J. W. WINDSOR LIMITED.....PETITIONER;

AND

MARITIME FISH CORPORATION LTD..RESPONDENT.

1925
Dec. 31.

Trade-Marks—Expunging—"Chicken haddies"—Distinctiveness—Descriptive

Held, that the words "chicken haddies" having been in use in the trade for a long period prior to the respondent's trade-mark, and such words forming part of the English language and thereby having become *publici juris,* could not be appropriated by any one as his trade-mark, and, further, that such words being descriptive of the character and size of the goods did not distinguish the goods of the proprietor of such trade-mark from those of other persons, and a trade-mark for the same was fundamentally null and void and should be expunged.

PETITION to expunge the trade-mark "chicken haddies" applied to the sale of fish and various products of fish and registered in the Canadian Trade Marks Register, at folio 15660.

Montreal, December 4, 1925.

Case now heard before the Honourable Mr. Justice Audette.

R. S. Smart for petitioner;

H. A. Chauvin, K.C., for respondent.

The facts are stated in the reasons for judgment.

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J. W. WINDSOR LTD. v. MARITIME FISH CORP., LTD.

Audette J.

AUDETTE J., now this 31st December, 1925, delivered judgment.

This is an application, by the petitioner, to expunge from the Canadian Register of Trade-Marks, the respondent's specific trade-mark

to be applied to the sale of fish and various products of fish, and which consists of the words "Chicken Haddies."

This trade-mark, which was registered on the 5th day of April, 1911, applies to the sale of fish generally and to various products of fish and is, in its scope, larger than the respondent's evidence seems to claim; since the respondent's evidence establishes that the word *chicken,* as applied to halibut, lobster and herring, was used in the trade many years before the registration of their trade-mark.

However, the petitioner's evidence has satisfactorily established that the expression *chicken haddies* has been in use in the trade for a long period anterior to the date of the respondent's trade-mark, some of the witnesses being able to say that they knew of it as far back as 35 years ago. Witnesses Denton, Letourneay, Byrne, Snow, Wilson and Nickerson establish that fact beyond any doubt. True some of the respondent's witnesses say they were not aware of it, but it is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negantibus,* because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed. *Lefeunteum* v. *Beaudoin* (1).

The trade-mark was obtained upon the usual affidavit stating that the same "was not in use, to our knowledge, by any other person than ourselves at the time of the adoption thereof."

This statement was untrue without, however, charging any bad faith on behalf of the deponent.

Now both words *chicken haddies,* are words forming part of the English language and thereby made *publici juris* which no one can appropriate to the exclusion of others. No one can monopolize the English language, nor can any one have a monopoly in the name of anything. Chicken

(1) [1897] 28 S.C.R. 89, at p. 93.

means young, baby, small, and in the trade as applied to haddock or haddie, which are also English words, denote haddock below 18 inches and also in latter years below 20 inches.

Distinctiveness is the cardinal requirement for a trade-mark to be good and valid, and distinctiveness means that the word, symbol or device shall be used or adopted to distinguish the goods of the proprietor of the trade-mark from those of other persons. Therefore the present trade-mark was bad, null and void *ab initio* as the words chicken haddie formed part of the English language and was in common use in the trade years back before the date of the trade-mark, and were used to designate and did denote a haddock of a small size. It could not in any manner whatsoever be used by itself to designate the goods of a trader to distinglish them from the goods of any other trader trading in fish.

Chicken is the prefix to denote the size of the fish as one witness said, the word jumbo would mean a large fish. The word was in common use before the date of the registration; it is descriptive of the character and size of the goods and is therefore fundamentally null and void and should be removed from the Register. See *Lamont, Corliss and Company* v. *The Star Confectionery Company* (1); *Re William's Ltd. re "Chocaroons"* (2).

The case is too clear to call for any further comment. The trade-mark in question is bad, null and void *ab initio,* as having been an expression in common use in that trade for years, composed of words forming part of the English language and furthermore as being descriptive of the goods and thereby inappropriate to distinguish the goods of a trader from those of another trader trading in the same class of goods and in the whole as detrimental to trade at large.

Moreover, it would seem that, under the respondent's own evidence, the trade-mark as registered is too broad, since it would also cover halibut, lobster, herring or any fish, in respect of which the word chicken has been in common use for years back, as testified to by respondent's own witnesses.

(1) [1924] Ex. C.R. 147.

(2) [1917] 34 R.P.C. 197.

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Therefore, I have come to the conclusion, for want of validity of the said trade-mark, as above set forth, to order and adjudge that the Specific Trade-Mark No. 64, Folio 15660, registered on the 5th day of April, 1911, consisting of the words "chicken haddies" as applied to the sale of fish "and various products of fish" be expunged from the Register of the Canadian Trade-Marks. The whole with costs.

Judgment accordingly.