
LIGHTNING FASTENER COMPANY, } APPELLANT; ¹⁹³¹
 LIMITED } *Nov. 19, 20.
*Dec. 22.

AND

CANADIAN GOODRICH COMPANY, }
 LIMITED } RESPONDENT.

CANADIAN GOODRICH COMPANY, } APPELLANT;
 LIMITED }

AND

LIGHTNING FASTENER COMPANY, }
 LIMITED } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-mark—Conflicting claims to word—Whether descriptive—Questions open for determination by court under proceedings taken—Use of word—Class of goods—“Merchandise of a particular description”—Confusion—Conditions justifying refusal of registration—Trade-Mark and Design Act, R.S.C., 1927, c. 201, ss. 45, 12, 11, 4 (c); Exchequer Court Act, R.S.C., 1927, c. 34, s. 22 (as enacted by 18-19 Geo. V, c. 23).

G. Co. in 1923-1924 adopted, put into use, and caused to be registered in Canada, the word “Zipper” as a specific trade-mark in connection with footwear, and has since sold under it overshoes equipped with

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.
 (1) [1925] Can. S.C.R. 49; [1926] (2) [1928] A.C. 127.
 A.C. 140.

1931
 LIGHTNING
 FASTENER
 Co. LTD.
 v.
 CANADIAN
 GOODRICH
 Co. LTD.

slide fasteners. The slide fasteners were manufactured by L. Co. which supplied all of them that were so used by G. Co. In 1927 L. Co. applied for registration of the word "Zipper" as a specific trade-mark in connection with the sale of slide fasteners. Subsequently G. Co. applied for registration of the word as a specific trade-mark in connection with the sale of slide fasteners and all articles containing the same. The Commissioner of Patents refused both applications, notifying the parties that, in view of certain conflicting applications, no further action could be taken "until the rights of the different parties have been determined either by mutual agreement or by a court of competent jurisdiction." L. Co. then petitioned in the Exchequer Court, and G. Co. (objecting party) counter petitioned, each for an order for registration as applied for. Maclean J. ([1931] Ex. C.R. 90) dismissed both petitions, holding that the word had become descriptive of slide fasteners in such degree as to preclude its registration as a trade-mark. Both parties appealed, both contending that the judgment below was made upon an issue not properly before the court, and that, in any case, the evidence was insufficient to support the holding, and each claiming an exclusive right to the use of the word for its purpose as applied for.

Held (1): It was within the competence of the Exchequer Court (and of this Court on appeal) to pass upon said ground taken in the judgment below. On proceedings such as those taken in this case, the court has jurisdiction to enquire into all reasons wherefor, under the *Trade Mark and Design Act*, the registration should be permitted or refused; its powers are co-extensive with those conferred on the Minister in s. 11, and (in the absence of surprise to the parties) its investigation should cover the same field (s. 45 of said Act cited and discussed; also s. 22 of the *Exchequer Court Act*, as amended by 18-19 Geo. V, c. 23). (*Quære* whether, on a reference by the Minister to the Exchequer Court under s. 12 of the *Trade Mark and Design Act*, the court's jurisdiction may not be limited to the determination of the question involved in the reference).

(2): The evidence, however, was not such as to establish that, at the time of the applications in question, the word "Zipper" had become descriptive, so as to justify refusal of registration on that ground.

To deny registration of a word on the ground that it is descriptive, it must appear that, at the date of the application, it was a name, in current use, descriptive of the *article itself*.

(3): G. Co.'s petition should be refused. A specific trade-mark can only be registered "in connection with the sale of a class merchandise of a particular description" (s. 4 (c)); and the "merchandise of a particular description" which G. Co. sold was an overshoe, not the fastener with which it was equipped; nor did G. Co. indicate any present intention of manufacturing or selling slide fasteners separately (*Batt & Co.'s Trade Marks*, 15 R.P.C. 262 and 534 (at 538), [1899] A.C. 428; *Bayer Co. v. American Druggists' Syndicate*, [1924] Can. S.C.R. 558, at 569-570; *Pugsley, Dingman & Co. v. Proctor & Gamble Co.*, [1929] Can. S.C.R. 442, at 448, referred to in this connection). Further, although G. Co. had used and registered the word in connection with footwear, it had never used it in connection with fasteners (and the exclusive right to a mark is restricted to the class of goods to which it has been attached: *Somerville v. Schembri*, 12 App. Cas. 453); and its application for registration was posterior to that of L. Co. Also its

application to register the mark in connection with "all articles containing" slide fasteners should be refused by reason of the confusion which, on the evidence (which showed that slide fasteners are or may be used on a great number of goods of all classes), would otherwise result; (*quaere* whether, under the Act, a request in that form for a specific trade-mark may be entertained at all).

- (4): L. Co.'s petition should also be refused. In view of the long and extensive use of the word by G. Co. in connection with overshoes, of the existence of certain other marks on the Register, and of the wide variety of goods to which the fasteners were or might be attached, confusion would likely have resulted had the mark been allowed. To justify refusal of registration it is sufficient that the mark *might* have the effect of deceiving the public (*Eno v. Dunn*, 15 App. Cas. 252, at 257). L. Co.'s adoption of the word as a mark for slide fasteners came too late in the word's history.

Judgment of the Exchequer Court (*supra*), in its result, affirmed.

CROSS-APPEALS taken independently by each of the parties from the judgment of Maclean J., President of the Exchequer Court of Canada (1), refusing the petition of each party for an order directing registration of the word "Zipper" as a specific trade-mark.

In 1923-1924, the B. F. Goodrich Company (a corporation of the State of New York, U.S.A.) adopted and put into use the word "Zipper" as applied to footwear manufactured by it, which footwear was equipped with a separable fastener of the slide controlled type (the fastener itself was not manufactured by it). In February, 1924, it obtained in Canada registration of the word "Zipper" as a specific trade-mark to be applied to the sale of footwear. This was assigned, in January, 1925, to the Canadian Goodrich Company, Ltd. (hereinafter called the "Goodrich Co.") which has since carried on the Goodrich business in Canada, which business has included the manufacture of overshoes equipped with slide fasteners under the trade-mark "Zipper." The Goodrich Co. never manufactured the slide fasteners themselves, but purchased them from the Lightning Fastener Company Ltd. (hereinafter called the "Lightning Co.") which manufactured them and supplied to the Goodrich Co. all that were used by the latter in its footwear as aforesaid.

In October, 1927, the Lightning Co. applied for registration of the word "Zipper" as a specific trade-mark to be used in connection with the sale of separable fasteners, par-

1931
 LIGHTNING
 FASTENER
 Co. LTD.
 v.
 CANADIAN
 GOODRICH
 Co. LTD.

1931
LIGHTNING
FASTENER
Co. LTD.
v.
CANADIAN
GOODRICH
Co. LTD.

ticularly of the slide-controlled type. Subsequently the Goodrich Co. applied for registration of the word "Zipper" as a general trade-mark, which application was refused, and the Goodrich Co. later applied for registration of the word as a specific trade-mark to be used in connection with the manufacture and sale of slide fasteners and articles containing same.

On March 14, 1929, the Commissioner of Patents wrote a letter to each of the parties, in which, after referring to certain conflicting applications, he stated that "no further action can be taken" thereon "until the rights of the different parties have been determined either by mutual agreement or by a court of competent jurisdiction."

On March 12, 1930, the Lightning Co. filed a petition in the Exchequer Court of Canada, praying for an order for registration of its trade-mark "Zipper" as a specific trade-mark to be used in connection with the manufacture and sale of separable fasteners. The Goodrich Co. filed its statement of objection, in which, by way of counter petition, it prayed for a declaration that it is exclusively entitled to the use of the word "Zipper" as a trade-mark for slide fasteners and articles equipped therewith, and for a direction to the Commissioner of Patents to act upon its application.

Maclean J., President of the Exchequer Court of Canada (1), refused both the petition and counter petition, holding that the word "Zipper" had become descriptive of slide fasteners in such degree as to preclude its registration as a trade-mark.

Both parties appealed, the Lightning Co. from that part of the judgment which refused registration of its trade-mark "Zipper" as a specific trade-mark to be used in connection with the manufacture and sale of separable fasteners, and the Goodrich Co. from that part which refused registration of its trade-mark "Zipper" as a specific trade-mark in connection with the sale of slide fasteners and articles containing the same.

Harold G. Fox for the Lightning Fastener Co. Ltd.

R. S. Smart K.C. for the Canadian Goodrich Co. Ltd.

ANGLIN C.J.C.—I would dismiss the appeal and cross-appeal with costs.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. was delivered by

RINFRET J.—These are cross-appeals taken independently by each of the parties from the judgment of the President of the Exchequer Court (1), refusing to order the registration by either party of the word “Zipper” as a specific trade-mark for separable fasteners of the slide-controlled type referred to as slide fasteners. The latter may be described as devices consisting of two opposite series of members adapted to be attached one on each side of an aperture in some article and to interlock so as to close the aperture upon the slide being operated in one direction, or to separate so as to leave the aperture open upon the slide being operated in the opposite direction.

The proceedings originated by way of petition to the Exchequer Court praying that an order may be made directing the registration of the trade-mark in the name of the Lightning Fastener Company Ltd. to be used in connection with the manufacture and sale of separable fasteners of the type in question. The Canadian Goodrich Company Ltd. was the Objecting Party, and, in its statement of objection, it also petitioned for the registration of the trade-mark in connection with similar goods.

The learned judge dismissed both applications. His decision was that, subsequently to its use and registration as a trade-mark by the Goodrich Company on overshoes equipped with slide fasteners, the word “Zipper” had become descriptive of slide fasteners generally and was, therefore, no longer a proper mark for registration.

Both parties appeal. They join in asking that the judgment be set aside because, as they contend, the adjudication was made upon an issue not properly before the court and as to which, at all events, the evidence was quite insufficient to support the conclusion of the learned judge. But, after having thus jointly enunciated their grounds of attack upon the judgment, the parties separate, and each

1931

LIGHTNING
FASTENER
CO. LTD.
v.
CANADIAN
GOODRICH
CO. LTD.

1931

LIGHTNING
FASTENER
Co. LTD.

v.

CANADIAN
GOODRICH
Co. LTD.

Rinfret J.
—

of them prays for a declaration that it is exclusively entitled to the use of the word "Zipper" as a trade-mark.

The question of the competency of the Exchequer Court in the premises must first receive our attention.

The point comes up in this way:

There being several applications for the registration of the word "Zipper" pending before the Commissioner of Patents, he notified each party that "no further action (could) be taken on any of the above noted conflicting trade-mark applications until the rights of the different parties (had) been determined either by mutual agreement or by a court of competent jurisdiction."

The point raised by the appellants is that conflict was therefore the only question in controversy and upon that question alone was the Exchequer Court competent to adjudicate.

Under the *Trade Mark and Design Act*, the Minister named by the Governor in Council to administer the Act may refuse to register a trade-mark in any of certain cases enumerated in sec. 11, and conflict is one of them. In such cases, the Minister may also, if he thinks fit, "refer the matter to the Exchequer Court of Canada" and, says sec. 12,

in that event, such court shall have jurisdiction to hear and determine the matter, and to make an order determining whether and subject to what conditions, if any, registration is to be permitted.

It may be argued—and with some force—that when the case is brought before the Exchequer Court in the form just described, the jurisdiction of that court is limited to the determination of the question involved in the reference. That question only, it may be said, is the subject-matter of the reference and it alone is "the matter" which the court "shall have jurisdiction to hear and determine."

But such is not the case that we have before us. The Minister made no reference. He simply left it to the different parties to decide upon their own course to have their rights adjusted. One of them, the Lightning Company, instituted the present proceedings. They are proceedings by way of petition complaining that the petitioner's application was, without sufficient cause, refused by the Minister. In proceedings of that kind, the parties apply to the court for relief notwithstanding that the matter has not been

referred to the court by the Minister. This they may do under sec. 45 of the Act (See *In re "Vulcan" Trade Mark* (1)), but they should express no surprise if, under the circumstances, they do not find themselves in exactly the same position as if there had been a reference. While it may be that, upon the bare words, section 12 is susceptible of being construed as conferring only a limited jurisdiction, as to which the present case does not call for our opinion, the same may not be said of sec. 45, which reads as follows:

45. The Exchequer Court of Canada may, on the information of the Attorney-General, or at the suit of any person aggrieved by any omission, without sufficient cause, to make any entry in the register of trade-marks or in the register of industrial designs, or by any entry made without sufficient cause in any register, make such order for making, expunging or varying any entry in any such register as the Court thinks fit; or the Court may refuse the application.

2. In either case, the Court may make such order with respect to the costs of the proceedings as the Court thinks fit.

3. The Court may in any proceedings under this section, decide any question that may be necessary or expedient to decide for the rectification of any such register.

We can see no limitation, such as is suggested, in the language of this section. The court may make such order as it thinks fit, or it may refuse the application; and, for that purpose, it has jurisdiction to inquire into all the reasons wherefor, under the Act, the entry in the register should be permitted or should be refused. The intention appears, in any of the cases contemplated by sec. 45, to import into the section all the provisions of sec. 11, so that, in the relevant litigation, the powers of the court are co-extensive with those conferred on the Minister in Sec. 11 and the court, *mutatis mutandis*, stands in the position of the Minister.

If it were necessary, resort may be had to sec. 22 of the *Exchequer Court Act*, as introduced in 1928 by c. 23 of 18-19 George V:

22. The Exchequer Court shall have jurisdiction as well between subject and subject as otherwise,

- (a) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade-mark or industrial design;
- (b) in all cases in which it is sought to impeach or annul any patent of invention, or to have any entry in any register of copyrights, trade-marks or industrial designs made, expunged, varied or rectified; and

1931

LIGHTNING
FASTENER
Co. LTD.

v.

CANADIAN
GOODRICH
Co. LTD.

Rinfret J.

(c) in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at Common Law or in Equity, respecting any patent of invention, copyright, trade-mark, or industrial design.

By the above section, the jurisdiction is conferred in broad and general terms. Both under that section and under sec. 45 of the *Trade Mark and Design Act*, the jurisdiction of the court is not limited to the points invoked in the Minister's ruling, and the whole case is properly and competently before the court.

Of course, as the appellants contend, the rule remains that the adjudication must be confined to the issues to which the trial was directed, but the real issue is whether the mark is a proper one for registration; 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. For that reason, when applied to those cases, the rule should receive the widest and most liberal interpretation. After all, the court may not give a final order for making an entry in the register of trade-marks, unless it be satisfied that the applicant is undoubtedly entitled to the exclusive use of the mark and that the mark is not in any way objectionable under one or the other of the sections of the Act, more particularly section 11; and it is for the applicant to satisfy the court in these respects. We fail to see why the court's investigation should not cover the same field as that of the Commissioner or the Minister, provided always the parties are not taken by surprise.

We do not therefore agree with the appellants' contention that the judgment proceeded on a point which was not before the court. As already said, the learned President refused the applications because, in his opinion, the word "Zipper" was descriptive and was not accordingly a proper mark for registration. It cannot be doubted that, in the present proceedings, the Exchequer Court was competent to pass upon that ground of objection, nor that the applicants were amply advised, by the course of the trial, that this would be one of the points considered in the judgment and that they were expected to satisfy the court in regard

to it. They have no reason to complain now if they have neglected to direct their attention to that question.

What is true of the Exchequer Court and of the manner in which it may deal with a case like this applies, we apprehend, in no lesser degree to this Court. We do not doubt our power to dispose of the case upon grounds other than those stated by the Minister, grounds based on the record and which are presently to be stated.

We would hesitate, however, to follow the learned trial judge in his conclusion that the evidence was sufficient to hold that the word "Zipper" had in such degree become descriptive as to preclude its registration as a trade-mark.

The proposition that words merely descriptive are not registrable is not disputed. It should, of course, be qualified by adding that even a descriptive word may be registered if, through long, continued and extensive use, it has acquired a secondary meaning and become adapted to distinguish the goods of the applicant (Rule X of the Patent and Copyright Office). Incidentally, it may be said that the Goodrich company quite failed in its attempt to establish that the word "Zipper" was generally associated by the public with wares of Goodrich manufacture or selection.

But, in order to deny registration of a word on the ground that it is descriptive, it must be shown that, at the date of the application (which is the date to be taken into consideration), the word was a descriptive name in current use, descriptive of the article itself as distinguished from a name exclusively distinctive of the merchandise of a particular dealer or manufacturer.

Now, in 1923, the word was a newly coined fancy word, applied to footwear equipped with slide fasteners, and not known in the language. It was none the less a fancy word because it might be said that "zip" (an ordinary English word expressing the light sharp sound of a bullet or other object passing rapidly through the air) lies at the root of "Zipper" (see the *Bovril* case (1), and the *Tabloid* case (2)). The application of the petitioner dates back to the first of September, 1927. The evidence bearing on the state of facts existing at that time falls far short of establishing

1931

LIGHTNING
FASTENER
Co. LTD.

v.

CANADIAN
GOODRICH
Co. LTD.

Rinfret J.

(1) (1896) 13 R.P.C. 382.

(2) (1904) 21 R.P.C. 217.

1931
 LIGHTNING
 FASTENER
 Co. LTD.
 v.
 CANADIAN
 GOODRICH
 Co. LTD.
 Rinfret J.

that, in the minds of the general public, the word had then acquired a meaning descriptive of slide fasteners of the type in question. There is some evidence of the occasional use of the word in that sense in a loose way; but even that is vague in point of time and quite fails, in our opinion, to show a general acceptance and a common use of the word for the purpose of describing the article itself.

In our view, the record does not contain the kind of evidence required to decide that, at the time of the applications, the word "Zipper" was not registrable, on account of having become descriptive. Accordingly we shall proceed further to examine the respective claims of the appellants, taking first that of the Objecting Party.

We think its application should be refused for two reasons.

A specific trade-mark can only be registered "in connection with the sale of a class merchandise of a particular description" (Sec. 4c).

The mark covers the merchandise as manufactured or sold. It may be applied to the product or the article itself, or it may be applied to the package, parcel, case, box or other vessel or receptacle containing the same (sec. 5), but it applies to the article in the form only in which it is produced or sold and not to the component parts of the article. The Goodrich company never manufactured or produced or offered for sale slide fasteners *per se*. They are dealers in footwear, and certain overshoes which they offer for sale are equipped with slide fasteners. That does not alter the fact that the "merchandise of a particular description" which they sell is an overshoe and not a fastener. The fastener is no more the merchandise than the fabric or the rubber which, together with it, go to make up the overshoe.

Nor does the Goodrich company indicate any present intention of manufacturing or selling slide fasteners separately. In fact, the only ground upon which it advances its claim in respect of the mark as applied to fasteners is that, although it admits having "purchased all the slide fasteners required by it from the Lightning company," it inspected and selected the same before using them. Assuming this to be sufficient to justify registration under the Act, suffice it to say that there is a complete absence of

satisfactory evidence to bring the Goodrich company within that condition. The learned trial judge came to the conclusion that "it was not so much that (Goodrich) wished the registration, but rather that it did not wish others to get it." We think the conclusion is certainly borne out by the record.

This is a situation to which the principle laid down in *Batt & Co.'s Trade Marks* (1) is clearly applicable. Bearing in mind the difference of language between the English and the Canadian Act, we would put in this way the question and answer propounded by Lindley, M.R., in the *Batt* case (2): Can a man properly register a trade-mark for goods which he does not sell or intend to sell—meaning by intending to sell, having at the time of registration some definite and present intention to sell certain goods or descriptions of goods, and not a mere general intention of extending his business at some future time to anything which he may think desirable? This question we answer in the negative.

In this connection, we may refer to what was said by Duff J., in *Bayer Co. v. American Druggists' Syndicate* (The *Aspirin* case (3)), and in *Pugsley, Dingman & Co. v. Proctor & Gamble Co.* (4), where he delivered the judgment of this court.

There might be yet another obstacle standing in the way of the Goodrich company's obtaining registration of the word "Zipper" as a specific trade-mark for slide fasteners. They have used and registered the word in connection with footwear; but we have seen that they never used it in connection with fasteners. The exclusive right to a mark is restricted to the class of goods to which it has been attached. (*Somerville v. Schembri* (5)). It follows that the same mark may be used by another in connection with a different article (See dictum of Lord Westbury in the *Leather Cloth* case (6)).

The application of the Goodrich company for the registration of the word in connection with fasteners was pos-

1931
 LIGHTNING
 FASTENER
 Co. LTD.
 v.
 CANADIAN
 GOODRICH
 Co. LTD.

Rinfret J.

(1) (1898) 15 R.P.C. 262 and 534;
 [1899] A.C. 428.

(2) See 15 R.P.C. 534, at 538.

(3) [1924] Can. S.C.R. 558, at
 569-570.

(4) [1929] Can. S.C.R. 442 at
 448.

(5) (1887) 12 App. Cas. 453.

(6) (1863) 4 DeG. J. & S. 137.

1931
 LIGHTNING
 FASTENER
 Co. LTD.
 v.
 CANADIAN
 GOODRICH
 Co. LTD.
 Rinfret J.

terior to that of the Lightning company. So that, under ordinary circumstances, as between itself and the Lightning company, with regard to "Zipper" as applied to fasteners, the Goodrich company can claim neither prior use, nor prior adoption, nor prior application for registration, and the petition of the Lightning company should receive first consideration.

But, in the particular circumstances of this case, there are reasons why, in our view, the latter petition should equally be disallowed.

Goodrich, at the inception of its business in Canada (1923-24), adopted, put into use and caused to be registered the word "Zipper" as a specific trade-mark in connection with footwear. Since then it has offered for sale and sold under the name of "Zipper" overshoes equipped with fasteners of the slide controlled type. These overshoes have been widely advertised and distributed. We are told that they have met with considerable success in the market. The Lightning company was manufacturing slide fasteners of the type in question, which they called "Lightning" or "Hookless." The evidence is that they supplied all the slide fasteners used by Goodrich and incorporated by the latter in the overshoes sold, as above mentioned, under the name of "Zipper." The Lightning company fully knew that their slide fasteners were being used in that way as an integral part of a Goodrich overshoe known to the trade and offered to the public under that mark. They allowed this to go on for considerable time, after which they suddenly turned around and applied for the registration of the word "Zipper" in connection with their slide fasteners alone. It is difficult to escape the suspicion that the application is hardly founded in truth, and that the real purpose is, in the words of Lord Watson, in *Eno v. Dunn* (1), "to obtain pecuniary advantage from the wide reputation" of the Goodrich overshoe.

The Lightning company admits that, if its application were acted upon as made, and authority was thus obtained for the general distribution of fasteners bearing the word "Zipper," the public would be deceived by the use of such fasteners on overshoes. While we are not prepared to say

whether a limitation excluding such a use could be satisfactorily framed, the conclusion seems to us unavoidable, upon the state of facts already in existence at the time of the first application to the Patent Office, that to have allowed then the registration of the mark for slide fasteners alone would have meant running a grave risk of deceiving the public.

At that time, the following marks, among others, were already on the Register: "Zipper" for footwear; "Zip-on" for children's leggings, coats and hats; "Zip" for bound loose-leaf books; "Zippis" for boots and shoes made of rubber; "Zip-over," "Zip-kinck" and "Zip-midy" for wearing apparel for men, women and children; "Zip-pat" for spats. All of these marks are applied to goods having or which may have slide fasteners as an integral part thereof. It is admitted these fasteners may be attached to an infinite variety of goods. Just previous to the Lightning company, the Ripper company, of Vancouver, put in an application for the word "Zipper" as applied to receptacle opening devices. We also know that the Cloggard Wardrobe Company, of Washington, wished to register the word in connection with wardrobe bags.

Many of the articles just referred to are usually sold by the same class of persons. It is not necessary that the danger of confusion should be demonstrated, it is sufficient to say that the mark might have the effect of deceiving the public. It would be the duty of the Minister to refuse to register when it is not clear that deception may not result from such registration (*Eno v. Dunn* (1)). The duty of the court is the same and, to use the language of Lord Macnaghten (p. 263), it "ought to reject words which involve a misleading allusion."

The whole question must be envisaged from a business and commercial point of view, and all the circumstances of the trade are to be considered. In the premises, we are convinced that, on account of the goods with which the slide fasteners of the type in question are used or are capable of being used and owing to the state of things at the time of the applications, there would have been every likelihood of confusion if the mark had been allowed. To say the least,

1931

LIGHTNING
FASTENER
Co. LTD.
v.
CANADIAN
GOODRICH
Co. LTD.

Rinfret J.

the extension of the number of such marks should not be encouraged (Kerly on Trade Marks, 6th ed., p. 281).

The adoption by the Lightning company of the word "Zipper," as a mark for slide fasteners, came too late in the history of the word.

Returning again to the Goodrich company. In addition to its demand with regard to slide fasteners *as such*, its application also requested the Commissioner to register the mark in its name in connection with all "articles containing the same." We have serious doubt whether, under the Act, a request in that form for a specific trade-mark may be entertained at all. The evidence shows that slide fasteners are used or may be used on an almost innumerable number of goods of all classes. By definition, a specific trade-mark means a mark having reference to "a class merchandise of a particular description" (sec. 4c). A mark intended to cover all articles containing slide fasteners would hardly answer the definition.

Be that as it may, on that part of the petition of the Goodrich company, the trial judge found as follows: "If the application in its entirety were granted, that there would be confusion is quite certain from the evidence."

It is unnecessary for us to add anything to what we have already said to indicate that, on that point, we find ourselves fully in accord with the learned President of the Exchequer Court.

The appeal of the Lightning company and the cross-appeal of the Goodrich company should be dismissed with costs. It should be stated, however, that nothing in the present judgment may be taken as affecting the specific trade-mark of the Goodrich company in connection with footwear.

Appeal and cross-appeal dismissed with costs.

Solicitor for Lightning Fastener Co. Ltd.: *Harold G. Fox.*

Solicitors for Canadian Goodrich Co. Ltd.: *Smart & Biggar.*