A DIGEST

OF THE

REPORTED ENGLISH CASES

RELATING TO

PATENTS, TRADE MARKS

AND

COPYRIGHTS

Determined in the House of Lords and the Courts of Common Law and Equity, with reference to the Statutes; founded on the Analytical Digest by Harrison, and adapted to the present Practice of the Law

BY R. A. FISHER
Of the Middle Temple

EDITED AND BROUGHT DOWN TO THE PRESENT TIME, WITH INDEX, TABLE OF CASES, ETC.

BY HENRY HOOPER

CINCINNATI
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PREFACE TO THE AMERICAN EDITION.

THIS work contains a digest of the existing law, equity, and practice relating to Patents, Trade Marks, and Copyrights, as determined in the English Courts of Common Law and Equity, including the House of Lords. To the Analytical Digest of Harrison and the later Digest of R. A. Fisher have been added all the contemporaneous reports of English cases upon the above branches of the law, down to the present year.

The English statutes upon these subjects, when short and comprehensive in their terms, have been introduced in the language of the legislature. Overruled cases have been omitted, as well as obsolete law. In short, it is believed that all rulings and decisions, from the earliest period until the present time, upon Patents, Trade Marks, and Copyrights, are here collated and presented for the use of the profession.

CINCINNATI, *May* 3, 1872.

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ABBREVIATIONS.

A. C.—Full Court of Appeal in Chancery.
C.—Lord Chancellor's Court.
B. & S.—Best and Smith, Queen's Bench Reports.
Bank.—Court of Bankruptcy.
C. C. J.—County Court Judge.
C. L.—Common Law.
Chanc.—Chancery.
C. P.—Common Pleas.
De G. F. & J.—De Gex, Fisher and Jones, L. Chancellor and Court of Appeal in Chancery.
Exch.—Exchequer.
Ex. Cham.—Exchequer Chamber.
H. L.—House of Lords.
Hopw. & C.—Hopwood and Coltman.
Ir. R., C. L.—Irish Reports of 1867, Current Common Law Series.
Ir. R. Eq.—Irish Reports, Equity Series of 1867.
L. JJ. and L. J.—Lord Justices' Court, or Lord Justice.
L. R.—Law Reports.
L. J.—Law Journal.
L. T. R.—Law Times Reports.
M. C.—Magistrates' Cases.
Moore P. C. C., N. S—Moore's Report of Privy Council.
N. S.—New Series.
P. C.—Privy Council and Privy Councillor.
Q. B.—Queen's Bench.
R.—Rolls' Court.
V. C. M.—Vice-Chancellor Malin's Court.
V. C. G.—Vice-Chancellor Gifford's Court.
V. C. B.—Vice-Chancellor Bacon's Court.
V. C. J.—Vice-Chancellor James' Court.
V. C. S.—Vice-Chancellor Stuart's Court.
S. C.—Same Case.
S. P.—Same Point.
W. R.—Weekly Reporter.

Trade Mark Cases.

DIGEST

English Trade Mark Cases.

TRADE MARKS.

1. Principle of Right.

There is no copyright in a trade mark. *Farina* v. *Silverlock*, 6 De G., M. & G. 214; 2 Jur., N. S. 1008; 26 L. J., Chanc. 11.

A manufacturer who has adopted a trade mark, in order to designate some particular article as made by him, has a right to the assistance of a court of equity to prevent any one from so using the same, or any similar mark, as to induce purchasers to believe, contrary to the fact, that they are buying that particular article to which the mark was originally applied. *Ib.*

There is no property in a trade mark, but a person who has been in the habit of using a particular mark may prevent other persons from fraudulently taking advantage of the reputation which his goods have acquired, by using his mark in order to pass off their goods as his, to his injury. *Collins Company* v. *Brown*, 3 Kay & J. 423; 3 Jur., N. S. 929.

The name of a manufacturer, or a system of numbers adopted and used by him in order to designate goods of his make, may

be the subject of the same protection in equity as an ordinary trade mark. *Ainsworth* v. *Walmsley*, 1 L. R., Eq. 518; 12 Jur., N. S. 205; 35 L. J., Chanc. 352; 14 W. R. 363; 14 L. T., N. S. 220—V.-C. W.

A court of equity refused to interfere to prevent a vendor of a quack medicine from advertising such medicine in such a manner as to induce the public to believe it was sanctioned by the plaintiff, a physician of eminence, and sold by the defendant as his agent; the injury being, in the opinion of the court, one rather of defamation than of injury to property; and it being incumbent on the plaintiff to establish at law the defamatory character of the advertisements before he applied for the interference of the court. *Clark* v. *Freeman*, 12 Jur. 149; 17 L. J., Chanc. 142—R.

Where a trade mark contained an emblem, with such a collocation of words as amounted to an advertisement of the character and quality of the goods, and contained statements which, though true as regarded the original adopter of the trade mark, were calculated to deceive the public when used by his assignee, the assignee is not to be entitled to protection in the use of such trade mark. *Leather Cloth Company* v. *American Leather Cloth Company*, 11 Jur., N. S. 513; 35 L. J., Chanc. 53; 13 W. R. 873; 12 L. T., N. S. 742; 11 H. L. Cas. 523.

Although a trader may have a property in a trade mark, giving him a right to exclude all others from using it, if his goods derive their increased value from the personal skill or ability of the adopter of the trade mark, he can not give any other person the right to affix his name or mark upon their goods, for the effect thereof would be to give them the right to practice a fraud upon the public. *Ib.*

Where A. introduces into the market an article which, though previously known to exist, is new as an article of commerce, and has acquired a reputation therefrom in the market by a name not merely descriptive of the article, B. will not be permitted to sell a similar article under the same name; and this, although the peculiarity of the name has long been in common use as ap-

plied to goods of a different kind. *Braham* v. *Bustard*, 1 Hem. & M. 447; 11 W. R. 1061; 9 L. T., N. S. 199.

The original inventor of a new manufacture, and persons claiming under him, are alone entitled to designate such manufacture as "the original;" and if he or they have been in the habit of so designating their manufacture, an injunction will be granted to restrain another manufacturer from applying the designation "original" to his goods. *Cocks* v. *Chandler*, 11 L. R., Eq. 446—M. R.

The word "patent" having come to be applied in common language to various manufactured articles as descriptive of a particular quality, without any reference to letters patent, the use of the word "patent thread," as part of the trade mark on an unpatented article, will not prevent a court of equity from protecting such trade mark. *Marshall* v. *Ross*, 39 L. J., Chanc. 225—V.-C. J.

The duties of a person who discovers that he has in ignorance infringed a trade mark—considered. *Upman* v. *Elkan*, 12 L. R., Eq. 140.

When a man has learned a trade secret from his employer, and practiced it after the employer's death, selling the article under the old name, he will not acquire such a right to the exclusive use of the name as a trade mark as will be protected in a court of equity. *Hovenden* v. *Lloyd*, 18 W. R. 1132—V.-C. B.

2. Action for Infringement or Imitation.

A declaration alleged that the plaintiffs prepared, vended, and sold for profit, medicines called "Morison's Universal Medicines," which they sold in boxes wrapped up in paper, having those words printed thereon; that the defendant, intending to injure the plaintiffs in the sale of the medicines, and to deprive them of profits, deceitfully and fraudulently prepared and made medicines in imitation of the medicines so prepared by the plaintiffs, and wrapped up the same in paper, having "Morison's Universal Medicines" printed thereon, in order to denote that such medicine was the genuine medicine prepared, vended, and sold by the plaintiffs; and that the defendant deceitfully and fraudulently vended and sold for his own lucre and gain the last-

mentioned boxes of the articles, represented and termed by him to be medicine, by the name and description of "Morison's Universal Medicines," which had been prepared, vended, and sold by the plaintiffs; whereas, in truth, the plaintiffs had never been the preparers, venders, or sellers thereof: Held, that the declaration disclosed a good cause of action. *Morison* v. *Salmon*, 2 Scott, N. R. 449; 2 M. & G. 385.

Action for wrongfully, knowingly, and fraudulently stamping bars of iron, made by the defendants, with a stamp resembling one used by the plaintiff, which the defendants knew and intended to be in imitation of the plaintiff's, and which was used by the defendants, in order to denote that their iron was made by the plaintiff; and for knowingly selling the iron so marked as and for the plaintiff's iron. A correspondence between the parties was given in evidence, in which the plaintiff charged the defendants with using the mark, as being a fraud upon him. The defendants, in answer, asserted that they had used the mark for many years continuously. This was not so in fact; but it was shown that the mark had been adopted by them in the execution of orders received from foreign correspondents: Held, that it was properly left to the jury to say, first, whether the defendants' mark bore such a close resemblance to the plaintiff's as was calculated to deceive the unwary, and injure the sale of the plaintiff's goods; and, secondly, whether the defendants used the mark with the intention of supplanting the plaintiff, or whether it was done in the ordinary course of business in execution of orders. *Crawshay* v. *Thompson*, 4 M. & G. 357; 5 Scott, N. R. 562; 11 L. J., C. P. 301.

Held, also, that the notice of the resemblance of the mark, given by the plaintiff to the defendants, did not, in the absence of proof of any intention to imitate it on the part of the defendants, give the plaintiff any cause of action. *Ib.*

An action may be maintained by a manufacturer against another manufacturer who marks his goods with the known and accustomed mark of the plaintiff, where the mark used by the defendant resembles the plaintiff's mark so closely as to be calculated to deceive, and as to induce persons to believe the de-

fendant's goods to be of the plaintiff's manufacture, and the defendant uses such mark with intent to deceive and sells the goods so marked as and for goods of the plaintiff's manufacture, and proof of special damage is not necessary. *Rodgers* v. *Nowill*, 5 C. B. 109; 11 Jur. 1039; 17 L. J., C. P. 52.

In such cases it is enough, at least after verdict, to allege generally that by means of the premises the plaintiff was deprived of the sale of divers large quantities of goods, and lost the profits that would otherwise have accrued to him therefrom. *Ib.*

If A., a manufacturer, uses the mark of B. for the purpose of giving to articles manufactured by A. the appearance of being of the manufacture of B., B. may maintain an action against A., although A.'s articles are not inferior in quality to B.'s, and although it is not shown that B. has sustained actual damage. *Blofeld* v. *Payne*, 1 N. & M. 353; 4 B. & Ad. 410.

Where a plaintiff marked his goods, "Sykes' Patent," to show that they were his own manufacture, and the defendant copied the mark on his goods to show that they were the plaintiff's manufacture, and sold them, so marked, as and for his manufacture: Held, that an action would lie for the injury, though neither party had a valid patent, and both were named "Sykes." *Sykes* v. *Sykes*, 5 D. & R. 292; 3 B. & C. 541.

The plaintiff's father prepared and sold a medicine called "Dr. J.'s Yellow Ointment," for which no patent had been obtained. The plaintiff, after his father's death, continued to sell the same. The defendant sold a medicine under the same name and mark: Held, that no action could be maintained against him by the plaintiff. *Singleton* v. *Bolton*, 3 Dougl. 293.

A declaration alleged that the plaintiff agreed with the defendant to manufacture for him fire-bricks, to be marked as he should direct; that he directed that they should be marked with R.'s name, he well knowing that R. manufactured fire-bricks marked with that name, to indicate that they were manufactured by him; that the plaintiff, ignorant of the manufacture of fire-bricks by R., and that marking fire-bricks according to the direction of the defendant would be wrongful, manufactured

fire-bricks for the defendant, and marked them with the name of R.; that R. filed a bill in chancery for an injunction and account against the plaintiff, and that the plaintiff, in order to compromise the suit, paid R. a sum of money: Held, that the declaration disclosed two grounds of action; first, because the plaintiff was liable to the injunction, although he used the trade mark of R. innocently, and, secondly, because the natural consequence of the defendant's act was to involve the plaintiff in a chancery suit, even if he had the means of defending it, by reason of his having used the trade mark of R. innocently. *Dixon* or *Dickson* v. *Fawcus*, 7 Jur., N. S. 895; 30 L. J., Q. B. 137; 9 W. R. 414; 3 L. T., N. S. 693; 3 El. & El. 537.

W. originally manufactured starch at a place called Glenfield. For this reason he called his starch the Glenfield starch, and it became well known in the market by that name. He continued to use this name, though he removed his manufactory from Glenfield, and on the labels which were placed on the packets of his starch, it was called the Glenfield starch. C. set up a starch manufactory at Glenfield, and called his starch by a different name. His labels were of the same color as those of W., but labels of this color were used by all starch manufacturers. At the bottom of C.'s labels were these words, "C. & Co., manufacturers, Glenfield." A bill was filed to restrain C. from making use of the word Glenfield: Held, that C. had done nothing to represent his starch to be the same as that of W., and that, consequently, no injunction ought to be granted. *Wotherspoon* v. *Currie*, 18 W. R. 942; 23 L. T., N. S. 443—L. J. J.

3. Restraining Use or Imitation by Injunction.

The jurisdiction of the court of Chancery, in the protection of trade marks, rests upon property, and fraud in the defendant is not necessary for the exercise of the jurisdiction. *Hull* v. *Barrows*, 10 Jur., N. S. 55; 33 L. J., Chanc. 204; 12 W. R. 322; 9 L. T., N. S. 561—C.

Where a name, once affixed to a manufactured article, continues to be used after the death of the manufacturer, the name in time becomes a mere trade mark, or sign of quality, and

ceases to denote, or to be current as indicating, that any particular person was the maker, and would, therefore, be protected. *Ib.*

If A. has acquired property in a trade mark, which is afterward adopted and used by B., in ignorance of A.'s right, A. is entitled to an injunction, but not to an account of profits or to compensation, except in respect of any user by B. after he became aware of the prior ownership. *Edelston* v. *Edelston*, 9 Jur., N. S. 479; 1 De G., J. & S. 185; 11 W. R. 328; 7 L. T., N. S. 768.

At law the proper remedy is by an action for deceit, and proof of fraud on the part of the defendant is of the essence of that action; but the court will act on the principle of protecting property alone, and it is not, therefore, necessary for the party applying for the injunction to prove fraud, or that the credit of the plaintiff was injured by the sale of an inferior article. *Ib.*

The right to ask for the interference of the court in respect of a trade mark is founded, first, on the fact that the plaintiff has acquired the right of using the mark, properly: that is to say, that it has not been copied, and does not involve any false representation; secondly, that the article so marked is actually a vendible article in the market; and, thirdly, that the defendant, knowing that to be so, has imitated the mark for the purpose of passing in the market other articles of a similar description. *McAndrew* v. *Bessett*, 10 Jur., N. S. 550; 33 L. J., Chanc. 561; 12 W. R. 877; 10 L. T., N. S. 442—C.

The court will grant a perpetual injunction against the use by one tradesman of the trade marks of another, although such marks have been so used in ignorance of their being any person's property, and under the belief that they were merely technical terms. *Millington* v. *Fox*, 3 Mylne & C. 338.

Where a person is selling an article in his own name, fraud must be shown to constitute a case for restraining him from so doing, on the ground that the name is one on which another has long been selling a similar article. *Burgess* v. *Burgess*, 3 De G., M. & G. 896; 17 Jur. 292; 22 L. J., Chanc. 675.

Therefore, where a father had for many years exclusively sold

a sauce under the title of "Burgess's" sauce, a court of equity would not restrain his son from selling a similar article under that name, no fraud being proved. *Ib.*

It is not necessary, in order to give a right to an injunction, that a specific trade mark should be infringed; it is sufficient that a court should be satisfied that there was on the whole a fraudulent intention of palming off the defendant's goods as those of the plaintiff; but in such a case it is essential that the imitation should be necessarily calculated to deceive. *Woollam* v. *Ratcliff*, 1 Hem. & M. 259.

To entitle a trader to relief against an illegal use of his trade mark, it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side; but the degree of resemblance must be such, that ordinary purchasers proceeding with ordinary caution are likely to be misled. *Seixo* v. *Provezende*, 1 L. R., Ch. 192; 12 Jur., N. S. 215; 14 W. R. 357; 14 L. T., N. S. 314—C.

The actual physical resemblance of the two marks is not the sole question for the court, for if the plaintiff's goods have, from his trade mark, become known in the market by a particular name, the adoption by the defendant of a mark or name which will cause his goods to bear the same name in the market, is as much a violation of the plaintiff's rights as the actual copy of his mark. *Ib.*

Although the defendant may have some title to the use of a name or mark, he will not be justified in adopting it, if the probable effect of his so doing is to lead the public to suppose, that in purchasing his goods they are purchasing those of the plaintiff. *Ib.*

4. Practice.

In substance there is no distinction between the sale of a business and good-will by a trader himself, and a sale by his assignees in bankruptcy. *Hudson* v. *Osborne*, 39 L. J., Chanc. 79—V.-C. J.

Therefore, on sale of a business by a trader's assignees in bankruptcy, the trader has no right, upon setting up a fresh busi-

ness, after his discharge, to use the trade mark of his old business, or in any other way to represent himself as carrying on the identical business which was sold, although he has a right to set up again in business of the same kind next door to his old place of business. *Ib.*

In such a case it is no objection to the purchaser coming for the assistance of the court, that he has continued to use the name of the old business which he found there. *Ib.*

The plaintiffs were, in August, 1869, and had for some time previously been carrying on business under the style of the Guinea Coal Company, their offices being at No. 22 Pall Mall. In the early part of 1869, the defendant, who had formerly managed their business, established a business on his own account under the style of the Pall Mall Guinea Coal Company; his offices being first at Beaufort buildings, whence, in August, 1869, he removed to No. 46 Pall Mall. The defendant solicited orders principally by circular, sending circulars to many of plaintiff's customers, and succeeded in obtaining orders, which the customers afterward said they had intended for the plaintiffs: Held, that they were entitled to restrain him from using the name "The Pall Mall Guinea Coal Company." *Lee* v. *Halley*, 39 L. J., Chanc. 284; 5 L. R., Chanc. 155; 18 W. R. 242; 22 L. T., N. S. 251.

The bill was filed on the 24th November, 1869: Held, that there was no laches, inasmuch as the plaintiffs must wait until sufficient proof of the injury they had received was collected. *Ib.*

An appeal from a decree granting an injunction to restrain the use of a trade mark ordered to be advanced, on the ground that the injury done to the defendant by the continuance of the injunction, if wrongly granted, would be irreparable. *Lazenby* v. *White*, 6 L. R., Chanc. Ap. 89—L. J. J.

5. Assignment.

If a personal trade mark is in any respect less assignable than one referring to locality only, or a mere device, the distinction must be limited to mere cases where the mark is so clearly per-

sonal as to import that the goods bearing it are manufactured by a particular person. *Bury* v. *Bedford*, 10 Jur., N. S. 503; 33 L. J., Chanc. 465; 12 W. R. 727; 10 L. T., N. S. 470—L. J.

A corporation trade mark granted by the Cutler's Company to a non-freeman, is assignable. *Ib.*

6. Forging and Costs.

A firm of forwarding agents in London received from correspondents abroad several boxes of cigars bearing forged brands, which were to be delivered to several persons in *England*. On application by the makers whose brand had been forged, the agent gave information as to the consignees, and offered either to send back the cigars or to erase the brands: Held, on a bill for injunction filed by the makers whose brands were forged, that the fact of the agents being merely carriers was no defense to the suit; but that as they had given sufficient information, and offered to erase the brands, they were not to pay costs. *Upman* v. *Elkan*, 7 L. R., Chanc. Ap. 130, C. Affirming the decree of Master of the Rolls, 12 L. R., Eq. 140.

The appellant gave notice to a respondent whose costs the appellant had been ordered to pay, that no alteration in the order as to his costs was asked for, and offered to pay his costs: Held, that the respondent was not entitled to his costs of appearing on the appeal. *Ib.*

Imitating or forging trade marks. See 25 and 26 Vict. c. 88.