1916
April 28

IN THE MATTER OF THE PETITION OF

BOWKER FERTILIZER COMPANY....PETITIONERS;

AND

GUNNS, LIMITED.....RESPONDENTS.

Trade Mark—Descriptive words—Secondary meaning—Expunging from registry.

"Sure-Crop" or "Shur-Crop," as applied to fertilizers, are ordinary words descriptive of the quality of the article, incapable of acquiring a secondary meaning and not registrable as a valid trade mark, and should be expunged from the register.

PROCEEDINGS to set aside a ruling of the Commissioner of Patents refusing the registration of a trade-mark.

Case tried at Ottawa, April 17, 1916, before the Honourable MR. JUSTICE CASSELS.

H. Fisher and *R. S. Smart*, for petitioners; *W. H. Clipsham*, for respondents.

CASSELS, J. (April 28, 1916), delivered judgment.

The Bowker Fertilizer Co. commenced proceedings pursuant to the provisions of the Trade Mark and the Exchequer Court Acts to have the ruling of the Commissioner of Patents, refusing to register the words "Sure-Crop" as a specific trade mark to be applied to the sale of fertilizers set aside.

The alleged ground of refusal by the Commissioner was the existence on the trade mark register of a trade mark registered on July 27, 1912, by the contestants Gunns Ltd. This trade mark consists of "a boy pressing the muzzle of a gun against a target on which appear the words 'never misses,' above the design being the name 'Shur-Crop' as *per* the annexed pattern and 'application.'" The Bowker Fertilizer Co., in addition to their application to have their trade mark registered, pray that the trade mark of the Gunns Ltd. may be expunged from the register.

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Reasons for Judgment.

The Bowker Fertilizer Co. are a foreign company incorporated in the United States of America. Gunns Ltd. are a corporation incorporated in Ontario with headquarters in Toronto.

I will first consider the application of the Bowker Fertilizer Co. to have the words "sure-crop" as applicable to fertilizers registered as a trade mark. Dealing with this question irrespective of any secondary meaning these words may have obtained as denoting goods manufactured or sold by the Bowker Fertilizer Co., I am of opinion they are not words which should be registered. They are words merely indicative of the quality of the fertilizer. Two plain common English words without any pretence of being fancy words.

The construction of the Canadian Trade Mark Act is dealt with in *Standard Ideal Co. v. Standard Sanitary Manuf.*, decided by the Board of the Privy Council and reported in [1911] A.C. 78 at 84. A case in our own Courts is peculiarly apposite: *Kirstein v. Cohen*,[1] involving "shur-on" and "staz-on" as applicable to glasses for the eyes.

It is contended by counsel for the Bowker Fertilizer Co. that, even if these words do not come within the class of words capable of registration, yet by reason of long use they have obtained a secondary meaning as denoting the goods of the applicants. It is a question whether ordinary English words of this character ever could obtain a secondary meaning. See *Application of Joseph Grosfield & Sons Ltd.*,[2] In this case the words "sure-crop" were not used as a trade mark. They were usually used in connection with the name Bowker. The goods sold by the Bowker Co. were sold in bags which were labelled "Bowker Sure-Crop." A case of resemblance is *Perry Davis & Son v. Harbord*.[3] The application was to register the words "Pain Killer." The British Trade Mark Act of 1875 provided for the registration also of any special and distinctive word "or words or combination of figures or letters used as a trade mark before the passing of this Act may be registered as such under this Act."

[1] 39 Can. S.C.R. 286.

[2] (1909) 26 R.P.C. 854.

[3] L.R. 15 A.C. 316.

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It was pointed out in the reasons for judgment that the words "pain-killer" had not been used as a trade mark before the passing of the statute but always in conjunction with other words, namely, "Perry Davis, etc." Registration was refused. Lords Halsbury and Morris also expressed strong views on the question whether these words were capable of registration as being merely descriptive. I think the application of the Bowker Co. to register must be refused.

The most prominent feature of the trade mark of Gunns Ltd. are the words "Shur-Crop." Douglas W. Gunn, an employee of Gunns Ltd., was a witness. He states that Gunns Ltd. ceased using any part of their trade mark except the words "Shur-Crop" on their bags at all events as early as 1914, the reasons being they could not reproduce it on their bags. He states as follows: Q. That (referring to the words "Shur-Crop") is now the only thing that marks your goods? A. Yes and the analysis. Q. And all your goods are put up in bags? A. Yes. Q. So that you do not now mark your goods as originally registered? A. No. Q. Then in your opinion the words "Shur-Crop" were the important elements of your trade mark? A. Naturally a man in asking for a brand would not ask for the boy and gun on it he would ask for Gunns "Shur-Crop" fertilizer—he would always connect the manufacturer with the words. Q. And that was your intention when you registered and proved to be the fact? A. Yes.

The Bowker Co. are a large corporation. For years prior to the commencement of business of Gunns Ltd. of the sale of fertilizer under the name "Shur-Crop" the Bowker Co. had their goods on the American and Canadian markets with the brand "shur-crop." Douglas W. Gunn may not have known about the Bowker Co. He is an employee of the company. There are other members of the company. It is not material whether they knew or not but the belief that they did not know may be commended to Judæus Apella. See *per* Burbidge, J., *Re Melchers* and *DeKuyper*, 6 Can. Ex. 83 at 101.

I think the existence of this trade mark is apt to lead to confusion and that the registration of the trade mark in question should be expunged.

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Reasons for Judgment.

Counsel for Bowker Co. are satisfied if the words "Shur-Crop" are removed and the registry amended accordingly, and if Gunns Ltd. prefer it, the order can issue in this shape.

As success is divided, each party should bear their own costs.

Judgment accordingly.

Solicitors for petitioners: *Fetherstonhaugh & Smart.*

Solicitors for respondents: *Douglas & Clipsham.*