

39. If there is no objection to the registration of a trade mark for the registration of which a sufficient and complete application has been made, the Registrar shall, subject as hereinafter provided, forthwith cause such trademark to be entered in the register as of the date upon which such application was received by him.

The statute therefore contemplates that the trade mark which comes within the terms of the definition of 2(*m*) will be registered unless within the terms of s. 39 there is an objection to the registration within the meaning of the statute.

These objections are expressed in the Act in the main by prohibitions against either the adoption of or the registration of the trade mark as such. This view is emphasized by the language of these sections in which the prohibition is always directed against a trade mark as illustrated by the opening words of ss. 14 and 26. In this latter section these are, "Subject as otherwise provided in this Act a word mark (a trade mark under s. 2(*o*)) shall be registrable if it (a) does not contain more than thirty letters \* \* \* (c) is not \* \* \* clearly descriptive or misdescriptive of the character or quality of the wares \* \* \* (f) is not similar to, \* \* \* some other word mark already registered \* \* \*." If the registrar refuses registration either because the word mark does not come within the definition of ss. 2(*m*) and 2(*o*) or if within that definition then because either its adoption or registration is prohibited by some provision in the statute, the applicant may appeal under s. 51 to the Exchequer Court.

It will be observed that all of the foregoing takes place without reference to s. 29, and, moreover, that s. 29 does not provide an appeal from the decision of the registrar. The opening words of this section, "Notwithstanding that a trade mark is not registrable under any other provision of

this Act," indicate that it is dealing only with trade marks and that it is in the nature of an overriding section which makes possible registration otherwise prohibited. It is important to observe that s. 29 applies only where the trade mark is not registrable and therefore has no reference to the provisions where the adoption of the trade mark is prohibited as in s. 14.

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It is, moreover, significant that Parliament in s. 29 does not ask the Court to determine whether the symbol "has become adapted to distinguish" as that phrase appears in s. 2(*m*). On the contrary, and with equal significance, Parliament here adopts in s. 29 language more closely related to the definition of "similar" in relation to "trade marks" in s. 2(*k*).

2. (*k*) "Similar," in relation to trade marks \* \* \* so resembling each other \* \* \* in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality \* \* \*

The proof required in s. 29 is stated as follows:

\* \* \* 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 \* \* \*

The language in s. 2(*k*) in so far as it relates to trade marks is not directed to any question as to whether the symbol "has become adapted to distinguish." No question of similarity under 2(*k*) arises until the symbols are trade marks within the definition 2(*m*). The word "similar" as so defined appears in s. 26(1)(*f*) already quoted and there the only question before the registrar is whether registration should be prohibited because the word marks are similar and therefore the likelihood of confusion and deception.

If registration is refused under s. 26(1)(*c*) (as in this case the respondent concedes "super-weave" would be) because the word mark is clearly descriptive, it is still open to the applicant to apply under s. 29 and there to make such proof as to satisfy the Court that the word mark "has become generally recognized" as in that section provided. The effect of the declaration is that, although the word mark is within the class which is clearly descriptive in association with these wares and therefore not registrable under

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s. 26(1)(c) this applicant has so used it in association with his wares as to cause it to lose its significance as a word of description and that it is now "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 \* \* \*"

It is in this section that Parliament provides proof of use by the applicant and while the phrase "distinctiveness in fact" is not here used, the declaration when made in relation to a word mark may be regarded as equivalent to the establishment of "distinctiveness in fact." This evidence, it will be observed, by the express language of s. 29, is given in relation to a trade mark as defined in 2(m), the registration of which is otherwise prohibited.

The language and plan of our statute is substantially different from the *Trade Marks Act* of 1905 in Great Britain but in principle its provisions for registration are similar and in effect much the same. It has always been recognized in both the common and statute law of both countries that with respect to trade marks there are words of such common and ordinary use that no person should be permitted to adopt them as trade marks and thereby acquire the exclusive right or monopoly to the use thereof. Even if in a particular instance in relation to specific wares evidence established "distinctiveness in fact" there remained that larger consideration of public interest which prevented their classification as words "adapted to distinguish." No amount of use by an individual could defeat the public interest and make possible their adoption as a trade mark. In the present enactment Parliament has not only not indicated a change but has adopted the phrase "adapted to distinguish" well known in the law of Great Britain under which this very principle is protected. Its meaning and position in Great Britain would be present to Parliament in the adoption of this phrase, and, indeed, it might with propriety be suggested that the language was for that very reason adopted. In any event, a survey of the relevant sections and of the statute as a whole lead to the conclusion that the phrase "adapted to distinguish" has the same meaning in our statute as under the statute of Great

Britain. It follows that words commonly used and appropriately described as laudatory epithets cannot become registrable as trade marks.

The compound word "super-weave" contains the well-known, commonly used laudatory epithet "super" and the equally well-known word "weave" commonly used to describe the texture or method of manufacture. It is a well-founded principle recognized in both the authorities and statute law that such words (subject to a descriptive word becoming "generally recognized" as in s. 29) should remain the common property of dealers and users and the public generally and no person or corporation should be granted the exclusive right to or a monopoly in the use of such words such as registration of a trade mark bestows upon the applicant.

When these words are joined to form the compound word "super-weave" it means, as stated by the learned trial Judge, "a better quality of weaving," and, with respect; I think would be so understood and commonly used by dealers and users, and as such properly classified as a laudatory epithet.

I agree that the Registrar of Trade Marks was a proper party to this appeal.

The appeal should be allowed, but without costs, and the applicant's petition dismissed.

*Appeal allowed and Petition dismissed without costs.*

Solicitor for the appellant: *W. P. J. O'Meara.*

Solicitor for the respondent: *G. H. Riches.*

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