A TREATISE

ON THE

LAW OF TRADE-MARKS

AND ANALOGOUS SUBJECTS,

(FIRM-NAMES, BUSINESS-SIGNS, GOOD-WILL, LABELS, &c.)

BY

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SUPPLEMENT

TO SECOND EDITION.

BOSTON:

LITTLE, BROWN, AND COMPANY.

1898.

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Rec. Apr. 21, 1898.

University Press:
John Wilson and Son, Cambridge, U.S.A.

PREFACE

OF THE SUPPLEMENT TO THE SECOND EDITION

OF

BROWNE ON TRADE-MARKS.

More than twelve years have passed since the publication of the above-mentioned work. Intervening time must be bridged by later authorities.

Although but few principles of the law appertaining to the subject have subsequently been evolved, still there are elucidations, judicial refinements, and modifications consequent on the legislation of various nations which require attention.

When the International Union for the Protection of Industrial Property was formed on May 20, 1883, by a Convention of representatives of several countries, it was believed that long-pending misunderstandings were soon to be harmonized, and that Commerce and Manufactures would be regulated by set rules of action, and that symbolic language of subjects in which all are interested might be regulated by intelligent general concurrence, so that the interpretation thereof might be as precisely reliable as the precious metals when coined. There was no difficulty in constructing a Bureau of the Union to act as a world-wide intermediary, and to place it in the Republic of Switzerland, isolated from the jealousy of rival and powerful kingdoms.

The Governments of Belgium, Brazil, Spain, France, Guatemala, Italy, Holland, Portugal, Salvador, Servia, and Sweden were first to enter the combination. Subsequently Great Britain, Tunis, the Dominican Republic, Norway, and Sweden signed the Convention and final Protocol. (The Republic of Salvador withdrew August 17, 1886.) The United States of America, with the advice and consent of the Senate, on March 27, 1887, adhered to the Convention and final Protocol of 1883. (Austria-Hungary joined the Union subject to parliamentary approbation.)

It is necessary to explain why our Nation never heartily co-operated in the general plan intended to unite all countries as one family in commercial relations. Our patent system was the stumbling-block. It was found that it was imperilled by too much concession, — the same difficulty which caused Great Britain to virtually withdraw. There was a general desire to disentangle trade-marks from the objects of the International Union.

Thereupon resulted the Arrangement of April 14, 1891, adopted by the Conference at Madrid, providing for International Registration of trade-marks. The system for central registration was a promising step. It was to take account of the differences existing between the laws of the several countries, especially of the necessary facts preliminary to registration in the places of origin; of the unequal terms of protection granted in different countries; and the publication of registered marks in all countries where protection was to be afforded. Although nominally a member of the Union, our country never became so in the fullest sense. The proclamation of our President reads thus: "And whereas the President of the United States of America,

by and with the advice and consent of the Senate thereof, did on the 29th day of March, 1887, declare that the United States adhere to the said Convention and final Protocol of the 20th of March, 1883," etc.

At first sight this statement is convincing. Eminent jurists and statesmen have accepted it as conclusive, and opinions have been rendered from the Federal Bench based thereon. On close examination, however, it is found to be fallacious.

The Attorney-General of the United States was called on to decide as to the effect of the mere senatorial confirmation; and on April 5, 1889, he rendered an opinion, of which the following is an extract (Opinions of the Attorney-General for 1889, p. 253): "This treaty is a reciprocal one. Every party covenants to grant to the subjects and citizens of the other parties certain special rights, in consideration of the like special rights to its subjects and citizens. It is a contract operative in the future infra-territorially. It is therefore not self-executing, but requires legislation to render it effective for the modification of existing laws." He cites the decision of the Supreme Court of the United States, wherein Chief Justice Marshall rendered the opinion, declaring as follows (*Foster* v. *Neilson*, 2 Peters, 314): "A treaty is in its nature a contract between two nations, not a legislative act, . . . and the legislature must execute the contract before it can become a rule for the Court."

The question of registrability could best be practically tested by consulting Mr. Morel, Director of the International Office for the Protection of Industrial Property, at Berne, Switzerland. His answer, confirmatory of the long-held views of the author of this Treatise, is given in the following extract: —

"Les Etats Unis n'ont adhéré jusqu'ici qu'à la Convention générale du 20 mars 1883 pour la protection de la propriété industrielle. Ils n'ont pas encore accédé à l'Arrangement du 14 avril, 1891, qui constitue une Union restreinte pour l'enregistrement international des marques de fabrique ou de commerce. Notre Bureau n'est donc pas compétent pour recevoir des marques américaines en vue de leur assurer la protection légale dans les États ayant adhéré à l'Arrangement sur l'enregistrement international."

Forasmuch, then, as the United States have not adhered to the limited Union constituted by the Arrangement of 1891, International Registration does not apply to them. As heretofore, independent treaties, or conventions, must be resorted to, unless our Congress shall have legislated in the matter.

These explanations were needed.

It is deemed advisable to include the general Index of the Second Edition in the general Index of this Supplement, as one will thereby be enabled to follow out subjects from their introduction.

W. H. B.

WASHINGTON, D. C.,
March, 1898.

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TABLE OF ABBREVIATIONS.

A.	Atlantic Reporter.
A. C.	Appeal Cases.
Abb. N. C. . . .	Abbott's New Cases.
Alb.	Albany Law Journal.
Annales	Annales de la Propriété Industrielle, Artistique et Littéraire. (Paris)
App. Cas.	Appeal Cases.
App. Div.	N. Y. Appellate Division.
App. D. C.	District of Columbia Court of Appeals.
Barb.	Barbour's Supreme Court Reports. (New York.)
Cal.	California Supreme Court Reports.
Can. S. C. R. . . .	Canada Supreme Court Reports.
C. C. A.	U. S. Circuit Court of Appeals.
Ch.	Chancery Division. (English.)
Ch. D.	Chancery Division. (English.)
Daly	Daly, New York Common Pleas.
F.	The Federal Reporter.
Ga.	Georgia Supreme Court.
Har. Law Rev. . .	Harvard Law Review.
H. L. E.	House of Lords of England.
How. Pr.	Howard's Practice Reports.
Hun	New York Supreme Court.
Ill.	Illinois Supreme Court.
Ill. App.	Illinois Appellate Court.
Ind.	Indiana Supreme Court.
Iowa	Iowa Supreme Court.
Jur. (N. S.) . . .	Jurist, New Series. (English.)
La. Ann.	Louisiana Supreme Court Reports.
L. J. P. C. . . .	Law Journal Reports.

L. J. Q. B. (N. S.)	Law Journal, Queen's Bench. (New Series.)
L. R. Ch. App.	Law Reports, Chancery Appeals.
L. T. Rep.	Law Times Reports.
L. T. Rep. (N. S.)	Law Times Reports. (New Series.)
Mass.	Massachusetts Supreme Judicial Court.
Minn.	Minnesota Supreme Court.
Misc. Rep.	New York Miscellaneous Reports.
Miss. Rep.	Mississippi Supreme Court.
Mo.	Missouri Appellate Court.
MS. Dec.	Manuscript Decisions of the Patent Office.
N. E.	Northeastern Reporter.
N. W.	Northwestern Reporter.
N. Y.	New York Court of Appeals.
N. Y. Crim. R.	New York Criminal Reports.
N. Y. Super. Ct.	New York Superior Court.
N. Y. Supp.	New York Supplement.
N. Y. S.	New York Supplement.
Off. Gaz.	Official Gazette of the United States Patent Office.
Ohio Dec.	Ohio Decisions.
Ohio N. P.	Ohio Nisi Prius Reports.
P.	Pacific Reporter.
Pa.	Pennsylvania Supreme Court Reports.
Pa. C. Ct.	Pennsylvania County Courts. (Common Pleas.)
Pa. Co. Ct. R.	Pennsylvania County Court Reports.
Pa. Dist. R.	Pennsylvania District Reports.
Q. B.	Queen's Bench.
Rep.	The Reporter.
R. I.	Rhode Island Supreme Court.
R. S.	Revised Statutes of the United States.
S.	Southern Reporter.
Sup. Ct. Rep.	United States Supreme Court Reports.
S. W.	Southwestern Reporter.
U. S.	Supreme Court Reporter.
U. S. App.	United States Court of Appeals.
Wis.	Wisconsin Supreme Court.
Wkly. Law Bull.	Weekly Law Bulletin.
W. N. C.	Weekly Notes of Cases.

SUPPLEMENT

TO

LAW OF TRADE-MARKS.

CHAPTER I.

VALID TRADE-MARKS.

§ 692. The office of a trade-mark.
§ 693. What constitutes the symbol.
§ 694–696. Illustrations of valid trade-marks.
§ 697. Object of a trade-mark.
§ 698 *et seq.* French court decisions.

§ 692. *The office of a trade-mark* is to point out distinctively the origin, or the ownership, of the article of merchandise to which it is affixed; or, in other words, to give notice as to who is the producer. This may be done in many cases by a name, or mark, or a device well known, but not previously applied to the same article.[1] See the U. S. C. C. of Appeals in the case of *Improved Fig Syrup Co.* v. *California Fig Syrup Co.*[2]

§ 693. As to what may constitute the symbol of a valid trade-mark, depends on the reason that is wrapped up in it and the circumstances involved. Examples are almost infinite in number and variations. What is valid in one case, in another, having close resemblance thereto, may be worthless for the purpose. No rigid rules can be laid down for guidance. — The word "Celluloid," being a new and arbitrary word coined by the plaintiff and applied to goods of

[1] For full treatment of this subject, see Chapter III., Browne on Trade-Marks.
[2] 54 F. 177: 4 C. C. A. 264 ; 7 U. S. App. 588.

its manufacture, is a valid trade-mark, and will be protected, although the word has become so generally known as to have been adopted by the public as the common appellation of the article to which it is applied.[1] — "Kaiser," as applied to beer, which had become known in the United States as the product of a particular German brewer, is a valid trade-mark, though under the laws of Germany it could not be adopted as such.[2] — Royal is not descriptive of Baking Powder, but is only "a metaphor in a high degree fanciful and remote." "It is, in fact, a sign of origin."[3] — "Bromo-Caffeine," a term not in general use when plaintiff applied it, and not descriptive of the articles used to make the medicine designated by it, is valid.[4] — The fact that flour marked with a certain brand acquired an extensive sale because the public discovered that it might be relied on as of a uniformly meritorious quality, demonstrates that the brand deserves protection, plaintiff having acquired the exclusive right to the words "La Favorita" for flour. It is no answer to say that there was no invasion of that right because the name accompanying the words on flour sold by the defendants varied from that used by the plaintiffs.[5] — The word "Star," and the symbol of a star, adopted and used during many years by manufacturers of shirts, waists, underwear, and furnishing-goods, to mark and designate the same, in combination with the words "Star Shirts," and other words describing the articles, so that the goods became well known by such marks, and the designation "Star Goods," constitute a valid trade-mark. Morrison & Hoyt began, in or about 1859, in the city of New York, marking goods with the word "Star," and so marking the packages and boxes containing said goods as to make the star so prominent and conspicuous as to attract attention, and deceive purchasers into the belief that the goods made

[1] Celluloid Manuf'g Co. *v.* Read (C. C.), 47 F. 712.

[2] Kaiserbrauerei, Beck & Co. *v.* J. & P. Baltz Brewing Co., 71 F. 695; affirmed C. C. A. 74 F. 222. See Luyties *v.* Hollandeer, 30 F. 632.

[3] Royal Baking Powder Co. *v.* Raymond, 70 F. 376.

[4] Keaseby *v.* Brooklyn Chemical Works, 37 N. E. 476; 142 N. Y. 467; reversing 21 N. Y. S. 696.

[5] Menendez *v.* Holt, 128 U. S. 514 (L. ed. 32, 226).

by defendant were the "Star Goods" of the complainants. Defendant denied infringement, as he had combined a crescent with the star. He also said that usually the complainants' star was red in color, and of six prongs, while defendant used a five-pointed star of another color. He was enjoined.[1]

§ 694. The word "Saponifier" became a technical trade-mark for concentrated lye, especially after a public acquiescence for thirty-five years.[2] — Every one of the plaintiffs' cigarettes was enclosed in a paper wrapper across which were the words, in circular form, "Sweet Caporal." Within the circle, and lengthwise of the paper, was the word "Rice," below which were "Kinney Bros." in script, and below the word "Paper." On the wrapper of defendants' cigarettes were the words, in circular form, "Sweet Coronal." Within the circle, and lengthwise of the paper, was the word "Rice," below which was "Oscar Maller" in script, and below that the word "Paper." To the left was the figure of a crown. The form and style of the letters and characters used by defendant closely resembled those used by plaintiff, as did also the manner in which they were grouped. *Held*, that the use of this combination by defendant was an infringement of plaintiffs' trade-mark.[3] — Plaintiffs conceiving that they had discovered a salt from the plant "wintergreen," containing valuable antiseptic properties, sent a quantity of the same to a chemist, for analysis and designation by a suitable name. The chemist suggested the name "Asepsin," a word coined by him to indicate the antiseptic qualities of the salt. Plaintiffs adopted and caused that name to be registered as a trade-mark. *Held*, that plaintiffs were entitled to the exclusive use of that word as a trade-mark, and that the word being new it was not objectionable as

[1] Hutchinson *et al.* *v.* Blumberg, 51 F. 829.

[2] Pennsylvania Salt Manuf'g Co. *v.* Myers, 79 F. 87. This is made up of Latin words "*sapo*" (soap) and "*facere*" (to make), and therefore is not descriptive. In Ex parte Wolf, in July, 1897, *held*, as "Gyrator" for bolting-machine, being a common English word, is merely descriptive, and therefore cannot be registered. U. S. Com. of Patents, Butterworth; 80 O. G. 1271.

[3] Kinney Tobacco Co. *v.* Maller, 6 N. Y. S. 389; 53 Hun, 340.

such because it suggested the qualities of the article sold.[1] — The plaintiff corporation manufactured matches under a trade-mark owned by it, affixed by a label on the match-box. On that was stamped, in red, "The Vulcan," over a globe with representations of certain medals owned by the plaintiff, and the words "Damp Proof," "Trade-Mark," "Paraffin Matches." Defendant imported matches in boxes of like size and general appearance, and bearing a label stamped in red, with the same words, except that "The Vulture" was substituted for "The Vulcan," with a fac-simile of the same medals, and in addition the picture of a vulture. The words and characters on the bottom and one of the sides of every one of the boxes were widely dissimilar. *Held*, that the resemblance between the boxes was such as to tend to create confusion and deceive intending purchasers of plaintiffs' goods. Injunction.[2]

§ 695. The complainant and its predecessors had for many years manufactured and sold scythe-stones under the trade-marks "Lamoille," "Green Mountain," "Black Diamond," "Indian Pond," "Magic," and "Willoughby Lake." Defendants, having succeeded to a company which had contracted to purchase complainants' scythe-stones for a series of years, refused to carry out the contract; and having procured quarries, were manufacturing and selling scythe-stones under the above names, except that they used in place of "Willoughby Lake" "Willoughby Ridge," and in place of "Black Diamond" "Diamond Glen," these names never having been used by complainant to designate stones taken from defendants' quarries. *Held*, that a preliminary injunction applied to all the names, whatever the decision might be, were the question alone as to the terms "Willoughby Ridge" and "Diamond Glen."[3]

[1] Lloyd *v.* Wm. S. Merrill Chemical Co. (Cin. Sup. Ct.), 25 Wkly. Law Bull. 319.

[2] Taendsticksfabricks Aktiebolaget Vulcan *v.* Myers, 34 N. E. 904; 139 N. Y. 364.

[3] A. F. Pike Manuf'g Co. *v.* Cleveland Stone Company (four cases), U. S. C. C. of Mass. and N. H., Colt, J., 35 F. 896.

§ 696. For fifteen years prior to 1855, two companies used in common, and made and sold certain patterns of scythe-stones. In 1876, they formed a pool, and for nine years sold their manufactures under the same labels. In 1885, they united with others to form another pool, all the members of which sold like patterns under like labels. In 1886, the plaintiff company bought out one of the original companies, and it and the other original company only continued to make and sell until 1890, when plaintiff bought out the other original company. *Held*, that there had been no such indiscriminate use of the patterns as would deprive plaintiff of its exclusive use.[1] — The word "Marvel" may be appropriated as a trade-mark to designate the output of a certain mill.[2] — The word "Ideal," as a trade-mark for fountain pens, is valid.[3] — "Johnson's Anodyne Liniment" had been sold for more than fifty years in bottles of a certain size and style, having a blue wrapper and a purplish label bearing a certain description, and a fac-simile of the name of A. Johnson. The defendant had a label differing but little from that of the genuine article, except a not very marked difference in color, and bore the fac-simile of defendant's name, F. E. Johnson. There was evidence besides showing actual deception. Enjoined.[4]

§ 697. The object of the trade-mark is to indicate either by its own meaning, or by association, the origin or ownership of the article to which it is applied.[5] — The right to the exclusive use of a trade-mark does not depend on novelty or invention.[6] — A label bearing the head of an elk, with the word "Elk" in large letters, together with the words

[1] Cleveland Stone Co. *v.* Wallace *et al.*, 52 F. 431.

[2] Listman Mill Co. *v.* William Listman Milling Co., 60 N. W. 261; 88 Wis. 334.

[3] Waterman *v.* Shipman (N. Y. App.), 29 N. E. 111; 130 N. Y. 301. (3 N. Y. S. 814, reversed.)

[4] Jennings *v.* Johnson, 37 F. 304. (This comes very near being merely a trade-name.)

[5] See Chapter IV., Browne on Trade-marks; Handy *v.* Commander (La.), 22 So. 230.

[6] Ibid.

"Patented[1] by the Elk Cigar Factory, June 15, 1875," sufficiently indicate origin and ownership to be a valid trade-mark.[2] — The fact that a trade-mark is put on different brands of the article is immaterial when the brands have distinguishing marks.[3] — The fact that the owner of a trade-mark allows the packages to be labelled with the names of the dealers, is no deception.[4] — The words "Anti-Washboard Soap" is valid as a trade-mark, the words so applied being suggestive rather than descriptive.[5] — The words "Cough Cherries," for a confection, are not descriptive of the quality of the article, but are sufficiently arbitrary and fanciful to be applied as a trade-mark.[6] — The same rule applies to "Bromidia."[7] — Arbitrary numbers may be appropriated by a person to his exclusive use to designate the styles of goods which he makes, and they will be protected as trade-marks; though, of course, numbers already known to the trade, and in use by others, cannot be so appropriated.[8] — The owner of certain natural springs, having for many years used the words "Blue Lick Water," to designate water from his springs, will be protected in the use of such words as his trade-mark.[9] — It is no defence that Spanish labels similar to a certain described trade-mark had been used by various manufacturers for many years, nor that imitations of the trade-mark were sold, or used, in the absence of evidence that it was with the consent or acquiescence of the owner.[10] — The words "Nickel — In," used to designate a brand of cigars, being original, arbitrary, and fanciful, and not descriptive of the articles, their grade, or quality, are entitled to protection.[11]

[1] The wrong use of the word "Patented" is harmless.

[2] Lichstenstein *v.* Goldsmith, 37 F. 359. [5] Ibid. [4] Ibid.

[5] O'Rourke *v.* Central City Soap Co., 25 F. 576.

[6] Stoughton *v.* Woodard, 39 F. 962.

[7] Battle & Co. *v.* Finlay *et al.* (C. C. 1891); 50 F. 106 (Battle & Co.).

[8] American Solid Leather Button Co. *v.* Anthony, 5 A. 625; 15 R. I. 338. (See Humphrey's Homœopathic Med. Co. *v.* Hilton, 60 F. 756, which decides that numerals used by a medicine company to identify descriptive terms will not be protected.)

[9] Northcutt *v.* Turney (Ky.), 41 S. W. 21.

[10] Cuervo *v.* Jacob Henkell Co. (C. C.), 50 F. 471.

[11] Selchow *v.* Baker (Sup.), 18 N. Y. S. 1; 63 Hun, 330.

§ 698. *Decisions in France.* — The Court of Cassation (the Supreme Court of France), in January, 1892, passed a decree enlarging the beneficent Article I. of the law of June 23, 1857.[1] It said that that Act punishes the usurpation of a trade-mark even if the usurper uses the mark on a prospectus only, and does not use it on the products which he delivers to the public. This decree definitely fixes a point of law up to that time vaguely defined. Inasmuch as the defendant had caused to be printed and distributed a prospectus bearing at its head the words "Salvo Petrolia et Cie," ornamented with a vignette representing an American eagle with spread wings, these divers indications constituting one of the marks of the American concern, — the Oil Company, — as he well knew, he vainly asserted that the law of June 23, 1857, was not operative in his case, as he had not affixed these symbols to his products, but used them only on his prospectus. Article I. of said Act is couched in most general terms, and requires only a condition constituting a *tort* to make the defendant amenable to the law.[2]

§ 699. The words "Belle Jardinière" constitute not only a simple sign, but also a trade-mark (see decision, Court of Paris, 1894).[3] — The Civil Tribunal of the Seine, in 1893, decided that the denominations "Grande Grille," "Hôpital," "Mesdames," are valid trade-marks. It is unfair competition to present an artificial product (in this case "Vichy") claimed as equal to the water of a spring belonging to a rival, and embracing the active principle of the natural springs, and producing an instantaneous result at a small price. This tends to establish a false analogy of therapeutic efficacy to the natural spring.[3] It was claimed that confusion would thereby be created, and the public be misled to think that the merchandise is placed under the patronage and guaranty of the company; and it establishes between the products a comparison by the terms in which it is presented,

[1] See Browne on Trade-Marks (2d ed.), p. 686, Appendix.
[2] 39 Annales, 359.
[3] Bessaud & Richard *v.* Dubois, 42 Annales, 90.

— a reprehensible disparagement. 2000 fr. damages, etc.[1] — In the Tribunal Civil of Lille, 1896, it was *held:* a bordering composed of a red thread, of a yellow thread, and of a white thread, constitutes a trade-mark for cloth, although the yellow thread had entered into the composition of a trade-mark that had previously become public property. A bordering composed of three such threads, with the interposition of another red thread, constitutes a fraudulent imitation, if there be a possible confusion of the mind of the consumer.[2]

§ 700. The Court of Lyons, in 1880, thus decided: The first adopter has the claim to exclusive use; but he cannot claim the mark of a lion, that is to say, consisting in the emblem of a lion, independent of every attitude, when it is established that having bought a place of business in which is employed a standing lion, he cannot object against his vendor substituting a lion lying down.[3]

§ 701. The Tribunal Civil of Lyons, in 1885, *held:* that words which constitute the necessary denomination of a product may, however, become the object of a private right, when they are disposed in a new manner, and are not the grammatical designation of the product. Especially the words "Liqueur de Quina," being in the public domain the denomination "Quina liqueur," becomes the property of him who first uses it.[4]

§ 702. The Tribunal Civil of the Seine, 1896, *held:* the denomination of the "Chat Noir" (black cat), registered in the year 1885, as a trade-mark with which to individualize an establishment composed of an eating-house and place of entertainment, was valid as a sign and trade-mark. The defendant — Ferny — used the title of "Chansons du Chat Noir" on the cover of his publication. The defendant vainly pleaded good faith, but he was forbidden to use the term "Chat Noir."[5]

[1] Compagnie fermière de Vichy *v.* Fédit & Co., 41 Annales, 296.
[2] Wihaux-Florin *v.* Lalouette-Parent, 42 Annales, 120.
[3] Flachat *v.* Bedel, 32 Annales, 176.
[4] Goutard *v.* Brunier Brothers, 33 Annales, 853.
[5] Solis *v.* Ferny *et al.*, 43 Annales, 21.

§ 703. The Court of Rennes, in 1887, and the Court of Cassation, in 1889, had the following case before them: in *Saupiquet* v. *Dauché*. — In 1882, the complainant registered as his trade-mark for sardines a vignette representing a race-track, with the words "Sardines Jockey-Club" as the essential element. The defendant afterwards registered a vignette representing a regatta, with the inscription "Sardines Rowing-Club." The Tribunal Civil of Nantes, while allowing the right to protection of the mongrel words of the complainant, decided that the form of the box was *not* entitled to protection. The complainant thereupon appealed, to secure his supposed right to the form of the box, which was purely geometrical, the color of which he asserted was original and having certain dispositions of placing. It went up on appeal until it reached the highest court, and was there decided in favor of the complainant, that the entire thing constituted a valid trade-mark; with additional damages and costs.[1]

§ 704. The Court of Douai, in the case of *C* . . . v. *Veuve* (widow) *Humbert*, *held*, that a special denomination such as "Chicorée au Mouchoir," with the enrolment of a handkerchief about the packet, and the name and the address of the fabricant, constitute, in the whole, a trade-mark protected by the law of 23 June, 1857. Said article enumerates some of the signs most ordinarily employed as a mark; but that enumeration is not limitative, for every sign, or symbol, from the instant that it is characteristic, special, and new, can constitute a mark. Inasmuch as the dame Annette Lervillé, — widow Humbert, — manufacturer at Lille, under the name of Lervillé, adopted as an arbitrary emblem the same sign, "Chicorée au Mouchoir" (with similar details), which emblem simulated a white pocket-handkerchief, in which was her name and address, her act was fraudulent, as there was a manifest intention to deceive the public and induce confusion.[2]

§ 705. The Court of Nîmes, in 1894 (*Legris* v. *Iatowski*), had this case: The inventor of a powder, to be used for the

[1] 42 Annales, 126 [1896].

[2] 34 Annales, 34 [1889].

complexion, and called by him "Kabiline," had registered it as a trade-mark. The label represented a woman in Kabyle costume horizontal to the capital letter L, which initial letter was a prominent feature. The defendant had a mark for a similar product composed of the word "Bengaline," and representing a woman standing up, holding a piece of stiff material with the letter L in a slightly incorrect form thereon, but having the same general aspect, etc. etc. Defendant was restrained. 200 fr. damages.[1]

[1] 42 Annales, 101 [1896].

CHAPTER II.

SYMBOLS NOT DEEMED VALID.

§ 706. Illustrations of marks not deemed valid.
§ 707. "Goodyear R. Co.," — "Cigar-Makers' Union," etc.
§ 708. Jaegar Sanitary Woolen System Co.
§ 709. Singer Manufacturing Co. *v.* Juno, etc.
§ 710. No valid trade-mark in materials.
§ 711. "Astral," "Kaiser."
§ 712. Treaty of 1871 with Germany, etc.
§ 713. Uncertainty of description, etc., bewildering to courts.
§ 714. "Green Mountain," for grapes.
§ 715. Original name that has become public property.
§ 716. "Old Sleuth Library."
§ 717. "Savon de Thridace."
§ 718. Mere geographical name cannot constitute trade-mark.

§ 706. "INSTANTANEOUS" is not a valid trade-mark for a preparation of tapioca adapted for immediate use without soaking.[1] — The term "Black Package Tea" is not such a distinctive appellation as will entitle the one first adopting it to its exclusive use in business, since it manifestly has reference either to the quality of the article, or the color of the package in which it is sold.[2] — An invented word cannot be registered as a trade-mark if it is intended to be descriptive.[3] — The words "Yorkshire Relish," by themselves, having only been used on packing-cases containing bottles of sauce, and with nothing to indicate that the words were used as a trade-mark, or otherwise than as a description of the contents of the cases, *held*, that the words had not been used as a trade-

[1] Bennet *v.* McKinley, 65 F. 505 ; 13 C. C. A. 25.
[2] Fischer *v.* Blank, 33 N. E. 1040; 138 N. Y. 244.
[3] In re Talbot's Trade-Mark, 8 Rep. 149. (Re Meyerstein's Trade-Mark, 43 Ch. D. 604, followed.)

mark.[1] — The plaintiff made corsets, which he called "Ball's Health-preserving Corset." Defendant called his corsets "Schilling's Health-preserving Corset." *Held*, no exclusive claim to the words "health-preserving." Labels and boxes of parties differed.[2] — One is not entitled to a trade-mark for a certain class of goods, — used for *some only* of the articles in the class, although he may in fact manufacture and sell other articles of the same class unmarked.[3] — "International Banking Company" is a term not capable of exclusive appropriation by a partnership as a firm name, or a trade-mark, for it is a generic term, descriptive of a class of business.[4] — "Sarsaparilla and Iron" is not valid, being generic.[5] — A valid trade-mark cannot be acquired for a word previously applied to same goods; for it does not indicate origin, manufacture, or ownership, but mere quality.[6] — "Taffy Tolu," for chewing-gum, is descriptive rather than indicative of its origin.[7] — The word "Imperial" is so far designative of quality as to be incapable of adoption as a trade-mark for beer.[8] — The words "Indurated Fibre," as applied to wares made of wood-pulp, which has been condensed and subjected to baths in linseed oil and resin, and baked, designate wood fibre which has been subjected to a hardening process, and refer to ingredients, quality, and characteristics, and are not so arbitrary as to authorize a preliminary injunction to protect them as a trade-mark.[9] — Acid Phosphate is a mere medical description.[10] — When the article made was theretofore

[1] Powell *v.* Birmingham Vinegar Co. (No. 1), 6 Reports, 52 App.

[2] Ball *v.* Siegel, 166 Ill. 137.

[3] Hargreave *v.* Freeman [1891], 3 Ch. 39. See also Rolander *v.* Peterson, 136 Ill. 215; 26 N. E. 603 (*infra*).

[4] Affirming 48 Hun, 48; Kohler *v.* Sanders, 25 N. E. 235; 122 N. Y. 65.

[5] Schmidt *v.* Brieg, 35 P. 623; 100 Cal. 672; Same *v.* McEwen, 35 P. 854; Same *v.* Steinke, Id. 855; Same *v.* Crystal Soda Water Co., Id.; Same *v.* Hake, Id.; Same *v.* Liberty Soda Works Co., Id. 1856.

[6] 46 F. 16; Columbia Mill Co. *v.* Alcorn, 14 S. Ct. 151; 150 U. S. 460.

[7] Colgan *v.* Danheiser, 35 F. 150.

[8] (Showalter, C. J., dissenting.) Beadleston & Woerz *v.* Cooke Brewing Co., 20 C. C. A. 405.

[9] Indurated Fibre Co. *v.* Amoskeag Indurated Fibre Ware Co., 37 F. 695.

[10] Rumford Chemical Works *v.* Muth, 35 F. 524.

unknown, it must be christened with a name by which it can be recognized and dealt in; and the name thus given to it becomes public property, and all have a right to so designate it.[1] — The word "Tycoon," for tea, is old, and therefore not valid.[2] — The letters "L. L.," placed on sheetings, which only indicate grade, class, or quality, and not origin, ownership, or manufacture, are not a trade-mark.[3] — The plaintiffs' assignor obtained a patent for an improvement in sewing-machines, the frame being in the form of the letter "G," and design-letters were also issued for the same form. *Held:* No trade-mark could be acquired for such form.[4] — The words "Liver Medicine," being merely descriptive, are not a trade-mark.[5] — The words "Svenska Snusmaganiset," meaning Swedish Snuff Store, are merely descriptive of business, and not a trade-mark, as against other Swedes engaged in the snuff business.[6] — The word "Satinine" is a descriptive word referring to the character and quality of goods, such as starch, glue, perfumery, etc., to which it is applied, and is not an invented word registrable under the English Act of 1888, § 10.[7]

§ 707. The name of Goodyear Rubber Company is not capable of exclusive appropriation, it being a mere indication of a class of goods.[8] — The words "Microbe Killer" do not constitute a trade-mark. They are common English words of fixed meaning.[9] — Where a voluntary association of cigar-makers, which puts no goods on the market, adopts a name to distinguish cigars made by any of them, but has not applied the name to any commodity of which said association is the

[1] Leclanche Battery Co. *v.* Western Electric Co., 21 F. 538; 23 Id. 276.

[2] Corbin *v.* Gould, 10 S. Ct. 312; 133 U. S. 308.

[3] Lawrence Manuf'g Co. *v.* Tennessee Manuf'g Co., 138 U. S. 537 (L. ed. 34, 997).

[4] Wilcox & Gibbs Sewing-Machine Co. *v.* Kruse-Murphy Manuf'g Co., 14 Daly, 116; affirmed, 23 N. E. 1146; 118 N. Y. 677.

[5] C. F. Simmons Co. *v.* Mansfield Drug Co. (Tenn.), 23 S. W. 165.

[6] Bolander *v.* Peterson (Ill.), 26 N. E. 603; 136 Ill. 215.

[7] In re Meyerstein's Trade-Mark, 43 Ch. D. 604.

[8] Goodyear's India Rubber Glove Manuf'g Co. *et al.* *v.* The Goodyear Rubber Co., 128 U. S. 598 (L. ed. 32, 535).

[9] Auff *v.* Radam (Tex.), 14 S. W. 164; 77 Tex. 530.

owner, or in which it trades, and which is in the market with the name attached, it acquires no trade-mark in the name.[1] —The Cigar-Makers' Union, having many thousand members, adopted a symbol, or device, to be used by any members on boxes of cigars made by them; such device not indicating by what persons the cigars were made, but only that they are made by some member of said union, the right to the device belonging equally to any of the members, and continuing only while the person remains a member. *Held*, not a legal trade-mark.[2]

§ 708. The plaintiff claimed a trade-mark on certain words on garments made by him by reason of a concession made to him by the inventor of the articles. The inventor had never made such garments, nor had he been a vendor of such garments with such words attached. *Held*, that the inventor had no trade-mark.[3]

§ 709. The name which is given to a patented device to distinguish it as a patented article from others of the same nature, is not, during the life of the patent, properly speaking, a trade-mark. It designates nothing excepting that the structure has a definite character, which was patented, and indicates nothing in regard to the character of the workmanship, or of the person by whom it was manufactured. A trade-mark is something different from the article which the mark designates (*Fairbanks* v. *Jacobus*, 14 Blatch. 337).[4] —One so using name which has become the generic name of patented article, on which the patent has expired, must adopt such precautions as will protect the property of others and prevent injury to the public interests, if by so doing no substantial restriction is imposed on the freedom of use; and the addition of other matters will not absolve him from a charge of attempting to deceive the public in the sale of the patented article.[5]

[1] Schneider *v.* Williams (N. J.), 14 A. 812.

[2] Cigar-Makers' Protective Union *v.* Conhaim (Minn.), 41 N. W. 943; 40 Minn. 243.

[3] Jaegar's Sanitary Woolen System Co. *v.* Le Boutillier, 47 Hun, 521.

[4] *Per Curiam* in Adee *v.* Peck Brothers & Co., 37 F. 209.

[5] Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169; 41 L. ed. 118; 75 Off. Gaz. 1703; 16 Sup. Ct. Rep. 1002.

§ 710. Materials are not the subject of appropriation as a trade-mark.[1] — There is no valid trade-mark in a piece of tin as a tag for tobacco, regardless of its color, shape, or inscription, as this is one of the common metals in use by the public for a large variety of purposes.[2] — Nor is "Tin Tag" or "Wood Tag" a trade-mark.[3] — There is no right to the use of material substances on which a word, figures, or emblems, may be impressed or engraved.[4] — A patent monopoly cannot be extended under guise of trade-mark.[5] — Nor can there be a trade-mark in a peculiar method of arranging soap.[6] — Nor for chewing-gum for *form* of sticks, or the shape or decoration of boxes; nor for arrangement of gum in the same.[7] — Nor in a method of bronzing horse-shoe nails.[8]

§ 711. Nor can there be a trade-mark in an oil-burning lamp called the "Astral," such a lamp having long been used.[9] — The word "Kaiser" is not a trade-mark, as others had previously acquired and exercised the right to use it for mere description. Long before complainant adopted the word, a number of springs of mineral waters bore the name as a prefix in different parts of Europe.[10] — As a large tract of land in which there are many coal mines, owned and operated by different persons, was long known and recognized as "Sonman Survey," it having a village post-office, telegraph office, and a railroad station, the name "Sonman" cannot be used as a trade-mark or trade-name for coal.[11] — The name "Rosendale Cement" cannot be a trade-mark, for all cement manufacturers in Rosendale may rightfully so call their product. There cannot be any trade-mark in the name of a place.[12] — The word "Hygienic,"

[1] Lorillard *v.* Pride, 28 F. 421
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Davis *v.* Davis, 27 F. 490.
[7] Adams *v.* Heisel, 31 F. 279.
[8] Putnam Nail Co. *v.* Bennet *et al.*, 43 F. 800. See also 59 F. 909, and 8 C. C. A. 362.
[9] Pratt's Mfg. Co. *v.* Astral Refining Co., etc., 27 F. 492.
[10] Luyties *et al. v.* Hollendeer *et al.*, 30 F. 632. (See also Kaiserbrauerie, Beck & Co. *v.* J. & P. Baltz Brewing Co., 71 F. 695, and 20 C. C. A. 402.)
[11] Appeal of Laughman (Pa.), 18 A. 415; 24 W. N. C. 465.
[12] New York & R. Cement Co. *v.* Coplay Cement Co., 45 F. 212.

as applied to underwear, is not a trade-mark.[1] — In 1873, complainant used a name on a small shipment of flour, and in 1884, the defendants used the same name, continuing the use for seven years. The use by conplainant was so inconsiderable that a registry of the same as a trade-mark could not confer a right on the complainant. The complainant's predecessors, flour dealers, in 1873, furnished two hundred and twenty barrels of flour for export to Venezuela, branding the barrels with the name "La Venezalano," and that seems to be the only occasion on which the trade-mark was used on behalf of complainant.[2] — The words "Iron Bitters," being an indication of the article so called, cannot be a trade-mark.[3] — The *intention* to adopt a trade-mark, and the sale of a few dozen bottles of a medicinal preparation with written labels affixed bearing a name different from that previously used for such preparation, does not amount to use in such circumstances as to publicity, and such length of use as to show an intention to adopt the written words as a trade-mark.[4] — Although registration of a trade-mark, under the Act of March 3, 1881, may not prevent the adoption of another device as a common-law trade-mark in domestic markets, such registration may be evidence in a suit to restrain an infringement of such common-law trade-mark to show what complainant really claimed.[5]

§ 712. Registration, under Act of 1881, is evidence of specific claim. The essential feature described a representation of a red anchor in an oval space. That was not proof of an intention to adopt a trade-mark consisting of the word "Anchor," and the symbol of an anchor, irrespective of color and surroundings. The treaty of 1871, between the United States and Germany (Article 17; 17 St. 931), which provides

[1] Jaros Hygienic Underwear Co. *v.* Fleece Hygienic Underwear Co., 60 F. 622; 65 F. 424. — Note: The word "Hygienique" as applied to suspenders. See Bailly *v.* Nashawanna Mfg. Co., 10 N. Y. S. 224.

[2] Brower *v.* Boulton, 58 F. 888; (C. C. A.) 7 C. C. A. 567.

[3] Brown Chem. Co. *v.* Stearns & Co., 37 F. 360. See Brown Chem. Co. *v.* Meyer *et al.*, 139 U. S. 540 (L. ed. 35, 247).

[4] Kohler Mfg. Co. *v.* Beshore, 53 F. 262; 59 F. 572; 8 C. C. A. 215.

[5] Richter *v.* Reynolds *et al.*, 17 U. S. App., affirming 52 F. 455.

that with regard to the marks of labels on goods, or of their packages, the citizens of Germany shall enjoy in the United States the same protection as native citizens, does not give to a citizen of Germany who has acquired the right to a trade-mark in that country a similar right to the trade-mark in the United States.[1]

§ 713. Uncertainty of description, and misconception of the matters that are calculated to make up essentials of a valid trade-mark, are at times bewildering to courts. Coxe, J., truly said in one case: "The courts will have time for little else, if they undertake to meddle with . . . the color and size of the wrapping-paper and boxes in which a shop-keeper displays his wares. Trade should not be hampered by vexatious restrictions in matters apparently so trivial."[2]

§ 714. "Green Mountain" was rejected as a trade-mark for grapes, it being a mere geographical name.[3]

§ 715. On expiration of a patent under which was manufactured kitchen ware described as "Granite," the public has the right to use that name; and the manufacturer is not entitled to the exclusive use of it.[4] — When a medicinal preparation, not patented, has come to be known by the name of the original compounder, another person engaged in the manufacture cannot appropriate the name to his exclusive use.[5] — The purchaser of a firm name has no right to use the same in such a manner as would expose to liability an individual whose name is part of, or constitutes the firm name.[6]

§ 716. The publisher of a series of stories entitled "Old Sleuth Library," and purporting to relate the adventures of a detective called "Old Sleuth," is not entitled to exclusive use of the word "Sleuth" in the title of stories about detectives.[7]

[1] 8 C. C. A. *supra.*

[2] Philadelphia Novelty Co. *v.* Rouss, 40 F. 585. See also Same *v.* Blakeley Novelty Co., Id. 588. Bill dismissed on preceding case. (See also 39 F. 273.)

[3] Hoyt *et al. v.* J. T. Lovett Co., 71 F. 173; 17 C. C. A. 652.

[4] St. Louis Stamping Co. *v.* Piper (Sup.), 33 N. Y. S. 443; 12 Misc. Rep. 270.

[5] Watkins *v.* Lawdon (Minn.), 54 N. W. 193.

[6] Chesterman *v.* Seeley (Com. Pl.), 18 Pa. Co. Ct. R. 631; 5 Pa. Dist. R. 757.

[7] Munro *v.* Tousey, 29 N. E. 9; 129 N. Y. 38; Id. 10 N. E. 129; 13 N. Y. S. 79, 81, reversed.

§ 717. In the Court of Paris, 1885 (*Rheus & Co.* v. *Javal & Parquet*), plaintiffs were manufacturers and vendors of soap to which they had given the name of "Savon de Thridace." It was said in the Tribunal below that inasmuch as the word "Thridace" is not the appellation of a person nor a name of fancy, created without necessity, but is the name given in pharmacy to the juice of a certain pottage herb (*suc de laitue*), which product is in the Codex, which gives the formula of a preparation of a syrup of Thridace, the denomination cannot be deemed arbitrary, susceptible of a private right as applied to soap. Judgment was against the plaintiffs. On appeal, said judgment was affirmed.[1]

§ 718. A mere geographical name cannot constitute a trade-mark. In 1810, one B. began the manufacture of mustard in Lexington, Kentucky, which became widely known as "Lexington Mustard." After some years plaintiff purchased the business, and, in 1877, removed it to Louisville. Prior to that time the label described the goods as "Burrowe's Mustard, Lexington, Ky.," which was changed to "Burrowe's Lexington Mustard," giving the address of the manufacturer as Louisville. Defendant began to make mustard in Lexington, in 1873, calling it "Metcalfe's Improved Lexington Kentucky Mustard," and, in 1877, "Metcalfe's Lexington Kentucky Mustard." *Held*, that where it is uncertain whether a geographical word is used as an address, or as the name of a manufactured article, and it is uncertain which, of two, first used it in the last-named way, neither party can appropriate the word to his exclusive use as a trade-mark.[2]

[1] 31 Annales, 74.

[2] Metcalfe *v.* Brand (Ky.), 5 S. W. 773.

CHAPTER III.

RIGHTS ANALOGOUS TO THOSE OF TRADE-MARKS.

§ 719. Unfair competition in business explained and defined.
§ 720. "Royal," not infringed by "Coral," etc.
§ 721. Imitations of bottles, signs, cuts, etc., enjoined.
§ 722. Color of labels, etc., used to deceive.
§ 723. Misuse of trade-names.
§ 724. Unfair competition by misuse of trade-names.
§ 725. Trade-names protected.
§ 726. Name of orchestra not assignable.
§ 727. "Blue Lick Water" case.
§ 728. Misuse of one's own name.
§ 729. "Portland Stove" case.
§ 730. "Le Page Co." case. (Cement.)
§ 731. "Draper Oiler Co." case.
§ 732. "Higgins' Soap Co.," "Boston Rubber Co.," etc., etc.
§ 733. "Fish Bros. & Co.'s Wagons" case.
§ 734. "The Sun Life Assurance Co. of Canada" case.

§ 719. *Unfair Competition in Business.* This matter is explained and defined in Browne on Trade-Marks, § 43. Since the introduction of the term *Concurrence déloyale*, anglicized as above, it has generally been adopted by the courts. It includes multifarious cases that are not strictly trade-mark matters, and are beyond recognized technical rules, but which are deemed worthy of protection. The following decisions afford illustration of the doctrine of *Unfair Competition.*

§ 720. In the case of the *Royal Baking Powder Co.* v. *Davis*, the use of the phrase "Coral Baking Powder," in connection with the color of the label, and the general appearance of the cans bearing the label, are calculated to deceive the public, although in themselves they are no infringement of the trade-mark, nevertheless they were enjoined;[1] — and in the

[1] 26 F. 293. See also C. F. Simmons Med. Co. *et al. v.* Simmons, 81 F. 163.

Carlisle Soap Co. v. *Thompson*, the imitation of the packages, and the color, design, style, and lettering were enjoined;[1] — and so in *Fleischman et al.* v. *Starkey*, although it was held that the color alone was not a trade-mark.[2]

§ 721. In *Cook & Barkheimer Co.* v. *Ross*, complainant sold a brand of whiskey bottled by it at the distillery in a bottle of peculiar shape devised by it, and thereby engaging favor in the market, which brand, through extensive advertising, came to be relied on as indicating complainant's bottling. Defendants, who for some time had bottled and sold the same whiskey, adopted a bottle precisely like complainant's. *Held*, that the use of such bottle was Unfair Competition, and should be restrained.[3] — The defendant, under the name of "Young," engaged in a business similar to that done by the plaintiff, under the corporate name of "De Youngs," established himself in the same street near the plaintiff, used similar business signs and advertising devices, and displayed the name "The Youngs," so that it differed from that of the plaintiff only in the prefix "The." *Held*, that such use of the name and devices should be enjoined.[4] — A device bearing the names of the proprietors of a patent medicine, the proprietors' place of business, the names of various diseases, etc., and consisting chiefly of a letter of the alphabet nine times repeated, arranged in three vertical columns, separated by lines or bars, so as to form three B's each, this letter being the initial of the three words forming the name of the medicine, generic words belonging to the science, the whole so printed on the wrapper that, when it is placed around the package of the goods, every one of the three sides were present to view, one of these combinations of B's is a *label* which the court will protect against infringement.[5] — Although the words "Kidney & Liver Bitters" are not the subject of a trade-mark, being merely descriptive, yet the name of the maker, and every

[1] 25 F. 625.
[2] 25 Id. 127.
[3] 73 F. 203.
[4] De Young *v.* Jung, 27 N. Y. S. 370; 7 Misc. Rep. 56.
[5] Foster *v.* Blood Balm Co. (Ga.), 3 S. E. 284.

device in the form and contents of a label and wrapper, to denote that the goods are made by him, are proper subjects for protection.[1] — Although the plaintiff cannot acquire the exclusive right to use the word "American" as descriptive of beer, yet it is entitled to an injunction when an imitation of its sign, bearing that word conspicuously, so closely resembles the company's in size and colored lettering as to deceive the public.[2] — The plaintiff, the name of which is known to the trade as the "Tuerk Water Motor Co.," is entitled to enjoin defendants, the members of the firm of the "Tuerk Water Motor Co.," from using such firm name, or cuts and printed matter in advertisements used by it prior to the formation of the defendants' firm, or any substituted imitation thereof, the adoption whereof by the defendants having been not only with the purpose of representing to the public that the motors sold by the defendants were those of the plaintiff, but being calculated to have, and having that result with ordinary purchasers, in the exercise of ordinary care and caution.[3] — In imitating distinguishing marks on stoves made by another, with the purpose and result of palming them off as the manufacture of such other, the imitator will be enjoined, irrespective of the question of trade-mark.[4]

§ 722. Plaintiff's label on packages of the same size, shape, material, and position, printed in the same colors, with some alterations, — where, on the plaintiff's label there was a progressive increase in the size of letters, there was the same on the defendant's label; the sentences and picture on the latter were very similar to those on the former, and in some instances the same; that the word "Germ" used by defendant was similar in sound and appearance to the word "Germea" carried by the plaintiff; that the words "Trade-Mark Registered," in similar colors, type, and position, though defendant had not registered any trade-mark at the time the action was brought, while plaintiff's labels were registered

[1] Spieker *v.* Lash (Cal.), 36 P. 362.
[2] American Brewing Co. *v.* St. Louis Brewing Co., 47 Mo. App. 14.
[3] Tuerk Hydraulic Power Co. *v.* Tuerk (Sup.), 36 N. Y. S. 384; 92 Hun, 65.
[4] Amos H. Van Horn *v.* Crogan (N. J. Ch.), 28 A. 788.

several years before the infringement began. It further appeared that the person who prepared defendant's package and labels had those of plaintiff before him; thus proving actual intent to deceive. *Held*, that injunction should issue.[1]

§ 723. The trade-names "A. N. Hoxie's Mineral Soap" and "A. N. Hoxie's Pumice Soap" are assignable, and if the assignee uses them to denote soap made according to the formulas of A. N. Hoxie, and to denote that they are made by said Hoxie, he may maintain a bill in equity to restrain an infringement. Hoxie subsequently issued a circular virtually representing himself as successor to the business, the good-will of which he had sold, and also asserted a right to the so-called trade-mark. This was in excess of what he could lawfully do.[2] — A bill was filed to enjoin defendant from manufacturing and selling certain medicines under the names of "Dr. Spencer's Queen of Pain," and "Spinal Paste or Salt Rheum Cure," from using the trade-names, and from libelling the plaintiff. The defendant had taken from administrator said medicines. The question was whether plaintiff had acquired, as against the defendant, the exclusive right to the trade-names formerly used by Dr. Spencer. In *Chadwick* v. *Covell*, it was decided that defendant had no such right. His only title from the representatives of Dr. Spencer accrued more than four years and a half after the doctor's death. He was not the purchaser of the business, which was wound up several years before he acquired title, and plaintiff did not buy the business.[3]

§ 724. Courts have frequently had occasion to investigate complaints of unfair competition, when the same arose from the wrongful use of trade-names, as contra-distinguished from trade-marks. The following citations afford illustrations under this head. *La République Française et al.* v. *Schultz* is a suit to enjoin the word "Vichy," in designating mineral waters. It

[1] Sperry & Co. *v.* Percival Milling Co. (Cal.), 22 P. 651 ; 81 Cal. 252.

[2] Hoxie *v.* Chaney, 143 Mass. 592.

[3] Covell *v.* Chadwick, 153 Mass. 263. See authorities cited, including Kidd *v.* Johnson, 100 U. S. 617, 620. — No business or good-will is shown, to carry property in a trade-mark.

also involves the question of right to use a geographical name in connection with mineral waters derived from springs in the same locality as that of Vichy, by persons owning such springs. Complainants claim that the word "Vichy" is not a trade-*mark*, but is a trade-*name*, and as such should be protected on principles analogous to those applied to trade-marks. Although defendant claims that the word is a trade-mark, much of his argument proceeds on the theory that it is not. This was a question of a right to redress. The court said that: "In the industrial property treaty of 1883, these three expressions are used, '*Marque de fabrique*' (trade-mark), '*Marque de Commerce*' (trade and commerce mark), and '*Nom Commercial*,' (trade and commercial name). The treaty provides that every trade-mark, or commerce-mark regularly deposited in the country of origin, shall be admitted to deposit, and so protected in all the other countries of the Union. (25 Stat., 1376, Art. 6.) And the first protocol, on page 1380, is as follows: Paragraph 1, of Article 6, is to be understood in the sense that no trade or commercial mark shall be excluded from protection in one of the States of the Union [international], by the mere fact that it may not satisfy, in respect to the signs composing it, the conditions of the laws of this State, provided that it does satisfy in that regard the laws of the country of origin, and that it has been in the latter country duly deposited," etc.[1] *

§ 725. The principle that nobody has any right to represent his goods as the goods of somebody else has no limit as regards name, origin, honesty of manufacture, or sale. Thus a trader whose goods have acquired a reputation under a particular name can restrain the user of that name in any way whatever by a rival trader in connection with the latter's own goods; even though that reputation has been acquired by the exertions or enterprise of the rival trader, as an importer or vendor, etc.[2] — The words "Mechanics' Store," as a trade-

[1] La République Française *et al. v.* Schultz, 57 F. 37.

* This case erroneously assumes that the United States was an active member of said union. Browne on Trade-Marks, § 85, is cited by court with approbation.

[2] Reddoway *v.* Benham [1896], A. C. 199, 204.

name, may be protected.[1] — The phrase "New York Dental Rooms" may become a trade-name to designate the business of a dentist doing business in St. Louis.[2]

§ 726. A trade-name given to an orchestra by its founder, is not assignable. It is personal, and rests on the reputation of the musician. It would be a fraud on the public to assign it.[3]

§ 727. The name "Blue Lick Water," having reputably been used for more than a century to designate the water of certain springs in Nicholas County, and known by that name ever since their first discovery, is a good trade-name, in the hands of lessees of said springs, as against owners of an artesian well near Louisville.[4] *

§ 728. A corporation assumed the name of an employé to get the trade of a rival of the same name.[5] — One entering into competition with another of the same name, who has an old and established business, is bound to distinguish his goods to prevent confusion. He is not entitled to use the same name, whether with his given name or his initials.[6] — The right of a person to use his own name in his own business does not authorize him to lend or give his name to a corporation for the purpose of engaging in a business which has been conducted by others, under precisely the same name.[7] — A person who so lends to a corporation the right to his name, does not thereby lose the right afterwards to use it in his own business.[8]

§ 729. The word "Portland," having been used for a number of years by the plaintiff to distinguish stoves, etc., a rival

[1] Weinstock, L. & Co. *v.* Marks, 109 Cal. 529; 3 L. R. A. 182; 42 Pacific, 142; Natl. Corp. Rpt. 341.

[2] Saunders *v.* Utt, 16 Mo. App. 322; Saunders *v.* Jacob, 20 Mo. App. 96.

[3] Messer *v.* The Fadettes (Mass.), 45 N. E. 407.

[4] Parkland Hill Blue Lick Water Co. *v.* Hawkins (Ky.), 26 S. W. 389.

* The proprietary rights in names under which articles are named, as analogous to trade-marks, considered by Grafton Dulaney Cushing, 4 Har. Law Rev. 321.

[5] City of Carlsbad *v.* Schultz, 78 F. 469.

[6] Walter Baker & Co. *v.* Saunders, 80 F. 887.

[7] De Long *v.* De Long Hook & Eye Co. (Sup.), 32 N. Y. S. 203; 10 Misc. Rep. 577.

[8] De Long *v.* De Long Hook & Eye Co. (Sup.), 39 N. Y. S. 903; 7 App. Div. 33.

dealer was prohibited from advertising and selling his stoves under a similar name.[1]

§ 730. The *LePage Co.* v. *Russia Cement Co.*, in the first circuit, *held*, as follows: The rights of original corporation are not affected by the fact that, after retiring therefrom, LePage obtained a patent on an alleged improvement over his original glue, and that the patent laws required notice to be stamped on each package of the patented article.[2] He assigned the patent to the LePage Co., plaintiff. That company claims that, as the owner of a patent, its privilege and duty is so to stamp its goods. Inasmuch as the patent was applied for, after the rights of the Russia Cement Co. accrued, it was estopped.[3]

(The Court of Appeal was composed of Gray, Cir.-Justice, and Colt and Putnam, Cir.-Judges. The last-named judge said, *inter alia:* "The method of stating that the article is patented was such as to aggravate the offence of the LePage Co. instead of excusing it. The face of William N. LePage, a fac-simile, and the words 'William N. LePage is the original inventor of preserved liquid fish glue,' etc.; and at the close follows: 'Improved process pat. Oct. 26, 1886.'") (This was an *action* for damages for the wrongful use of the name "LePage." Verdict of jury, $8,000.) The record shows that, subsequently to the state of facts shown in *Cement Co.* v. *LePage*, a corporation was formed in January, 1887, being the defendant below, taking first the name of LePage Liquid Glue and Cement Company. The original corporators were William N. LePage, his wife, and his counsel.[4] The court cited many cases to forcibly illustrate the underlying principle.—In *Seixo* v. *Provezende*, Lord Chancellor Cranworth said that "the actual physical resemblance of the two marks is not the sole question for consideration; but that the adoption by a rival trader of *any mark* which will cause his goods to bear the same name in the market is as much a

[1] Amos H. Van Horn *v.* Crogan (N. J. Ch.), 28 A. 788.
[2] R. S. § 4900.
[3] 51 F. 291.
[4] 147 Mass. 206; 17 N. E. Rep. 304.

violation as an actual copy."[1] — The same doctrine is that of *Orr Ewing & Co.* v. *Johnston & Co.*[2] Lord Selborne, Lord Chancellor, said in the House of Lords that the mere appearance of the two tickets could not lead any one to mistake one for the other. It might easily happen that they might be taken by natives of Aden or India, unable to read and understand the English language, as equally symbolical of the plaintiff's goods. If many such persons took notice of the differences between the two labels it might probably appear that they were only differences of ornamentation, posture, and other accessories, leaving the distinctive and characteristic symbol substantially unchanged. — The plaintiff in error claims that the letter from the attorney of the Russia Cement Co., that the use of the name is not likely to do them harm enough in the long run to make it worth while to bring another suit, *operates as an estoppel;* but the court said that in equity, coupled with evidence of *laches*, it might have some effect in accounting, but in a suit at law it has no effect whatever.[3]

§ 731. The case of *Noera* v. *H. A. Williams' Manufacturing Co.*, a bill to enjoin N. from using the word "Draper" as applied to oilers (other than those made by the complainant corporation). Draper & Co. had made hardware ever since 1833, and had put the name "Draper" on different articles of their make. About 1880, they began to make oilers and put their name on them to denote superior excellence. Before and since, inferior oilers resembling the genuine article, and called "Draper" oilers and "Star" oilers were in the market. From 1880 to 1884, one A. bought some cans from Draper & Co., manufactured cans resembling theirs, and marked them "Draper Oiler Co." Up to 1887, Draper & Co. made all the oilers sold by Noera under the name "Draper Oiler Co." N. began to have the less important parts made elsewhere, and the oilers were completed by D. & Co. In selling oilers N. packed them in boxes labelled "Draper Steel Oilers." In

[1] L. R. 1 Ch. App. 192, 196; 14 L. T. (N. S.) 314; 12 Jur. (N. S.) 215.
[2] 13 Ch. D. 463.
[3] 51 F. 491; 2 C. C. A. 555.

1890, N. sold out to the complainant and went into its employ. "Draper," having gained a certain commercial value, as applied to oilers, he then attempted to steal a part of its reputation. D. & Co. ceased to use "Draper Oiler Co.," at the demand of one Alden, — for the sake of peace, — perhaps unduly impressed by the suggestion that Alden had a copyright. The word "Draper" certainly did not become public property. Injunction denied as to Williams' Manufacturing Co. *et al.*; but Noera enjoined.[1]

§ 732. One Higgins sold to the plaintiff, Charles H. Higgins Co., a soap business long established at Brooklyn, with the good-will, labels, and trade-marks, reserving the right to engage in the same business. The soap made by said company was extensively advertised at large expense, and was known to the trade as "Higgins' Soap," and plaintiff was known as its manufacturer, and was to some extent called the "Higgins' Soap Company." Among the labels sold were "Higgins" and "Higgins' Soap." Thereafter, Higgins with others, including members of his family, organized a company to manufacture soap at Brooklyn under the name "Higgins' Soap Company;" and within four months thereafter, that company received over twenty-eight business letters intended for the other corporation. *Held*, that though the new company took its name from the family name of its organizers, and adopted it in good faith, without design to acquire plaintiff's trade, it would be restrained from using it.[2] — In another case, a petition stated that the adoption and use by defendant of plaintiff's corporate name was with the fraudulent intent of appropriating plaintiff's trade, that the public was deceived, and plaintiff's trade diverted to defendant thereby. *Held*, a case for equitable relief.[3] — The *Boston Rubber &c. Co.* v. *Boston Rubber Co.* involves the same principle. A certificate of incorporation was held to be conclusive that respondent's name was conferred by law; and because petitioner does not

[1] 158 Mass. 110.

[2] Chas. S. Higgins' Co. *v.* Higgins' Soap Co., 39 N. E. 490; 144 N. Y. 402 (reversing 24 N. Y. S. 801).

[3] Plant Seed Co. *v.* Michel Plant & Seed Co., 23 Mo. App. 579.

show its right or interest it is not injured or put in jeopardy by the exercise of a franchise. The *younger* corporation cannot be restrained from using its corporate name.[1] — In *Converse* v. *Hood*, and the same against the Boston Rubber Co., it appeared that for thirty years the trade-name had been known, differing from its corporate name. A junior corporation of the same name was organized in 1878. It made the same goods, and in the same city. An objection was made to the use of the name by the junior company. *Held*, that corporate rights cannot be maintained by one individual stockholder against another. The second bill was brought by plaintiff as a stockholder in the Boston Rubber Co., and in behalf of all other stockholders who were not defendants, for the purpose of restraining acts injurious to stockholders. Bill shows no right to equitable relief, for that must be alleged by the corporation.[2]

§ 733. All the property, assets, and business of the firm of Fish Bros., Wagon Manufs., passed by successive changes to Fish Bros. & Co., thence into the hands of a receiver, and thence to the Fish Bros. Wagon Co. The Fish brothers remained in the business through all the successive changes, and became directors and officers of the new company, although the majority of stock was owned by others. During all this time the products were variously advertised under the trade-names "Fish Bros.," "Fish Wagons," "Fish Bros., Agents," "Fish Bros. & Company, Agents," and the picture of a fish with "Bros." or "Bros. & Co." on it. Several years after the organization of the company, the Fish brothers withdrew therefrom and set up on their own account, under the firm name of "Fish Bros. & Co." *Held*, in an action by the corporation against "Fish Bros. & Co.," that plaintiff owned the good-will of the old business, including the right to use the fish symbols.[3]

§ 734. In June, 1893, the Sun Life Assurance Co. of Canada, which was duly incorporated in Canada, and had there carried on business for some years under that name, opened an

[1] 149 Mass. 436. [2] 149 Mass. 471.

[3] Fish Bros. Wagon Co. *v.* La Belle Wagon Works (Wis.), 52 N. W. 595.

office in the city of London. The Sun Life Assurance Co., which was established in England in 1810, its head office being in said city, asked for an injunction to restrain the Canadian company from carrying on in the United Kingdom of the business of life assurance, under the name of the Sun Life Assurance Company of Canada. *Held*, inasmuch as the mere user by the defendant company of its full name involved no mis-statement of fact, and was not a fraudulent user, the defendant was entitled to use its full corporate name, but the right did not extend to the use of "The Sun," or "The Sun Life," without the addition of the words "of Canada." [1]

[1] 8 Reports, 125; Id. [1894], 1 Ch. 537.

CHAPTER IV.

ASSOCIATIONS, UNIONS, SUCCESSION, ETC.

§ 735. Statutes relative to use of trade-marks, names, etc.
§ 736. Protection by laws of Me., Mass., O., Ills., Wis., Ky., Neb.
§ 737. Protection to unincorporated associations.
§ 738. Label adopted by a union can be used by all its members.
§ 739. Punishment for forged imitations, or counterfeits.
§ 740. Label not libellous in case stated.
§ 741. Imitation of a trade-mark a misdemeanor in So. Dakota.
§ 742. Succession, priority, etc.
§ 743. One's own name, when assignable.
§ 744. Symbol "N & S" on cigars.

§ 735. ASSOCIATIONS, UNIONS, etc. — In many of the States there are statutes regarding the use of trade-marks, trade-names, and analogous matters by unincorporated companies and trades-unions; but it is not the province of this work to give more than examples of, and citations on these subjects.

§ 736. In Maine, the Rev. Stat. c. 39, §§ 37–43, in relation to the adoption and protection of the use of trade-marks, labels, etc., is extended to associations of working-men.[1] — In Massachusetts, the Pub. Stat. c. 203, §§ 63, 64, concerning the counterfeiting of prints, labels, stamps, and trade-marks, is amended so as to make the statute applicable to labor and trade associations.[2] — In Ohio, there is a provision for the protection of skilled labor, and for the registration of labels, etc.[3] — In Illinois, there are general provisions for the adoption, and protection in the use of trade-marks, by persons, associations, and unions of working-men, and penalties for violations.[4] — In Wisconsin, there are similar provisions by the Act of April

[1] Act Mch. 28, 1891. (Pub. Laws 1891, c. 114, p. 124.)
[2] Act of Mch. 19, 1890. (Acts 1890, c. 104, p. 65.)
[3] Act of Apr. 2, 1890. (Laws 1890, p. 141.)
[4] Act May 8, 1891. (Laws 1891, p. 202.)

16, 1891.[1] — In Kentucky, there is a provision authorizing the filing with the Secretary of State of copies of labels, marks, etc., adopted by unions or associations of working-men or women, and protecting the same.[2] — Nebraska has substantially the same provisions.[3]

§ 737. An unincorporated association of operatives who are employed by others in manufacturing a product, may adopt a device for designating the articles manufactured by themselves, and are entitled to equitable protection against fraudulent imitations, it appearing that goods marked with the label command a better price than others.[4] The fact that one of the objects of such unincorporated association is to maintain fair wages for its members, and that it allows a device adopted to designate the products, is not presumed to be illegal.[5] — A voluntary association of cigar-makers having issued to manufactories in which its members only are employed, or to a member who makes cigars on his own account, to indicate that the cigars bearing the labels are made solely by such member or members, and to distinguish them from other cigars, though such cigars are made in various manufactories by various workmen, and neither the workmen nor association have any proprietary interest in them, — yet such label is a trade-mark, within the meaning of Pen. Code N. Y. § 366, defining a trade-mark to be a mark to indicate the owner, maker, or seller, of an article of merchandise, and usually affixed to merchandise to denote that it was manufactured, etc., or otherwise prepared, and section 364, making it a misdemeanor to counterfeit a trade-mark, or to affix a counterfeited trade-mark to merchandise, etc.[6]

§ 738. A label adopted by the International Cigar-Makers' Union, to be pasted on boxes containing cigars made by members, is not a legal trade-mark, it not indicating by what per-

[1] Act Apr. 16, 1891. (Laws 1891, p. 353.)
[2] Act Apr. 16, 1890. (Pub. Acts 1889–1890), c. 823, p. 99.
[3] Act Mch. 31, 1891. (Laws 1891, c. 15, p. 214.)
[4] Strasser *v.* Moonello, 55 N. Y. Super. Ct. 197.
[5] Ibid.
[6] People *v.* Fisher, 3 N. Y. S. 786; 50 Hun, 552.

sons the cigars are made, but only that they are made by members of one of the local unions, the right to use it belonging equally to all members, and continuing only while they are members.[1] — The Cigar-Makers' International Union of America, a voluntary unincorporated association of workmen, organized "for promoting the mental, moral, and physical welfare of its members," but not engaged in the business of making or selling cigars, etc., is not a trader, and is not entitled to a trade-mark, either at common law or under Act U. S. July 8, 1870, which provides that a statement shall be recorded in the Patent Office, showing "the names of the parties applying for the registration, with their residences and places of business, and a description of the goods comprising the class" by which the trade-mark is to be appropriated.[2]

§ 739. Under the statute providing for the punishment of any person who shall vend goods, etc., on which, or in connection with which any forged imitation, or counterfeit label, trade-marks, etc., have been placed, affixed, or used, and intended to represent the said goods as the genuine goods or properties of any other person, it is not an indictable offence to use or counterfeit the label of a labor union, or organization not making or dealing in similar goods, indicating that the labor of members of such organization has entered into the manufacture of goods to which it is attached.[3]

§ 740. A statement on a label adopted by a cigar-makers' union that the cigars contained in the box are made by a member of such union which is opposed to "inferior, rat-shop, cooley, prison, or filthy tenement-house labor" does not deprive such label from protection against infringement on the ground that it is libellous.[4] — Where a label, adopted in accordance with 80 Ohio Laws, 166, providing for the protection of labels adopted by labor unions, stated that the

[1] Weemer *v.* Brayton (Mass.), 25 N. E. 46 ; 152 Mass. 101.
[2] McVey *v.* Brendel (Pa. Sup.), 22 A. 912 ; 144 Pa. St. 235 ; 29 W. N. C. 1.
[3] State *v.* Berlinsheimer, 62 Mo. App. 168.
[4] Perkins *v.* Heert, 5 App. Div. 335 ; 39 N. Y. Supp. 223.

cigars on which it was placed, are the product of an organization opposed "to inferior, rat-shop, coolie, prison, and filthy tenement-house workmanship," it is not objectionable as against public policy.[1] — Said statute is constitutional.[2] — A complaint in an action brought by Louis Allen *et al.*, as "officers and members of Cigar-Makers' Protective Union, No. 98, of the State of Minnesota, a branch and member of the Cigar-Makers' International Union of America, composed of local Union Societies," etc., etc., shows a proprietary interest entitling them to maintain action.[3] — In the Supreme Court of Michigan, May 28, 1897, was this case, *Supreme Lodge Knights of Pythias* v. *Improved Order Knights of Pythias et al.*, the sole question was whether defendants shall be enjoined from using the name "Improved Order Knights of Pythias." *Held*, members withdrawing from the "Knights of Pythias," and organizing an association on similar lines, may use the title K. of P. The court recited the history of schisms in other societies which have adopted, as a permanent part of their respective names, the name of the parent organization. No careful person could think that these two orders are identical, or that the similarity of names is calculated to mislead the ordinary run of mankind. A decree was entered dismissing complainants' bill.[4]

§ 741. The South Dakota Statute. Using a trade-mark of another with intention to deceive is a misdemeanor punishable by fine, or imprisonment, or both. The using of such trade-mark, after notification that it is a counterfeit, is similarly punishable.

§ 742. *Under the head of* SUCCESSION, there are many interesting cases. In the case of *P. Lorillard Co.* v. *Peper*, an assignment was traversed by defendant. The controverted fact of succession of complainant in business is not established by complainant. As to who is a "predecessor"

[1] Cigar-Makers' Protective Union, No. 4, *v.* Lindner (Com. Pl.), 2 Ohio N. P. 114; 3 Ohio Dec. 244.

[2] Ibid.

[3] Allen *v.* McCarthy (Minn.), 34 N. W. 416. Act Mch. 7, 1890, Laws 1890, c. 153, 321.

[4] 71 N. W. 470.

is a legal question. A "predecessor," in the common acceptation, is one who goes before or precedes another in a given state, position, or office, and does not necessarily express any relation of legal priority.[1] — The firm of Probasco & Oakes manufactured and sold candles under the name of "Excelsior Candles," but afterwards called their candles "Oakes' Candles." Oakes sold out to Probasco, including in the bill of sale the right to use this name. He then entered the employ of Probasco, and continued therein for several years, superintending the making of the candles, during which time Probasco devised and used a trade-mark consisting of two oak-trees with the words "Oakes' Candles" printed across them. Oakes subsequently quitted Probasco's service, and, several years later, Probasco sold the business, together with the right to use the trade-mark. *Held*, that as the trade-mark was used to denote candles made by the firm, and was not a guarantee that the candles were made by Oakes personally, the use thereof was not a fraud on the public, and the sale of the right thereto was valid. The bill of sale by Oakes to Probasco stipulated that the right to use the name "Oakes' Candles" should cease on a sale of the business to a stranger, and should then revert to Oakes; but the purchaser from Probasco was not aware of this condition. *Held*, that being a *bonâ-fide* purchaser he was not bound thereby.[2] As the *bonâ-fide* purchaser had good title to the trade-mark he could convey it to another, even though the latter had notice of the stipulation.[3]

§ 743. The fact that a trade-mark bears its owner's own name and portrait does not render it unassignable to another.[4] — Under a purchase from an assignee for the benefit of creditors, the purchaser acquired the right to use a lot of sacks and wrappers marked with the name of the assigning firm. *Held*, that this did not preclude a member from apply-

[1] Lorillard Co. *v.* Peper, 65 F. 597.

[2] Oakes *v.* Tonsmierre (C. C.), 49 F. 447.

[3] Ibid.

[4] Dr. S. A. Richmond Nervine Co. *v.* Richmond, 159 U. S. 293; 23 L. ed. 155; 16 Sup. Ct. Rep. 30.

ing its name to a corporation afterwards organized by him.[1] — An assigment of a business, with the debts and plant, includes trade-marks used in the business, and gives the assignee the exclusive right thereto.[2] — The right of one to use his name as a trade-mark, the words used in connection with his name, the words being words of common use, is a personal right, and does not pass to his assignee in bankruptcy.[3] — The failure of an assignee of a trade-mark to show the assigment on his label will not prevent enforcement of his rights thereto, where the omission involved no fraud or false representation.[4] One Magale, a wholesale dealer in "Monarch Whiskey," stamped on the barrels above the brand of the manufacturers the brand Magale's, so that when so stamped the brand was "Magale's Monarch Whiskey." The name of Magale gave the whiskey value, because of his general reputation for integrity. After his death, the successor to his business conducted it in Magale's name. *Held*, that on such successor ceasing to do business, an assignment by him of such brand and trade-mark was against public policy and void.[5]

§ 744. *Frank* v. *Sleeper*[6] was a case of infringement of a trade-mark by a symbol "N & S." It is alleged that a cigar-dealer adopted the letters "N. S.," to designate cigars of a certain style, and for a superior and uniform workmanship, and manufactured by him from a certain standard grade of tobacco; that he sold his business and with it assigned the trade-mark to plaintiff, who continued to sell the same cigars, which were also made exclusively for him by the same manufacturer; that labels on the cigar-boxes gave the location of the factory, and, after his purchase, the plaintiff's name as successor to the business and trade-mark, with a notice that the "N. S." brand, as originally manufactured, continued to be made by the same person for the plaintiff.

[1] Iowa Seed Co. *v.* Dorr, 70 Iowa, 481.
[2] Merry *v.* Hoopes (N. Y.), 18 N. E. 714.
[3] Mattingly *v.* Stone (Ky.), 12 S. W. 467.
[4] Royal Baking Powder Co. *v.* Raymond (C. C.), 70 F. 376.
[5] Mayer *v.* Flanagan (Tex. Civ. App.), 34 S. W. 785.
[6] 50 Mass. 583.

Defendant was enjoined, the decree reciting that the letters constituted a valid trade-mark to represent cigars of a certain and distinct kind, that it was assignable, and that the symbol did not indicate personal selection further than that it was the name of cigars of a certain size, quality, and shape.[1]

[1] 150 Mass. 583.

CHAPTER V.

CONCURRENCE DÉLOYALE.

§ 745. "Crystal Champagne" case.
§ 746. Livery and color of coaches protected.
§ 747. Name of quarry stone protected.
§ 748. Name of "Roquefort" for cheese, distinctive.
§ 749. Wife's name borrowed, to continue business after partnership dissolved.
§ 750. Misuse of Numerals, to deceive.
§ 751. Ex-employé's rights protected, when honest.
§ 752. Ex-employé must preserve good faith.
§ 753. A vendor of good-will must act in good faith.
§ 754. Pommery wine case. One's name enjoined. Moët Name protected.
§ 755. Saint Quentin Cement.
§ 756. Conflicting Publications.
§ 757. Vichy water and that of Saint-Yorre.
§ 758. Owner of Mineral Springs may give to them genuine name of country of origin.
§ 759. "Modèles de Paris" case.
§ 760. Criminal prosecution to stop alleged unfair competition.
§ 761. Syndicate stops the selling of false medicines.
§ 762. False use of surname.
§ 763. When partner is considered legally in possession.
§ 764. Ex-wives cannot use, in business, names of former husbands.
§ 765. Unfair dealings in name of son.
§ 766. Professional syndicate suppresses fraud.
§ 767. Fraudulent breach of contract.

§ 745. The Court of Cassation, in 1896, had the case of the *Société des eaux de St. Galmier* v. *Bertet*. The defendant, Bertet, a restaurateur, had delivered the water "Crystal-Champagne" to consumers who called for the water of St. Galmier. Considering that the water of the spring "Crystal Champagne" has, to a certain degree, the same hygienic properties of those of St. Galmier, and belong to the same neighborhood and make a part of the canton of that

name, *held*, that it is not unlawful competition in Bertet towards the *Société de St. Galmier*. B.'s labels on bottles and half bottles bore the words "Crystal Champagne Spring, Canton of St. Galmier;" and customers demanded the St. Galmier water, without designating one spring from another.[1]

§ 746. The Court of Angers, in 1883, in *Compagnie des petites voitures* v. *Mabreux Bonget et al.*, *held:* a proprietor of carriages for hire has the right to interdict a rival from imitating the livery of his coachmen and the painting on his vehicles, which he has adopted to distinguish them and attract attention. It matters little that an attentive examination allows one to distinguish coaches of the two rivals, if confusion really exists, or is possible.[2]

§ 747. The Tribunal Civil of the Seine, in 1896, considered the case of *Standish* v. *Civet & Co.* The complainant was proprietor of certain quarries of stone for building purposes, in the territory of the commune of Morley (Meuse), at a place termed the "Forest of Morley," and set forth that the defendants were selling similar stone under the name adopted by complainant, the "Forest of Morley." He asked the Tribunal to enjoin his rivals from the use of that especial denomination. It was *held*, that inasmuch as bad faith is the necessary element of unfair competition, which in this case was not clearly established, yet there are circumstances which require the action asked for. There are certain characteristics of similarity in all the stone of the quarries of that region; not only in that portion of the woods reserved to Mr. Standish, but in all the surrounding woods under the common name of the commune. After a commercial usage generally adopted, one has the right to give to his products an indication of the origin of his stone in the special part of the commune where it is quarried; and others, although they have a right to use the name of the commune, may be prohibited from using the special designation adopted

[1] Société des eaux de St. Galmier *v.* Bartet, 42 Annales, 344.

[2] Compagnie de petites voitures *v.* Mabreux, Bonget, Guibert & Lambourg, 34 Annales, 14.

by him. It was ordered that Mr. Standish has the sole right to designate the stone extracted by him from quarries situate in the Forest of Morley by the words "Stone of the Forest of Morley." Defendants to pay 1000 fr. damages, and costs.[1]*

§ 748. The Tribunal Civil of Millau, in 1896, had the case of "*Société des caves, etc., de Roquefort*" v. *Mercadier*. It is well known that the locality denominated Roquefort, situate in the old region of Millau, has acquired great distinction because of its products; it being generally acknowledged that the quality of the soil where the caves are sunken have certain characteristic conditions which create an unrivalled reputation for the cheeses produced from Roquefort. The defendant, a cheese-maker at Lestaing, inscribed at the head of his envelopes in his correspondence the words "Fromages de Roquefort," whereas he sold an inferior cheese produced from Lestaing. Enjoined, with costs.[2]

§ 749. In the Tribunal of Commerce of Aurillac, in 1895, the case of *Bois* v. *Lafon* was considered. The parties to the suit had been partners in business. In separating they had stipulated that each might re-establish himself, but should not take the title of successor to the old firm of Lafon & Bois. Bois took the name of Louis Lafon: Lafon took the firm name of Lafon-Bois (the maiden name of his wife was Bois). But, inasmuch as Lafon had not used her name in partnership, it was *held*, that such use would create confusion among customers, it being only a pretext for continuing the old firm name of Lafon & Bois. Lafon was forbidden the use of his wife's name on his cards, signs, and in his business generally.[3]

§ 750. In the Court of Riom, in 1889, was *Rousselon* v. *Lafort-Dumas*, which was a case of confusion by the intentional misuse of numerals. It was said that to appreciate the possibility of confusion between two marks,

[1] 42 Annales, 145.

* See Newman *v.* Alvord, 49 Barb. 588; 35 How. Pr. 108; R. Fox, 404. Also Browne on Trade-Marks, §§ 182 *et seq.*

[2] Société des caves, etc., de Roquefort *v.* Mercadier, 42 Annales, 165.

[3] Bois *v.* Lafon, 43 Annales, 26.

they should be examined together, the constitutive elements of said marks considered, and every detail compared, which would in any way serve to mislead the public. Thus the mark *Véritable Dumas et Cie., 52*, was held to be a fraudulent imitation of the mark *Véritable Dumas, 32*. (The case is an intricate one, and must be studied to be thoroughly understood.) [1]

§ 751. The Court of Cassation, in 1891, had this case on appeal, — *Redfern & Sons* v. *Williamson et al.* Messrs. Williamson and Mulligan were employed by Redfern & Sons, ladies' tailors, but had quit their employers, and formed a similar enterprise of their own, also in Paris. The Tribunal of Commerce regarded it as an unfair competition in business, and forbade its continuance, under the penalty of 300 fr. for every disobedience of its order, and prohibited any future announcement on defendants' part, or the use on letterheads, or papers of commerce of any nature, of the fact of their being old employés of Redfern & Sons, and condemned them to 2,500 fr. damages. Their appeal found its way to the highest court. It appeared by the evidence that they had served for several years in the capacity mentioned, one as cutter, the other as book-keeper. They had been circumspect, and had done nothing to create confusion in the minds of the public. It is true that they had rendered homage to the standing of the house in the industry of shaping garments for the ladies, an enterprise which in itself is useful, and in the interests of commerce should be protected. They had not been guilty of falsehood, nor of any other illicit act. It also appeared that they had not been guilty of obtaining a list of the customers of the former house, nor of improperly soliciting their work. The case was reversed, and the plaintiffs, Messrs. Redfern & Sons, were ordered to pay the primary costs and those of appeal.[2]

§ 752. The Court of Cassation, in 1890, had the case on appeal of the *Compagnie française du Celluloid* v. *Schnerver et al.* Messrs. Jules and Charles Schnerver, brothers, and both

[1] Rousselon *v.* Lafont-Dumas, 36 Annales, 67.

[2] Redfern & Sons *v.* Williamson *et al.*, 38 Annales, 13.

Americans, the one a chemist, and the other an engineer, were proprietors of English patents. They had entered the service of the plaintiffs, taking their patents, and giving their technical knowledge to the firm; and they engaged, by a contract of 1883, not in future to engage in this business with other parties, whether as partners, managers, engineers, employés of any kind, in France, or elsewhere in Europe, either as a corporation or under a collective name; or to occupy themselves in the making, or selling, of celluloid, or analogous products. At the end of six months the brothers Schnerver gave notice of quitting employment in the works of the company, and had entered the service of an American firm of the name of Hyde & Ward, afterward the Company Phibolithoid. The Schnerver brothers occupied themselves in the manufacture of celluloid and articles similar to it. The Compagnie française du Celluloid considered this action on the part of the brothers as a violation of their contract of 1883, and summoned them before the Tribunal of Rouen, demanding 10,000 fr. damages and an injunction, under penalty of 1000 fr. for every repetition of the offence. The brothers, not defending the case, judgment was awarded the Compagnie française. The brothers defendant demanded 10,000 fr. damages in further legal proceedings. Meanwhile, the judgment by default was reduced to 3000 fr. and the constraint to 500 fr. It seemed that the first protest of the brothers was in their letter of withdrawal; that the complaint among other things was that their salary was insufficient, etc., etc. *Held*, that they had violated their contract. They appealed to the Court of Rouen, which affirmed the judgment. They then appealed to the Court of Cassation. In its decree of 1890, it was *held*, among other matters, that the acceptance of the brothers' withdrawal by the Compagnie did not avoid the obligations of the contract. The decision of the lower courts was affirmed.[1]

§ 753. In the Court of Nîmes, on appeal, in 1887, was considered *Gibelin* v. *Peyron*. The vendor of a place of business bound himself not to exercise an industry of a sim-

[1] Compagnie française du Celluloid *v.* Schnerver, 37 Annales, 68 [1891].

ilar nature — blacksmithing — within a determined perimeter; but he furnished to his brother the necessary funds to install an establishment of the same kind within said perimeter. Jean Peyron had bound himself against the business of blacksmithing within the canton of Verroux, except the territory of Silhac, yet secretly intended to substitute a third person in carrying on a similar business. A forge was established by Ferdinand Peyron, with the funds furnished by his brother, — Ferdinand having begun his work, awaited the expected more funds from Jean. *Held*, that Jean Peyron's contract with the plaintiff had been violated. He was fined 600 fr., unless Ferdinand's forge was discontinued within a month, with 400 fr. additional, and costs.[1]

§ 754. The Tribunal Civil of Epernay, 1889, had the case of *Veuve Pommery, fils, et Cie.* v. *Alfred Pommery.* The defendant, a minor, had founded at Epernay, at the beginning of 1887, a house of commerce for champagne wines, under the name of Alfred Pommery, — this was formed of his own patronymic and one of his baptismal names. The plaintiffs, Société Veuve Pommery, fils, et Cie., had, on the other hand, carried on business for the sale of champagne wines at Rheims, for more than thirty years, and their wines had enjoyed an enviable renown, not only throughout France, but in foreign countries as well. The plaintiffs demanded the abandonment, by defendant, on his labels, letter-heads, stamps, signs, and from his corks and price lists, the name of Pommery; and that he should be condemned to pay 3000 fr. damages, and costs, and make due publication of such decison in the French papers. Plaintiffs argued that the wines of champagne are distinguished not by the names of vintages, but by those of fabricants; so that when two wines are sold under the same commercial name, even if the labels on each mention the date of foundation, the place of business, and differ in other material ways, yet confusion is sure to result. Plaintiffs showed that defendant had no cellars, nor workmen, nor a wholesale license, nor capital; but only retailed wines furnished all prepared by their

[1] Gibelin *v.* Peyron, 37 Annales, 50.

fabricant. Therefore defendant was not a veritable vendor, having the right to commercial usage of the name of merchant. The Tribunal found for defendant against plaintiffs, with damages and costs. The plaintiffs appealed to the Court of Paris, which reversed the decision below, notwithstanding that there had been proved no intentional guilt on the part of defendant, who had, indeed, offered to submit all his labels, signs, etc., to the plaintiffs before placing them on his goods, and which offer plaintiffs had refused.[1] — The Court of Paris, in 1890, had the case of *Chaudon et Cie.* v. *Henri Moët*, which had come up from the Tribunal Civil at Rheims. The house of Moët had been founded in 1743; the firm of Moët and Chaudon had succeeded to the business and were proprietors of certain trade-marks and labels and emblems of the old established house. The defendant, Moët, conducted a business of champagne wines under his own name, against which plaintiffs had brought suit. The decision was in favor of defendant as he had lawfully used his ancient patronymic. On appeal it was *held:* one has the incontestable right in commerce and in industry to inscribe his patronymic on signs, advertisements, prospectuses, etc., thus upholding the decision of the court below.[2]

§ 755. In the Court of Amiens, 1886 (*Tausin* v. *Soupflet-Lebland*), were developed these facts: Inasmuch as the cement made at Saint-Quentin has long been classed by commerce in the category known under the denomination of "Roman Cement;" and there are other regions, notably in the Basin of Paris, in Bourgogne, Boulogne-sur-mer, where other cement of the nature of that of Saint-Quentin is produced, — the fact remains that the term "Roman Cement" is merely descriptive, and is employed by commerce to designate a material of a general quality, each region having its peculiar geographical designation. The words "*Ciment de Saint-Quentin*" indicate the origin of the cement made at Saint-Quentin, and not at another place. The name of a city belongs exclusively to the individual resident who first appropriated it to his product, and he has the right, while

[1] 37 Annales, 124 [1891].

[2] 37 Annales, 133.

strangers have not. It is unfair competition to introduce other cements, as from Belgium, and bring them into France under the name of "*Ciment de Saint-Quentin.*" On appeal, the judgment was affirmed.[1]

§ 756. In the Tribunal Civil of the Seine, 1885, was the case of *La Nouvelle Revue* v. *Veuve Dentu.* La Nouvelle Revue had published a series of studies under the titles of "La Société de Berlin," "La Société de Vienne," and "La Société de Londres." This last study had appeared in book form and been put on sale May 1, 1885, in Paris. Near the same date, March 14, 1885, had been announced in London the early appearance of a similar work under the title of "Society in London;" but it was not in the market until early in May. Madame Dentu purchased the right of reproduction of this book under the title of "*La Société de Londres.*" The director of La Nouvelle Revue, fearing that the similitude of titles would tend to confusion between the two works, brought suit against Madame Dentu to restrain the sale of the volume edited by the latter, demanded modification of the title, the style of the work, and 3000 fr. damages. The defendant insisted that she had the right of anteriority of the title, for the English work had appeared before the publication made by La Nouvelle Revue, and stated that no confusion was possible, for the names of authors, the construction of the book, and the prices differed. *Held*, the originality of the title "La Société de Londres" could not be counterbalanced by the co-existence of an English book entitled "Society in London." Judgment, prohibition of sale of the book under penalty. She to pay the costs. Veuve Dentu, after appealing, consented to change the title to "*Le grand Monde de Londres.*"[2]

§ 757. In the Tribunal Civil of the Seine, 1894, was considered *Compagnie fermière de Vichy, État et Union de propriétaires et concessionnaires des eaux Minéraux* v. (Divers persons). The City of Vichy is the centre of a hydrographic region known under the name — more or less exact in a scientific point of view — of the Basin of Vichy. The

[1] 32 Annales, 190.

[2] 36 Annales, 26.

widely diffused usage, in the learned and commercial world, is to borrow the name of this locality to designate all the mineral waters of the region; but the name cannot be the object of exclusive appropriation, for the waters which emerge within the administrative limits of the commerce of Vichy. It would be unjust to forbid those in the business of mineral waters at Saint-Yorre to employ in any manner the name of Vichy on their labels and capsules; but the tribunals may determine the conditions under which the name *should* figure on labels, etc., to avoid confusion of a nature to create belief that their springs belong to Vichy proper. In the case of one defendant, it was said that if he wishes to continue to use the name of Vichy, to give his waters a generic name, he should adjoin a notice informing the public of their exact source; for instance, "*eau Minérale Naturelle du Bassin de Vichy, Source Larbaud, Saint-Yorre, près Vichy;*" and the capsules should bear the name of "*Saint-Yorre près de Vichy.*" The principle of all the other cases is thus explained.[1]

§ 758. In the Court of Rouen, 1893, was the case of *Piatier et préfet de la Corse* v. *Angeli et al.* Piatier was lessee of the mineral fountains of Orezza, which belonged to the department of the Corse. It is a principle that the names of places are in the public domain, and every one may truly indicate the origin of his products. Therefore, the proprietor of mineral springs may, without being amenable to criticism, give to the water the genuine name of the country whence it issues, provided he truly does so; and that the use of this denomination should be under the condition susceptible of not causing confusion in the mind of the public, with similar springs of the same region, exploited under the same name.[2]

§ 759. In the Tribunal of Commerce of the Seine, 1896 (*Beer, Raudnitz, Doucet et al.* v. *Lœu*), the plaintiffs were originators of certain models of fashion. Defendant had purchased the right to issue the patterns of the robes of the winter season, and to engrave them for his publica-

[1] 41 Annales, 5.

[2] 41 Annales, 25.

tion, which he edits under the title "*Modèles de Paris.*" The plaintiffs refused to allow him to put their names on the bottom of the designs reproduced by him, although he had bought and paid for them. He, nevertheless, printed their name without especial authority. It is not established that he had acted in bad faith, and with the object of unduly appropriating to himself the reputation of the plaintiffs, but he led many customers to look to him directly instead of going to the plaintiffs. *Held*, the patronymic name and the denomination of fancy adopted by a firm, constitute, in the commercial sense, a property of which the usage is expressly limited to those duly authorized. Defendant had no right to use the names complained of, and must discontinue them in the publication "*Modèles de Paris*," and pay costs.[1]

§ 760. In the Court of Cassation, 1897, was the remarkable case of *Veuve Leloutre* v. *Dubuisson.* The parties were in the same kind of business, — the making of bronze figures. The complainant thought that she could best check the defendant in an act which she deemed unfair competition by giving a criminal turn to affairs. The subjects of contest were: 1. Two torches of the style of Louis XIV., and the representation of two children embracing each other; 2. Statuettes termed "*Enfants terre et eau.*" Plaintiff caused the articles in possession of defendant to be judicially seized, insisting that she was the assignee of M. Graux-Morly, the fabricant. It was *held*, that the fabricant who purchases at a sale on execution pieces of bronze, destined for reproduction by castings from the models, has the sole right to such reproductions, and could not in any sense be regarded as a counterfeiter. Judgment in favor of defendant.[2]

§ 761. In the Court of Cassation, 1894 (*Brachat* v. *Syndicat des pharmaciens de Bordeaux*), a syndicate may intervene to claim damages against a pharmacien, even a member of the syndicate, who is complained of as selling falsified medicated substances.[3]

[1] 43 Annales, 98.
[2] 43 Annales, 155.
[3] 41 Annales, 22.

§ 762. In the Court of Paris, 1888, was the case *Corube & Oriée* v. *Rouillon et al.* C. & O. for more than forty years were engaged in the dressing and preparation of skins, under the name of "Grison," as their duly registered trade-mark. This was the name of the founder of the house. Rouillon, and others in the same line of business, associated themselves with a young man named George Grison, and instituted the commercial house of Grison and Company. In this enterprise they had imitated the trade-mark of C. & O. The Tribunal of Commerce had found that young Grison was of little account. Of course he had the right to use his own name, but the addition of "and Company" was held to be a fraudulent attempt to encroach on the rights of plaintiffs. The amount of 5000 fr. was awarded plaintiffs. Defendant was also ordered to publish this sentence in fifteen French and other newspapers which plaintiffs might select. On appeal to the Court of Paris, the judgment was affirmed.[1]

§ 763. In the Court of Cassation, 1891, was heard on appeal *Antoine* v. *Labadie & Agostini. Held*, when a firm of business has been dissolved, and the trade-mark belonging to it not having been expressly provided for, and one of the late partners having continued the use of said mark without opposition, the court has the power to conclude that such partner is legally in possession.[2]

§ 764. In the Tribunal of Nantua, 1891 (*Choffé* v. *Dame Ratel*), the divorced wife has not the right to call herself "*ex femme divorcée*" of such a one, for the name of her former husband no longer belongs to her.[3] — In the Tribunal of Commerce of Marseille, 1881, it had been held in *Léon Espié* v. *Dame Espié*, as follows: When husband and wife have been separated *à mensa et thoro*, the woman cannot exercise a commerce similar to that of her husband, without adjoining her family name to that of her married name, as, for instance, the designation "*Irma Criquet, femme de Léon Espié.*[4]

[1] 38 Annales [1891], 141.
[2] 41 Annales, 125.
[3] 38 Annales, 8.
[4] 38 Annales, 9.

§ 765. In the Court of Paris, 1887 (*Jouot* v. *Société Générale de laiteries*), these facts appeared. A certain number of wholesale milk-dealers associated themselves for the sale of milk produced in Paris or in the provinces. Eugène Jouot had transferred to the association his interest in the business and good-will, and had accepted the appointment as inspector of the concern for 3000 fr. a year, but voluntarily quit his employment as inspector in 1881. All the members of the Société had bound themselves to the interests of the association. In February, 1882, Eugène Jouot actively occupied himself in the apparent interest of his son, in establishing a milk business under the name of Mathieu and Co. In February, 1883, they duly registered for the sale of their milk-produce, under a collective name with one Tempez and Albert Jouot, son of Eugène. At this time, Albert was in military service, and Eugène took direction and control of the business under the apparent name and authority of his son. It was a matter of public notoriety that Eugène himself directly admitted his personal interest, and circumstances concurred to show his individual connection. The firm of Albert Jouot and Tempez having been dissolved by the latter's death, the concern had been sold under a judgment of the Tribunal of the Seine of Feb. 7, 1884, and was re-established for the purpose of wholesale milk-dealing in the branches of the trade situate in Fleury (Oise) and Saint-Simèon (Seine-et-Marne); Eugène Jouot, representing himself as agent for his son, still absent as a soldier, was manager of these several establishments. The son had by notarial act qualified himself as a wholesale dealer in milk. The evidence showed that Eugène Jouot had directed the milk interests under the names of Matthieu & Co., Jouot & Matthieu, Jouot & Tempez, etc., in every case pretending to be the agent for his son, to whom he rendered no accounting. The court *held*, that Eugène Jouot was clearly guilty of unfair competition in business, and adjudged him to pay fines and costs.[1]

§ 766. In the Court of Bourges, 1894 (*Montupet and the*

[1] 37 Annales, 54.

Union of Proprietors and Lessees of Mineral Springs v. *Nattan et al.*), the following case involved a matter of deceit, detrimental to the interests of owners, etc., of mineral waters. It was said that every deceit as to the nature of merchandise sold, every fraud, every illicit act to the injury of the consumer, causes also a double injury to legitimate vendors. A professional syndicate has therefore the right to demand the cessation of such false practice. *Held*, to be a case of unfair competition, with the usual penalty.[1]

§ 767. In the Court of Paris, 1888 (*Omer Décagu et fils et al.* v. *Ferniot*), was this case of unfair competition. F. and his partners had ceded to the plaintiffs their interest in the commerce of fruits, vegetables, and flowers in one of the central halls of Paris. The contract contained a clause that F. should not directly, nor indirectly, engage in a similar business. The evidence showed that F. had worked to the detriment of the Décagu firm by lending to Bellau & Roux — of which his son-in-law was one of the partners — his active assistance in conducting their correspondence, and taking part in their commercial operations, which were of the same nature as those of plaintiffs. *Held*, to be an infraction of the contract to the great loss of the plaintiffs; and Ferniot was condemned to pay 3000 fr. damages, 500 fr. for each act of disobedience, and costs.[2]

[1] 41 Annales, 17. See also Société générale des eaux Minérales de Gouzan *v.* Bertrand, a similar case, 37 Annales, 164.

[2] 37 Annales, 53.

CHAPTER VI.

INJUNCTIONS.

§ 768. "Benedictine" and "Hostetter's Bitters" cases.
§ 769. Rights of Canadian citizens manufacturing in New York, etc.
§ 770. Corporation cannot use name of another for deceit, etc.
§ 771. "Lightning Hay Knives," "Akron Dental Rubber," etc.
§ 772. Imitation of "Mumm's Extra Dry" trade-mark; "Cuticura," etc.
§ 773. "Frazer's Axle Grease." N. K. Fairbank Co. case.
§ 774. When an injunction will not be refused.
§ 775. When a label may be enjoined on evidence of deceit of two persons.
§ 776. Infringement of "Sapolio" by "Pride of the Kitchen."
§ 777. "Washburn Flour Mills Co." case, "Clark Thread Co." case.
§ 778. "Club Soda" case.
§ 779. "German Sweet Chocolate," "Brown's Iron Bitters," etc.
§ 780. Instances of protection to various manufacturers' trade-marks.
§ 781. "Star" tobacco case.
§ 782. "Maryland Club Whiskey."
§ 783. Punishment for falsely branding names of places.
§ 784. Restrained from buying or using old bottles.
§ 785. "Maizena infringed by Maizharine," "Fig Syrup" case.
§ 785½. "Carlsbad Sprüdel Salts" case.
§ 786. Continued use of same name by father and son.
§ 787. No defence that infringer ceased use.
§ 788. "Home" for sewing-machine, infringed by "Home Delight."
§ 789. "Chatterbox" series of books case, "Investor Publishing Co."
§ 790. "Chicken Cock Whiskey" case.
§ 791. "Howe's Grain Cleaner."
§ 792. Real Estate Auctioneers' flag.
§ 793. How far ex-employé can carry on business similar to that of former master.
§ 794. "Golden Crown" tobacco and tag.
§ 795. Deleterious substances. Disparagement.
§ 796. Ignorance no defence. Effects of indifference or negligence.
§ 797. Devices and methods intended to deceive, enjoined.
§ 798. Defendant's use of hotel trade-mark for cigars enjoined.
§ 799. An instance of unfair competition enjoined.
§ 800. Term American Syrup of Figs by English Co., misrepresentation.
§ 801. "Six Big Tailors" enjoined.
§ 802. "U. S." infringement on "United States."

§ 803. Rights of industriel to trade-mark for sewing-thread, etc.
§ 804. Injunction against copying a costume used as a sign of trade.
§ 805. Against use of similar names intended to deceive.
§ 806. "Insectine," "Baeder Flint-Paper Co." cases.
§ 807. Under what circumstances a Preliminary Injunction is granted.
§ 808. Preliminary Injunction in case of almost identical labels.

§ 768. *Injunction.* This term means a remedy in equity to restrain infringement, when the peril is imminent; and it is invoked when law does not afford an adequate redress. The following are cases and examples of late decisions: —

The fact that the complainant, the manufacturer of a cordial made according to a recipe obtained from the Benedictine monks, attached to the bottle-labels an advertisement bearing Latin and French phrases, which, translated, are, "Genuine Benedictine Liqueur of the Benedictine Monks of the Abbey of Fécamp," does not preclude relief against one who manufactures and places on the market an article in such form and guise as to clearly indicate that it is the identical article sold by the complainant, — such phrases not being representations that the Benedictine monks are still engaged in its manufacture at Fécamp, but that it originated with them, especially as one of the advertisements shows that the cordial is manufactured by complainant, a corporation.[1] The contention is based on the fact that the Latin words "*Liquor Monachorum Benedictinorum Abbatiæ Fiscanensis*" appear on a label pasted round the neck of every one of the Société's bottles; that an advertisement printed in French is also wrapped up with every bottle with the leading words, "*Véritable Bénédictine Liqueur des moines Bénédictines de L'Abbaye de Fécamp*," and that the wax seal on the cork of every bottle has impressed thereon the figure of a monk, and that one of the labels on the body of the bottle bears the cabalistic letters "D. O. M." It also bears illustrations that dispel any suggestion of deceit. Defendant put on the market a cordial not made according to the genuine recipe. Thayer, J., enjoined, and ordered an accounting of profits.[2] — Complainant had sold for many

[1] Société Anonyme de la Distillerie *v.* Western Distilling Co., 43 F. 416.
[2] Ibid.

years an article known as "Hostetter's Bitters." Defendant manufactured an article resembling it in color and in other particulars under the name "Host's Style Bitters," and sold the same in large demijohns, without labels, and was shown in several instances to have given to the purchaser of his bitters an empty bottle bearing all complainant's labels. *Held*, that defendant — although the purchasers from him were not deceived — had furnished the means, and should be enjoined from selling "Host's Style Bitters," and at the same time, and in connection with the sale, giving the purchasers empty "Hostetter" bottles.[1] — Defence attempted to show that the beverage contains alcohol, and the evidence shows that some chemist found a teaspoonful of alcohol in a quart, and others much less, and that it was used to cut the flavoring oils, and mostly evaporated. The defendant claimed that injunction should be dissolved, because plaintiff is not a corporation in point of fact, and because there never was such a person as Lieutenant Moxie; that the product contains alcohol, and is not manufactured from a sugar-cane-like plant which grows near the equator and further south, and that the representations are false. Motion to dissolve injunction refused.[2]

§ 769. Citizens of Canada, engaged in the manufacture of trade-marked articles, and who have places of business in the State of New York, where they make and ship such articles, are within the international convention of March 20, 1883, for the protection of industrial property; and they may succeed in the United States courts for infringement to trade-marks by its citizens. (Defendant has produced a catching device to deceive trade and induce sales.)[3] — The word "Valvoline," compounded and used on packages of lubricating oils by plaintiffs and registered as a trade-mark, may be used for that purpose, and the use thereof by defendant in the same manner will be enjoined, though defendant use his own name in connection with the word.[4]

[1] Hostetter Co. *v.* Becker, R. 297.
[2] Moxie Nerve Food Co. *v.* Baubach *et al.* (C. C.), E. D. Texas, 32 F. 205.
[3] 60 F. 272.
[4] Leonard *v.* White's Golden Lubricator Co., 38 F. 922.

§ 770. The United States Circuit Court of Appeal *held*, that a corporation which, by arrangement with one R. W. R., takes his name and stamps it on articles sold by it, with the purpose of inducing the public to think that in purchasing such articles they are purchasing the articles of another "R." of established reputation, will be restrained from using such stamp.[1] — A newly coined word is used in the manufacture and sale of various compounds of "pyroxoline," which it designates as "Celluloid," to distinguish it from similar compounds used by others. Defendant was incorporated by the name of the "Cellonite Manufacturing Co." *Held*, that the similarity was sufficient to mislead ordinary, unsuspecting purchasers. Enjoined by Bradley, Just.[2] *

§ 771. "Lightning Hay-Knives" is a trade-mark under which was advertised and sold thousands of the manufactured article bearing this name, and the word "Lightning" was registered. "Lightning Pattern Hay-Knives" was enjoined, it being *held*, that the word "Lightning" is not merely descriptive of the quality or characteristics of the knives.[3] — A manufacturer of an article of dentistry printed on the boxes containing it, "Non-Secret Dental Vulcanite, made according to our analysis of the Akron Dental Rubber," the words "Akron Dental Rubber," being the trade-mark of a competitor, and being printed in red ink and large type. The preceding words were printed in large black type, and the formula for the preparation of the article followed in red ink in very small type. *Held*, that the label was likely to mislead, that it was an infringement, and that its use should be enjoined.[4] — Defendants use a bottle which has a peculiar form, color, and round shoulders, and the short neck of complainants' bottle, with a label containing the words "Theller's Celebrated Stomach Bitters," a monogram of the letters "A. T."

[1] R. W. Rogers Co. *et al. v.* Rogers M'f'g Co., 70 F. 1017 ; 17 C. C. A. 576.

[2] Celluloid M'f'g Co. *v.* Cellonite M'f'g Co., 32 F. 94. See Celluloid M'f'g Co. *v.* Read, 47 F. 712.

* In 1873 complainant caused the word "Celluloid" to be registered in U. S. Patent Office as a trade-mark.

[3] Hiram Holt Co. *v.* Wadsworth, 41 F. 34.

[4] Keller *v.* B. F. Goodrich Co. (Ind.), 19 N. E. 196 ; 119 Ind. 556.

in place of the picture of St. George and the dragon, used by complainants, a black shield below the monogram greatly resembling complainants' shield, and below the shield an imitation of the lettering on the genuine label. *Held*, an imitation well and designedly calculated to deceive.[1] The fact that one of the defendants was, in 1870, engaged in manufacturing imitations of the goods, labels, and trade-marks now manufactured and owned by complainants, and was then successfully sued therefor, is immaterial.[2] — The labels on complainant's tobacco packages had a representation of a shield or banner and an ellipse within a circle, and the words "Smoke and Chew." The colors used were red and yellow. Defendant's labels had the same figures and colors, and the words "Smoke and Chew," and were so much like complainant's, that one might easily be mistaken for the other. One was called "Peach Blossom" and the other "Sweet Lotus." *Held*, that defendant's wrapper was a palpable imitation of complainant's, and that their use should be enjoined.[3] — A firm in the United States engaged in bottling and selling whiskey under the name of "Canadian Rye Whiskey," in bottles and with labels, bands, and devices so nearly resembling those on bottles of a corporation engaged in Canada in manufacturing and selling whiskey under the name of "Canadian Club Whiskey," as to constitute unfair competition, and evidence and intent to deceive purchasers.[4] — When complainant has established a trade in a cough mixture known as "Bull's Cough Syrup," and "Dr. Bull's Cough Syrup," and defendant has placed on the market, with a fraudulent purpose of causing it to be mistaken for complainant's article, with a similar name and wrapper (or any kind of wrapper calculated to deceive the public), he should be enjoined.[5] — One who puts into the hands of retail dealers an article made by him, and so dressed up as to enable such dealers to deceive the ultimate purchasers into the belief that they are buying the goods of a third person, may be enjoined

[1] Myers *v.* Theller, F. 38, 607. [2] Ibid.
[3] Wellman & Dwire Tobacco Co. *v.* Ware Tobacco Works, 46 F. 289.
[4] Hiram Walker & Sons *v.* Mikolas (C. C.), 79 F. 965.
[5] Meyer *v.* Dr. B. L. Bull Vegetable Medicine Co. (C. C. A.), 58 F. 884.

by the latter.[1] When so dressed up, it is unnecessary to prove that any particular person has in fact been so deceived.[2] When the devices used by the plaintiff are imitated by the defendant, the testimony of witnesses as to the likeness is not necessarily required.[3]

§ 772. In 1866, the plaintiffs, at Rheims, France, originated a champagne wine, having a "dry" flavor, which has been very extensively sold in the United States as "G. H. Mumm & Co.'s Extra Dry." In the beginning, plaintiffs adopted a new and characteristic metal capsule, of a peculiar rose color never before used, on top of which is stamped, in blue, an imperial mantle, bearing a trade-mark, while running perpendicularly are the words "G. H. Mumm & Co." Just below the capsule is a small label on which the trade-mark is also printed. The principal label of the bottle also bears that trade-mark in the upper field. Defendants sell an assorted American wine in ordinary champagne bottles. On the upper part of the principal label they put the words "Extra Dry," and also a colorable imitation of the trade-mark and mantle, while the words "Extra Dry" are stamped perpendicularly thereon in the same place where plaintiff stamped "G. H. Mumm & Co." Defendants' wine has no "dry" quality; and the court found from the testimony that the words "Extra Dry" were used by them for the purpose of fraud, and that the bottles were dressed up so as to enable them to be put off as goods of plaintiffs. *Held*, that defendants should be enjoined (1) from using in a combination the marks, labels, and capsules described; (2) from using any colorable imitation of plaintiffs' trade-mark; (3) from placing the words "Extra Dry" on any bottles of their product, of the character described either in combination or otherwise; (4) from surrounding the neck and cork of any bottles of the form generally used for champagne, and containing their product, with a rose-colored metal capsule, whether stamped as before described or otherwise.[4]—

[1] Von Mumm *et al. v.* Frash *et al.*, 56 F. 830. [2] Ibid.

[3] Coats *v.* Thread Co., 13 Sup. Ct. 966 (149 U. S. followed).

[4] Von Mumm *et al. v.* Frash, 56 F. 830. (As stated by the N. Y. Ct. of Appeals, in Thrascher *v.* Blank, 33 N. E. 104, "each case must, in a measure, be a law unto itself.")

"Cuticura," a trade-mark for a toilet soap, is infringed by the word "Curative," applied to a different soap; and the use may be enjoined, especially when imitative devices were used, and there was an actual attempt to mislead.[1] — Defendant's boxes of medicine, as prepared for market, bore a close and intentional resemblance to plaintiff's boxes externally, and the arrangement and words on the bottles of medicine, pamphlets, and labels were calculated to mislead the public. *Held*, that plaintiff is entitled to an injunction restraining defendant from infringing on the original peculiar method of preparing the wrapping, boxing, and packing the medicine.[2]

§ 773. The defendant Frazer, the patentee of an article known as "Frazer's Axle Grease," "Frazer's Lubricator," or "Frazer's Grease," sold his present and future interest therein to plaintiffs, authorized the use of his name in the manufacture and sale by it of such article, and agreed to refrain from the manufacture and sale thereof, or the use of his name in connection therewith. Thereafter, he obtained a patent for an alleged improved axle grease composed of essentially the same ingredients, though mixed in different proportions. This he sold in packages somewhat different from plaintiff's, but marked "Frazer & Co.," in good-sized letters. *Held*, a breach of the contract with plaintiffs, which was enjoined.[3] — Where defendant's packages resemble complainants' in numerous particulars besides those of size, color, and form, an injunction should be granted against the sale of that particular form of package, or any other form which should, by reason of the collocation of size, shape, color, lettering, spacing, ornamentation, present a general appearance as closely resembling complainants' package as the one complained of; but a clause should be added to the effect that the injunction should not be construed as preventing a sale of a package of the same size, weight, shape, or color, — provided it be so differentiated as not to be likely to deceive ordinary purchasers.[4]

[1] Potter Drug & Chem. Corp. *v.* Miller, 75 F. 656.

[2] Homœopathic Med. Co. *v.* Bell, 2 N. Y. S. 50.

[3] Frazer *v.* Frazer Lubricator Co. (Ill.), 13 N. E. 639.

[4] N. K. Fairbank Co. *v.* R. W. Bell M'f'g Co. (C. C. A. affirming circuit), 77 F. 869.

§ 774. An injunction will not be refused because the complainant was not the original designer or owner of the trade-mark, but succeeded to the rights of a firm which used it; nor is it refused because defendant has made no sales, but would have done so but for the suit.[1] — An innocent misrepresentation is no ground for refusing relief.[2]

§ 775. A label bearing six different points of resemblance to a label used by another person in the same business, may be enjoined by evidence that two persons were deceived and that the defendant's sales were increased.[3]

§ 776. The complainant had a trade-mark, "Sapolio," used to designate a particular kind of soap. When a person called at defendant's store and asked for "Sapolio," the salesman would, without explanation, put out a soap called "Pride of the Kitchen," plainly so marked, and paid therefor the usual price. The wrapper was different, and the size and shape different from that of "Sapolio." *Held*, that although there was no use of the word "Sapolio" on defendant's soap, and no resemblance in his package, he should be enjoined. Costs reserved.[4]

§ 777. The use of a brand on flour differing from a brand used by an established manufacturer only in adding the initials to a name, slightly altering the design of the letters in a prominent word, and the arrangement of certain letters and words, is a colorable imitation, manifestly intended to mislead the public, and will be enjoined. Objection that the corporation complainant, formed and managed by members of a firm which originated the brand, is itself guilty of misrepresentation as to the real maker of the goods, if valid at all, is obviated by the placing on the goods the name of the corporation, with the word "successor."[5] — Where a corporation has changed its name, and adopted a modified name, at the sug-

[1] Cuervo *v.* Landauer, 63 F. 1003.

[2] C. F. Simmons Med. Co. *v.* Mansfield Drug Co., 23 S. W. 165.

[3] McCann *v.* Anthony, 21 Mo. App. 83.

[4] Enoch Morgan's Sons Co. *v.* Wendover *et al.* (C. C.), 43 F. 420.

[5] Pillsbury *v.* Pillsbury-Washburn Flour Mills Co., 64 F. 841; 12 C. C. A. 432.

gestion of the manager of another corporation, the latter corporation is estopped, afterwards, to object to the use by the former of the modified name. — Fraud, to disentitle complainant to relief, cannot be predicated of trivial inaccuracies or "trade-talk," as to say that his thread is sold "everywhere," or that the thread is the 'latest and best." No one is deceived.[1] — An injunction should be granted if the defendants adopt their brand for the purpose of selling their goods, or to enable others to do so, and complainant has been injured, or was likely to be injured thereby.[2] — It is no defence that no deception is in fact practised on others with whom they deal personally, or that retailers could thereby be enabled to deceive consumers.[3]

§ 778. One who has registered an English trade-mark, "Club Soda," in Jamaica, is not disentitled to relief against an infringer because plaintiff has printed on his labels the words "Manufactured in Ireland by H. M. Royal Letters Patent," where such words relate to patented machinery. They do not necessarily induce belief that the ingredients were patented.[4]

§ 779. Plaintiff marked an article called by him "German Sweet Chocolate." *Held*, that, deceit of the public having been shown, an injunction should issue without reference to question of trade-mark.[5] — Upon the facts, as to the use by defendant of labels resembling those of complainant, *held*, that defendant was attempting to palm off his goods as those of complainant, and should be enjoined.[6] — If one person by superior energy, by more extensive advertising, by selling a better or more attractive article, or by greater frankness in disclosing the ingredients of his compound, outbids another in popular favor, he has a right to do so, provided he do not attempt

[1] Clark Thread Co. *v.* Armitage (C. C.), 67 F. 896; 21 C. C. A. 178; 74 F. 936. See Same *v.* Wm. Clark Co., 37 A. 599.

[2] Southern White Lead Co. *v.* Cary, 25 F. 125.

[3] Ibid.

[4] Cochrane *v.* Macnish (P. C.) [1896], A. C. 225; 65 L. J. P. C. N. S. 20; 74 Law T. Rep. 109.

[5] Pierce *v.* Guittard, 68 Cal. 68.

[6] Klotz *v.* Hecht (C. C.), 73 F. 822.

to palm off his goods as the product of another. He must not so far imitate as to enable a dishonest trader to sell. Where complainant was proprietor of a preparation known as "Brown's Iron Bitters," and defendant made another called "Iron Tonic Bitters," which is falsely stated to be made by "Brown & Co., New York," *held*, that such statement should be enjoined.[1] — A maker of salt in Genesee Valley will not be enjoined from using "Genesee" in connection therewith, but will be restrained from using it in such a way as to imitate a combination previously used by another manufacturer.[2] — Where a proper name has become the chief means in commerce of distinguishing the article of merchandise, the use of the same by another for a similar article will be enjoined, where the name is fraudulently intended to deceive.[3] — Alexis Godillot adopted a trade-mark, "A. G." combined in a monogram, and used the same for many years on articles made by him in France and sold in the United States. In 1884, he sold the right to use the trade-mark in the United States to T. W. & Co., and such right afterward passed to their successor, the T. W. Co. In 1894, a receiver of the firm re-sold the right to Godillot. Afterward, the stock in trade of the T. W. Co. was sold to the American Grocery Co., which began business at the former stand of the T. W. Co., and affixed a mark consisting of the letters "A. G. Co." in a monogram similar to G.'s, which it applied to cigars and coffee, and claimed the right to use it without restriction in its business of dealing in groceries. *Held*, that the American Grocery Co. should be restrained from using such monogram.[4] — The use of imitative labels on inferior articles to enable retailers to sell as the product of others, enjoined.[5] — *Held*, that though defendant did not itself use plaintiffs' labels and bottles, still in advising its customers it was guilty of a wrong which equity will enjoin.[6]

[1] Brown Chemical Co. *v.* Frederick Stearns & Co. (C. C.), 37 F. 360.

[2] Genesee Salt Co. *v.* Burnap, 20 C. C. A. 27.

[3] Chas. S. Higgins' Co. *v.* Amalga Soap Co., 30 N. Y. S. 1074; 10 Miss. Rep. 268.

[4] Godillot *v.* American Grocery Co., 71 F. 873.

[5] Garrett *v.* T. H. Garrett & Co., 78 F. 472.

[6] Hostetter Co. *v.* Brueggeman-Reinert Distilling Co., 46 F. 188.

§ 780. A cigar manufacturer, to protect his trade-marks, may have an injunction restraining a box-maker from furnishing boxes with those trade-marks to other cigar manufacturers, and against all who knowingly combine for that purpose.[1] — A manufacturer of white lead, in Chicago, will be enjoined from the use of the words "White Lead, St. Louis."[2] — A manufacturer will be protected in the use of a geographical name by which his goods are known to the public, as against another manufacturer who used the same name to designate a similar article, not for the purpose of describing the place where the goods are made, but for the fraudulent purpose of deceiving purchasers.[3] — In a distinctive package and label, though technically not a trade-mark, it is immaterial that defendant did not intend to deceive the public, when, by the use complained of, he knowingly put it in the power of the retailer to do so.[4] — Actual deceit is not required to be shown to warrant injunction.[5]

§ 781. After plaintiff's well-known "Star" tobacco, having a trade-mark of a five-pointed star with a hole in the centre, had been in the market, defendant adopted the words "Buzz-saw" for tobacco, to which is attached a tin symbol of the same size as that of plaintiff, with eight points slightly inclined to the right, with a hole in the centre and the word "Buzz" dimly impressed on the surface. It is attached to the plug in the same way as the star of the plaintiff. *Held*, that the "Buzz-saw" symbol was an infringement of the plaintiff's trade-mark, and that its use should be enjoined.[6] — But one not the first to use the design of a star on plug tobacco, but who was the first to use a star made of *tin*, a little over a half an inch in diameter, with a hole in the centre, cannot prevent another from using a round *paper* label, over three-quarters of an inch

[1] Cuervo *v.* Jacob Henkel Co. (C. C.), 50 F. 471.

[2] Southern White Lead Co. *v.* Colt, 39 F. 492.

[3] Gebbie *v.* Still, 31 N. Y. S. 102; 82 Hun, 93.

[4] New England Awl & Needle Co. *v.* Marlboro Awl & Needle Co. (Mass.), 46 N. E. 386.

[5] Shaw *v.* Pilling, 175 Pa. 78; 34 Alb. 446.

[6] Liggitt & Myer Tobacco Co. *v.* Sam. Reid Tobacco Co. (Mo.), 15 S. W. 843.

in diameter, with a red star between words "trade" and "mark" in gilded letters on a red background, having beneath the star the word "Light," thus forming by the figure and the letters the word "Starlight," which is the name given to the tobacco, instead of "Star."[1] — The resemblance need not be such as to deceive persons seeing the two trade-marks side by side, or such as to deceive experts.[2]

§ 782. That the plaintiff adopted the words "Maryland Club Whiskey" as an arbitrary designation, not to designate a particular kind, quality, or composition, but only applied to a certain grade manufactured by him, does not invalidate a right to protection.[3] An objection to the geographical term held to be inapplicable.[4] The words "pat. Aug. 13th, 1872," that being the date of the registration of the trade-mark, was not a false affirmation that goods were *patented*, to defeat right to protection.[5] A representation on the trade-label that the article is "pure old rye whiskey" is not falsified by proof that the whiskey is diluted with water, and packages bear but one stamp, while high-proof whiskey bears two stamps, and does not deprive of right to protection if it appear that the whiskey does not possess commercial purity.[6]

§ 783. Where manufacturers at one place falsely mark or brand their goods as manufactured at another, for the purpose of inducing trade which would otherwise go to manufacturers at such other place, such false marking will be considered as fraudulent and a "resort to a palpable trick," and complainant being injured thereby, the infringing manufacturers should be enjoined from thus using the name of the place where the complainant carries on its business.[7]

§ 784. The complainant used on the bottles in which it sold liquid bluing, a bright metallic cap of tin, extending down over about half of the rim at the mouth of the bottle, the cap having six perforations, *held*, that defendant should

[1] Liggitt & Myer Tobacco Co. *v.* Finzar, 129 U. S. (L. ed.) 32, 395.
[2] Liggitt & Myer Tobacco Co. *v.* Hynes, 20 F. 883.
[3] Cahn *v.* Gottschalk, 2 N. Y. S. 13.
[4] Ibid. [5] Ibid.
[6] Ibid.
[7] Southern White Lead Co. *v.* Corry, *supra*.

be restrained from using for the sale of his bluing a similar cap on bottles of the same shape and appearance as those of complainant. Where both parties are manufacturers of liquid bluing, the defendant may be restrained from buying old bottles of the complainant having the latter's name on them (following *Evans* v. *Van Laer*, 32 F. 153).[1]

§ 785. "Maizena" was a mark for corn-flour put up by complainant. The defendant put upon similar goods the word "Maizharine." Complainant had a second trade-mark, consisting of an allegorical picture representing the cultivation of the corn, and the preparation and cooking of the flour by the Indians. Defendant also had a registered mark, — a pictorial representation of a man carrying a quantity of maize in his arms. Enjoined.[2] — The use of the phrase "Improved Fig Syrup," or a preparation resembling a similar preparation manufactured and sold under the name of "Syrup of Figs," and calculated to deceive and mislead the public, was enjoined as an infringement of the complainant's trade-mark.[3]

§ 785½. The city of Carlsbad, Bohemia, having long made and sold salts of high medicinal qualities, in crystals and powders, made by evaporating water from the springs owned by that city, under the name of "Carlsbad Sprudel Salts," *held*, that it was an infringement to sell articles of salts, in no way derived from the Carlsbad waters, under the name of "Improved Effervescent Carlsbad Powder." The fact that the city of Carlsbad sells Carlsbad Sprudel Lozenges with labels stating "that they are manufactured under the direct administration of the city of Carlsbad," and which contain but 10 per cent of the ingredients formed in Carlsbad water, and 90 per cent of cane sugar, constitutes no fraud or misrepresentation such as would warrant a contention that the city of Carlsbad does not come into court with clean hands.[4] *

[1] Sawyer Crystal Blue Co. *v.* Hubbard, 32 F. 388.

[2] Glen Cove Mfg. Co. *v.* Ludeling, 22 F. 823.

[3] Improved Fig Syrup Co. *et al. v.* California Fig Syrup Co., 54 F. 175; 4 C. C. A. 264.

[4] City of Carlsbad *et al. v.* Kutnort, 71 F. 167; 18 C. C. A. 24.

* A decision of the High Court of Chancery in England, granting to the defendant, against the complainants' opposition, a right to register as a trade-mark the

§ 786. The continued use of the same name, by father and son succeeding to the same business, without disclosing the change of the actual manufacturer, is not misrepresentation such as to bar the right to restrain infringement of the same.[1]

§ 787. T. sold to his partners all his rights in the manufacture and sale of "Simmons' Liver Medicine," "under any name or style." Afterward he formed a partnership, and made and sold a compound called "M. A. Thedford's Liver Invigorator." *Held*, no defence that he had discontinued the use of the word "Simmons," and the symbols and literature intended to deceive.[2]

§ 788. The use of the word "Home," in connection with a make of sewing-machines used by complainant for over twenty-five years, entitles the manufacturer to protection against one who puts the words "Home Delight," in a similar way, on a machine offered for sale by him.[3]

§ 789. In 1866, one Johnston originated the title "Chatterbox" on a series of books which he caused to be compiled, containing illustrations and stories for the young. The distinctive appearance and names of the cover and printing were generally recognized in England and the United States, and were highly appreciated. Said Johnston afterwards assigned to complainant the exclusive use of title in the United States and Canada, and the publications were made simultaneously, in England by Johnston, and in this country by complainant. The defendant published juvenile books bearing the title "Chatterbox" on the cover, the books being similar in general appearance and style to complainant's books, but with different contents. Enjoined.[4]—The Investor Publishing Company long published a paper called the United States Investor. The

words alleged to be an infringement, and the affidavits from which such decision was made, are irrelevant and inadmissible in an infringement suit in this country. 68 F. 794.

[1] Feder *v.* Benkert, 76 F. 613; 18 C. C. A. 549.

[2] Chattanooga Medicine Co. *v.* Thedford *et al.*, 66 F. 554; 14 C. C. A. 101.

[3] New Home Sewing-Machine Co. *v.* Bloomingdale *et al.* [N. Y. 1893] (C. C.), 59 F. 284.

[4] Estes *v.* Worthington, 31 F. 154. (See Estes *v.* Leslie, 29 F. 91. Preliminary Injunction.)

defendant had begun the publication of a paper called the Investor, and stated in its columns that it was published by the Investor Publication Company. Enjoined.[1]

§ 790. Plaintiff and his predecessors have long used on their whiskey barrels the picture of a chicken cock standing upright, within a circle surrounded by the words "Old Bourbon Whiskey, Bourbon Co., Ky.," and below the picture the words "From J. A. Miller, Paris." For over thirteen years this brand has been known to the trade as "Miller's Chicken Cock Whiskey," or "Chicken Cock Whiskey." Defendant, doing business in Boston, adopted a like picture, including the circle, his brand being called "Miller's Game Cock Rye." On the label, in smaller type, are the words "The King of all Whiskeys, John Miller & Co., Sole Proprietors, Boston, Mass." *Held*, an infringement; and it is understood that defendant used the device both on barrels and bottles, while plaintiff has heretofore used it only on barrels; and that defendant's whiskey is a "blended whiskey," having but one stamp, while plaintiff's is a "straight whiskey," having two stamps.[2]

§ 791. The S. Howes Co. was organized in January, 1895; the Howes Grain Cleaner Co., in February, 1896, the latter being named for its president. Both companies manufactured the same class of machinery. *Held*, that the latter company should be enjoined from using its corporate name.[3]

§ 792. A real-estate auctioneer who for many years sold suburban property on the instalment plan, and who had always used in his business, and had printed in connection with his advertisements, the representation of a flag with stars on the upper and lower borders, is entitled to an injunction against the use of a like arrangement of stars or representation of flag used by another for the same business.[4]

§ 793. Although a servant after leaving his employment is entitled to carry on a business of the same character as that

[1] Investor Publishing Co. *v.* Dobinson, 72 Mass. 603.
[2] G. G. White Co. *v.* Miller (C. C.), 50 F. 227.
[3] S. Howes Co. *v.* Howes' Grain Cleaner Co. (Sup.), 46 N. Y. S. 165.
[4] Johnson *v.* Hitchcock, 3 N. Y. S. 680.

of his former employer, and to obtain the trade of the latter's customers, and to use trade-wrappers and other trade-papers, notwithstanding his former employer does so, and to employ the same printer, he can only exercise these rights in such a manner as not to represent that his business and goods are those of his former master; for if he does so represent, he may be restrained from so-doing by injunction.[1]

§ 794. The plaintiff, a manufacturer of plug twist chewing-tobacco, marked the words "Golden Crown" on the boxes in which it was packed, and fastened four tin tags of a particular size, shape, lettering, and position on every bar of his tobacco, with the words "Golden Crown" on every one of them. Defendants used the words "Golden Chain" in connection with tin tags lettered and arranged in a manner similar to the plaintiff's. *Held*, that while the defendants' words "Golden Chain" might not be an infringement, their use in connection with the tags might be restrained.[2]

§ 795. Independent of any right of complainants to the exclusive use of a trade-mark of the name applied by them to their product, the sale by defendants of a deleterious substance, represented by the latter to be in part or in whole the same substance in which complainants are dealing, and of which they are the sole producers, and which is admittedly of a beneficial character, will be restrained.[3] — To warrant injunction, it must be shown that statements were in disparagement of goods of plaintiffs' in particular, that they were untrue, and that they occasioned special damage.[4]

§ 796. Although the defendant be ignorant of the fact of another's ownership, the use of a trade-mark may be restrained; but if the owner of the same has had knowledge of the use of it by another, and through indifference or negligence has taken no steps to protect his rights, he is not entitled to an account of sales and profits.[5]

[1] Hart *v.* Colley, 44 Ch. Div. 193.
[2] Parlett *v.* Guggenheimer (Md.), 10 A. 81. (A doubtful authority.
[3] City of Carlsbad *v.* Tibbitts (C. C.), 51 F. 852.
[4] White *v.* Mellin (1895), App. Cas. 154; 11 Reports, 141.
[5] Low *et al.* *v.* Fels, 35 F. 361.

§ 797. Devices and methods working a dangerous semblance of the shape, color, designation, name, and general appearance resembling that of complainant, thereby calculated and intended to deceive and mislead probable purchasers generally, may be enjoined.[1]

§ 798. The use by defendant of the name of plaintiff's hotel as a trade-mark for his cigars will be enjoined, though, at the time of the registration of such trade-mark by the plaintiff, he had not opened the hotel for business, but had it in process of construction, and it appeared that the prospective hotel was well known by the name in question.[2]

§ 799. The adoption by the defendant of a manufacturer's distinctive means of advertising his goods, by the use for similar goods of means which involve nothing original, and, though not identical at every point, including the use of a picture which, in general design and in the idea conveyed, is so like a picture used to advertise said manufacturer's goods as to be readily mistaken for it by the ordinary purchaser, though differing from it in details of arrangement, constitutes unfair competition, and should be enjoined.[3]

§ 800. The adoption of the term "The American Syrup of Figs" by an English company is a misrepresentation. *Held*, the plaintiff is entitled to injunction and to account, and is not disentitled to relief for misrepresentation.[4]

§ 801. The words "Six Big Tailors" are so similar to the trade-name "Six Little Tailors" as to warrant an injunction.[5]

§ 802. Complainant, who for several years in various places had done business, and advertised in other places, as the "United States Dental Association," may restrain the use by another, in the same business, in a place where such advertising is done, of placing on his signs "U. S. Dental Associa-

[1] Hires *v.* Hires (Com. Pl.), 6 Pa. Dist. R. 285; Gail *v.* Wacherbarth, F. 28, 286.

[2] Kingsley *v.* Jacoby (Sup.), 20 N. Y. S. 46; 28 Abb. N. C. 451.

[3] Hilson Co. *v.* Foster (C. C.), 80 F. 896.

[4] The California Fig Syrup Co. *v.* Taylor's Drug Co. Ld. (Before High Ct. J. J., Ch. Div. Mch. 25 & 30, 1897.)

[5] Mossler *v.* Jacobs, 65 Ill. App. 571; 1 Chicago L. J. Weekly, 643.

tion," the letters "U. S." having a tendency to lead persons to suppose it was the place of business of complainant.[1]

§ 803. The Tribunal Civil of Douai in 1887, and the Court of Douai in 1888, and the Court of Cassation in 1890, had this question before them. In the case of *Descamps* v. *Balny and Morot et al.*, the industriel who has registered a mark for sewing-thread of linen, cotton, and other materials has the right to interdict the usage of this mark to a fabricant of sewing-cotton, although he himself has never employed the mark except for linen thread. The registrant has the right to enjoin the use in a similar industry. The manufacture of linen and cotton sewing-thread are incontestably two similar industries, if not even two branches of the same industry. Paris not being a city important for the manufacture of sewing-thread, a manufacturer of Lille may give to his products the denomination "Fil de Paris," or "Paris Peleton," and place on his boxes the arms of the city of Paris.[2]

§ 804. The Tribunal of Commerce of the Seine, in 1896, had the case of *Bruant* v. *Leclerc*, and decided on the following facts: For a number of years the complainant appeared in public clad in a conspicuous costume of velvet, peculiar boots, a broad-brimmed felt hat, and red foulard scarf about the neck. He was the author and vendor of a series of his popular songs, and dressed himself in this guise to attract attention. The defendant exhibited himself in an exactly similar costume, copying it from his former master. Complainant charged unfa competition by identity of dress, in a degree his personal sign and mark, deceiving the public into mistaking the wrong one for the right person. Restrained, with costs.[3]

§ 805. The Court of Paris, 1891, had the following: *Mme. Hudry* v. *Époux de Lisle*. The Dame de Lisle, whose husband is joined, had long before formed a house of fashion known

[1] Cady *v.* Schultz (R. I.), 32 A. 915.

[2] Descamps *v.* Balny & Morot *et al.*, 39 Annales, 333. (The propriety of this decision is doubted in a note (p. 334), with auth.rities.'

[3] 43 Annales, 19.

under the name of "Maison Georgette." Madame Hudry had established beside Madame de Lisle another emporium of modes under the name of "Georgette." The complainant demanded that defendant be compelled to adopt as a sign "Ancienne Maison Gavard, Georgette Rostaing, Successeur." Defendant was forbidden to use the word "Georgette" for the commerce of fashions; and ordered that in eight days she should cease to use it under penalty of fifty francs per day. On appeal, the Court of Paris ordered that she should absolutely renounce the *prénom* "Georgette," which was but one of her first two names. — The Tribunal of Commerce of the Seine, in 1887, had the case of *Eugène Carcassonne, fils, et Cie.* v. *Veuve Martial Crémieux.* The house of A. Crémieux, fils, of which Carcassonne & Company are proprietors, was established anterior to that of Veuve Martial Crémieux, who had invented a speciality of vestment complete at thirty-five francs. She used only the name Crémieux, thereby creating confusion against interest of complainants. *Held*, that she must cease such use, and join the *prénom* "Veuve Martial" to "Crémieux," in the same letters and characters. Three days were given her in which to make said change on all notices, signs, and pictures, under penalty of ten fr. per day.[2]

§ 806. *Preliminary.* — At times the injunction is merely preliminary, as in the following cases "Insectine" for the destruction of noxious insects, was infringed by "Instantine." The bottles and labels were similar to those of plaintiff. Evidence showed that purchasers had frequently mistaken one for the other.[3] — In an action to restrain infringement of a trade-mark, affidavits showed that large sums had been expended by plantiffs in establishing the reputation of their flint-paper, for which they had adopted as their trade-mark the words "The Baeder Flint-Paper Co., New York;" that their first quality flint-paper bears the mark "Baeder's Flint-Paper Company, Flint-Paper," and is well recognized as of first quality and of established reputation; that it is the practice of manufacturers to brand paper of first quality with

[1] 38 Annales, 11.
[2] 37 Annales, 82.
[3] Arthur *v.* Hoyard (Com. Pl.), 19 Pa. C. Ct. 81.

a firm name, while second quality is designated differently, as "Star Paper," and the like; that defendants manufacture flint-paper at Philadelphia under the name of Baeder, Adamson, and Co.; and for the purpose of deceiving the public, and of disposing of second-class paper, appearing to be made by plaintiffs as their first-class paper, marked their second-rate paper as "Baeder's Flint-Paper [Star]. Manufactured at Riverside Flint-Paper Mills, Philadephia. No. 1 warranted." Preliminary injunction.[1]

§ 807. A preliminary injunction is not granted unless the necessity is pressing, the right clear, and the apprehended injury grievous.

§ 808. This is a case of almost identical labels. Defendants swear that in selecting their box labels they had no intention to infringe complainants' trade-mark. The court could not escape the conviction that their mode of dressing up their goods was intended to deceive the purchasing consumer. "It is apparently so easy for one who honestly sells to sell his own goods as his own, to dress them up in such a way that they may be recognized as his own." Preliminary Injunction.[2]

[1] Baeder *v.* Baeder, 5 N. Y. S. 123; 52 Hun, 170; 5 N. Y. S. 124.

[2] Cuervo *v.* Owl Cigar Co., 68 F. 541.

CHAPTER VII.

INJUNCTIONS DENIED.

§ 809. Complaints too technical and unsubstantial.
§ 810. False representations may result in denial.
§ 811. Result of neglecting to protect one's trade-mark.
§ 812. Denials from different causes.
§ 813. "Sweet Caporal" cigarettes. "Jaegar" underwear.
§ 814. No deceptive similarity of labels.
§ 815. Alleged misuse of labels.
§ 816. Descriptive words do not create title.
§ 817. Deceit may defeat claim to redress.
§ 818. Name of protected article passes to the public.
§ 819. Use of one's own name with truth. See Wm. Roger's case, etc.
§ 820. Labels that do not deceive.
§ 821. Forfeiture of right to redress by fraud.
§ 822. Manufacturer cannot stop a rival from use of own name.
§ 823. When names of publications do not conflict.
§ 824. Non-conflicting names of goods.
§ 825. Equity cannot compel proprietorship to be designated by signs.
§ 826. Mottoes for underwear, non-conflicting.
§ 827. Mere indications of place of manufacture.
§ 828. Manner of packing tablets in boxes.
§ 829. Bronzed horse-shoe nails not a trade-mark.
§ 830. One using his own surname.
§ 831. Name of medicine not protected when false.
§ 832. Registration of different marks for foreign and domestic use.
§ 833. Conflicting corporations.
§ 834. Officer may say "late of," when leaving a corporation and entering in business for himself.
§ 835. Name of article honestly used.
§ 836. When name of corporation is a fraud.
§ 837. "Prince's Metallic Paint" case.
§ 838. Porous plasters — when injunction not violated.

§ 809. THE following are cases in which injunctions have been refused. The complainant alleged that by virtue of certain patents it had the exclusive right to manufacture "hot-forged and hammer-pointed" horse-shoe nails in imitation

of the old hand process; and that defendant, with intent to cheat and defraud, had advertised its nails as "hot-forged and hammer-pointed," when in truth they are neither, and yet this very defendant has palmed off its goods for those of complainant. *Held*, that, strictly speaking, neither nail is "hammer-pointed," and that in the absence of proof that defendant actually tried to deceive the public, no recovery could be had.[1] Complainant's was a machine by which the nail is subjected to the quick, percussive blows of two pair of dies in hammers operating alternately on the entire length of the nail. The nail is formed and pointed by this method, and does not require the removal of superfluous metal by clipping or shearing. The defendants' was a revolving hammer which acts only on the nail by a series of progressive blows drawing it out from head to point. A head is formed near the end of the nail by the stroke of the hammer or bevelling die; the surplus metal is then clipped off, and the nail is finished. The defendants' description may not contain the whole truth, but there is nothing fraudulent about it. On reading some of complainant's advertisements one would be justified in the conclusion that its nails are incomparably the best in the world, and that the defendants' nails are so liable to split and sliver in the heat that many of the ills that horse-flesh is heir to can be directly traced to their baleful influence. *Held*, that the complaints were technical and unsubstantial. Bill dismissed.[2]

§ 810. The manufacturer of uncooked pudding, put up under the trade-name "Puddine," could not enjoin a similar article described as "Pudding." The court *held*, that the manufacturer falsely represented the composition of his goods.[3] — An injunction was refused on the ground that the statements made are calculated to induce the belief that the "He-No" tea of the plaintiffs' is of the kind called in China "He-No," and is the kind drunk by the Chinese, and is imported by plaintiffs directly from China, guaranteed to be the genuine arti[illegible], and that there are various grades, of which theirs is

[1] Putnam Nail Co. *v.* Ausable Horsenail Co., 53 F. 390.
[2] Ibid.
[3] Clotworthy *v.* Schepp, 42 F. 62.

the best; and that as the tea is not imported as sold, but is compounded of several varieties purified by the plaintiffs' secret process, and as there is no such variety of tea in China as "He-No," the statement is deceptive. And, though not deliberately so, plaintiffs have no equitable relief.[1] — On the label used by the plaintiffs on their compressed yeast, the several dates of registry are printed in fine type, in a circle, within which at the top are the words "Fleischmann & Co.'s," printed circularly, and at the bottom the words "Compressed Yeast," in two lines. Within these are the words "None Genuine," also printed circularly, and the words "Without our Fac-simile Signature," forming three lines, following which is the fac-simile of plaintiffs' signature. On defendant's label are marginal blank lines forming a square within which are the words "Atlantic Yeast Company," in comparatively large type, and the words "S. Newman, Prop.," in small script, form a circle, and within it are the words "None Genuine," printed circularly, and the words "Without my Signature, S. Newman, Prop. Compressed Yeast," in fine lines. Both labels are square, and tinted yellow. The form of package and label, and the color of the latter, have been in use by a number of persons for ten years, though the labels of plaintiffs and defendant are of lighter shade than those of other dealers. *Held*, that defendant is not guilty of an actionable simulation of plaintiffs' packages, or of infringement of trade-mark.[2] — On a bill to restrain infringement of a trade-mark, there being no charge that defendant was insolvent, and irreparable damage not being probable, and the question of imitation being for the jury, an interlocutory injunction is properly denied.[3]

§ 811. Where the owner, through a period of twenty-four years, during which he might have registered the word claimed as a trade-mark, takes no steps to interfere with its use by other persons in a particular country, while protecting it in other places, it may be presumed that it was his inten-

[1] Kenny *v.* Gillet (Md.), 17 A. 499; 70 Md. 574. (Bryan, J., dissenting.)
[2] Fleischmann *v.* Newman, 4 N. Y. S. 642.
[3] Lies *v.* Daniel (Ga.), 8 S. E. 432; 82 Ga. 272.

tion to allow said word to become *publici juris* in that country.[1]

§ 812. Packages of tea were imported by plaintiffs, with labels stating that their firm was the importer, and followed by an X-mark with the firm's initials in the angles, and a statement of the kind of tea, and that it was imported from Japan, where the packages were put up. Defendant's tea was in the same sized packages, except that the name of importer's firm and the initials in the X-mark were different. The defendant's tea was the superior, and it appeared that purchasers were influenced solely by the initials in the X-mark. Injunction refused.[2] — The D. Co. of New York sold vinegar for a number of years in Philadelphia, through its agent, the M. Co., as the "Gold Seal" vinegar, but did not adopt these words as an exclusive trade-mark. The M. Co. afterwards gave up its agency, adopted the words in question as a trade-mark, and sought to enjoin its use by the D. Co. *Held*, that an injunction must be denied, though the M. Co., which dealt in other vinegars, may have sold some of its own vinegar under such trade-mark before the agency terminated.[3]

§ 813. In a suit to restrain the use of a trade-mark, "Sweet Caporal," on cigarettes, the tobacco of which was treated by the "Hornbostel process," the evidence tended to show that the process was of no value, there being other and more approved means of obtaining the same end; that defendant had abandoned the use of said process, and notified plaintiff to that effect; that the word "Sweet" was prefixed to the word "Caporal" which had always belonged to defendant as a means of determining the amount of sales of tobacco subject to plaintiff's process, no agreement being made that the same should constitute a trade-mark. The court refused to find that the trade-mark "Sweet Caporal" had become widely known and valuable because of the use of said process in treating the tobacco, and in the manufacture of cigarettes.[4]

[1] Nat. Starch Mfg. Co. *v.* Munn's Patent Maizena & Starch Co., 6 Reports, 462; App. Cas. 275.

[2] Castle *v.* Siegfried (Cal.), 37 P. 210.

[3] Miles Corson Co. *v.* Young (Pa. Com. Pl.), W. N. C. 256.

[4] Hornbostel *v.* Kinney (N. Y.), 17 N. E. 666.

— One Jaeger originated and advocated in a foreign country the use of a distinctive kind of sanitary underwear. It was manufactured by various persons, and used before a certain firm began the manufacture in the foreign country under an arrangement with J., for its exclusive manufacture, and the use of his name, in connection with other terms used by him to designate his peculiar kind of underwear as a trade-mark. *Held*, that said firm did not have, seven years thereafter, any exclusive proprietary right in the name of Jaeger, as applied to underwear in the United States, which underwear having the same descriptive name had been sold by various dealers, even if it had acquired such right in the foreign country.[1] — The plaintiff sold soap marked "B. T. Babbitt Trade-Mark, Best Soap;" and defendant sold soap marked "B. T. Buller's Trade-Mark, Best Soap." Defendant's soap was sold in cakes of a somewhat different size and shape from those of plaintiff. The wrappers were of the same color, and about the same size, but different in general appearance. *Held*, that no one was misled.[2]

§ 814. A fruit-dealer cannot enjoin the use of a fruit-label which resembles his own in the color and arrangement of the fruit, where there is no similarity in those parts which might be claimed as a trade-mark, one being called "The Keystone Brand," and the other "The Diamond Brand." The name of each dealer appears on its label in large letters of different colors; and the evidence shows that no one has been deceived by the similarity, though both labels have been in use for some time in the same locality.[3] — The plaintiff's trade-mark for flour manufactured by him was on a label containing the following words: "Ingersoll Roller Mills," "Trade-mark Registered," "196," "Gold Leaf Flour," and his name and address. *Held*, that it was not infringed by a label, of the same size and shape, containing the following words: "Patent Process, Gold Leaf, 196." The term "Gold Leaf"

1 Dr. Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier, 24 N. Y. S. 890; 5 Misc. Rep. 78.

2 Babbitt *v.* Brown, 23 N. Y. S. 25; 6 Hun, 515.

3 Heinz *v.* Lutz (Pa. Sup.), 23 A. 314.

being generally used to designate a certain quality of flour.[1]

§ 815. Complainant manufactured silk thread, and used on the best quality a particular device. Defendant, acting for a third person, sold a quantity of thread bearing this device, under the belief that it was the best quality of complainant's manufacture; but it was discovered afterwards that, although manufactured by complainant, the silk was of an inferior quality and had been re-dyed, when defendant took back the silk. *Held*, not sufficient ground to restrain defendant from selling an inferior silk with the device used for complainant's best quality.[2] — A firm composed of defendant and another was engaged in selling oil manufactured by plaintiff. The oil was put up in packages bearing a certain label, on the face of which was printed the firm name. Afterward, the firm was dissolved, and the property, including the label, was sold at auction, and was purchased by defendant, who thereon arranged to sell the oil of another manufacturer. He used the label of his late firm, except that the name of the manufacturer was substituted for that of the firm. He also issued a circular stating: "I shall continue to import the oil in the same style packages as heretofore, except that I have made a few slight changes in the label, by way of improvement. I have substituted the name of the producers," etc. *Held*, that there was no representation that the oil sold by defendant was manufactured by plaintiff. (The evidence did not show that plaintiff was ever entitled to the label.)[3] — A trade-mark consisting of the picture of a tobacco plant and the words "Fabrica Tobaccos," which had been used in the tobacco business, together with the words "El Cabio" above and beneath the words "De R. Solis," "Habana," "Copyrighted," "R. Solis, Manufacturer, Denver," is not infringed by a label having a similar picture, the words "El Cario," and beneath the words "D. Porzo & Suarez, Manufacturers, Denver,

[1] Partis *v.* Todd, 17 Can. S. C. R. 196.

[2] Appeal of Wilcox (Pa.), 12 A. 573.

[3] Société des Huiles d'Olive de Nice *v.* Rorke, 31 N. Y. S. 51; 82 Hun, 511. See Listman Mill Co. *v.* Wm. Listman, 6 N. W. 261; 88 Wis. 334.

Colo.," since, taken as a whole, they are not so similar that a purchaser using ordinary care and caution would likely mistake the one for the other.[1]

§ 816. The "Elgin Butter Company" cannot, by using with its name the words "Proprietor of the Elgin Creamery," acquire such a property in the words "Elgin," "butter," and "creamery," that it can enjoin another company from using such words, if the latter actually deals in butter manufactured at Elgin, and has not used the words fraudulently.[2] — Where one sells his distillery, and agrees that during a short period, in which he does not propose to engage in the business, the purchasers may use his name in branding whiskey, there is no such suspension of the use on his part to continue his right to use it.[3]

§ 817. The rule is that the continuous use of a symbol for a series of years is sufficient to fix the right of a claimant therein; but right thereto may be defeated by deceit. Thus, where a label used by a defendant prior to 1871 contains statements that baking-powder sold by him was made by the A. & C. Co. in England, whereas in truth it was made by defendant in New York, it was *held*, that the word "Royal" on such label could not, in connection with such misrepresentation, perform the functions of a trade-mark.[4] Even if the court is satisfied that a package was devised by defendant to simulate complainant's package, an injunction would not issue unless the similarity is such as will mislead ordinary purchasers; but where the defendant changed the color of package to that of complainant, and made other numerous changes, all which resembled complainant's, *held*, that they were manufactured to simulate.[5]

§ 818. The right to use the generic name of a patented article, in every form, passes to the public with its dedication

[1] Solis Cigar Co. *v.* Porzo (Colo.), 26 P. 556.

[2] Elgin Butter Co. *v.* Sands (Ill. Sup.), 40 N. E. 616; 155 Ill. 127; 51 Ill. App. 231, affirming.

[3] Mattingly *v.* Stone (Ky.), 14 S. W. 47.

[4] Royal Baking Powder Co. *v.* Raymond, 70 F. 373.

[5] N. K. Fairbank Co. *v.* R. C. Bell Mfg. Co., 77 F. 809.

resulting from the expiration of the patent even if the name is the surname of the inventor, or the original manufacturer.[1]

§ 819. A circular published by W. R., Jr., in 1880, was in the following words: "Sectional plate spoons and forks [Eagle], Wm. Rogers x 12. Triple-plated on all points exposed to wear. Plated by the method invented by Wm. Rogers in 1855, who was original inventor of sectional plate. Wm. Rogers (since 1878), Wallingford, Conn., formerly of Hartford and West Meriden." *Held*, not an infringement of the rights of the successors of Wm. Rogers under his trade-marks, it not being misleading to a person familiar with the facts stated therein, and with the fact that Wm. Rogers, Sr., died in 1873. As between father and son, both having the same name, and both well-known to the trade as skilful manufacturers of plated silver-ware, the adoption and use by the son, after the father's death, of his own name as a trade-mark and stamp, is not, in the absence of fraud on his part, an infringement of the trade-marks so imitated. He may advertise that he is a manufacturer of "the celebrated Wm. Rogers, Sr., spoons, forks, and knives," which is not a violation of the rights of the complainant, when the advertisement is not intended to induce the public to believe that the goods are manufactured by the complainant, although the effect of the advertisement is to cause the goods of W. R., Jr., to be known in the market as Wm. Rogers' goods.[2] The U. S. Circuit Court of Appeal said that goods sold to the trade stamped with Rogers' name can and will be sold by dishonest dealers under a representation that they are manufactured by a company of established reputation, having a similar name, which manufactures a high class of goods. The mere fact does not justify an injunction against use of such stamp. Said the court: "There are some indicia of an unworthy purpose to gain an advantage from a name well known to the purchasers of silver-plated ware, but the affidavits do not convey sufficient facts to justify the conclusion that Rogers was

[1] Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169; 41 L. ed. 118; 85 O. G. 1703; 16 Sup. Ct. R. 1002.

[2] Wm. Rogers Mfg. Co. *v.* Simpson (Conn.), 9 A. 395.

using his name unfairly and dishonestly in the business in which he was entitled to use it." [1] — The fact that a manufacturer uses a brand composed in part of his own name, which is of such similarity to that of another member of his firm as to indicate an intent to deceive, does not justify an injunction forbidding absolutely the further transactions of such business in his own name.[2] — The complainant made and sold "*Morse's Compound Syrup of Yellow Dock Root*" in bottles with paper wrappers. The defendant subsequently set up a sale in bottles, without wrappers, of "Dr. Morses' Celebrated Syrup." These words being blown in the glass, with labels inscribed "Dr. Morses' Improved Yellow Dock and Sarsaparilla Compound." The bottles were exactly similar in size and shape, but the labels were different. The complainant made his preparation under one trade-name, and sold it under another, and advertised it as "sold only in quart bottles;" whereas the bottles, though known in the trade as quart bottles, held substantially less. *Held*, that complainant was not entitled to injunction and account of profits.[3] — A foreign firm agreed to consign their wine exclusively to plaintiffs, for sale in the United Kingdom, or its colonies. *Held*, that plaintiffs could not maintain an action to restrain defendants, London wine-merchants, from selling wine under a name in colorable imitation of the trade-marks of such foreign firm, plaintiffs having no interest in the trade-marks, and no right to restrain the fraudulent use of them.[4]

§ 820. Plaintiff's and defendant's medicines were both put up in gallon jugs of similar shape and color. One was called "Microbe Destroyer," the other "Microbe Killer." One label had a conspicuous red symbol or figure in the centre, with printed matter in columns at each side, and a bright-red border. The other was printed on blue or yellow paper, and no columns of printed matter. *Held*, that the resemblance between them was not calculated to deceive.[5]

[1] Rogers *v.* Wm. Rogers Mfg. Co., 17 C. C. A. 575.
[2] Rock Springs Distilling Co. *v.* Monarch (Ky.), 22 S. W. 1028.
[3] Alexander *v.* Morse, 14 R. I. 153; s. c. 51 Am. Rep. 369.
[4] Richards *v.* Butcher, 62 L. T. 867.
[5] Radam *v.* Capital Microbe Destroyer Co. (Tex.), 16 S. W. 990.

§ 821. Relief in equity was refused, on the ground that if plaintiff had had title, he had forfeited his equity by using his trade-mark in connection with paints made from ores dug from other than the original Prince's Mine. It was *held*, that the defendant in that litigation had always used the trade-mark in connection with paints from the Prince's Mine, but no equity for infringement was awarded to the complainant.[1]

§ 822. The complainant left San Francisco, Cal., where he had been engaged in manufacturing rolled wheat, and came to Minneapolis, Minn. He leased a mill where, with his two brothers, he carried on a successful manufacture of rolled wheat. This product, called by them "Pettijohn's California Breakfast Food," was put on the market in small paper or pasteboard boxes, or parcels, as customary. The wrapper contained a trade-mark, the pictured representation of a bear, and words "P.'s Cal. B. Food, Prepared by Wm. A. Pettijohn, Sole Manuf'r, San Francisco, Cal., and Minneapolis, Minn., Mach. in'd for purpose, and shipped from Cal." Seven months later, one Beeman was admitted as a partner, and the firm name became Beeman & Pettijohn. In October, 1890, the three brothers caused a corporation to be formed, — the Pe.. & B. Food Co. They succeeded to the business of B. & P., and carried it on until 1893, when said corporation leased mill to complainant, with all its tangible property, including its trade-marks. The mill was destroyed by fire in January, 1894. At the time of the fire, complainant was the owner of several other mills in different parts of the country; two in Ohio, one at Chicago, and another at Cedar Falls, Iowa. Complainant insists that retail dealers and travelling salesmen impose on the public by substituting defendant's rolled wheat for that made by complainant; and the fraud is made possible by the use of the name Pettijohn by the defendant, — the real name of both. The cause of action is unfair competition in trade. Injunction is prayed to stop use of Pettijohn in defendant's corporate name, and in the designation of defendant's product, and to stop the use of the

[1] Prince's Metallic Paint Co. *v.* Prince Mfg. Co., 57 F. 938; 6 A. C. A. 647.

name on wrapper. The court declined to declare complainant's right to have people believe that the "P. B. F." marketed by it was made at a Minneapolis mill. *Held*, that a manufacturer cannot prevent a rival manufacturer of the same surname from using such surname for his goods.[1]

§ 823. The plaintiff issued a monthly periodical named "The Railroad and Engineering Journal," the result of a consolidation of two periodicals he had purchased, one of which was known as "The American Railroad Journal." The defendant published a weekly periodical called "Engineering News and American Railway Journal." In an action to enjoin defendant from using the words "Railway Journal," it appeared that the plaintiff's paper had but a limited circulation, and that there was no evidence showing actual confusing in any instance, from the claimed similarity in names; while the titles, as printed, indicated possibility of error from plaintiff's use of the term "Engineering" rather than from defendant's use of the words "Railway Journal." *Held*, that the relief sought was properly denied.[2] — In 1891, the plaintiff was publisher of "The Electrical World." In 1890, the defendant had published a newspaper styled "Electric Age." In 1891, the defendant changed the name of his paper to "The Electrical Age," and adopted a title-page similar in general to that of the plaintiff, and printed in, and on, other and different colors. *Held*, the facts were not sufficient to justify an injunction.[3] The plaintiffs published a book called "The Good Things of Life," which consisted of pictorial illustrations and short dialogues taken from a serial owned by some of the plaintiffs, and called "Life." The defendants published a book called "The Spice of Life," containing illustrations and dialogues from a German paper. The word "Life" was in quotation marks on plaintiffs' book, but not on defendants', and the letters forming the

[1] American Cereal Co. *v.* Eli Pettijohn Cereal Co. (aff. by C. C. A.), 76 F. 872. This principle is fully concurred in by the U. S. C. C. A., Feb. 23, 1897, in Duryea *v.* Nat. Starch Mfg. Co., 45 U. S. App. 649.

[2] Forney *v.* Engineering News Pub. Co., 10 N. Y. S. 814; 57 Hun, 588.

[3] W. J. Johnston & Co. *v.* Electric Age Pub. Co., 14 N. Y. S. 803.

word were double the size on plaintiffs' of those on defendants' book. The colors of the lettering were different, and, with the exception of a similarity in size and binding, the two books were dissimilar, including the contents. *Held*, that it was evident that plaintiffs used the word "Life" in a different sense from that in which it was employed by defendants, and that the use by the latter in no respect infringed upon its employment by plaintiffs.[1]—The trade-mark acquired in connection with the title "Charley's Aunt," given to plaintiff's play, is not infringed by the title "Charley's Uncle," given to defendant's play. Posters used in advertising defendant's play, entitled "Charley's Uncle," though in the same style as those of the plaintiff, are not so similar as will entitle the plaintiff to injunction against their use, when plaintiff's posters have the device of a laughing cat, and the defendant's posters have the device of an owl.[2]

§ 824. The trade-mark "Magic Headache," used on packages labelled "Gessler's Magic Headache Wafers, a positive cure for headache and neuralgia," with directions as to taking; "Manuf'd by Max Gessler, M'f'g Chemist, Milwaukee, Wis. Price 35 cts.," is not infringed by the use of similar packages, with similar labels and directions, but reading "Brown's Alpha Wafers; a positive cure for headache and neuralgia;" "Manufactured at Brown's Pharmacy, Marquette, Mich."[3]

§ 825. A merchant erected a building of peculiar architecture, adjoining a similar building occupied by an old firm engaged in a similar business; and, for the purpose of deceiving the customers of such firm, adopted a similar name, and refrained from using any signs about the building to designate the proprietor. *Held*, that equity could not compel the merchant to designate by signs, within and without the building, who was the proprietor thereof, but should require him to distinguish his store from the other in some

[1] Stokes *v.* Allen, 9 N. Y. S. 846; 56 Hun, 526.
[2] Frohman *v.* Miller (Super. N. Y.), 29 N. Y. S. 1109; 8 Misc. Rep. 379.
[3] Gessler *v.* Grieb, 48 N. Y. 1098.

other way that would be a sufficient indication to the public that his store is a different place of business from that of the other.[1] — A complainant is not entitled to enjoin the use by another, engaged in the same business, of signs of the same size, shape, and color as those used by complainant, the characteristics thereof not differing from those ordinarily on business-signs similarly placed.[2] — Nor is he, from long use in his business-signs and advertisements of words "Scientific Dentistry at moderate prices," entitled to exclusive use.[3] — The use of name in an advertisement, but failure to affix it to the article, is not the adoption of a trade-mark.[4]

§ 826. A trade-mark for underwear, consisting of a sun surrounded by rays, having a distinctly-marked human face, and frequently, though not necessarily, bearing words "Warmth is Life," is not infringed by a symbol having an imperfect outline, somewhat resembling sun-rays, but the characteristic feature of which is a circle enclosing a monogram, the label never bearing the words "Warmth is Life," but always having the name of the manufacturing company using it.[5]

§ 827. There was nothing in a certain trade-mark to indicate that the medicine was from a particular manufactory. Another person cannot be restrained from using it, as the only effect of the symbol is to indicate a class of goods which any one who knows how may manufacture.[6]

§ 828. The plaintiff manufactured a remedy called "No-To-Bac," in the form of light-gray odorless tablets put up in dark red boxes, with plaintiff's name, and the name of the remedy, in conspicuous black letters, with a description of the remedy and directions for use. The defendant man-

[1] Weinstock, Lubin, & Co. *v.* Marks (Cal.), 42 P. 142 ; 109 Cal. 529.

[2] Cady *v.* Schultz (R. I.), 32 A. 915.

[3] Ibid.

[4] Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co. (Ill. Sup.), 30 N. E. 339.

[5] Underwear Co. *v.* Simons (C. C.), 49 F. 276.

[6] (Following Chadwick *v.* Covell, 23 N. E. 1068) ; Covell *v.* Chadwick (Mass.), 26 N. E. 850.

ufactured a remedy called "Baco-Curo," in the form of dark brown tablets, with an odor of licorice, and varying in size and weight from that of plaintiff's, and which were put up in boxes like plaintiff's, but white in color, with the defendant's name and the name of its remedy conspicuously printed in green, with a description which was similar to plaintiff's. *Held*, that there was no unfair competition.[1]

§ 829. The manufacturer of horse-shoe nails coated them with bronze, for the sole purpose of making them popular; and defendant did the same, thereby imitating plaintiff's nails. *Held*, that there was no trade-mark in the bronze nail, and its use could not be enjoined.[2]

§ 830. The defendant withdrew from the firm of Marcus Ward & Co., Limited, which was engaged in the manufacture of linen papers, and established the firm Wm. H. Ward & Co. in the same business. Action to restrain from placing the words "Marcus Ward's Son" on their goods, and the expression "late of the firm of Marcus Ward & Co." on their letter-heads. *Held*, he, being the son of Marcus Ward, and lately a member of the firm named, could not be restrained.[3]

§ 831. The statement filed to obtain registration, and attached to the affidavits for a preliminary injunction, may be considered on the final hearing. "One Night Cure," used as a trade-mark for a cough-remedy, is not infringed by the use of the words "Beshore's One Night Cough Cure." Words are not protected which "assert a manifest falsehood and a physiological impossibility."[4]

§ 832. Although a trade-mark is registered for foreign commerce, one might adopt and use a different one for domestic trade. (The court cited Trade-Mark Cases, 100 U. S. 82; *Ryder* v. *Holt*, 128 U. S. 529; not inconsistent with the doctrine of *Richter* v. *Remedy Co.*, 52 F. 455.)[5]

[1] Sterling Remedy Co. *v.* Eureka Chemical & Man'g Co., 70 F. 704.

[2] Putnam Nail Co. *v.* Dulaney, 21 A. 391; 27 W. N. C. 330; affirming 8 Pa. C. Ct. R. 595; 59 F. 909; 8 C. C. A. 227.

[3] Marcus Ward & Co. *v.* Ward (Sup.), 15 N. Y. S. 913; 61 Hun, 625.

[4] Kohler Mfg. Co. *v.* Beshore, 59 F. 572; 8 C. C. A. 215.

[5] Ibid.

§ 833. A corporation will not be enjoined from using a name similar to one previously used by an unincorporated association which was afterwards incorporated, since the assumption of a corporate name by the unincorporated society was illegal.[1] — The "Drummond Tobacco Company," a corporation, sought to enjoin the incorporation of another company under the name of "Drummond & Randle Tobacco Company." *Held*, in the absence of proof that injury to the plaintiffs would result, equity will not interfere.[2] — Outgoing stockholders of a corporation named the "Van Auken Company," whose names were Van Auken, could not organize a corporation under the name of "Van Auken's Specialty Company," and compete in business with the older corporation.[3] — A corporation engaged in the liquor trade, contrary to law, cannot sue to enjoin another corporation from using a name similar to its own.[4]

§ 834. The defendant, who was doing business under the name of the "Newark Coal Company," unincorporated, on the formation of a corporation by that name, transferred to it his business and the good-will thereof, and was taken by the corporation into its employ, as an officer, for four years. *Held*, that defendant, on the dissolution of his connection with the corporation, and engaging in a rival business, would not be enjoined from advertising himself as formerly connected with such corporation.[5]

§ 835. One who sells a preparation which could be used only by dentists, cannot enjoin a dentist from using it, or advertising that he uses it, for a certain purpose, though the name under which it is sold is a valid trade-mark, when in selling it no restriction was placed on its use.[6]

§ 836. The defendant, owner of land known as "Milbrae Station," formed a co-partnership with the plaintiffs to keep

[1] German-Hanoverian & Oldenberg Coach-Horse Ass'n, 46 Ill. App. 281.

[2] Drummond Tobacco Co. *v.* Randle, 114 Ills. 412.

[3] Van Auken *v.* Van Auken Steam Specialty Co., 57 Ill. App. 240.

[4] Portsmouth Brewing Co. *v.* Portsmouth Brewing and Bottling Co. (N. H.), 30 A. 346.

[5] Newark Coal Co. *v.* Spangler (N. J. Ch.), 34 A. 932.

[6] Sweezy *v.* McBrair (Sup.), 35 N. W. S. 11; 89 Hun, 155.

cows on said land, and to sell the milk therefrom under the trade-name of "Milbrae Dairy." Afterwards the partnership was dissolved, plaintiffs taking the milk-routes and business of selling milk, defendant, who owned the lands, agreeing to supply them with milk therefrom. Later, plaintiffs terminated contract with defendant, and took no more of his milk, but still conducted a business under the title of the "Milbrae Dairy," and formed a corporation under the name of "Milbrae Company." *Held*, that plaintiffs could *not* ask for an injunction to restrain defendant from using the name "Milbrae" in a competing business, since their own use of the name was a fraud on the public.[1]

§ 837. An injunction granted in New York, restraining defendants from using the name "Prince" to designate or describe any article of paint, now or hereafter manufactured, or exposed for sale by them, or from inserting advertisements denying the rights of plaintiff to the use of the designation "Prince's Metallic Paint," is violated by affixing such name to car-loads of paint at Lehigh Gap, Pa. — Defendant advertised that the recent decision "in a suit brought against us by our competitors in trade is not a final disposition of the case," and, in reference to other decisions by the courts of another State, said: "In these cases our right to use our corporate name and trade-mark was fully sustained, and we are confident that upon the final hearing of the case upon its merits our rights in the city of New York will also be sustained." *Held*, a violation of injunction.[2]

§ 838. An advertisement of plasters manufactured and sold by defendant as "Benson's Porous Plasters; Benson's Capcine Porous Plasters; Benson's Plasters, the best Porous Plaster," does not violate an injunction restraining defendant from using the word "Porous" by affixing or applying it to any plasters manufactured, shipped, sold, or supplied by them, or to the boxes in which they are put up.[3]

[1] Milbrae Co. *v.* Taylor (Cal.), 37 P. 235.

[2] Prince's Manufacturing Co. *v.* Prince's Metallic Paint Co., 4 N. Y. S. 348; 51 Hun, 443.

[3] Porous Plaster Co. *v.* Seabury, 1 N. Y. S. 134.

CHAPTER VIII.

MISCELLANEOUS PRACTICE.

§ 839. Jurisdiction of State Courts not impaired by Federal Act, etc.
§ 840. Registration cannot impair *publici juris*, etc.
§ 841. "Somatose," not descriptive, etc., etc.
§ 842. Abandonment, good faith, etc.
§ 843. Imitations of sewing-machine symbols illegal, etc.
§ 844. License to use mark does not excuse non-compliance with contract, etc.
§ 845. Rights growing out of assignment of trade-mark.
§ 846. How right to trade mark is lost, etc.
§ 847. Question of variance as to adoption of trade-mark.
§ 848. Question of disparagement by inferiority.
849. Non-interference defeats claim to title, etc.
§ 850. False claim to a trade-mark.
§ 851. When intention to deceive may be proved or inferred.
§ 852. When Name of an Order may not be protected.
§ 853. Manufacturer's own portrait may be registered as legal trade-mark.
§ 854. Decision in a case of *initials*, etc.
§ 855. Right of manufacturer to use his own portrait as trade-mark.
§ 856. Nice distinction in "Bromo-Caffeine" case.
§ 857. A right to symbol passes with good-will. One's name.
§ 858. Trader cannot sell by misuse, even of correct name.
§ 859. Owner's name, etc., need not appear on trade-mark.
§ 860. Massachusetts Act as to foreign corporation using name of domestic corporation.
§ 861. "Magnolia" Metal Co.'s cases.
§ 862. Question of registered initials interference, etc.
§ 863. Registration in Argentine Republic does not give prior right to registration in France.
§ 864. *Tramway* not exclusive word and therefore not a trade-name.
§ 865. Not unfair competition for merchant to praise his own wares and omit mention of rival's wares in advertising in journal.
§ 866. When two labels on medicines did not conflict.
§ 867. Fraud may exist, in spite of differences in detail.
§ 868. Right to mark dispelled by proof of priority.
§ 869. Untrue representations do not always vitiate, etc.
§ 870. Unfair sale of goods under popular names, etc.
§ 871. "*Hunyadi Janos*," under what conditions sales allowed.
§ 872. Unfair and misleading *chicory* label.

§ 839. THE following are recent decisions affecting miscellaneous practice. The Act of March 3, 1881, conferring jurisdiction on United States Courts, does not impair the jurisdiction of State courts over suits for infringement of trade-marks.[1] — A United States Circuit Court cannot interfere by injunction at the instance of a corporation organized under the laws of a State outside of its circuit, and prevent any necessary step being taken, under the statutes of said State, in the creation of a corporation bearing the same name as the foreign corporation.[2] — The United States Supreme Court has no jurisdiction to review a judgment of the Circuit Court of Appeals of the District of Columbia, denying a writ of mandamus to register a trade-mark; and even in a regular case of appeal its jurisdiction would fail unless the matter in dispute exceeds $5000, exclusive of costs; or there is drawn in question the validity of a treaty, or statute, under an authority conferred and exercised by the United States.[3] — The Act of Congress, March 3, 1881, Sec. 7 (21 St. at Large, 502), relating to trade-marks used in commerce with foreign nations, which provides that any person who shall counterfeit "any trade-mark registered under this Act," shall be liable to an action on the case, does not apply to any trade-mark that has not been registered, so as to oust the jurisdiction of a State court in a prosecution for counterfeiting a foreign trade-mark which is not registered under the Act of 1881.[4] — Since the adoption of the California Code, exclusive right to a trade-mark is acquired only by recording it.[5] — A sale of a case of liquors labelled with a certain device by a State Commissioner in Canada, is not authorized by the Act of South Carolina of Dec. 24, 1892 (Dispensary Act providing for the purchase and sale of liquors by the State); and the State is not thereupon entitled to have the device registered.[6] — In

[1] Re Keasbey Matteson Co., 16 S. Ct. 273; 160 U. S. 221.
[2] Lehigh Valley Coal Co. *v.* Hamblen, 23 F. 225.
[3] U. S. *ex rel.* St. S. Car. *v.* Seymour, Com. Pats.
[4] People *v.* Molins, 10 N. Y. S. 130; 7 N. Y. Crim. R. 51.
[5] Whittier *v.* Dietz, 66 Cal. 78.
[6] Seymour *v.* U. S., 2 App. D. C. 240.

1870, Congress passed a statute providing for the registration of trade-marks, and in 1876, a statute imposing penalties for trespass on the rights obtained by such registration. The Statute of 1870, having been declared unconstitutional, in 1881 a valid statute was enacted, touching registration, which did not re-enact the penal Statute of 1876, and made no reference thereto. *Held*, that the penal statute fell with that of 1870, and did not remain suspended, to become operative under the Statute of 1881.[1]

§ 840. The adoption of a trade-mark ("La Normandie," for cigars) cannot take away any right previously acquired by the public.[2] — A party avowedly not the owner of a trade-mark for the use of which he had been sued under the allegation that it was the imitation of another's trade-mark, has no standing in court to sue for damages as a vindication of such trade-mark, after the dismissal of the plaintiff's action on his own motion.[3] — A certificate of registration, under the Act of 1876, must contain words to show that the alleged owner acquired an exclusive property in the mark claimed.[4] — An application for the registration of a trade-mark stated that it consisted "essentially of the illustration of a boy in a position indicating suffering from cramps." Immediately below the figure of the boy were the words "Cramp Cure," forming part of the expression "Cramp Cure for every ache or pain;" but the applicant stated that this descriptive matter might be altered or omitted at pleasure, without affecting the character of the trade-mark. *Held*, that the trade-mark consisted in the design of the suffering boy, which the application stated to be the essential feature, and that the words "Cramp Cure" formed no part thereof.[5]

§ 841. On the application in England to register the word "Somatose" as a trade-mark in respect of an article made from meats, and called a pharmaceutical product, its object

[1] United States *v.* Koch, 40 F. 250.

[2] Stachelberg *v.* Ponce, 128 U. S. 686. (L. ed. 32, 569.)

[3] Lacroix *v.* Nodal (La.), 6 So. 195; 41 La. Ann. 1018.

[4] United States *v.* Braun, 39 F. 775.

[5] L. H. Harris Drug Co. *v.* Stachy, 46 Fed. 624.

being nourishment for the human body, *held* (Lindley, L. J., *dissentiente*), that "Somatose" was not an "invented word," but that, even if it were an invented word, it was not a "word bearing no reference to the character or quality of the goods," within Sec. 10 (Act of 1883), as amended in 1888, and consequently could not be registered.[1] — A declaration by a French citizen for infringement of a trade-mark, which fails to allege that he has deposited a copy of his trade-mark, as required by the convention of April 16, 1869, between the United States and France, is fatally defective.[2] — Under the English Act of 1883, the owner of a trade-mark can only sue for infringement thereof in connection with the particular classes for which his trade-mark is registered.[3] — A suit in a Federal court between citizens of the same State cannot be maintained unless it be alleged that the goods covered by the mark are intended to be transported to a foreign country, or in lawful intercourse with an Indian tribe.[4] — The word "Emolliolorum," used as a trade-mark to designate a preparation for rendering every description of leather waterproof and supple, could not be registered as a "fancy word" under the British Act of 1883, inasmuch as it would convey to the mind of an ordinary Englishman[5] the idea that the preparation would act by softening the articles to which it was intended to be applied; and it is therefore descriptive, and would not come within the definition of "fancy word" laid down in *Re Van Duzer's Trade-Mark*, 34 Ch. Div. 623; nor could it be registered under Section 10, Patents, etc., etc., Act of 1888, as an invented word, or as a word having no reference to the character or quality of the goods.[6]

§ 842. The jury must be satisfied that the trade-mark was the exclusive property of the person alleged in the indictment to be the owner, that the alleged trade-mark was capable of

[1] Farbenfabriken T. M. K., 7 Reports, 439; Id. [1894], 1 Ch. 645. (See also Cohn *v.* People, 149 Ill. etc., etc., cited in note.)

[2] Lacroix *v.* Escobal, 37 La. An. 533.

[3] Hart *v.* Colley, 44 Ch. Div. 193.

[4] Luyties *et al. v.* Hollandeer *et al.*, 21 Fed. 281.

[5] Is this not a judicial stretch of fancy?

[6] In re Talbot's Trade-Mark, 8 Reports, 149.

appropriation as such, that it has not been abandoned by acquiescence in the use by others.[1] — In a prosecution for selling cigars from a box bearing a counterfeit label, the fact that two strangers, who bought cigars at defendant's stand, told him that the label was counterfeit, is not sufficient to show guilty knowledge on his part.[2] — To warrant conviction it must appear that the goods sold were not entitled to bear the genuine label; but to establish such fact it is not sufficient to show that defendant sold the cigars knowing the label to be counterfeit.[3] — A Federal court has no jurisdiction between citizens of the same State, unless the infringement is applied to goods to be transported out of the State.[4]

§ 843. The lettering "N. Y. S. M. M'f'g Co.," corresponding in style and size of letters with the lettering "The Singer Manuf'g Co.," on the brass plates of the latter company, cannot lawfully be used on sewing-machines similar to those of the Singer Company, by a company bearing the former name, although it does not employ the name "Singer," when the position and size, as well as the inscription found on the plate, are imitations of those used by the Singer Company, and are calculated to deceive the public.[5] — The similarity need not be so close as to deceive the ordinary consumer, nor need it appear that any one was actually deceived, to entitle to relief.[6] — A trade-mark consisting of a red Greek cross is not infringed by a Maltese cross having a red centre and dark projections with letters, etc., giving a more distinctive individuality than that of the plaintiffs'.[7] — One who has the right to use the word "Hygeia," in connection with certain other words, and who makes that word more prominent than the rest of his trade-mark, does not

[1] People *v.* Molins, 10 N. Y. S. 130; 7 N. Y. Crim. R. 51. (*Ubi supra.*)

[2] Vogt *v.* People, 59 Ill. App. 684.

[3] State *v.* Berlinsheimer, 62 Mo. App. 168.

[4] Schumacher *v.* Schwenke, 26 F. 818.

[5] Singer Mfg. Co. *v.* Bent, 163 U. S. 205; 41 L. ed. 131; Off. Gaz. 1713; 16 Sup. Ct. Rep. 1016.

[6] Drummond Tobacco Co. *v.* Addison Tinsley Tobacco Co., 52 Mo. App. 10.

[7] Johnson *v.* Bauer (C. C.), 79 Fed. 954.

thereby infringe the rights of another, who also has the right to use the word "Hygeia" alone, as a trade-mark.[1]

§ 844. It is no defence that defendant had a license for the use of a trade-mark, where the contract for the license requires defendant to keep books, make returns, and pay royalties, or forfeit the license, and it is shown that defendant failed to perform these conditions, and the plaintiff notifies him that the license is terminated.[2] Nor is it any defence that compensation may be made, for plaintiff is not seeking to enforce a forfeiture, but insists that the license is terminated by the terms of the contract.[3]

§ 845. In 1871, John Forrest, who had carried on in London the business of watchmaker, and had marked his watches "John Forrest, London," died; and a firm of watchmakers in London purchased the good-will of the business, but did not continue it, except that, until 1874, they put "John Forrest, London," on some of their watches. In that year they granted an exclusive license to another firm in Liverpool to use for seven years the name "John Forrest, London," on their watches; but after the license had expired, they did not use the name themselves, save only in a very few cases. In 1890, they assigned their assets to a trustee for their creditors, and, in 1891, he sold their business and the good-will and lease of the premises; and on the same day he sold to the plaintiff, a watchmaker in Coventry, the name, title, and good-will of the business, "John Forrest, London." *Held*, that the plaintiff, being a mere assignee in gross of the right to the name of "John Forrest," was not entitled to restrain the use of such name on watches made by the defendant, who was also a watchmaker in Coventry.[4]

§ 846. The complainants adopted a name, and applied it to small lots of cigars manufactured and sold by them, one

[1] Waukesha Hygeia Mineral Springs Co. *v.* Hygeia Sparkling Distilled Water Co., 63 F. 438; 11 C. C. A. 277.

[2] Martha Washington Creamery Buttered Flour Co. of U. S. *v.* Marlieu, 44 F. 473.

[3] Ibid.

[4] Thorneloe *v.* Hill, 8 Reports, 718; Id. [1894], 1 Ch. 569.

lot in 1878, on a special order; one in 1884, with a trade-mark, for a limited market; one in 1885; and no more until 1889. Before the sale in 1885, the defendants, without knowledge of what had been done by the complainants, and in good faith, began the sale of cigars of their own manufacture under the same name, and continued extensive sales and advertisements thereof for five years without question. *Held*, that there was no appropriation for actual occupation of the market by the complainants to entitle them to assert a right to a trade-mark against defendants.[1] — A cigar label containing these words, "opposed to inferior, rat-shop, coolie, prison, or filthy tenement-house workmanship," is not illegal, as being immoral or against public policy.[2]

§ 847. In a suit for infringing a trade-mark, the petition failed to state that the paper package adopted by the plaintiff as a trade-mark had on it the words "Kohlberg Bros.," which by the evidence it appeared to have. *Held*, it was for the jury to determine whether this was a variance between the trade-mark declared on and that proved, since there was abundant evidence, outside the words referred to, identifying the trade-mark used by plaintiff as that described in the petition.[3]

§ 848. A manufacturer of goods familiarly known to the trade, and sold under the manufacturer's name, as "Priestley's Silk Warp Henrietta," is entitled to an injunction against any person selling an inferior quality under that name, with intent to deceive the public.[4] — A declaration, alleging that plaintiffs are profitably engaged in the manufacture and sale of a certain valuable medicine; that the defendant fraudulently, and with intent to injure the plaintiffs' business, manufactured under a similar name a spurious and inferior medicine in imitation of that made by the

[1] Levy *et al. v.* Waitt *et al.*, 61 F. 100; 10 C. C. A. 227. (See Browne on Trade-Marks, § 677, as to instantaneous seizure of trade-mark after abandonment.)

[2] Cohn *v.* People (Ill. Sup.), 37 N. E. 60, criticising McVey *v.* Brendel, 22 A. 912, and directly opposite thereto.

[3] Goodman *v.* Bohls (Tex. Civ. App.), 22 S. W. 11.

[4] Priestley *v.* Adams, 13 N. Y. S. 41; 59 Hun, 380.

plaintiffs, and by simulating the wrappers used by plaintiffs in putting up their medicine, deceived the public, and thus sold large quantities of the spurious medicine as genuine, to plaintiffs' damage, was *held* to be sufficient on demurrer.[1]

§ 849. In an action to restrain defendant from using a trade-mark which both parties claimed, an instruction that if both parties had used the trade-mark for one year, and afterwards without any attempt to interfere with each other's use, the jury should find for defendant; but if the plaintiff was the exclusive owner, and had done nothing which would lead defendant to believe that it had abandoned its right, and had always objected to defendant's use of it when such use came to the plaintiff's knowledge, they should find for the plaintiff, — such instruction is not open to objection on the part of the defendant.[2]

§ 850. The defendant showed that he abandoned the use of label before the hearing of the motion for injunction *pendente lite*, and that the plaintiff was misleading the public by falsely claiming that the form of cakes of soap on which the label was used, and the title, were secured by a trade-mark.[3]

§ 851. A man must be taken to have intended the reasonable and natural consequences of his own acts. If a mere comparison of the goods, having regard to the surroundings, is not sufficient, then evidence of an intention to deceive is admissible, — either oral or in writing, — or inferences from conduct. There should be an account of profits, although no evidence of mistake of goods.[4]

§ 852. In a suit to enjoin certain persons from organizing another association under the name of the "Order of Scottish Clans," *held*, that plaintiff could not maintain its bill under the Statute of 1888, on the ground that it was entitled to have its name protected as a trade-name.[5]

[1] M. A. Thedford Med. Co. *v.* Curry, 22 S. E. 661; 96 Ga. 89.
[2] Durham Tobacco Co. *v.* McElwee (N. C.), 5 S. E. 907.
[3] Brown *v.* Doscher, 20 N. Y. S. 900; 66 Hun, 626.
[4] [1887] 36 Ch. 1; Saxlehner Apollinaris Co., Kekewich, J.
[5] American Order Scottish Clans *v.* Merrill, 151 Mass. 558 [1890].

§ 853. The portrait of a manufacturer of goods is a "distinctive device of Sec. 10, Sub-sec. 1, of the Patents, Designs, and Trade-Mark Act, 1888. Romer, J., below, has so decided and said, *inter alia*: "as to the case of Anderson's Trade-Mark, 26 Ch. Div. 409, which was cited as deciding that a portrait cannot be the subject-matter of a trade-mark. That case decided nothing of the kind. The chief part of the trade-mark was the portrait of Baron Liebig for Liebig's Extract of Meat. His name was *publici juris*, and as his name was applied to that substance, that name on the photograph of Baron Liebig was another method of describing the goods to which the trade-mark was to be attached.[1] That decision in nowise applies to this case. The plaintiff's name is not *publici juris*." The defendant appealed. The Lords Justices affirmed the decree and dismissed the appeal.[2]

§ 854. The mere use by defendants of their own former initials, "B. & S.," on articles sold by them, is not an infringement of a registered trade-mark for the two letters "S. B.," arranged in that order. Both parties were citizens of the same State. In this case a trade-mark was *not* involved. It is not understood how Federal courts had jurisdiction. *[3]

§ 855. The right of a fabricant to affix his portrait on his products is a right, in some sort, as natural as that of signing his name; but the fabricant who registers a mark containing his portrait cannot complain of a rival who equally employs a portrait of the maker.[4]

[1] See decision U. S. Sup. Ct. in The Dr. Richmond Nervine Co. *v.* Richmond, *ubi supra*, as to portrait being a valid trade-mark. See also Lestarquit *v.* Carrette, 34 Annales, 211, *infra*, also declaring portrait a valid trade-mark; Rowland *v.* Mitchell (C. A.), 1897, 1 Ch. 171; 66 L. J. Ch. N. S. 110; 75 L. T. Rep. 498; Affg. 75 L. T. Rep. 65; 65 L. J. Ch. N. S. 857.

[2] Rowland *v.* Mitchell, Ch. Div. [1897] 71.

* One of the judges said, *inter alia*, substantially, that registration had been obtained "by patents No. 20,907, March 29, 1892, and No. 22,294, Jan. 3, 1893." Certificates of registration must have been meant. A trade-mark never could have been patented. The phrase *patent* in such a case is a false term, and illogical as well as misleading. See § 340, Browne on Trade-Marks.

[3] Bart *et al. v.* Smith, 71 F. 161. See Johann Hoff *v.* Tarrant & Co. (C. C.), F. 71, 163.

[4] Lestarquit *v.* Carrette, 34 Annales, 211.

§ 856. The New York Court of Appeals has drawn a nice distinction between "Bromo-Caffeine," a term not in general use when the plaintiff applied it, and not descriptive of the articles used to make the medicines designated by it, and the noted case of "Ferro-Phosphorated Elixir of Calasaya Bark" (*Caswell* v. *Davis*, 58 N. Y. 223). The latter case indicated to druggists, and the public, the principal ingredients of the article. "Bromo-Caffeine" was used before for a certain chemical compound (the words a mere curiosity, having no known significance to the medical world); while "Bromo-Caffeine" appeared in a chemical journal in Leipsic, in 1868; the formula was also found in Watt's Dic. of Chemistry, ed. 1872. There is "no identity of substance between the 'Bromo-Caffeine' of chemistry and the 'Bromo-Caffeine' prepared as a medicine by the plaintiffs. The former is a worthless medical compound, while the latter is a valuable medicine." For this reason it was a valid trade-mark.[1]

§ 857. A right to the symbol is inseparable from the right to sell the commodity. A trade-mark may pass with sale of the good-will;[2] and a trade-mark affixed to articles manufactured at a particular place may lawfully be sold with the establishment, though it consists simply of the name of the vendor;[3] but a manufacturer cannot claim as a trade-mark exclusive use of his own name as against another bearing the same name, and whose business is conducted in the same place.[4]

§ 858. A trader is not entitled to pass off his goods as those of another, by selling them under a certain name, although in its primary meaning that name is merely a true description of the goods.[5]

[1] Keasbey *et al.* *v.* Brooklyn Chemical Works, 37 N. E. 476.

[2] Atlantic Milling Co. *v.* Robinson, 20 F. 217.

[3] Dant *v.* Head (Ky.), 13 S. W. 1073.

[4] El Modelo Cigar Mfg. Co. *v.* Gato (Fla.), 7 So. 23. (See §§ 819 and 822 on same subject.)

[5] Reddeway *v.* Banham (H. L. E. 1896), A. C. 199; 65 L. J. Q. B. N. S. 381; 74 L. T. Rep. 289.

§ 859. The whole name of the registrant of a trade-mark containing his own name need not appear on the trade-mark, nor need the whole name of each partner in the firm, or the whole name of the firm, appear on the face of a trade-mark. It is sufficient if the name is used fairly and *bonâ fide* on the face of the trade-mark, in such a way that it cannot be mistaken for anything else than the name of the owner of the trade-mark, and the manufacturer of the goods to which it relates.[1]

§ 860. The Massachusetts Statute of 1889 prohibits a foreign corporation from carrying on banking, mortgage, loan, or trust business, in and under a name previously used by a domestic corporation, so nearly identical as to be misleading. Enjoined.[2]

§ 861. *In re "Magnolia Metal Co.'s"* three trade-marks, Nos. 86,401, 90,573, and 180,551, on a motion to expunge from the register of trade-marks, the objection was made that "Magnolia" was a geographical name. That objection was overruled on appeal before the Lords JJ. Lindley, Lopes, and Rigby, June 3, 1897. *Held*, that the word "Magnolia," applied to anti-friction metal, or "Magnolia Metal," and formerly a purely fancy name, had become merely descriptive of an anti-friction metal, and could not be registered for that reason. It was said by the court that the objection made below, that "Magnolia" is a geographical name, is untenable; although it may coincide with the names of various unimportant places.[3]

§ 862. The letters "W. H. W.," printed in script, in white, in a horizontal line on a red background, on boxes of confectionery, do not infringe a trade-mark registered in the United States Patent Office as "P. C. W.," generally arranged to appear in script, printed in a horizontal line on a background of any suitable color, distinctly stating that other forms of letters may be employed, or that they may be differ-

[1] In re Colman's Trade-Marks, 8 Rep. 208; Id. [1894], 2 Ch. 115.

[2] International Trust Co. *v.* International Loan and Trust Co., 153 Mass. 271.

[3] Court of Appeal, June 3, 1897.

ently arranged, and that the essential features are the letters "P. C. W."[1]

§ 863. In the Court of Riom, 1888 (*Veuve Grouze* v. *Chaput-Aurélhen*), later in the Court of Cassation, was the following case. The Grouze house, important manufacturers of cutlery with an establishment at Thiers, owned a number of trade-marks affixed to products. The plaintiff complained of numerous counterfeits. The defendant responded that he had contented himself in good faith with executing orders for houses in South America only, and that the marks in question did not belong to the Grouze house, but to foreign merchants who had previously adopted them. He showed that, anterior to the registration of the marks in France, they had been duly registered in Buenos Ayres, in the Argentine Republic, which had not a diplomatic convention with France. The defence showed that his employer, the house of Kirchenbilder, Greenway, & Co., had previously adopted the mark, and that defendant had not been guilty of ill faith and fraudulent usurpation. *Held*, that inasmuch as registration in the Argentine Republic cannot take precedence of registrations in France, for lack of such diplomatic convention, therefore the marks of defendant were confiscated, with costs and damages.[2]

§ 864. In the Court of Nîmes, 1881 (*Compagnie de tramways de Nîmes* v. *Fricon*), *held*, inasmuch as the administrative act which authorizes the establishment in said city of a series of tramways, has not conferred the exclusive right of the name of *tramway*, therefore defendant has a right to call his coach "tramway de Nîmes à Bouillargues."[3]

§ 865. In the Court of Paris, 1894 (*Lippcmann & Co.* v. *Arrault*), *held*, on appeal, not to be unfair competition in a merchant to publish, in a prospectus of an official report by a universal exposition, favorable comments on his own wares, while withholding similar praise for like wares of a rival.[4]

[1] Lafeau *v.* Weeks, 177 Pa. 412 ; 34 L. R. A. 172 ; 8 Kulp. 384 ; 3 A. 693.
[2] 34 Annales, 140.
[3] 34 Annales, 37.
[4] 41 Annales, 87.

§ 866. In the Tribunal Correctionnel of the Seine, 1885 (*Fremouze* v. *Lemeslier*), was a case of alleged simulation of a trade-mark. This consisted of two labels affixed to a box containing a pharmaceutical product called "Sirop de dentition du Dr. Delabarre." One label was of rectangular form, occupying the length of the box, and sealing the opening. The other label was divided into three compartments, one bearing a red cross, the other two being distinctive. *Held*, it is a fraudulent imitation of a trade-mark when the aspect of the whole is reproduced for a similar product, when above all the similitude is accentuated by the resemblance of the details. But this was not a case of the kind alleged.[1]

§ 867. In the Court of Paris, 1885 (*Fournier & Co.* v. *Adam et al.*), and in the Court of Cassation, 1886 (*Fournier & Co.* v. *Laas*), it was said that the fraudulent imitation under the Law of 1857 results in the fact that the mark assailed as false, in spite of certain differences of detail, offers in its entire aspect a resemblance to the genuine mark confusing to the eye; especially so when the name of the imitator of the product to which is affixed the counterfeit mark is similar to that found on the genuine label.[2]

§ 868. In the Court of Cassation, 1884 (*Lanman & Kemp* v. *Rigaud*), it was said, that the registration of a mark is intended to create a presumption of property, but that presumption is dispelled when it is shown that the registered mark has fallen into the public domain. The registration that has been effected by a foreigner in virtue of international legislation, notwithstanding such treaty, gives him no rights.[3]

§ 869. *Untrue representations* do not disentitle a trade-mark owner to equitable relief. Statements of complainant on his labels, not strictly accurate, but entirely immaterial, are not such false representations as will operate to the prejudice of the owner of the trade-mark.[4] Leonard Hoff was forbidden to sell an extract manufactured by him as "Hoff's Malt Extract;" but was directed to affix a label

[1] 31 Annales, 17. [2] 31 Annales, 115. [3] 32 Annales, 205.
[4] Tarrant & Co. *v.* Johann Hoff (C. C. A.), 76 F. 959.

showing that said extract was made by *Leonard* Hoff.[1] — Use of the word "Magnetic," in the title "Universal Magnetic Balm," where there was no pretence that the liquid possessed any magnetic qualities, does not show any fraudulent intent to deceive the public, which would deprive plaintiff of right to redress.[2] — The defendant, in the preparation and sale of a medicine, imitated exactly the name of the medicine, the description of it, the direction for its use, and the design of the wrapper used by the plaintiffs. The inner wrapper of plaintiffs' medicine described it as "prepared by Dr. M.," who had originally made it and sold out his interest to plaintiffs, but the outer wrapper described it as prepared by plaintiffs. M. had either assumed, or acquired the title of Doctor. *Held*, that the statements as to its preparation were not a fraud on the public, and constituted no defence in a suit by plaintiffs to enjoin such use by defendant.[3] — The trade-mark of plaintiff, a piano manufacturer, was "Weber, New York." *Held*, that an injunction *pendente lite* against the defendant from putting on his pianos the word "Webster, New York," was rightly refused, there being nothing to show any intention by defendant to sell pianos as the pianos made by plaintiff, or that the use of the word "Webster" had deceived any one.[4] — Where the wrapper used by plaintiff for his soap contains the words "Blizzard Soap," within an octagonal figure, in letters covered with snow, and the plaintiff's name and address in another octagonal figure, and the picture of the Brooklyn Bridge during a blizzard; and the wrapper used by the defendant for his soap contains two octagonal figures, and the words "Leader Soap," in close-cut block letters, and presents a scene in which the air is filled with snow, and contains defendant's name and address, and a picture of his factory, — the similarity of his label is not sufficient to deceive the public.[5]

[1] Tarrant & Co. *v.* Johann Hoff (C. C. A), 76 F. 959.
[2] D. Ransom, Son & Co. *v.* Ball, 7 N. Y. S. 238.
[3] Ibid.
[4] Foster *v.* Webster Piano Co., 13 N. Y. S. 338; 59 Hun, 624.
[5] Brown *v.* Descher (N. Y. App.), 42 N. E. 268; 147 N. Y. 647.

§ 870. If a person sells his goods with the intention of inducing the public to believe that his goods are the goods of another, this is actionable; and entitles the latter to nominal damages, even though no special damage is proved. If an article has acquired a distinctive meaning in the trade, connecting it with a particular person's manufacture, and another advertises and describes, or makes up his goods so as to lead purchasers to believe, or to create a probability of their believing that they are buying the goods of the former, when in fact they are buying the goods of the latter, and this though there is no intention to deceive, and no special damage is proved, a court of equity will grant relief by way of injunction. The fraudulent intention is essential in the first case; it is unnecessary in the second.[1] — The use of the name "Yorkshire Relish," long employed by the maker of a sauce under a secret recipe, or a similar, but not identical sauce in similar bottles, in connection with the name of another maker, is not justified when the consumer may be misled into supposing that it is the genuine article.[2] — The complainant, a brewer of St. Louis, made and exported to Panama and South American ports beer in bottles with a label bearing the words "St. Louis Lager Beer." Defendant, shipper of beer from New York City, and a competitor in trade in Panama and other places in South America, labelled his bottles "St. Louis Lager Beer." *Held*, that although complainant could not have an exclusive property in the words "St. Louis Lager Beer," yet as his beer had always been made at that city, the designation on his labels was legitimate. Those of defendant quite to the contrary.[3]

§ 871. Defendant was importing and selling in this country the water of a certain mineral spring of Hungary, owned by Andreas Saxlehner, who had christened said water as "Hunyadi Janos." Defendant's exclusive right, which was under a contract, was questioned. His defence was that he

[1] Reddeway *v.* Bentham Hemp-Spinning Co. [1892], 2 Q. B. 639.

[2] Powell *v.* Birmingham Vinegar Co. (C. A.) [1896], 2 Ch. 54; 65 L. J. Ch. N. S. 563; 74 Law T. Rep. 509.

[3] Anheuser-Busch Brewing Ass'n *v.* Piza, 24 F. 149.

could use the name, as he did it honestly, and had a right to sell. It was *held:* that it is not material whether he was actuated by a desire to annoy the complainant, or to promote his own pecuniary interests.[1]

§ 872. A statement in a label that the contents of a package is "Chickorien Kaffee aus des Fabrick von E. B. M. & Co., in Roulers" (Belgian), is misleading and unfair, when the only thing done in the place indicated is to "harvest" the chicory root.[2]

1 Apollinaris Co. *v.* Scherr, 27 F. 18. (The respective counsel were Roscoe Conkling, for complainant, and Wayne McVeigh, for defendants.)

2 Scheuer *v.* Muller (C. C. A.), 74 F. 225; 20 C. C. A. 161.

CHAPTER IX.

MISCELLANEOUS PRACTICE (*continued*).

§ 873. "J O B," trade-mark for cigarettes, infringement of, at Stamboul.
§ 874. Lapsed trade-mark registration in Turkey.
§ 875. Ribbon infringement case in Barcelona, Spain.
§ 876. "Candilon," trade-name of house in Madrid.
§ 877. "Monopole," trade-mark for champagne, infringed in Switzerland.
§ 878. Richard Wagner trade-mark case in Austria.
§ 879. "Montebello," name of noble family as a wine-mark.
§ 880. Fictitious mark for wines under German law.
§ 881. "Grande Chartreuse" marks in Switzerland and Italy.
§ 882. Russian remarkable decision as to trade-mark.
§ 883. Swedish case — Benedictine "Munk Likör."
§ 884. Egypt — Mixed Tribunal judgment on trade-name.
§ 885. "Millennium" registration case in Austria.
§ 886. "The Saratoga," name for saloon.
§ 887. "Elastic Starch" case.
§ 888. "Matzoon" trade-mark, term in Armenian language.
§ 889. "Mazawattee," trade-mark word compounded from the Hindoo, Singhalese, etc.
§ 890. Canadian liquor trade-mark case.
§ 891. Violation of trade-mark by printing for third party.
§ 892. Supreme Court of Rome — Lenient view of trade-mark piracy.
§ 893. Foreigner in France, no more right to trade-mark than native.
§ 894. "Kneipp Malt Coffee" decision.
§ 895. "Columbia" tissue paper trade-mark litigation.
§ 896. "Aromatic Cocktail Bitters" case.
§ 897. "Poland Spring Water" case.
§ 898. Saxlehner's "Hunyadi János" case.
§ 899. Unfair competition by disparagement.
§ 900. Ehrmann's registrations, refusal of.
§ 901. Infringement of trade-mark "Oval Blue."
§ 902. Exclusive title to words not allowed to certain publications.
§ 903. "Compactum," as name for umbrellas, contested.
§ 904. "Kynite" allowed as trade-mark for an explosive.
§ 905. "Vitascope," contest over name of.
§ 906. "Red Cross" (Greek) not infringed by Maltese cross.

§ 907. "Chicago Waists," as an exclusive designation of origin, — when.
§ 908. "Linotype Company's" right to its trade-name.
§ 909. Hostetter's Bitters, imitation and infringement of.
§ 910. Affixing owner's mark without authority, illicit.
§ 911. Cases under German law, Section 4, May 12, 1894.

§ 873. In February, 1895, the Tribunal of Commerce of Stamboul, presided over by Tevfik Bey, rendered a judgment as to paper for cigarettes bearing the trade-mark "J O B." The printing establishment of *Xénophon Nomisinatidis* at Stamboul, who manufactured the labels and the paper, had been complained of by the representative of the owner. A domiciliary visit had ended in the seizure of several reams of the stamped paper. The culprit was condemned in damages and costs (*Moniteur Oriental*).[1]

§ 874. Recently, in the Tribunal of Commerce, of Constantinople, was the case of the trade-mark of the Count Thurn. The steel works of the Count at Streitleben had registered in Turkey, twenty years ago, a mark which is protected everywhere generally. The renewal of the deposit was accidentally omitted at the expiration of the statutory time of protection. A Greek profited by the circumstance to deposit in his own name the mark of the works in question, after which he interdicted the use of it in Turkey by the true owner; and he had confiscated the merchandise imported by the Count Thurn. A long suit sprang up before the tribunal above named. It ended by a judgment that the simple fact of having deposited a mark does not suffice to assure the proprietorship, but the registrant should be the veritable owner of the trade-mark. A registration obtained by one not the true owner is null and void. The Greek had deposited as a mark an anchor, accompanied by a written statement which was false, and which applied only to the mark of Count Thurn. The judgment directed the annulment of the registration made by the Greek, and ordered the false record to be erased. The defendant was

[1] La Propriété Industrielle, 1897, p. 180.
See also § 398, Browne on Trade-Marks, which gives a history of "J O B Paper," and of the origin of the trade-mark.

condemned to pay the costs of the suit, and 1000 Turkish *livres* per year, from the date of the formulated protestation by the injured party to the date of the erasure of the falsely obtained mark.[1]

§ 875. In Spain (Section of the Government for the Protection of Trade-marks, of the Council of State, April 16, 1895), the house of *Garriga y Valls*, of Barcelona,[2] had deposited six trade-marks for ribbons of all kinds; and a notice concerning the registration had been published by the Administration in the *Boletin Oficiale.* Señor *Felipe Campo*, also of Barcelona, demanded that the registration should be refused for five of these marks, in view of their resemblance to those of the opponent, registered by him for ribbons of thread, of silk, and of cotton. The Administration agreed with Señor Campo as to two of the marks, and allowed the others to stand. Campo appealed to the Council of State. Of the trade-marks in question belonging to the Maison Garriga y Valls, one of them has for a central part a sun placed in the centre of a frame in the form of a lozenge. About the lozenge floats a ribbon containing the indication of the street and the number of the establishment. Above the mark is found the commercial name of the house, in ornate letters disposed in the form of a horse-shoe. Below is the name "Barcelona," in the arc of a circle open near the top, and lower, in letters in a straight line, the year of the foundation of the house; from the sun spread rays prolonged to the horse-shoe. The corresponding marks of the new depositors distinguish themselves in the fact that the sun is substituted by an oval containing a *caduceus*, and in which the lozenge gives place to a frame-work in broken lines. The general proportions produce in the mark an effect equivalent to the aspect of the lozenge on the others. All the parts of the two marks exactly correspond, — the ribbon with the address, even the inscriptions, and the rays parting from the centre above, and the inscription on the horse-shoe, below the word "Barcelona." There are the same characters for the inscriptions, which are varied only by the commercial names, the names of the streets,

[1] La Propriété Industrielle, 1897, p. 94.

[2] Ibid. 1896, p. 74.

and the numbers of the two establishments, and the dates of the foundation of the two houses; there are the same colors and the same general appearance. Two others of the contesting marks differ in various aspects. A prominent feature is the representation of the celebrated Virgin of Montserrat, resting on a foundation of rocks of the characteristic mountain of the name. In refusing these last, the Administration is not less guided by the resemblance than by the first, regard being had to the danger of confusion of another nature, to wit, the inducement given to the public to accept the packages with the picture delineations for those of the legitimate trade emblem.

The Section of the Council of State having the matter in charge, decided against the opponents of registration, and pronounced in favor of the registration of the contested marks. After an attentive examination, it concluded that the mark of the "Caduceus" and the "Virgin of Montserrat" do not resemble the sun and the "Virgin of Montserrat," registered by Felipe Campo. It said that it is not necessary to strive to establish the essential differences in the conflicting marks by bringing them directly under the eye, as the variations in the essential features are such as not to require a minute analysis; and the descriptions filed confirm this opinion. (A lengthy exception to, and weighty criticism of, the reasons assigned for making this decision follow the report of the case in the official journal (*La Propriété Industrielle*), which criticism reflects the sentiments on the law of this subject, of the principal nations of the world, united under the Treaty of 1883. This journal says substantially, in relation to the foregoing decision, that the ruling in this case supposes that every purchaser will make a minute and detailed examination, without having the conflicting marks simultaneously under inspection; for, in fact, the decision is in derogation of well-established rulings on the subject.)

§ 876. In the Supreme Court of Madrid (Spain), April 22, 1895, was presented the case of *D. Carlos Wicht* v. *Budia Brothers.* Wacht is owner of a trade-mark adopted for the use of his house of commerce, known as "El Candilon." The defendants, in their neighboring house, had inscribed on

the glass of their windows the word "Candilon," to announce the sale of certain objects of crystal of a special fabrication. Suit was brought by Wicht for restraint. It was *held*, that the act was not calculated to lead purchasers into error and to create confusion between the houses of the parties to the suit, nor to injure the industrial property of the plaintiff, as the word Candilon is a simple designation of the house of commerce of the plaintiff, and in its use by the defendants it designates only certain objects offered for sale by them.[1]

§ 877. In Switzerland, in the Tribunal Fédéral, December 7, 1895 (*Walbaum Luling, Goulden & Co.* v. *Carl Hahn*), the following case was determined:[2]

The term "Monopole" is a denomination of fancy, which, after the Federal law of 1890, as also the French law (June 23, 1857), is constituted a trade-mark. — After a foreign mark has been registered in Switzerland, it is presumed that all the conditions precedent for registration have been complied with. — In June, 1886, the house of Heidsieck & Co., at Rheims, deposited in the Federal Bureau several marks for Champagne wines. With a single exception, they contained the word "Monopole," sometimes employed alone, at other times accompanied with the words "sec" or "dry," or of the firm-name, Heidsieck & Co. In February, 1890, Walbaum Luling, Goulden & Co., successors of Heidsieck & Co., modified their names, and had deposited new marks. September 29, 1894, Carl Hahn, then lately established at Basle, began the manipulation of *Vins Mousseux*, denominated wines of Champagne. He sold and delivered to A. Jeltsah-Heinzmann, at Basle, certain bottles of said wine. He himself had received the wine from one Rabenecker, of Coswiz, Saxony, who by Hahn's order had affixed to the bottles "Monopole" — "Jourdain frères, Rheims." There was no such house in Rheims. The wine was German, and of inferior quality. Walbaum Luling, Goulden & Co., who had seen one of the bottles sold to Jeltsah-Heinzmann, made complaint against Hahn. The defence was that "Monopole," a part of the mark of complainants, indicated mere quality, and that he

[1] La Propriété Industrielle, 1896, p. 127. [2] Ibid. 1896, p. 148.

had not counterfeited the mark. — The complainants had registered their marks in Switzerland, under the treaty between the latter country and France, February 23, 1882, and of the International Convention of March 20, 1883. It was established that the marks were protected in France. The defendant insisted that no person could claim the exclusive use of the words of a general sense as "fin," or of the words "*première qualité*," or of words to express a mode or place of fabrication, etc. The judgment of the Court of Appeal of Bach-Ville was affirmed, and the defendant was adjudged to pay costs and damages.[1]

§ 878. The Ministry of Justice, of Austria, on December 31, 1895, thus decided: A Viennese merchant, of the name of Richard Wagner,[2] had registered in his name a trade-mark consisting exclusively in the portrait of his namesake, the poet-musician of Bayreuth, accompanied by the notice, "Mark registered." The wife and the son of the composer brought suit before the Ministry of Commerce, demanding the erasure of this mark. The decision of the Ministry was thus rendered: The demand is not granted, and the mark attacked is maintained in vigor for the reason that the action for erasure has no basis in the provisions of the law. The 10th section of the law of trade-marks is limited to interdict the use of a name of a producer, or of a merchant, made by the defendant without the consent of the party in interest, and does not contain, absolutely, a disposition forbidding the user, made under similar circumstances, of a private person.

§ 879. In the Court of Appeal of Paris (1st Cham.), January 2, 1896, the case of *Consorts de Montebello* v. *Epoux de Juge*[3] was heard. The Duke Napoleon de Montebello, Alfred de Montebello, and Gustave de Montebello, all three sons of the Marshal Lannes, first Duke of Montebello, founded, under the firm-name of "*Alfred de Montebello et Cie.*," an establishment for the exploitation of the demesne of Mareuil-sur-Ay, for the culture of grapes, and the sale of wines of Champagne. By the terms of the constituent act, it is provided that all the wines

[1] La Propriété Industrielle, 1896, p. 148.
[2] Ibid. 1896, p. 80.
[3] Ibid. 1896, p. 140.

of the concern shall bear a seal inscribed with the name and title and the arms of the Duke of Montebello, which seal was to be the property of the firm, never to be used but by a member of the family bearing the name of the chief of the name of Montebello, or of a branch of the firm, of which it (the family) shall be the agent. The firm was established on the sixth of April, 1836, and reorganized in 1880. This case came up from the Tribunal of Commerce of Rheims, and had been defended there by the descendants and actual representatives of the three sons of Marshal Lannes.

Considering that the Dame de Juge, assisted by her husband, and acting in the capacity of *tutrice* (or guardian) of Napoleon-Barbe-Joseph-Jean Lannes, Duke of Montebello, a minor son, alleged that the firm Alfred de Montebello has not the right to use the title of the Duke of Montebello and his armorial bearings, as commercial marks, and demanded the annulling of every claim of said firm to such use. *Held*, that the right of the claimant below was properly refused. A title of nobility in commerce may, with the name, designate the product of merchandise as a trade-mark therefor. Conceding, indeed, that titles of nobility — despoiled to-day of every feudal privilege, and at the same time of every right accorded to rank — have only a personal character, and are simply honorary; and that in a judicial sense they are a complement of patronymic formality the better to distinguish persons. Although there is a right to the protection of the title, there cannot be conceded to it a special and privileged protection. . . . Conceding that the incorporation of the concern has existed ever since 1836, and that the title became popularized into a trade-mark, the title and name become simply elements of such trade-mark, and such mark constitutes a distinct right protected under the rules governing such property. . . . The claim below, against the Montebello firm, is disallowed, with costs.

§ 880. In the Landgericht of Strasbourg (Crim. Cham.), February 19, 1896, an accusation was made under the German trade-mark law, based on the fact that the defendant (tenant of the principal restaurant of the International Exposition of

Strasbourg) had put on sale in his restaurant *Vins Mousseux*, while the wine cards and the labels on the bottles were falsely furnished with the name of a locality, as well as an erroneous statement as to the value and quality of the merchandise. Fined one hundred and fifty marks. . . . The wine bore the name of Champagne in red, and indicated a certain number of sparkling German wines, and a species of foaming cider. The French wines indicated bore a number of names of wide reputation, as Heidsieck, Moët et Chandon, Pommery Greus, etc.[1]

§ 881. In the Court of Justice in Geneva, June 13, 1896, was considered the case of *Grézier* (director) v. *Bonnet et al.*[2] Grézier, residing at the Grande Chartreuse (Isère), demanded of the court the authority to seize, in the hands of Bonnet & Company, merchants at Geneva, bottles, labels, and notices bearing the inscription "Véritable liqueur fabriquée au Grande Chartreuse de Pavie Giraud, Ignace-Marie, directeur." Grézier had registered the several marks of his house in France and in Switzerland, and the adverse label had also been registered in Switzerland. In Italy, the claim of Grézier had been repulsed in a suit in the Tribunal of Pavia, and by the Court of Appeal of Milan, which held that the act of Giraud was not illicit,* and that, as his labels differed in form and color from those of Grézier; that the bottles are of different form; that the inscriptions thereon indicate that the liqueur is fabricated at Pavia; that these are elements which show that all possibility of confusion is prevented thereby. The circumstance of the employment of the word "Chartreuse," or "Grande Chartreuse," does not constitute a contravention of the law. The decision of the Court of Appeal was further considered in the Court of Cassation of Turin, which adhered thereto. In Switzerland, appeal was taken to the Tribunal Fédéral (1st Section), October 10, 1896. The latter court confirmed the judgment of the Court of Justice of Geneva, which judgment was in favor of Grézier, the director of the Grande Chartreuse,

[1] La Propriété Industrielle, 1896, p. 74. [2] Ibid. 1897, p. 61.

* There does not exist in Italy a law protecting names of men, or localities, as portions of trade-marks.

with costs. (Notes from the *Journal des Tribunaux*, tell that Giraud installed his manufactory in the Chartreuse of Pavia, which is a national monument, and is not used for industrial purposes. The intimation that he is a successor of the ancient monks, and will continue the simple fabrication of the liqueur, is deprived of all serious foundation. He has not designated the Chartreuse de Pavia under its Italian name, but under the French. The liqueur made by him is of the same color as that of the genuine Chartreuse. All the circumstances indicate an intention to deceive. Even the words "of Pavia" are placed in small, inconspicuous characters.) *

§ 882. In St. Petersburg (Russia), June 26, 1896, a prosecution was instituted against *Iwan Borodine*, for affixing on his merchandise trade-mark labels similar to those of the merchant *Henry Sturm*, on the complaint of the latter.[1] The subject-matter was vinegar, of which 100 bottles were seized by the police. The defence was that there was no resemblance calculated to deceive, and that the inscriptions were different. The defendant also alleged that his labels had been made, and the design had been chosen by a printer named Fieldmann, to whom he had not given explicit orders for form, but left that to the said printer. An expert deposed that he found little if any resemblance, and a number of witnesses concurred with him. The inscriptions on B.'s labels bore his name and also the denomination "Naturel." On those of Sturm were the words "Of the table." The colors of the labels were also different. The magistrate *held*, that all this demonstrates plainly a lack of imitation, and that the affixing of the same on the merchandise of B. was not fraudulent, and cannot injure the interests of S. No falsification was proved, but the case rested solely on the somewhat remote resemblance of

* By looking at §§ 407, 409, 410, and 582 of the book of which this is a supplement, may be found citations of suits involving the title of Liqueur de Chartreuse, a few of the very many contentions to which the monks of the Grande Chartreuse have been subjected. Although in France the law relating to the subject is well defined, the strife in other countries has been vexatious, avarice and chicanery having been aided by the contrarieties of the laws of the respective nations.

[1] La Propriété Industrielle, 1897, p. 10.

the labels. The criminal charge was dismissed, leaving without examination the right to a civil action to be brought by Sturm. (*La Propriété Industrielle*, 1897, p. 10, says that the decision of the magistrate was quite erroneous as to form, and is open to criticism. It is only to be regretted that the magistrate found himself favorably inclined to acquit, a tendency which unfortunately is too deeply rooted in the practice of the Russian Tribunals; when a choice is given between acquittal and punishment, for what may be deemed a mild offence, the punishment being generally for a short term. The writer speaks of having instituted a comparison between the labels in controversy, and of having established an imitation almost servile, as to ornaments and disposition of the inscriptions. He asks, "What difference is there for an illiterate purchaser to discriminate between 'Vinaigre de table' and 'Vinaigre Naturel,' borne on labels of the same form and character?" On appeal by Sturm, to the Assembly of Judges of the Peace of St. Petersburg, it was said: It is not proved that the labels of Sturm have served as models for imitation for those of Borodine. He had no knowledge of the exclusive right of Sturm, by reason of the registration made by S., nor proof that B. had acted with a guilty knowledge.)

§ 883. The Tribunal of First Instance, of Stockholm (Sweden), had the following case under consideration: *La Société Anon. des Benedictines de Fécamp* v. *Skandinevіska Benedictine Kompaniet*.[1] La Société des Benedictines de Fécamp had adopted for the Scandinavian countries a trade-mark analogous to that employed for use in other countries, containing certain principal designations of "Benedictine" and other denominations of fancy, including the words "Munk Likör" (*liqueur* of the monks). This was registered in Sweden, July 8, 1885. For several years before this suit, the *Skandinevіska* (etc.), having its seat at Stockholm, made a liqueur which it sold under labels containing the words "Benedictine," "Munk Likör," etc. The product was sold by the Swedish concern in bottles, labelled with diverse bands, with the mode of corking similar to that of the plaintiff con-

[1] La Propriété Industrielle, 1896, p. 129.

cern. In six suits that were brought, five of them were decided in favor of the plaintiff. The sixth chamber *held*, that the words "Munk" and "Munk Likör" were not illicit, and did not conflict with the genuine. In the successful suits 300 crowns (420 francs) were awarded.

§ 884. In the Mixed Tribunal of First Instance, at Alexandria, Egypt, June 20, 1896, was this case: *Cutlers' Company of Sheffield* v. *Levy and Cohen, Back and Co.*[1] The Count della Chiesa, as presiding judge, gave a decree authorizing the seizure of objects of cutlery fraudulently marked with the word "Sheffield," and of other distinctive words belonging to the Cutlers' Company. (It will thus be seen that the Mixed Tribunal protects trade-marks indicating origin.)

§ 885. Decision of the Minister of Commerce (Austria), October 8, 1896. The question was the removal from registration of certain trade-marks for matches. No. 658 consisted in the words "*Millennium Ezredéves*," registered August 28, 1895. The registrant demanded the erasure of the mark "*Millennium*," registered in favor of P. & Co., No. 379, September 9, 1895. Defendants made a counter-attack looking to the erasure of the mark 658, as constituting a counterpart of their mark 329, registered April 30, 1895. This last mark is composed of a ribbon displaying the ends, and showing the word "Millennium." This was registered before the law of July 30, 1895, went into force, after verbal marks on products were in all forms possible, and not only the figurative forms under which they had been deposited. S., the owner of the mark 658, registered under the new law, said that it was now a mark verbal, and that the mark 329, of P. & Co., should be construed as a figurative mark, having been registered under the old law. A verbal mark and a figurative mark, he contended, could not come into collision; it therefore results that the anteriority of 329 cannot be opposed to Ezredéves, and that therefore 658 should have priority over 379 of P. & Co., the two marks being of the same nature. The Minister of Commerce was not of the same opinion citing § 3, No. 2, of the law of 1890, which excludes

[1] La Propriété Industrielle, 1896, p. 113.

from protection of composite merchandise certain exceptions from protection as trade-marks: "Armorial bearings of States, or other armorial bearings, of letters, or of words." But this does not hinder the introduction of words as integral parts of figurative marks; and the words composed in such marks should fully enjoy the protection of the figurative elements of the latter. "Now, it is the word '*Millennium*' which gives to the figurative mark its characteristic seal, as it also constitutes the principal part of the verbal mark 658, which consists in the words *Millennium Ezredéves*. The characteristic word being the same in the two marks, a danger results therefrom of confusion to ordinary purchasers. In consequence, the Minister of Commerce has decided on the erasure of 658, which thereby renders unnecessary the erasure of 379."[1]

§ 886. A saloon having been conducted for thirty-five years under the name of "The Saratoga," that name becomes a trade-name rather than the name of the building, and may be protected in use on removal to another location.[2]

§ 887. A label on which appears, on a white background in red and black letters, an advertisement of "Elastic Starch," made by the H. Company, with a large, red, prominent cut of a flatiron, used as a trade-mark for starch, is not infringed by another label, used as a trade-mark for starch, bearing on a red background, in white, yellow, and black letters, an advertisement of "E.'s New Process Starch," with a picture of a colored woman holding up prominently a freshly ironed shirt, underneath which, on a table, appears a small flatiron.[3]

§ 888. "Matzoon," a term in the Armenian language meaning "fermented milk," will be protected as a trade-mark for one who has used it for many years for such article.[4]

§ 889. The fact that a word conveys an idea of the East generally, does not justify the court in holding that a trade-mark is not valid as being geographical, or as referring to a

[1] La Propriété Industrielle, 1897, p. 41.
[2] Dewitt *v.* Mathey (Ky.), 35 S. W. 1113.
[3] J. C. Hubinger Bros. Co. *v.* Eddy (C. C.), 74 F. 551.
[4] Dadirrian *v.* Theodorian (Sup.), 37 N. Y. S. 611; 15 Misc. R. 300.

particular locality, or to the quality or character of the goods, in the class in which it is registered.[1] — "Mazawattee," a compound of the Hindostani "Mazadhar," luscious, and Singhalese "wattee," growth, or garden, as applied to tea or coffee, is neither descriptive of the character or local origin of the goods, nor deceptive, inasmuch as it conveys no meaning to Englishmen, or to any class of Englishmen, or to a Hindoo, or to a Singhalese.[2]

§ 890. In plaintiff's application, the trade-mark was claimed to consist of a device of an anchor in combination with the letters "J. D. K. & Z." branded or stamped on barrels, etc., containing an article sold by the applicants. It was also stated in the application that on bottles was to be affixed a label shaped like a heart, a *fac-simile* of which was attached to the application, but no express claim to the label itself, as a trade-mark, was made. The defendant's trade-mark consisted of a heart-shaped label, with an eagle in the centre, having at its feet the letters "V. D. W. & Co.," and medals on each side. *Held*, that the shape of the label did not form a feature of plaintiff's trade-mark, and therefore defendant's label was not an infringement.[3]

§ 891. Where a party, unwittingly violating a trade-mark by printing labels ordered by a third party, on being notified of the infringement promised to desist from further printing, and offered to surrender the lithograph stone, but an injunction suit was nevertheless brought, the complainant should pay his own costs.[4]

§ 892. The Court of Cassation of Rome, Italy, rendered a decision on January 20, 1897, as follows: Several persons had put on sale indigenous petroleum, originating in the Refinery of Fiorenzuola d'Arda, bearing the fanciful names of American proprietors, as follows: "*Atlantic*," "*Splendor*," and "*Royal*," which had been registered in Italy by the for-

[1] *In re* Densham's Trade-Marks [1895], 2 Ch. 176; 12 Reports, 283.

[2] Ibid.

[3] De Kuyper *v.* Van Dulken, 24 Can. S. C. R. 114; Van Dulken *v.* De Kuyper, Id.

[4] Bass, Ratcliff & Gretten *v.* Guggenheimer (C. C.), 69 F. 271.

eign owners. The case came up from the Court of Parma, which had acquitted the defendants, because it was not deemed that an intention to deceive purchasers had been proved; and it at the same time declared the absence of any culpable act, because the sales were made with the declaration that they covered indigenous petroleum. The Court of Cassation rejected the charge of the public ministry, basing its decision principally on the circumstance that no fraud had been shown in fact, and affirmed the judgment of acquittal. It did not take into consideration the presumable fact that declarations of the first vendors, to ward off suspicion, would not be circulated among subsequent purchasers, but that the marks themselves would naturally beget confusion and fraud.[1]

§ 893. In the Tribune of Commerce of the Seine, March 20, 1897, *Hugo Schneider* v. *Boisson et al.*,[2] it was *held*, that in trade-mark matters a foreigner has no more right than a private citizen. Consequently, when a foreigner prosecutes a Frenchman for counterfeiting a registered mark of which said foreigner claims the ownership, he is held to prove, as a condition-precedent, that in his own country he has the exclusive right to said trade-mark. Consequently, he should be denied redress when it is found that in his own country (in this instance Germany) his mark has been erased from registration for lack of renewal of deposit. In the interval between the two deposits of his mark, during which it fell into the public domain, it was counterfeited. Hugo Schneider was condemned to pay all the costs and expenses (*Gazette de Paris*).

§ 894. The U. S. Circuit Court of Appeals for the Seventh Circuit, in May, 1897, on appeal from the C. C., U. S., N. Dist., Ill., decided the case of *Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung & Kneipp Malt Food Company* v. *The Pastor Kneipp Medicine Company*.[3] A bill in equity was filed in the court below by the appellants, to restrain the use by defendant of certain trade-marks or trade-names, "Kneipp

[1] La Propriété Industrielle, 1897, p. 178
[2] Ibid. 1897, p. 79.
[3] 82 F., C. C. A. 321.

Malt Coffee," "Kneipp Coffee," and "Kneipp Malz Kaffee," and to restrain the use of the picture and signature of the Rev. Father Sebastian Kneipp in connection with Malt Coffee, either on packages, or in advertisements, or announcements. . . . Sebastian Kneipp, a resident of Bavaria, and a priest, had interested himself in the subject of health, and had devised and formulated a system of dietetics, health preservatives, hygienic food, and sanatives, which he had explained and expounded through addresses, lectures, pamphlets, and books. Among other things, he deprecated the use of coffee, asserting it to be a deleterious beverage, and advocated as a substitute a drink prepared from roasted malt. The complainant firm placed the products on the market with the knowledge, consent, and approval of Father Kneipp, and designated this product as "Kathreiner's Kneipp Malzkaffee." They obtained for themselves, successors, and licensees, the right of so designating the product, and of the use of Father Kneipp's name, and the sole right to place on every package the portrait and *fac-simile* signature of Father Kneipp. The product became widely known in many countries, and the name, signature, etc., have been registered in connection with the same, in this as well as in almost every other important country. . . .

In April, 1892, John Blocki and Edward Heller, of Chicago, who had for a short time theretofore conducted a drug business at Chicago, and incorporated themselves, under the law of the State of Illinois, as "Pastor Kneipp Medicine Co.," and began the manufacture of medicines and articles recommended by Father Kneipp, without his consent or license. This corporation also manufacture and sell a malt coffee labelled "Kneipp Coffee," and which contains the portrait and the *fac-simile* signature of Father Kneipp. . . . The bill was dismissed below, and an appeal taken. The appellate court said, *inter alia:* "Upon the record we are constrained to believe that the Pastor Kneipp Medicine Company, the appellee, was 'conceived in sin and brought forth in iniquity;' that wrong attended at its birth, and that fraud stood sponsor at its christening, imposing upon the corporate child a name to which it was not entitled, and which it had no right to bear.

. . . Without dispute, the present German proprietor, one of the appellants, has the exclusive right, so far as the Rev. Father Kneipp could grant it, to the use of his name, portrait, and *fac-simile* signature in connection with the sale of malt coffee. . . . Craft and cunning, discerning the value of the product, and the profit to be acquired, would, at the inception of the business, flood the market with spurious and cheaper articles, or preparations of the similitude of the genuine, and strangle the trade in the genuine at its birth." . . . (The court cited well-known cases to show that the proprietor is entitled to protection from the time of beginning the use of the trade-mark.)

The order, or decree appealed from, was reversed, and the cause remanded to the court below, with directions to issue the writ of injunction as prayed for.

§ 895. U. S. Circuit Court, District of N. J. *Morgan Envelope Co.* v. *D. S. Walton et al.*[1] — The complainant filed its bill, setting out that for more than ten years last past, continuously, it had manufactured a superior quality of tissue-paper, which has been known, identified, and called for as "Columbia," and which is known and referred to by such designation, "Columbia," in connection with a symbolic or allegorical representation of Columbia, and charging the defendants with the use of a similar design upon their wrappers of tissue-paper, in contravention of complainant's rights, and in such manner as to constitute an unfair and fraudulent competition in business, and asking for an injunction to restrain the defendants from making use of said wrapper, or label, or any colorable imitation, in connection with tissue-paper not made by complainant. The defendants filed a cross-bill asking for the same relief against complainant. In 1883 the defendants were manufacturers of tissue-paper, which, without other distinguishing mark, they placed upon the market, labelled "Columbia," and since have continued to so label and sell it; that it has been known to the trade, and has been called for as Columbia paper; that in 1885 or 1886 the complainant, being like manufacturers of tissue-paper,

[1] xxii. Trade-Mark Record, 8.

adopted and placed upon their produce, without other distinguishing mark, a figure of the goddess Columbia, with the name Columbia upon the shield, and the letters "Columbia" upon the sides of the package, which paper has also been known to the trade and called for by the name "Columbia;" that in 1893 the defendants were induced to place upon their package a figure of Columbia, which is similar in all respects to that used by complainant. It cannot be said that Walton & Company acquired a technical trade-mark in the word "Columbia," in view of the decision of *Columbia Mills Company* v. *Alcorn*, 150 U. S. 460, but that they were the first persons, so far as the record shows, to apply the word to this article of production cannot be disputed. By such application and continued use, their paper became known to the trade and the public generally; it acquired a reputation for quality, and the name was a distinctive mark of excellence. The figure of "Columbia," afterwards added by complainant, cannot be regarded as more than a mere amplification of the word Columbia previously appropriated; and it conveys no further or other idea than the word, and can be regarded only as a different way of expressing it. . . . *Held*, the prayer of the complainants' bill will be denied; and an injunction granted to the defendants on their cross-bill, as prayed for.

§ 896. In the Supreme Court of Louisiana, May 10, 1897, was considered *Handy et al.* v. *Commander*.[1]

Per curiam: "Plaintiffs claiming to be sole and exclusive owners of a certain trade-mark which they adopted in 1893, and have since used, to distinguish their 'Aromatic Cocktail Bitters,' and to which they have at all times had the exclusive right of use, and alleging that the defendant has been guilty of an infringement thereof, prayed for a writ of injunction against him and his agents and employés from further using or attempting to use the same, directly or indirectly, or any trade-mark of similar design or device. . . . They also alleged a resulting injury from said infringement, and prayed for compensatory damages in the sum of $2,500. On the trial there was judgment pronounced in favor of the plaintiffs for $450

[1] 22 S. 230.

damages, perpetuating the injunction, and defendant prosecutes this appeal, after making an unsuccessful effort to have a new trial. . . . Defendant, Commander, was in plaintiffs' employ for several years; and, while his services were thus engaged and paid for by the plaintiffs, he learned the aforesaid formula for their Aromatic Cocktail Bitters. Commander left plaintiffs' employ in 1893, and soon after set up a rival establishment for the manufacture and sale of their aforesaid Aromatic Cocktail Bitters, and put the same on the market through solicitors and canvassers, under Handy & Co.'s trade-mark, and thereby did all in his power to deceive the public into the belief that he was selling plaintiffs' Aromatic Cocktail Bitters. In size, style, color, lettering, and execution, and word for word, not a point of difference exists between the trade-mark of Handy & Co. and the trade-mark thus put forth by Commander, except that the latter is styled 'Commander's Bitters,' while the former is styled 'Handy's Bitters.' . . . From a casual inspection, it is readily perceived that the two are identical in design and phraseology, and only differing in the name of the proprietors and their respective places of business. . . . The rule of law is universal that a *bona fide* possessor, presumably the owner, is not required to prove title as against a mere trespasser. Judgment affirmed."

§ 897. In the Supreme Judicial Court of Maine, June 2, 1897, the case of *Ricker et al.* v. *Portland & R. F. Ry.*[1] was heard on appeal. The plaintiffs alleged, in their bill praying for an injunction, that the use of the word "Poland Springs" by the defendant railway, to designate its station in the town of Poland, where the plaintiffs have a spring of water with the same name, besides a large hotel, endangered their trade-mark * in the name of "Poland Spring Water," and also alleged that water shipped from the defendants' station may be marked "Poland Spring Water," and sold in competition with the plaintiffs' water. The bill did not allege that this had been done, or was threatened to be done, by the defendant, or any one else. *Held*, that, conceding that the plaintiffs have a trade-mark, it has not been infringed upon, nor threat-

[1] 38 A. 338.

* Properly a trade-*name*.

ened, by the defendant. The latter is a railroad company, chartered for the transportation of persons and merchandise as a common carrier, and only for that. It would be *ultra vires* for it to enter on the business of bottling, shipping, and selling water, or to enter into commercial business not necessary and incident to its business of common carrier. Until it does, or threatens to do this, the plaintiffs are not injured, and have no cause for an injunction upon that ground.

Held, that because the plaintiffs for a series of years had run a stage-line from Danville Junction, a station on two other railroads, to their hotels, affords no legal right to exclude another stage-line over the same route, and much less from another station upon another railroad to the same destination, so long as the new line is not represented in some way as that of the plaintiffs, or by this means a fraud is perpetrated upon the traveller, or upon the plaintiffs.

From a long opinion of the Supreme Court, the following matter is condensed. Complainants allege that the name "Poland Springs," given to the defendant's station nearest complainants' property, tends to deceive the public, and induce the belief that the station is at the complainants' hotel property. . . . The station is called "Poland Springs," in the plural. The trade-mark claimed by complainants — "Poland Spring" — indicating one only. . . . Yet the complainants ask this court, sitting in equity, to aid in deceiving travellers desiring to visit its hotels into the belief that the only practicable approach thereto is by way of Danville Junction, and thus secure to it the profits on six miles of stage transportation. . . .

The case stated by the bill does not entitle the complainants to the relief prayed for. . . . Decree affirmed. Bill dismissed, with additional costs.

§ 898. In the U. S. Circuit Court, Southern Dist. N. Y., June 17, 1897, was considered the case of *Saxlehner* v. *Graef et al.* This was a suit in equity by agents of the Apollinaris Co., to enjoin the use of certain alleged infringing labels and trade-marks in the sale of mineral waters. Many years ago, the markets of this country were flooded with dark blue and

red labels, lettered with variations of the name Hunyadi, and calculated to deceive the public. At that time the Apollinaris Company was the sole consignee of complainant's predecessor, Andreas Saxlehner, in the United States. Said company urged Saxlehner to unite with it in suit to stop such infringements, but he peremptorily refused. Thereupon the Apollinaris Company adopted a distinctive badge of its own, to wit, a red diamond on a yellow background, with the inscription, "The Diamond is the trade-mark of the Apollinaris Company, Limited," and is meant only to indicate that mineral waters so marked are sold by it.

So long as it continued to sell Saxlehner's Hunyadi János water, it pasted its individual mark on every bottle. It no longer sells such water, and it now affixes its individual red diamond label on another natural Hungarian aperient water which it now sells. Complainant has no right to this red diamond label, and her application for an injunction could be sustained only on the theory of unfair competition. Of course, having handled the original Hunyadi János water so long, and having become well known as the exclusive importer of it into this country, the Apollinaris Company, when it took up another variety of water, was bound in good faith to the public to offer the new water in a dress so different as to challenge the attention of the purchaser to the fact that it is some other mineral water to which the red diamond label is now affixed. This has been done; the label of the "Apenta" water, now sold by said company, is totally unlike the old Hunyadi János label. It fully sustains the proposition, repeatedly laid down in this court, that when there is an honest effort to accentuate differences in labels and wrappers, there need be no confusion as to the identity of competing goods. . . . Should defendant hereafter, and before final hearing, resume the use of the word "Hunyadi," the question can then be presented by a renewal of the motion which is now denied.[1]

§ 899. *Sentence arbitrale* of June 8, 1897. — *J. A. Niclausse* v. *Delauny-Belleville & Co.*[2] An industriel cannot, in writ-

[1] xxii. Trade-Mark Record, 27.

[2] Annales (1897), p. 255.

ings destined for the public, cite by name a house manufacturing or selling products of a similar nature, for the purpose of instituting comparisons prejudicial to the latter, and for the purpose of pointing out the inferiority of a rival's goods. The necessity of responding to the allegations of a rival does not justify the publication of a diagram drawing comparisons between the products of such rivals, — the trials of steam-engines, without indicating the difference of combustion and of sustaining powers.

By the *Tribunal arbitrale*, the defendants were held to be guilty of unfair competition in business, for the following reasons:

1. In distributing with an album a sheet wherein the above complainant is named, indicating in figures the trial of speed of the cruiser *Letouche-Treville*, and also of the cruiser *Friant*, in which was made to appear the superiority of the boilers of Delauny-Belleville over those of J. A. Niclausse.

2. In presenting on the diagram in in-exact figures representations intended to create belief in the inferiority of complainant's products.

3. In causing to be printed in a journal especially adapted to such a scientific matter, to wit, the publication named "Engineering," published in the city of London, disparaging comments on the rival's manufactures. Damages were awarded in favor of the complainant for 3,000,000 (fr.). The Tribunal said *inter alia:* In April, 1892, the State had adopted the Niclausse boiler for the cruiser *Friant*, and the engines Belleville for the iron-clad *Letouche-Treville*, the official trials of which had taken place about that time, in accordance with the respective specifications, for the purpose of determining the consumption of coal in diverse trials, according to square metres in the furnace room. After the trial above mentioned, the "Naval Architects" of London held their annual Congress in Paris, June, 1895. The defendants, by derogatory remarks and comparisons, endeavored to influence the minds of the several members of the Association mentioned against the interests of the complainant, thus giving cause for the suit referred to.

§ 900. *In re Ehrmann's Applications* for registration of trade-marks heard in Chancery Division, June 18, July 6, 1897.[1] A firm consisting of five partners was dissolved by a deed which provided that the business should in future be carried on by two separate firms composed of various members of the old firm; that all the partners should be entitled to use the trade-marks formerly used by the old firm; and the members of the new firms should be exclusively entitled to the good-will of the old business. The new firms applied simultaneously for the registration of their respective marks which had been used by the old firm. Some of said marks had previously been registered in the name of the old firm, excepting one, which had not been registered in England at all. The new firms mutually consented to each other's application. Sterling, J., said, *inter alia:* It was laid down by the Court of Appeal in the Australian Wine Importers, in 1889,[2] that the court has (under similar circumstances) a discretion, but a disinclination, as to whether, though registration is not prohibited, it is such a registration as the court ought not to encourage by directing the comptroller to go on. It was then held that the registration of the mark of a golden fleece in respect to wine ought not to be permitted in the face of the opposition of the owner of the mark of the same kind, registered in respect of spirits, but not of wines, on the ground that the use of such a mark was calculated to deceive when applied to goods of a description similar to the goods in question, in respect of which registration had already taken place. *In re Dewhurst's Trade-Mark*, 1896,[3] it was further held by the Court of Appeal that a mark which, in the judgment of the comptroller, had such a resemblance to one on the register as to be calculated to deceive, ought not to be registered, even if the owner of the registration consented thereto. It was *held*, therefore, in the present case, that the motions for registration ought not to be allowed.

§ 901. In the High Court of Justice, Chancery Division, before Mr. Justice Kekewich, June 30, 1897, *Ripley* v. *Bau-*

[1] 2 Ch. D. 495.
[2] 41 Ch. 278.
[3] 2 Ch. 139.

dey[1] was heard. The plaintiff was a registered owner of an old trade-mark for laundry-blue, consisting of the words "Oval Blue;" and the evidence showed that "Oval Blue" had for many years meant the plaintiff's blue, which was sold in packets of an oval shape. R. brought an action against B. to restrain him from passing off his goods as, and for, the goods of the plaintiff. The court said, *inter alia*: "The plaintiff is the registered owner of the trade-mark 'Oval Blue,' which appears in the trade-marks' Journal of the 20th January, 1877. So long as that stands on the register, no man can properly use the words 'Oval Blue,' applied to the goods in the class in which that registration stands. . . . It is well known — I need not refer to authorities to show that — there may be such a common-law trade-mark, notwithstanding the statute, and side by side with a registered trade-mark." . . . The court said that, on the ground of neglect on the part of the plaintiff to assert his rights as to others, the action would be dismissed without costs.

§ 902. In the U. S. Circuit Court, S. D. Cal., July 9, 1897, this matter of trade-name of the *Investor Pub. Co. of Mass.* v. *Dobinson, et al.*[2] was decided, in a suit for an injunction and an accounting. The bill alleges: That the plaintiff is a corporation formed and existing under the laws of the State of Massachusetts, and the defendant company a corporation formed and existing under the laws of the State of California; that for more than five years last past, plaintiff has published, and still publishes in Boston, New York, and Philadelphia, a weekly trade and financial journal named "United States Investor," which has become widely and favorably known throughout the United States and other countries. That defendant, since about March, 1894, at Los Angeles, Cal., began the publication of a trade and financial journal under the name of "The Investor." The defence is that the title-page of defendant's journal in no way resembles the title-page of complainant's journal, and is in no way calculated to produce confusion between the two journals. . . .

[1] xxii. Trade-Mark Record, p. 31.

[2] 82 F. 56. (See substantially the same case 72 Mass. 603, § 789, *supra*.)

The presiding judge of the court said, *inter alia*: "After much consideration I am satisfied that the addition of the words 'of "Los Angeles, Cal.,"' to the headline on the editorial page of defendant's journal, and the other above-mentioned distinguishing characteristics of said journal, together with the absence of any evidence, do present a case materially different from that made by the bill. . . . A name, whether of an individual or corporation, as well as any other mark or symbol, will be protected in a proper case; and that irrespective of whether such name is an arbitrary one, or not, if the other considerations entitling it to such protection are present. It is evident, on the other hand, that the use of the same name would not be enjoined where the parties were doing a business thereunder entirely dissimilar and distinct; as, for instance, where one represented a banking business and another locomotive works; nor could the first national bank established enjoin every other bank from using the name 'First National Bank,' nor could the 'Mechanics' National Bank' of New York enjoin the 'Mechanics' National Bank' of New Jersey, nor the 'Fulton Bank' of New York, the 'Fulton Bank' of Brooklyn. . . . For the reasons above indicated, I am satisfied that the stipulated facts do not entitle the plaintiff to any relief, and the bill will be dismissed."

§ 903. In the High Court of Justice, Chancery Division, before Mr. Justice North, July 23 and August 10, 1897, in the matter of *Davis' Trade-Marks*.[1]

A. obtained a patent for improvements in umbrellas, which made them look more compact. He adopted the word "Compactum" to denote umbrellas so made, and such umbrellas were sold under that name. A. registered three "Trade-Marks," — one in 1882, consisting of a device with the word "Compactum" thereon, another in 1884, consisting of the word "Compactum" alone, and a third in the year 1890, consisting of certain devices and letter-press, including the word "Compactum," which word was disclaimed. The patent expired, and A. relinquished business. B., his son, began to manufacture and sell umbrellas of the kind above-mentioned,

[1] xxii. Trade-Mark Record, p. 50, January, 1898.

under the name "Compactum." An action having been brought against him by Y. and Z. to restrain him from using the word "Compactum," he moved to rectify the Register of Trade-Marks by expunging the first two trade-marks, and served the notice on A., Y., and Z., none of whom appeared on the hearing.

An order was made to expunge the two said trade-marks and for the costs to be paid by Y. and Z. Subsequently, on the motion of Y. and Z., the order was amended by adding A. as one of the parties to pay the costs.

In 1881, Henry Albert Davis obtained letters patent for an improved rib-holder and umbrella-stick, and adopted the word "Compactum" to denote umbrellas manufactured under this patent. The word "Compactum" was adopted as being precisely descriptive of the compact appearance of an umbrella manufactured according to the patent.

On the 5th of December, 1881, he registered, under No. 27,178, a representation of his patent rib-holder, with the word "Compactum" thereon, in Class 13, for metal umbrella-ribs and metal umbrella furniture, and in Class 50, for umbrellas.

In 1882, Henry Albert Davis opened a shop at No. 13, Poultry, in the city of London, where he carried on the business of manufacturing and selling umbrellas made according to his patent, which he invariably described as "Compactum" umbrellas; and they became known and were referred to and described as the "Compactum." On September 19, 1884, H. A. D. registered "Compactum" by itself, for umbrellas, in Class 50; on June 26, 1890, he registered a third trade-mark, for umbrellas, in Class 50, which consisted mainly of the representation of three umbrellas and certain letter-press, including the word "Compactum," but said word was disclaimed. In 1892, the said patent lapsed, by reason of non-payment of the annual duty. In March, 1897, the premises, 13, Poultry, were taken possession of by a mortgagee, and the said H. A. D. relinquished business. He then sold to his son, Henry John Davis, the small remaining stock. Said H. J. D. thereon commenced to manufacture and sell umbrellas of the same

kind as those manufactured and sold by his father under the title of "Compactum." The premises formerly occupied by H. A. D. were reopened for the sale of umbrellas by a company called "Umbra, L'd," which claimed the exclusive right to use the word "Compactum;" and they and one W. B., a mortgagee of the business, required the said H. J. D. to desist from using the word "Compactum" in any way, and began action in court against him for this purpose.

The said H. J. D. subsequently gave notice of motion to rectify the Register of Trade-Marks by removing therefrom two trade-marks previously registered, and served the same on H. A. D., "Umbra, L'd," Walter Bartram, and the Comptroller-General. After much discussion, the court, on July 23, 1897, directed the marks to be expunged, and ordered "Umbra, L'd," and Walter Bartram to pay the costs. On August 10, 1897, the parties last above-named moved to vary the order by ordering the costs of the application by H. J. D. to be paid exclusively by him, as registered owner of said trade-marks. North, J., directed the order of July, 1897, to be amended by inserting the name of H. A. D. as one of the parties to pay costs; and directed that the costs of this motion should be paid by "Umbra, L'd," and Walter Bartram.

§ 904. In the High Court of Justice, Chancery Division, before Mr. Justice Kekewich, August 10, 1897, in the matter of *G. Kynoch & Co.'s Trade-Mark*, — "Kynite,"[1] in Class 20, which consists of explosives. The word was invented by taking the first syllable of Kynoch and adding the termination "ite," which is a common termination for explosives. The Comptroller refused registration on the ground that the word was capable of having reference to the character or quality of the goods. It appeared that there was in existence a word "Kainite," which was the name of a mineral substance, and also "Kinetite," the name of an explosive. It was also suggested that the word might be taken to have a reference to the root of "Kineite." On an appeal, the court *held*, that "Kynite" was an invented word, and had no reference to

[1] xxii. Trade-Mark Record, 57, January, 1898.

the quality or character of the goods, and the Comptroller was directed to proceed with the registration.

On December 22, 1896, G. Kynoch & Company, L'd, applied for registration in Class 20 (explosives) of said word, "Kynite," as a trade-mark.

On January 7, 1897, the Comptroller refused to proceed with the application, on the ground that the word "Kynite" was capable of having reference to the character or quality of the goods.

On March 5, 1897, the application was refused by the Comptroller.

On appeal to the Board of Trade, it was referred to the court.

An affidavit by the Registrar of Trade-Marks was filed in opposition to the appeal. Among other objections, it stated that the termination "ite" is very commonly used to denote that the article to which it applies is an explosive, and to any person in the trade would convey the notion of an explosive. One of the earliest examples of its use was the name dynamite. Explosives are sometimes named by adding "ite" to a descriptive prefix; and, as examples, he named "Ballistite," "Roburite," "Carbonite," "Panclastite," "Fulgarite," "Securite," "Ammonite," "Vigorite," "Cordite." . . . The pronunciation of the word "Kainite," given in the Standard Dictionary, published by Funk and Wagnalls, does not appear to confirm what is said by Mr. Clerk, one of the directors of the applicant in his affidavit, and the derivation of the word "Kainite" from the Greek kainos, mainly would go to show that the correct pronunciation of the word is identical with the ordinary pronunciation of the name "Kynite," which the applicants have given to their explosive. After protracted discussion, Kekewich, J., said: "In my opinion, this word 'Kynite' is an invented word, and not descriptive of the quality or character of the goods within the meaning of the Act of Parliament." (His Honor made a lengthy disquisition on the modern pronunciation of Greek words very possibly differing from the inflexion given by the ancient Greeks, and continued:) "I do not think it is fair to those who have

invented this word to say that it is presumably derived from kineo, or presumably descriptive of something which compels motion. Unless I come to that conclusion, I do not see how I can say that 'Kynite' is descriptive of the character or quality of the goods. I think, therefore, that the Comptroller, in his anxiety — which I always desire to uphold — to observe the provisions of the Act of Parliament, and prevent the registration of improper words, has here erred on the side of excessive caution." The Comptroller was directed to register.

§ 905. In the U. S. Circuit Court, N. J., September 4, 1897, was heard the case of *Vitascope Co.* v. *U. S. Phonograph Co.*[1] The bill of complaint sets out that Raff & Gammon, the assignors of the complainant, in January, 1896, began the manufacture of a certain machine or device, invented by Thomas A. Edison and Thomas Amart, to project upon a screen apparently living figures and scenes, in view of spectators, and that the said Raff & Gammon coined the word "Vitascope," and applied it to designate said machine; that afterwards said Raff & Gammon assigned to the complainants the right to manufacture the said machine or device, and to lease the same under the name of "Vitascope," and to sell territorial rights for giving public exhibitions with the said machine and device; and that in the exercise of said right the complainant has made a large number of such machines, and given thousands of exhibitions in all the large cities of the United States. The complainant agreed to take and pay for all said machines according to the contract; and subsequently Edison sold the machines not taken to reimburse himself for their cost. *Held*, that the purchasers from Edison, in offering their machines for sale as "Edison Vitascopes," were not guilty of unfair competition with complainants, since there was no misleading or deception of the public, who, in fact, obtained the identical machines to which the name was intended to apply. Kirkpatrick, J., said, *inter alia*, in declining to grant the injunction applied for: The grounds on which unfair competition in trade will be enjoined are, either that the means used are dishonest, or that by false representa-

[1] 83 F. 30.

tions, or imitation of a name or device, there is a tendency to cause confusion in the trade, and commit fraud on the public, by inducing the acceptance of a spurious article. When these grounds are absent, and no trade-mark rights exist, injunction is not allowed. The case as presented comes clearly within the principle decided in *Apollinaris Co.* v. *Scherer*.[1] There, however, the complainant possessed an element of strength wanting here, in that it had the undisputed exclusive right, so far as it could be acquired, to sell the product in the territory sought to be occupied by the defendant. There is no proof in this case of an exclusive right to the use of the words "Vitascope" and "Edison's Vitascope" as connected with machines. (A number of cases hereinbefore cited were adduced by the court.)

§ 906. In the U. S. Circuit Court of Appeals, of the 7th Circuit, October 4, 1897, *Johnson & Johnson* v. *Bauer & Black*,[2] where medicinal and surgical plasters had long been put up in packages bearing a red Greek cross, so that they had become known, and were asked for as "Red Cross Plasters," *held*, that the use by another of a Maltese cross of somewhat different form, with a large red circle in the centre, was an infringement, though bearing on its face letters and marks not on the other, and although there was little resemblance in the packages or other *indicia* (79 F. 954, reversed). The court below said: "I do not think that the defendant so nearly imitates the trade-mark, or comes anything like so nearly imitating it, as to deceive the public who are looking for the complainant's goods." The Appellate Court was held by Woods, Jenkins, and Showalter, Cir. JJ., and it was said, *inter alia*: "The Maltese cross adopted by the appellee, in so far as it contains a red circle, has a tendency to promote confusion, and will interfere with the legitimate trade of the appellant. . . . The red cross speaks to the eye, and the article being known by that designation speaks also to the ear by that name. It is the one peculiar and commanding feature imposed on the package to designate its origin; and in the absence of critical examination, the one manufacture

[1] 27 F. 18.

[2] 82 F. 662.

may readily be imposed upon the purchaser desiring the other. This is peculiarly true where, as here, the mark is displayed upon the package containing the article, and not upon the article itself." The court cited *Pillsbury* v. *Flour Mills Co.*, 24 U. S. App. 395, 64 F. 841, and 12 C. C. A. 432, where it said: "Disguise defeats the very end and object of legitimate competition. . . . A specific article of approved excellence comes to be known by certain catchwords, easily tortured in meaning, or by a picture which the eye readily recognizes." The court cited § 449, of Browne on Trade-marks. In that case, it was conceded by able counsel on each side, and found by the Patent Office, that the picture of a bouquet, with elaborate ornamentation, and the simple word "Bouquet," interfered with each other when used upon the same class of goods. "If vision were the sole guide, the lack of physical resemblance would have decided that no interference existed. One delineation could not possibly be mistaken for the other. Here is the test: Would the use by different houses of the two things cause confusion? The ear is the medium to mislead a purchaser. He might ask this question, 'Have you the Bouquet ham?' and either of the traders could truthfully reply in the affirmative. The picture and the word could not lawfully coexist as marks for rivals dealing in the same class of merchandise." — The court also cited *Reed* v. *Richardson*, 45 Law T. (N. S.) 54; the complainant's beer had acquired distinction because of the manner of its identification, the name of "Dog's Head Beer."

§ 907. In the U. S. Circuit Court, W. D. Michigan, S. D., October 27, 1897, *Gage-Downs Co.* v. *Featherbone Corset Co.*,[1] a motion was made for injunction in a case of alleged unfair competition. It was *held*, that one making corset-waists in Chicago and selling them as "Chicago Waists," so that this designation came to denote among purchasers the goods made by him, is entitled to an injunction against another who makes similar waists in a different State and city, and sells them as "Chicago Waists," with a manifest intention of availing himself of the reputation acquired by the other's goods.

[1] 83 F. 213.

The court said that the name of the place may acquire a secondary signification, and become, instead of merely denoting the place where the goods are manufactured, a mark denoting the manufacture itself, and for said trade-name the first adopter may obtain for it the right of exclusive use. Such a case depends entirely on the proof, and, if it appears that the name is used for the purpose of denoting the place of manufacture as the primary object, then it is not subject to be appropriated by any one person resident therein. All other residents have the like privilege of use. But if the circumstances show only that the use of the name is a means of appropriating the business advantages, the good-will, and the trade-name of the complainant, that is not lawful. This feature of the case would be much affected by the circumstance of the residence of the parties. The persons who confess the use of said trade-name in the business are residents of California (Buyer & Reich), and others residing at Kalamazoo, the Featherbone Corset Co. Under these circumstances of lack of good faith, a preliminary injunction was granted.

§ 908. In the High Court of Justice, Chancery Division, before Mr. Justice Kekewich, October 29, 1897.[1] In the matter of the *Linotype Company's* application for registration of a trade-mark, the word "Typograph," in Clause 5, — viz.: Unwrought and partly wrought metals used in manufacture, the Comptroller refused registration, and, on appeal to the Board of Trade, the appeal was referred to this court. On the evidence, it appeared that "typograph" was a dictionary word meaning a type-making and type-setting machine. The applicants manufactured machines of this nature. In opposition to the motion before the court, the Registrar of Trade-Marks made an affidavit, *inter alia* : —

1. For many years prior to the above-mentioned applications being made, machines were in use for the automatic composing of lines of type, and were commonly known as Typograph. In one class of such machines the operators' part was controlled by a series of keys, the depression of

[1] The Trade-Mark Record, January 19, 1898, vol. xxii. p. 50.

which caused an imprint corresponding to a letter in soft metal papier-maché, or other suitable material. When the metal or other material had upon it the imprint of a line, it was used as a stereotyped matrix in the ordinary way. In another kind of such machines, by depressing the keys, separate type matrices were brought into line, which, when completed, were transferred to another part of the machine, where it served as one side of the casting mould, into which suitable type-metal was forced. Speaking generally, the patents of The Linotype Company or Linotype Patents relate to machines of the latter.

2. The word "Typograph" is in common use, and is found in English dictionaries, e. g., The Imperial Dictionary, and The Standard Dictionary. In The Century Dictionary, published in New York and London in the year 1891, the meaning of the word is given as a type-making and type-setting machine.

For the applicants, it was contended that this is a word having no reference to the character or quality of the goods. In the Act of 1888, the term "fancy word" is omitted, and the acts now contemplate the registration of words that are not fancy words. Also, there is a contrast made between invented words and other words. . . . As regards quality, typograph neither praises nor blames. (Kekewich, J., said I do not think quality means praise or blame, but other characteristics such as hard, or soft, or pliable.)

Sir R. E. Webster, A. G., for the Comptroller, after reading the affidavit of the Registrar, continued: The company which makes printing machinery for the setting up of type and machines known as "Typograph" wish to get the monopoly of the common word "typograph" in connection with metal that may be used for the purpose of these machines. Without quoting cases, I may mention the "Solio," "Somatose,"[1] and "Satinine"[2] cases. The rule of the court is that it will decline to interfere if unable to see that the discretion of the Comptroller has been improperly exercised. Apart from this,

[1] 7 Rep. 439; 7 Ch. 645; § 841, *ante*.
[2] 43 Ch. D. 604; § 706, *ante*.

it would be a reversal of principles to allow the registration under the circumstances of this case.

Moulton, Q. C., in reply, said it would be strange if we could not be allowed to register, but other persons might be. Also, the fact that something within the class may be described by the word does not prevent registration for that class; the class must be considered fairly as a whole in reference to the question. Kekewich, J., responded: In considering the question whether a particular word has reference to the character or quality of the goods, one must not regard the word from an etymological point of view, such as the point from which a man of high education would regard it, but from the ordinary point of view, which would be the ordinary British subject dealing with the particular goods. . . . Now, is it possible that any man of ordinary education, seeing that the Linotype Company had registered Typograph, should not conclude that it is in connection with metal for the type-founding business? It seems to me that the question put in that way is an extremely simple one, and can only be answered by saying that this is a word having reference to the character and quality of the goods. Appeal dismissed with costs.

§ 909. In the U. S. Circuit Court, S. D., N. Y., on December 23, 1897, Townsend, J., decided the case, *Hostetter Company* v. *Sommers and Joseph*.[1]

The bill alleged that the complainant was the compounder of "Hostetter's Bitters," and charged the defendants with fraud and unfair dealing in selling as its bitters another article so compounded as to resemble in taste, color, and smell, the genuine Hostetter's; and suggesting and advising intending purchasers to secure the Hostetter bottles, to fill them with the imitation and sell them as Hostetter's. The defence was a general denial; but the evidence sustained the bill. The court decided that infringement is shown on the facts, within the rule laid down in the case of *Hostetter Co.* v. *Bruggeman-Reinert Distilling Co.*[2] The judge said, *inter alia*: "The complainant is entitled to protection against

[1] xxii. Trade-Mark Record, 59, January, 1898.

[2] 46 F. 188.

the appropriation of its trade-mark by any and all unfair and dishonorable means, and a court of equity has power to grant such protection, whenever it is satisfied that an attempt has been made by ingenious subterfuges to invade the rights of an owner of a trade-mark, either by a conspiracy with others to deprive him of such rights, or by misrepresentation in the sale of a spurious article, so manufactured as to deceive the public.

"In the sharp contest between the individual manufacturer, who strives to acquire and retain the fruits of industry and honesty, and the field of keen rivals, seeking to wrest from him the prize of the public good-will, the inventive ingenuity of the infringer has conceived a great variety of devices for evading the established rules of fair dealing. Among the latter of these devices are acts professedly within legal limitations, but manifestly designed to be afterward so made available by other acts as to deceive the public. In such cases courts of equity, looking beyond the original acts, and finding that their ultimate object and effect are to enable and induce the retail seller of a fraudulent imitation to palm it off on an unsuspecting public for the genuine article, and thus to contribute to the infringement upon the rights of the original owner, have not hesitated to apply the remedy."

The court *held*, that Joseph's claim, that he said that his bitters were not "Hostetter's Bitters," was immaterial, as he labelled them "Hostetter's Bitters." In either view of the case there was an illegal appropriation of complainant's right of property which should be enjoined. Decree for an injunction and accounting.

§ 910. Before the *Tribunal de Commerce, d'Anvers* (Belgium), in the case of *W. Pearson* v. *Van Neck*,[1] the following principles were established.

The affixing of a mark of an owner without his authority is illicit, even on products of his own manufacture. To decide otherwise would be to oblige the inspection by the owner of the mark, to seek in each particular case the sanction of his rights by chemical analysis of the product, or to have recourse to other difficult means of verification. The trade-

[1] La Propriété Industrielle, Dec. 31, 1897, pp. 192, 193.

mark "Créoline Pearson," which was registered April 23, 1890, in the Tribunal of Commerce of Brussels, was intended to be affixed in various sizes, and in characters of every form, on packets, envelopes, boxes, and bales of the product thus denominated, which trade-mark was protected by the law of April 1, 1879. The plaintiff sold a disinfecting product in bottles of different sizes, all the recipients having special forms and appearance. Van Neck, having bought quantities of the product, had retailed it in bottles dissimilar to those employed by the plaintiff, and bearing plaintiff's especial trade-mark, in conjunction with the defendant's name, place of business, etc. The trade-mark was affixed in writing.

It was *held*, that, it matters little whether the liquid sold by Van Neck emanated or not from the laboratory of the plaintiff. The product is not only a liquid, but is capable of being condensed into solid form, in both of which forms plaintiff has presented it to the public. The defendant pleads erroneously a tacit consent to his use of the mark, and says that he is justified in so doing by the fact of plaintiff's registration and his placing of the goods upon the market. Should it be otherwise, another dealer would be allowed to present it to the public under a number of indeterminate forms. The shape of the bottle is immaterial. One flask would not present more guarantees than another; and the public could not distinguish the difference between the two products. Consequently inevitable counterfeits might be produced with the greatest ease. The only safeguard would be a chemical analysis, which, of course, would be impracticable. It is for the purpose of avoiding indefinite inconveniences, as much in the interest of the public as for the manufacturer, that the rule should be rigidly observed that the right of the owner to affix his mark should be exclusive. Such is the only means of distinguishing the products of industry or the objects of commerce. The judgment was that defendant should pay 200 francs damages and costs. (*Revue Internationale de la Propriété Industrielle.*)

§ 911. In Germany, on December 17, 1896, and March 26, 1897, the trade-mark cases of *Maréchal Ruchon et Cie.*

and *Peugeot Frères* were decided before the Bureau of Patents.[1]

By the terms of the first paragraph of section 4 of the German law of May 12, 1894, it is provided that trade-marks composed exclusively of numerals or letters should be refused registration. Foreign marks, if so composed, are not susceptible of protection in virtue of the present law. Marks registered in France before the annexation of Alsace-Lorraine are assimilated to marks registered in Germany anterior to Imperial legislation. Therefore, the mark "G. B. D." is rejected for the following reasons:

It must be considered that the mark in question is not composed of letters only. It also includes an external form, but that is without importance in the essentials of the mark. Conceding that simple figurative signs, words, letters, etc., are often accompanied by circles, ellipses, rectangles, etc., these external configurations have no bearing on the marks themselves, and, therefore, should not be deemed characteristic elements of the technical marks, as they form merely frames for them.

In response to the decision refusing registration, MM. Maréchal Ruchon et Cie. argued *inter alia:* It is incumbent on the Patent Office to accept the mark in question, as it can be demonstrated by section 24 of the German law of 1894, that registration can be peremptorily invoked. Said paragraph says that registration shall not be refused to marks already registered in virtue of an ancient provincial protection. . . . Every mark protected before the year 1874 by a local law, on condition that the demand for registration should be presented during the transitory period granted by the law before the first of October, 1878, shall be duly recognized. Besides, the Supreme Court of the Empire, on November 21, 1881, conceded that every mark registered in France before the annexation of Alsace-Lorraine should have the benefit of Articles 3 and 9 of the law of 1874. The judgment says in substance that every mark registered before 1871 is protected in all the territory (including Alsace and Lorraine). Even after the

[1] La Propriété Industrielle, Dec. 31, 1897, p. 193.

annexation by Germany, the French law of June 23, 1857, is a protection. A refusal of protection by virtue of the treaty of commerce between Germany and France in 1862 was accordingly reversed. (*Raynaud* v. *Hauer*, November 29, 1881.) *Grand Dictionnaire International de la Propriété Industrielle*, T. I., p. 342. Other decisions have been rendered conforming to the jurisprudence adopted by the Supreme Court, notably a decision of the Court of Colmar, of September 18, 1888,—*Menier* v. *Schultz et Gobel* (*Grand Dictionnaire*), etc., p. 345. The same principles have also been applied by the French government, as was shown by a decision of the Director-General of Customs of June 5, 1887. *Ibidem*, p. 348.

In view of the authorities cited, the Imperial Patent Office at Berlin reversed the decision of the Bureau of Patents, and returned the case for action and registration.

In the case of *Fils de Peugeot Frères*, March 26, 1897, the decision of the Patent Office, made under similar circumstances, relative to the trade-mark "*à la main*," was reversed.

CHAPTER X.

PATENT OFFICE TRADE-MARK DECISIONS.

§ 912. "Tivoli," as trade-mark for beer.
§ 913. "Cream of Wheat," as trade-mark for breakfast food.
§ 914. "Menlo Park," for time-keeping instruments.
§ 915. "Seal of Minnesota," words and picture for flour.
§ 916. "White Laurel," for medicine.
§ 917. "Yale," for locks.
§ 918. "Old Yorkshire Mills," for paper.
§ 919. "Peerless," for carbon black.
§ 920. "Black Horse," etc., for tobacco.
§ 921. Representation of crown, or the word "Crown," for cheese.
§ 922. "Imperceptible," for starch.
§ 923. "White Wrapper," for canned salmon.
§ 924. Representation of bundle of cigars, etc., for cigars.
§ 925. "Roman Punch," etc., for beverage.
§ 926. "Hopkins," etc., for hulled canned corn.
§ 927. "Squirrel," and picture of, for ammunition.
§ 928. "Sterling," for cereal products.
§ 929. "Kangaroo," for rubber tubing and tires.
§ 930. Appeal from refusal to transmit interference.
§ 931. "Old Fashion," for Louisiana molasses.
§ 932. Appeal from refusal to dissolve "Dr. Coderre" interference.
§ 933. Appeal from refusal to dissolve "Royal" interference.

§ 912. AMONG Interesting Decisions by Chief of the Patent Office, are the following: —

Ex parte Frederick A. Poth, application for registration for a trade-mark for beer.[1] The words claimed were "Tivoli Export," for pale beer. Registration was refused on the following grounds:

1. The matter claimed is geographically and ordinarily descriptive in character and incapable of appropriation as a trade-mark.

2. It cannot be registered in view of the registered trade-mark, No. 23,870, of Robert Portner Brewing Company for the word Tivoli, as applied to beer.

[1] 62 MS. Dec. 329.

The Examiner holds that the word "Export" is purely descriptive, and he is clearly correct, since the authorities cited by him in support of his holding leave no doubt as to the matter.

The trade-mark "Tivoli" of the Robert Portner Brewing Company was intended for use on beer which is to be exported, and the applicants' trade-mark differs from that of the registrant only in adding the descriptive word, "Export," which means only that it is beer possessing certain peculiarities adapting it to export trade. The beer of the registrant, being intended for exportation, might naturally and properly be called "Tivoli Export Beer," and, therefore, the trade-marks clearly interfere, the only part, if any, in either trade-mark constituting trade-mark matter, being the word "Tivoli."

The Examiner also holds that the word "Tivoli" is geographical in character, and as a consequence cannot be registered as a trade-mark. It is unnecessary, however, to decide this question in view of the above holding that the trade-mark is not registrable for other reasons. Decision of Examiner affirmed. (GREELEY, *Asst. Com.*, Oct. 11, 1897.)

§ 913. *Ex parte Cream of Wheat Co.*,[1] application for registration of words "Cream of Wheat," as applied to breakfast food, refused by Examiner, because of:

1. Prior registration of the same words.

2. The expression sought to be registered is descriptive, in that it conveys the idea that only the best part of the wheat berry is employed. He quotes the decisions of Asst. Com. Fisher, in *North Dakota Mills Co.*, 58 MS. Dec. 176, affirming decision of same words for same article. In that case, according to the original statement, the words were also intended to be applied to flour, among other things; and the then Assistant Commissioner held this fact to be significant in the consideration of the previously registered trade-mark. In the present case, the words are to be applied to "breakfast foods, such as rolled wheat, cracked wheat, etc." *Held*, that neither ground taken by the Examiner is sound. Breakfast food and flour are

[1] 62 MS. Dec. 329.

different commercial products, and the word "Cream" in this connection is merely fanciful, and does not imply, of necessity, the use of the best portions of the wheat berry. Decision of Examiner reversed. (GREELEY, *Asst. Com.*, Oct. 11, 1897.)

§ 914. *Ex parte Hampden Watch Co.*,[1] application for registration of words "Menlo Park" as a trade-mark for time-keeping instruments, which mark, as stated in the application, has been used at Canton, O., upon time-keeping instruments, and particularly watch movements, since April, 1880.

The particular ground for refusing registration, as set up in the Examiner's answer to the appeal, is that the words for which registration is sought, have no other than a geographical meaning, and do not, therefore, constitute a lawful trade-mark under the decisions of the court, and under the practice of this office.

While it is true that Menlo Park is the name of a small town in New Jersey, and is also the name of a town in San Mateo Co., Cal., it does not appear that either of these localities is a manufacturing town. Certainly in neither of these towns is the manufacture of watch movements carried on; and while it is true that if the business of manufacturing watch movements were to be established in either of these towns, those engaged in that business would have the right to put the name of the locality on the products made there, the contingency is too remote to bar the registration of a trade-mark which has been in use in a purely arbitrary and fanciful sense, by these applicants, for over seventeen years.

While it is true that Menlo Park is a geographical term, it does not, in my opinion, stand on the same footing as the word "Columbia," commonly used to designate the United States as a whole, or the word "Lackawanna," the name of a region of country in Pennsylvania, or "International," or "East Indian," all which have been held not to be lawful trade-marks, and all which are considered or referred to in the decision of the Supreme Court in "*Columbia Mills*" v. *Alcorn*, 65 O. G. 1916. In all these cases, the word on which suit was brought was one which was of such a nature, or cov-

[1] 62 MS. Dec. 333.

ered such an extent of territory, that it was necessarily to be presumed that there would be those who could employ the word with equal truth, and would therefore have an equal right to employ it for the purpose for which it was used by the person who brought suit.

The line is not easily drawn in all cases between those words of geographical nature which are registrable and those which are not, but where there is reasonable doubt registration should be permitted. Decision of Examiner reversed. (GREELEY, *Acting Com.*, Oct. 12, 1897.) [1]

§ 915. *Ex parte New Prague Flouring Mill Co.*, application for registration of trade-mark for flour, — the pictorial portion of the seal [2] of Minnesota, with the words "Seal of Minnesota." The Examiner's position is that in view of certain authorities, which he cites, trade-marks consisting essentially of symbols, or coats-of-arms, are not registrable. The trade-mark has been registered in Minnesota, in which State no question of presumptive lawfulness can be raised as a prerequisite to registration. This does not seem to affect the question of registration in this office.

It has been distinctly held that the coat-of-arms of the United States, or of any State, shall be refused registration as against public policy. (*Schmaltzenberg Bros.*, 51 MS. Dec. 204.) There is no doubt that this applies equally to the seal of the State.

Further, even if it be admitted that the seal of a State may be properly used as a mark for merchandise, it is clear that its use as such is as much a public right as the use of the word "Minnesota," or the name of any State. Decision affirmed. (GREELEY, *Asst. Com.*, Oct. 25, 1897.)

§ 916. *Ex parte Loring L. Cumings*, application for registration of words "White Laurel," [3] for medicine. Registration is refused by Examiner on the ground that the medicinal properties of the laurel are well known, and that the words applied to medicine are descriptive in character. He says that if laurel does not occur as an ingredient of the

[1] 63 MS. Dec. 375.

[2] 62 MS. Dec. 437.

[3] 63 MS. Dec. 45.

medicine, the term is deceptive, and that the word "White" merely emphasizes the particular kind of laurel which the applicant employs.

The applicant contends that if the word "laurel" is used alone, it might properly be held descriptive, or, if the ingredient laurel were not used, deceptive; but the two words, "White Laurel," taken together, are wholly meaningless, and could be held either descriptive or deceptive.

As stated by the Examiner, the word "White," as indicating color, has repeatedly been refused registration. The words "White Laurel" would seem to indicate that the remedy in question is derived from a species of laurel. "I cannot agree with the contention of the applicant that the words themselves are meaningless." (GREELEY, *Acting Com.*, affirming Examiner, Dec. 3, 1897.)

§ 917. *Ex parte Yale & Towne Manufacturing Co.*, application for registration of the word "Yale" as a trade-mark for locks. Registration was refused on the following grounds:

1. It is public property, being descriptive of a lock of a certain kind.

2. Also as being a patented device.

No one has the right to the exclusive use of the word Yale as a trade-mark for locks, as any one who makes a lock disclosed by any of the expired patents taken out by the Yales, has a right to designate such lock as a "Yale lock;" and it would be the proper and true name for such lock. On appeal, it was *held* that the records of this office show that more than forty years ago one Linus Yale obtained several patents on locks. The nature of the invention is such as to make it applicable to many kinds and forms of locks. The Commissioner cites the history of several such patents, also from the American and English Encyclopædia of Law; and the latest authority quoted by him is from the U. S. Supreme Court, *Singer Co.* v. *June Co.* (75 O. G. 1703).

The public have the right, on the expiration of the patents, to make the patented article, and to use its generic name.

The result, then, of the American, the English, and the

French doctrine is this: that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created.

The Yale Company has no more right to the term Yale as a trade-mark for locks, invented by the Yales and manufactured by appellant, whether the well-known Yale pin-tumbler lock, or the Yale bank-lock, or other locks, than the Singer Company had to the word "Singer." On the other hand, any one who makes a lock of the type disclosed by any one of the expired patents of the Yales has a right to designate such a lock as a "Yale lock;" and it would be the proper and true name of such lock. Decision of Examiner affirmed. (BUTTERWORTH, *Com.*, Oct. 1, 1897.)

§ 918. *Ex parte The George C. Gill Paper Co.*, application for registration of the words "Old Yorkshire Mills," as applied to paper. The grounds for refusal to register are two:

1. The expression sought to be registered has for its most prominent word one of geographical signification.

2. A similar term, viz.: "York Mills," has previously been registered for the same class of merchandise.

Either of these grounds seems to be sufficient to justify the Examiner in refusing to register the words in question. Decision affirmed. (GREELEY, *Acting Com.*, Sept. 11, 1897.)

§ 919. *Ex parte The Peerless Carbon Black Co., Limited*, application for registration on appeal from Examiner for refusing the word "Peerless," as a trade-mark for carbon black. The refusal is on the ground that it is descriptive of the goods.

The word "Peerless" is defined by the dictionary as "unequalled, unmatched, matchless, unsurpassed." Peerless black, therefore, means a black of superior quality, a matchless black, superlative black, a black better than any other black. These adjectives are not fanciful words, that is, words which when used as trade-marks, are obviously meaningless to ordinary people. The word "Peerless" is such a word as is ordinarily

used by merchants in a laudatory sense to extol their goods. If appellant's black is of a superior quality, it is proper so to state. Any person, however, who thinks his black is superlative, or unsurpassed, or peerless, has as much right as appellant to so designate his goods. To give to one person the exclusive right to such a word as a trade-mark would be to deprive the public of its lawful use in language.

This word falls within the class of words, such as "incomparable," "sterling," "standard," "wonderful," "superior," "most excellent," "famous," "splendid," "unrivalled," etc., which have been properly refused registration. This word "peerless," in fact, has also been refused registration, *Ex parte Butler*, 54 MS. Dec. 130, on the ground that it is a word in common use describing quality. Decision affirmed. (BUTTERWORTH, *Com.*, Oct. 1, 1897.)

§ 920. *S. Hernsheim Brothers & Co., Ltd.* v. *J. H. Hargrave & Son.* This is an appeal from the decisions of the Examiner of Interferences, rendered March 18, 1897, April 27, 1897, and June 2, 1897.

On June 18, 1896, Hernsheim Bros. & Co., the junior parties to this interference, filed an application for the registration as a trade-mark for leaf tobacco, manufactured tobacco, and cigars, of the words "Black Horse," or the representation of a black horse. Refused on the registered mark to Hargrave & Son, which consisted of the words "Dark Horse," and the pictorial representation of a blanketed horse. Interference was declared between the two parties, the issue being, "The words 'Dark' (or black) 'Horse,' and the picture of a horse applied to chewing tobacco."

Testimony was duly taken in behalf of H. Bros. & Co., there being no appearance for Hargrave & Son, who did not take any testimony in their own behalf.

"The record of Hernsheim Bros. & Co., Limited, the junior party, would seem to disclose that 'black horse' has been used by said junior party and their predecessors in business as a trade-mark for tobacco for about a quarter of a century; but there is not a word of testimony to show that they ever sold an ounce of chewing tobacco under this trade-mark, or that

they ever applied this trade-mark to a single package of this class of tobacco. The junior party has, therefore, entirely failed to show the adoption and use by them of the mark 'black horse' applied to chewing tobacco, and hence have not sustained the burden of proof resting upon them. Judgment of priority of adoption and right of the trade-mark in issue is hereby rendered in favor of J. H. Hargrave & Son, the senior party herein." On March 24, 1897, Hernsheim Bros. & Co., made a motion that the Examiner of Interferences suspend the interference and rehear the same, the ground for this motion being, substantially, that the Examiner erred in holding that the failure of Hernsheim Bros. & Co. to establish evidence that they used the trade-mark as defined in the issue on chewing tobacco at a date prior to the record date of Hargrave & Son, was the basis of a judgment that they were not the owners thereof, or that if this holding were not erroneous, then the Examiner erred in rendering a decision of adoption and use, and in not dissolving the interference. On April 27, 1897, the Examiner of Interferences denied this motion, stating that —

"All that the Examiner of Interferences has decided, or attempted to decide, was as to the ownership of this trade-mark used on the particular article of merchandise named in the issue; and in so doing he is of the opinion that he made no error. Being of that opinion, he must and hereby does refuse to disturb the decision already made, but reaffirms the same."

Hernsheim Bros. & Co. appealed on the ground that the issue of interference is narrower than their claim. *Held*, "that the action of the Examiner of Interferences awarding priority is set aside. The papers will be transmitted to the primary Examiner, who will re-form the issue and return the papers to the Examiner of Interferences for the purpose of considering the question of priority on the new issue." (BUTTERWORTH, *Com.*, Oct. 2, 1897.)

§ 921. *Ex parte Christine Baumert*, appeal from Examiner of Trade-Marks, refusing to register the representation of a crown, or the word "Crown," as a trade-mark for a certain

class of cheese. Refused, on the trade-mark of J. H. Hodgson, registered Oct. 2, 1879, which shows and claims as the essential feature a garter in an oval form, with a crown in the upper or centre portion.

The ground on which this action was based is that the salient feature of the registered mark is the crown, and that the cheese to which this mark is applied would probably be known to the ordinary class of purchasers as "crown," or "crown brand" cheese, and that, therefore, cheese bearing the applicants' mark would be mistaken for that of the registrant. Decision affirmed. (GREELEY, *Asst. Com.*, July 12, 1897.)

§ 922. *Ex parte E. R. Durkee & Co.*, appeal from Examiner of Trade-Marks, refusing to register the word "Imperceptible" as a trade-mark for starch. *Held*, that the word "imperceptible" is clearly not descriptive of the starch as put on the market, nor is it clear that it is descriptive of the starch as applied to fabrics. The starch as applied has not only ceased to be an article of trade, but has, in the process of applying it to the fabric, been subjected to chemical action. The trade-mark is registrable. Examiner's decision reversed. (GREELEY, *Acting Com.*, July 10, 1897.)

§ 923. *Ex parte William H. Lord*, appeal from refusal by Examiner of Trade-Marks to register the words "White Wrapper" as a trade-mark for canned salmon, on the ground that a wrapper of particular color cannot constitute a trade-mark. The Commissioner cited *Ex parte Landreth*, 31 O. G. 1441, the essential features of the mark for registration being a red bag in which the goods were packed for the trade; also the case of *Fleischmann et al.* v. *Starkey*, 25 F. 127, in which the yellow colored label was in question; also *Fisher et al.* v. *Blank*, 33 N. E. 1040, where "Black Package Tea" was considered. In all these cases, color was held to be simply descriptive and not lawful as trade-marks. Examiner affirmed. (BUTTERWORTH, *Com.*, June 8, 1897.)

§ 924. *Ex parte S. Rosenberger & Co.*, appeal from Examiner's refusal to register as a trade-mark for cigars "a representation of a bundle of cigars, with two transverse stripes across its face, one near the end, and these connected

by two diagonal stripes crossing each other at or near the centre of the length of the face of the bundle." The essential feature was said to be "the stripes as presented on the face of a representation of a bundle of cigars." Refused for being purely descriptive in character. Cases cited by the Acting Commissioner were *Ex parte Spencer*, 14 MS. Dec. 132, where the picture of a lathe, with the overhead countershaft laid across its bed, with the words "John E. Spencer" above it and "Standard Lathes" below it, were held to be descriptive, and refused. Substantially the same ruling was made in the cases of *Ex parte Pratt and Farmer*, 10 O. G. 866, and *Ex parte Smith*, 16 O. G. 679. See also *Ex parte Silverman & Co.*, 50 MS. Dec. 76, where applicant sought to register as a trade mark for suspenders "the representation of a hole formed in the front or back facing strip of a suspender or like article to show a wire gauze strengthening piece," etc. Examiner affirmed. (FISHER, *Acting Com.*, June 6, 1896.)

§ 925. *Ex parte C. J. Countie & Co.*, appeal from Examiner of Trade-Marks, refusing to register the words "Roman Punch" in connection with the words "non-alcoholic," or words of similar import. The Examiner cited *Ex parte Rowe*, 50 MS. Dec. 168, where it was held that the words "Cherry Cocktail" are descriptive, when applied to a non-alcoholic drink; and reference was made to "Cooling Drinks and Dainty Cups," Terrington, London, 1872, pp. 221–223, to show that Roman Punch is a beverage containing alcoholic liquor. The Century Dictionary defines Roman Punch as a water-ice, flavored usually with lemon, and mixed with *rum* or other spirit.

As was stated in the case of *Ex parte Metropolitan Watch Co.*, 44 MS. Dec. 272, "the essential feature of a trade-mark is not what the registrant elects to designate as such, but that which strikes the public as its most salient feature, and as lending character to the entire mark." Examiner affirmed. (FISHER, *Acting Com.*, June 6, 1896.)

§ 926. *Ex parte The Western New York Preserving and Manufacturing Co.*, appeal from the Examiner of Trade-Marks, refusing to register the word "Hopkins" on a white rectan-

gular background, surrounded by a white bronze border, for "Canned Hulled Corn" or steamed hominy. The refusal was based on the previous registration of "Hopkins' Improved Prepared Flour," in 1873, used on "a compound of flour made of wheat, or other grain, and other substances, prepared so as to be self-raising when used in cooking." The word Hopkins is the salient part of each mark, and may be said to be the "essential feature." The question to be decided is whether "Canned Hulled Corn" (or steamed hominy) is included in the class of goods named by the registered mark. The Examiner holds that under the doctrine of *Ex parte North Dakota Milling Co.*, 58 MS. Dec. 176, canned hulled corn and "a compound of flour made of wheat and other goods" are the same class. It seems evident that these goods are of the same class, and the appellant in said case so considered them, as in his application as originally filed he included "flour" in the class of goods on which his mark was used, and which were put up in the same kind of packages.

In the present case, however, it is thought that the goods are not of the same class, and that the appellant or registrant *did not intend to include in his statement as to the class* of goods on which his mark was used, the class of goods named by the other. There is no similarity between the packages. The ordinary purchaser would not mistake one class for the other, or be led to believe that the ingredients of the registrants' goods were used or put up in the goods of the applicant, as was the case in *Eno* v. *Dunn*, Cox's Man. T. M. Cases, p. 488. Examiner's decision reversed. (FISHER, *Acting Com.*, June 19, 1896.)

§ 927. *Ex parte Frank C. Fowler*, appeal from action of Examiner of Trade-Marks, refusing to register as a label for ammunition the word "Squirrel," and the pictorial representation of a squirrel. The appellant states that "in use the label is printed, stamped, or otherwise affixed generally to the outer face of the top wad of a shell containing a 'squirrel' load." Refused, on the ground that the Act of June 18, 1874,* excluded trade-marks from the benefit thereof, and

* The Copyright Act.

that a label cannot be registered as such, if it contains trade-mark matter, until after such device is registered as a trade-mark.

The question of the registry of labels was considered at length by the "Supreme Court, in the case of *Higgins* v. *Keuffel*, 140 U. S. 428. In that decision it was said that the eighth section of Article I. of the Constitution of the United States, which declares that

'the Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,'

does not have any reference to labels which simply designate or describe the articles to which they are attached, and which have no value, separated from the articles, and no possible influence upon science or the useful arts."

From the appellants' statement in the record, it is evident that the sole purpose of his label is to designate what the packages to which it is attached contain, and that it is valuable only when connected with such packages. The label of itself is not intended to instruct the reader, and has not by itself value as a composition. Decision of Examiner affirmed. (FISHER, *Acting Com.*, June 23, 1896.)

§ 928. *Ex parte Maria A. Hall*,[1] application for registration of a trade-mark, consisting of the word "Sterling" applied to cereal products. The objection was:

1. That the registration of said word has heretofore been refused by the Commissioner. "In his statement the Examiner bases his refusal on the ground that the word 'Sterling' has hitherto been used in connection with a similar product. He calls attention to the recent decision in the case of *Beaumort*, 62 MS. Dec. 15. . . . It appears that the pound sterling mark, if made the sole essential feature of the trade-mark, would be registrable. It also appears that the pound sterling mark is the feature of this mark which is most prominent, and is calculated to attract attention from the ordi-

[1] 62 MS. Dec. 438.

nary purchaser." The decision of the Examiner is reversed. (GREELEY, *Acting Com.*, Oct. 26, 1897.)

§ 929. *Ex parte Consolidated Rubber Works*,[1] application for registration of the word "Kangaroo" for rubber tubing and tires, which had been refused by the trade-mark Examiner, from whom this appeal was made. It was urged by the applicant that the registration that had been made of the word "Kangaroo" for velocipedes or bicycles is no bar to this application. *Held*, the applicant is clearly right in this contention. Pneumatic tires and tubing for tires are recognized in the market as distinct articles of trade from the bicycles on which the tires may be used. The decision of the Examiner is reversed. (GREELEY, *Acting Com.*, Oct. 30, 1897.)

§ 930. *Oberhaeuser and Landauer* v. *Pastor Kneipp Medicine Co.*,[2] appeal from the Examiner of Interferences refusing to transmit to the primary Examiner the motion to dissolve the interference between the above cases. The statement of the Examiner of Interferences is:

The gist of the contention made is that since Oberhaeuser and Landauer alone have the exclusive right to the use of the mark in issue, the Pastor Kneipp Medicine Company did not and could not comply with the statutory requirements prerequisite to the granting of the certificate of registration; and, as it is claimed, having shown that the Pastor Kneipp Company has not used the trade-mark in lawful commerce, etc., the certificate issued to them is invalid, and the Commissioner of Patents is without jurisdiction to determine the question of ownership; and, that being so, the interference must, of necessity, be dissolved without judgment upon the question of ownership. . . . *Held:*

"It may be that the Pastor Kneipp Medicine Company was not entitled to registration for the reason that it had not complied with the statute relating to foreign trade; but it does not follow from that that Oberhaeuser and Landauer are entitled to registration.

[1] 62 MS. Dec. 457.
[2] 63 MS. Dec. 61.

"It is just as important that the office determine from the testimony whether Oberhaeuser and Landauer were the first to adopt and use the mark as it is to determine whether the Pastor Kneipp Medicine Company has complied with the law; and this can be done by letting the case proceed to final hearing on priority."

The decision of the Examiner of Interferences is affirmed. (GREELEY, *Acting Com.*, Dec. 6, 1897.)

§ 931. *Ex parte G. W. Dunbar's Sons*, appeal from the Trade-Mark Examiner's refusal of the registration of the words "Old Fashion" applied to Louisiana molasses.[1]

Refusal is based on the deceptive character of the term, as implying that the preparation is manufactured in an old style or method, and, consequently, superior in grade; and that the words, accordingly, lack the arbitrary and fanciful character which should authorize the symbol to be registered as a distinguishing mark of origin. Examiner's decision affirmed. (GREELEY, *Acting Com.*, Dec. 6, 1897.)

§ 932. *McGale* v. *Simard & Mignault*,[2] this is an appeal on motion from the Examiner of Trade-Marks refusing to dissolve an interference between said parties. The issue is "The name 'Dr. Coderre' applied to medical preparations." The basis of the appeal was that the interference was void for irregularity. McGale is seeking registration for a *fac-simile* of the signature of "J. Emery Coderre." Each of the trade-marks registered by Simard & Mignault consists of the name "Dr. Coderre," together with certain other words. Neither of them contains the *fac-simile* of the signature of *Dr. Coderre*, or of *J. Emery Coderre*. Simard & Mignault cannot, by reason of the registration of their trade-marks here mentioned, prevent the use by McGale of the trade-mark which he seeks to register. Nor would the registration of the *fac-simile* sought to be registered by McGale — which *fac-simile* does not appear to be used by Simard & Mignault — confer any right on him to prevent the use by them of the registered trade-marks. Examiner reversed. (GREELEY, *Acting Com.*, Dec. 9, 1897.)

[1] 63 MS. Dec. 65.

[2] 63 MS. Dec. 99.

§ 933. *Debnam* v. *O'Meara*,[1] this is an appeal on motion from the decision of the primary Examiner refusing to dissolve the above-entitled interference. The grounds of the motion set up by O'Meara are —

1. Want of interference in fact.

2. Irregularity in declaring.

"The issue of the interference is the word 'Royal' as applied to headache powders in tablets. O'Meara has obtained registration for the word Royal in connection with the words Headache Powders. Debnam is seeking registration of the word Royal with the words Headache Tablets, and in connection with the words Headache Powders. . . . That the tablets and powders are considered equivalents by Debnam is evidenced by his statement."

The grounds of this motion are equally untenable. O'Meara contends that, in view of his position as an applicant for registration, Debnam should have been required to show his use in foreign countries prior to O'Meara's date of registration. This is a matter that should be left to the discretion of the primary Examiner. The Examiner of Interferences at the proper time will make his report. The decision of the primary Examiner is affirmed. Affirmed by GREELEY, *Acting Com.*, Dec. 15, 1897.

[1] 63 MS. Dec. 122.

CHAPTER XI.

TREATIES, CONVENTIONS, LAWS, DECREES, ETC., FOR PROTECTION OF TRADE-MARKS.

§ 934. Portugal, decree as to Concurrence Déloyale.
§ 935. France and Roumania, treaty between.
§ 936. Great Britain and Roumania, treaty between.
§ 937. Switzerland and Greece, treaty between.
§ 938. Italy and Columbia, treaty betwcen.
§ 939. Italy and Paraguay.
§ 940. Morocco, no special laws in.
§ 941. Sweden — law for modification of former law in.
§ 942. France — circular of Minister of Commerce of.
§ 943. Sweden and Norway, similar protection awarded in.
§ 944. Mexico — Decree of Minister of Finance of.
§ 945. Brazil — as to counterfeiting labels and foreign marks in.

§ 934. In Portugal, the execution of the decree of December 15, 1894, is rigidly enforced. As to Concurrence Déloyale (Art. 255), it is provided that every time that the proprietor of a patent, of a mark, of a name, etc., shall be injured by the Act of Unfair Competition, and the chief of the Division of Industry shall obtain knowledge thereof, whether directly by complaint of the party in interest, — who shall have furnished all the elements of appreciation required, — or indirectly through other channels, said officer shall make the necessary communication to the Director General of Customs, or to the representative of the public ministry near the Tribunal of Commerce, according to the facts of the case.

1. The said chief of the Division of Industry shall embrace in his communication a report of the facts of the case, and indicate the nature of the title possessed by the injured party.

2. The intervention of said chief of Division, etc., shall be the same, whether the complainant is a citizen or a foreigner.

By Art. 258, the said Chief, etc., shall refuse to effect the registration of trade-marks or names, or the deposit of designs

when by such means a *concurrence déloyale* might ensue, or a false indication of the origin of goods might be made, etc.[1]

§ 935. By the treaty between France and Roumania of February 27 to March 11, 1895, Art. I., it is provided: Every product bearing a false indication of origin in either of the two countries, or in a place subject to one of them, which shall, directly or indirectly, indicate the country or place of origin, shall be seized in either of the two countries, on proper information. The seizure shall be effectuated in the state where the false indication shall be affixed, or in that in which the product shall have been furnished with such false information.

If the legislation of either country shall not permit the seizure or importation, the seizure shall be substituted by prohibition of importation. (Provision is made for ample judicial redress.)[2]

§ 936. Great Britain and Roumania, by treaty, March 20 to April 1, 1895, Art. 1, has substantially the same provisions as the foregoing (between France and Roumania). Art. 2 provides that: The seizure shall be made at the request of the party in interest or in conformity with the order of the public ministry, in accordance with the interior legislation of each state. The authorities shall not be held responsible for effecting the seizure of the products *in transitu.* . . . Art. 4. The present dispositions shall not be an obstruction to the vendor — including his name or his address — of products coming from a country different from that of sale; but in that case the address, or the name, shall be accompanied by the precise indication of the place or country fabricating the product. Art. 5 gives the tribunals of the respective countries full judicial cognizance. Art. 6 applies to all the colonies of Great Britain and her foreign possessions, except India, Canada, Newfoundland, Cape of Good Hope, Natal, New South Wales, Victoria, Queensland, Tasmania, and other colonial parts of Australia,[3] etc.

[1] La Propriété Industrielle, 1896, p. 1, *et seq.*

[2] Ibid. 1896, p. 20.

[3] Ibid. 1896, p. 21.

§ 937. Switzerland and Greece, by treaty of November 21 to December 3, 1895, have substantially the same provisions for the mutual protection of trade-marks.[1]

§ 938. Italy and Columbia adopted essentially the same provisions October 27, 1892.[2]

§ 939. Italy and Paraguay, by convention of October 27, 1892, have incorporated the same provisions.[3]

§ 940. In Morocco there do not exist special laws for the protection of trade-marks; but by virtue of a sovereign decree of the Sultan, October 24, 1892, protection to France, England, Germany, and Belgium is accorded.[4]

§ 941. (Sweden, etc.) Law for the modification of certain parts of the law of July 5, 1884, for the protection of marks of fabric and of commerce.

We, Oscar, by the grace of God, King of Sweden, of Norway, of the Goths, and the Vandals, make known that with the concurrence of the Diet, we have found good to decree that the Articles 4, 7, and 16 of the law (above mentioned), shall have the following tenor: —

ART. 4. There shall not be registered marks composed only of ciphers, of letters, and of words, not distinguished by form particularly technical, which may be considered as figurative marks. Registration, however, shall not be refused if a mark is composed of words that can be considered as a denomination especially created for special merchandise, indicated in conformity with Article 3, and if the said denomination has for its object only to designate the origin, the nature, the quantity, and the price of the merchandise,[5] or —

2. Marks which improperly contain a peculiar commercial name other than that of the registrant, or an inscription belonging to a third person.

3. A mark embracing public arms, or stamps.

4. Designs or other reproductions of a scandalous nature.

5. A mark identical with that of another previously registered, or in its nature calculated to mislead.

Other provisions follow of a similar nature, etc.

[1] La Propriété Industrielle, 1896, p. 21.
[2] Ibid. 1896, p. 36.
[3] Ibid. 1896, p. 36.
[4] Ibid. 1896, p. 36.
[5] Ibid. 1897, p. 1.

§ 942. The Minister of Commerce (France), on January 28, 1897, issued a circular wherein he treats of the counterfeits of French trade-marks in foreign nations, and he points out to his fellow-citizens a much needed protection. He says that on April 14, 1891, at Madrid, an Arrangement was signed with Belgium, Brazil, Spain, Italy, Netherlands, Portugal, Switzerland, and Tunis, where, by a single registration at Berne, Switzerland, as an intermediary, protection is assured in all those countries.[1]

§ 943. In Sweden and Norway, the same protection was given to the latter as to the former, in accordance with the law of April 1, 1885, as to marks of trade and of commerce, and to all in Norway engaged in manufacture, in agriculture, in mining, in commerce, or any other industry. All trade-marks must be duly registered in order to insure protection.[2]

§ 944. In Mexico, a notice has been given and especial attention called in regard to the law of 1889, which required foreign owners of trade-marks applying for registration to appoint a special agent in the Republic with power to deposit the mark with the Ministry of Finance. It is stated therein, that a large number of Europeans and Americans have registered their marks in Mexico. The country is inundated with counterfeits of foreign specialities having no registered marks, above all fire-arms, alimentary conserves, cutlery, and perfumery. To remedy this evil the Minister of Finance has published a decree obliging Mexican manufacturers of articles, to which are given a foreign appearance by reason of simulated trade-marks and labels, to deposit with him, in future, said marks and labels; that it may be understood that they do not counterfeit foreign trade-marks already registered. Domestic products bearing marks not registered shall be considered as foreign products, and treated as such in the bureau of customs, in ports, and in the interior.[3] (*Revue Diplomatique.*)

[1] La Propriété Industrielle, 1897, p. 41. NOTE. — In a communication coupled with the above is a statement that nearly 8,000 trade-marks are annually registered in France.

[2] La Propriété Industrielle, 1897, p. 10.

[3] Ibid. 1897, p. 80.

§ 945. A recent decree in Brazil puts into vigor the new registration law of trade-marks and indications of origin, applied to Brazilian manufactures. By the terms of the regulation, the counterfeiting of labels and foreign marks on native products is punished, and the importation of foreign goods bearing false marks and labels is prohibited. There is equally prohibited the sale of drugs without the indication of origin of name and price, and labels bearing misleading foreign language. . . . There is authorized the exceptional use of denominations such as "*bitter*," "*brandy*," "*cognac*," "*fernet*," "*kirsch*," and "*rhum*," which have not equivalents in the Portuguese language; and the indication must also be given of the names of makers, or originators, if they are foreigners.[1] (*Le Soleil.*)

[1] La Propriété Industrielle, 1897, p. 149.

APPENDIX.

Exchange of Notes between the Netherlands Legation and the Department of State.

Dated February 10, 1883, and February 16, 1883.

The United States Secretary of State had transmitted to him an official edition of the Dutch Law relative to trade-marks, bearing date of May 25, 1880.

. . . . . .

The Secretary of State responded, *inter alia:*

"I have taken due note of your statement that this law makes no distinction between Netherlanders and foreigners, so that the citizens of the United States are treated in the Low Countries on the same footing as the natives thereof in all that concerns the registration and protection of their commercial and trade marks."

This simple interchange of civilities fixed the law of the case.

Exchange of Notes between the Swiss Legation and the Department of State.

Dated April 27, 1883, and May 14, 1883.

Swiss Legation, Washington, April 27, 1883.

To the Ministry of Foreign Affairs, Washington.

Mr. Secretary of State, — The undersigned, Minister of the Swiss Confederation, has this day had the honor to receive your note of the 24th instant, whereby you had the kindness to acquaint him with your views concerning an exchange of de-

clarations between the United States and the Swiss Confederation, relative to the mutual protection of trade-marks.

. . . . . .

As regards the question whether the principle of reciprocity is embodied in the Federal Law of December 19, 1879, the undersigned has the honor to invite your attention to the text of Article 7, paragraph 2, of the Federal Law of December 19, 1879, and also to the contents of the message of the Federal Council relative thereto. In the aforesaid paragraph of the law of December 19, 1879, it is expressly provided that producers and merchants, whose business is carried on in a State *which accords the right of reciprocity to Swiss citizens*, may have their marks registered in the same manner as Swiss citizens. But one condition is added, viz., that foreigners shall be obliged to prove that these marks are *already* protected in the State to which they belong, the sole object of which reservation is to prevent foreigners from depositing, with fraudulent intent, under the protection of reciprocity, marks for which they cannot claim protection in their own country. The Federal Council, moreover, in its message of October 13, 1879, whereby it transmitted to the Federal Chambers a bill for the protection of trade-marks, made the following declaration touching trade-marks: "As regards foreign trade-marks we are of opinion *that Switzerland should stand upon the ground of reciprocity*, and that this is the only position that should be taken by us in the interest of our industry."

. . . . . .

The undersigned thinks that he has, by the foregoing, furnished proof that the Confederation recognizes the principles of reciprocity, as regards the international protection of trade-marks, as an integral part of its public law, and that the United States may, with the most perfect confidence, enter into such an arrangement with the Confederation.

. . . . . .

CONVENTION AND FINAL PROTOCOL BETWEEN THE UNITED STATES AND MANY OF THE NATIONS FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

Concluded at Paris, March 20, 1883.
Exchange of Ratifications by Signatory Powers, June 6, 1884.
Adhesion to the Convention advised by the Senate, March 2, 1887.
Ratified by the President, March 29, 1887.
Accession of the United States to the Union announced by the Minister Resident and Consul-General of the United States at Berne to the Federal Council of Switzerland, May 30, 1887.
Proclaimed, June 11, 1887.

The following are Articles especially relating to trade or commercial marks:

. . . . . .

ARTICLE II.

The subjects or citizens of each of the contracting States shall enjoy, in all the other States of the Union, so far as concerns patents for inventions, trade or commercial marks, and the commercial name, the advantages that the respective laws thereof at present accord, or shall afterwards accord to subjects or citizens. In consequence they shall have the same protection as these latter, and the same legal recourse against all infringements of their rights, under reserve of complying with the formalities and conditions imposed upon subjects or citizens by the domestic legislation of each State.

ARTICLE III.

Are assimilated to the subjects or citizens of the contracting States, the subjects or citizens of States, not forming part of the Union, who are domiciled or have industrial or commercial establishments upon the territory of one of the States of the Union.

ARTICLE IV.

Any one who shall have regularly deposited an application for a patent of invention, of an industrial model or design, of a trade or commercial mark, in one of the contracting States, shall enjoy for the purpose of making the deposit in the other States, and

under reserve of the rights of third parties, a right of priority during the periods hereinafter determined.

In consequence, the deposit subsequently made in one of the other States of the Union, before the expiration of these periods cannot be invalidated by acts performed in the interval, especially by another deposit, by the publication of the invention or its working by a third party, by the sale of copies of the design or model, by the employment of the mark.

The periods of priority above-mentioned shall be six months for patents of invention and three months for designs or industrial models, as well as for trade or commercial marks. They shall be augmented by one month for countries beyond the seas.

. . . . . .

ARTICLE VI.

Every trade or commercial mark regularly deposited in the country of origin shall be admitted to deposit and so protected in all the other countries of the Union.

Shall be considered as country of origin, the country where the depositor has his principal establishment.

If this principal establishment is not situated in one of the countries of the Union, shall be considered as country of origin that to which the depositor belongs.

The deposit may be refused, if the object, for which it is asked, is considered contrary to morals and to public order.

ARTICLE VII.

The nature of the production upon which the trade or commercial mark is to be affixed cannot in any case be an obstacle to the deposit or the mark.

ARTICLE VIII.

The commercial name shall be protected in all the countries of the Union without obligation of deposit, whether it forms part or not, of a trade or commercial mark.

ARTICLE IX.

Every production bearing, unlawfully, a trade or commercial mark, or a commercial name, may be seized upon importation into those of the States of the Union in which such mark or such commercial name has a right to legal protection.

The seizure shall take place either at the instance of the public prosecutor or of the interested party, conformably to the domestic legislation of each State.

ARTICLE X.

The provisions of the preceding article shall be applicable to every production bearing falsely as indication of origin, the name of a stated locality when this indication shall be joined to a fictitious commercial name or a name borrowed with fraudulent intention.

Is reputed interested party every manufacturer or trader engaged in the manufacture or sale of this production when established in the locality falsely indicated as the place of export.

ARTICLE XI.

The High Contracting parties engage between themselves to accord a temporary protection to patentable inventions, to industrial designs or models as well as to trade or commercial marks for the productions which may figure at official or officially recognized International Exhibitions.

ARTICLE XII.

Each one of the High Contracting parties engages to establish a special service of Industrial Property, and a Central Depôt, for giving information to the public, concerning patents of invention, industrial designs or models and trade or commercial marks.

ARTICLE XIII.

An International Office shall be organized under the title of "International Bureau of the Union for the Protection of Industrial Property."

This Bureau, the cost of which shall be supported by the Governments of all the contracting States, shall be placed under the high authority of the Superior Administration of the Swiss Confederation, and shall work under its supervision. Its powers shall be determined by common accord between the States of the Union.

FINAL PROTOCOL.

. . . . . .

4. Paragraph 1 of Article 6 is to be understood in the sense that no trade or commercial mark shall be excluded from protection, in one of the States of the Union, by the mere fact that it may not satisfy, in respect to the signs composing it, the condi-

tions of the laws of this State, provided that it does satisfy, in this regard, the laws of the country of origin, and that it has been in this latter country duly deposited. Saving this exception which concerns only the form of the mark, and under reservation of the provisions of the other articles of the convention, the domestic legislation of each of the States shall receive its due application.

In order to avoid all misinterpretation, it is understood that the use of public armorial bearings and decorations may be considered contrary to public order in the sense of the final paragraph of Article 6.

NOTE. — So far as concerns this country, legislation is necessary for the enforcement of the foregoing. See opinion of the Attorney-General, in the Preface to this Supplement.

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND DENMARK FOR THE RECIPROCAL PROTECTION OF TRADE-MARKS AND TRADE LABELS.

Concluded at Copenhagen, June 15, 1892.
Ratification advised by the Senate, July 21, 1892.
Ratified by the President of th United States, July 29, 1892.
Ratified by the King of Denmark, September 23, 1892.
Ratifications exchanged at Copenhagen, September 28, 1892.
Proclaimed, October 12, 1892.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a Convention between the United States of America and the Kingdom of Denmark for the reciprocal protection of Trade-Marks and Trade Labels was signed by their respective Plenipotentiaries at the City of Copenhagen, on the fifteenth day of June, one thousand, eight hundred and ninety-two, the original of which Convention, being in the English and Danish languages, is word for word as follows:

CONVENTION.

With a view to secure for the manufacturers in the United States of America, and those in Denmark, the reciprocal protec-

tion of their Trade-Marks and Trade Labels, the Undersigned, duly authorized to that effect, have agreed on the following dispositions.

ARTICLE I.

The subjects or citizens of each of the High Contracting Parties shall in the Dominions and Possessions of the other have the same rights as belong to native subjects or citizens, in everything relating to Trade-Marks and Trade Labels of every kind.

Provided, always, that in the United States the subjects of Denmark, and in Denmark, the citizens of the United States of America, cannot enjoy these rights to a greater extent or for a longer period of time than in their native country.

ARTICLE II.

Any person in either count y desiring protection of his Trade-Mark in the Dominions of the other must fulfil the formalities required by the law of the latter; but no person, being a subject or citizen of one of the contracting States, shall be entitled to claim protection in the other by virtue of the provisions of this convention, unless he shall have first secured protection in his own country in accordance with the laws thereof.

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE EMPIRE OF JAPAN.

COMMERCE AND NAVIGATION.

Concluded at Washington, November 22, 1894.
Ratification advised by the Senate, February 5, 1895.
Ratified by the President, February 15, 1895.
Ratified by the Emperor, February 27, 1895.
Ratifications exchanged at Washington, March 21, 1895.
Proclaimed, March 21, 1895.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, a Treaty of Commerce and Navigation between the United States of America and the Empire of Japan was concluded

and signed by their respective Plenipotentiaries at the city of Washington on the 22d day of November, 1894, which treaty, being amended by the Senate of the United States, and being in the English language, is word for word as follows:

The President of the United States of America and His Majesty the Emperor of Japan, being equally desirous of maintaining the relations of good understanding which happily exist between them, by extending and increasing the intercourse between their respective States, and being convinced that this object cannot better be accomplished than by revising the Treaties hitherto existing between the two countries, have resolved to complete such a revision, based upon principles of equity and mutual benefit.

. . . . . .

ARTICLE XVI.

The citizens or subjects of each of the High Contracting Parties shall enjoy in the territories of the other the same protection as native citizens or subjects in regard to patents, trade-marks, and designs, upon fulfilment of the formalities prescribed by law.

. . . . . .

PROTOCOL.

. . . . . .

But nothing contained in this Protocol shall be held to limit or qualify the right of the Japanese Government to restrict or to prohibit the importation of adulterated drugs, medicines, food, or beverages; indecent or obscene prints, paintings, books, cards, lithographic or other engravings, photographs, or any other indecent or obscene articles; articles in violation of the patent, trade-mark, or copy-right laws of Japan; or any other article which for sanitary reasons, or in view of public security or morals, might offer any danger.

. . . . . .

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE EMPIRE OF JAPAN.

PATENTS, TRADE-MARKS, AND DESIGNS.

Concluded at Washington, January 13, 1897.
Ratification advised by the Senate, February 1, 1897.
Ratified by the President, February 2, 1897.
Ratified by the Emperor, March 6, 1897.
Ratifications exchanged at Tokyo, March 8, 1897.
Proclaimed, March 9, 1897.

The President of the United States of America and His Majesty the Emperor of Japan, being desirous of securing immediate reciprocal protection for patents, trade-marks, and designs, have resolved to conclude a Convention for that purpose, and have appointed as their Plenipotentiaries:

. . . . . .

Article XVI of the Treaty of Commerce and Navigation between the United States of America and Japan concluded at Washington on the twenty-second day, the eleventh month, the twenty-seventh year of Meiji, corresponding to the twenty-second day of November, eighteen hundred and ninety-four of the Christian Era, shall have full force and effect from the date of the exchange of ratifications of this Convention.

The Bureau of Commerce, of the DEPARTMENT OF STATE, at Washington, D. C., January 11, 1898, has issued the following on

LABELS AND TRADE-MARKS IN CHINA.

Commercial missions must bring large results to nations who take intelligent methods to ascertain the needs of the world's peoples. . . . The establishment of a commercial museum in Philadelphia and the projecting of another in San Francisco is the first organized effort of the United States business men to supply needful information and illustration of the world's products and demands. One of the most valuable uses of such museums is the exhibition of samples of the kinds of goods used in foreign

lands and illustrations of the methods of preparing and putting up such goods as command the favor of the purchasers.

A writer in a recent number of an English commercial paper says: "Closely allied to the previous grounds of the success of foreign producers is the question of packing, as to which there is a general consensus of opinion that our (England's) foreign competitors, and in particular, perhaps, the United States, take much more trouble than we do. The following instance is cited: Hongkong — candles. British makers absolutely decline to alter their system of packing to that adopted by continental markets; consequently, they have lost the whole trade. The personal factors which enter into successful competition must not be ignored. It is important that our manufacturers of textile fabrics should know what are the desires or prejudices of purchasers in the different markets of the world, as regards quality, weight, sizing, dressing, and the finish which will often sell low-priced goods; preferred lengths and widths, and the manner of putting up and packing, freight charges, etc. An unfortunate trade-mark will often doom an otherwise desirable product to failure. This is particularly true in China."

Mr. Gardner, English consul at Amoy, says: "It has not unfrequently occurred that the sale of foreign goods has been greatly crippled by having some label placed upon it that was offensive to Chinese superstition or tastes. Many colors have peculiar recognition by the people; some offend their tastes and others their superstitions. Some are all right on some kinds of goods and all wrong on others. The Chinese will often buy biscuits, needles, thread, matches, soap, medicine, scent, sweets, etc., for the sake of getting a lucky label. Some colors and combinations of colors are to the Chinese unlucky." The same gentleman has furnished his Government with some four hundred designs for trade-marks and labels which, in his judgment, would be popular with the Chinese people. I have no means of knowing what he has furnished, but from my own observation of what is displayed in shops and what is manifestly pleasing to the people, I give herewith a few specimens of things most frequently seen, and which, I therefore think, must be popular.

Simply naming these things will not supply sufficient data from which to prepare them. It must be remembered that Chinese art is very peculiar, and a tiger, as ordinarily represented by foreign artists, would not meet with favor with these people. It must be

a tiger according to Chinese imagination and art, of unreasonable length of body or bigness of head or curve of tail, and impossible attitudes. On a popular Japanese match box is displayed a monkey standing on its front feet, head nearly touching the ground, with hind feet up in the air, and tail whipping the skies. The grotesque and even hideous, to the American mind, tickles the fancy of the dwellers in Far Cathay. No description can supply adequate information to an engraver or colorer by which he could produce the real thing, and any departure from the Chinese fancy in such things would brand the goods at once as the product of a "foreign devil" and doom it to defeat.

A Chinese dragon differs from a Japanese dragon in its contortions. A royal dragon must have five claws, while the plebeian beast has only four. A stork must always stand on one leg or, flying, must present an enormous spread of wings and trailing long legs. All Japanese birds, when flying, must have a tendency downward, never up or on a straight course. To a Japanese, nothing is preferable to the representation of snow-capped, sacred Fusiyama, as seen on nearly all Japanese fans, screens, etc.

The following are some of the labels, trade-marks, etc., which would be useful in the trade of the Far East:

Animals. — Lion, tiger, deer, fawn, leopard, ape, elephant, camel, dragon, buffalo, man plowing with water buffalo, boy riding water buffalo, woman in bright robes holding a long-necked vase on her shoulder while on one side of her is a monkey holding up a chrysanthemum in its mouth. Many of these animals are represented in various attitudes — leaping, running, standing on hind legs — some with enormous heads out of all proportion to the body, while some have a long body out of all proportion to the other parts.

Trees. — Banyan, fir, pine, olive, palm, fern, yucca, cactus, tea plant, tea field, orange, banana, pineapple, etc.

Fish. — Dolphin, double dolphin, reversed, carp, double carp, crab, lobster, etc.

Birds. — Pheasant, peacock, paddy bird, stork, cormorant, duck, goose, cock, generally represented flying.

Flowers. — Chrysanthemum, sunflower, lily, rose, twining vines, jessamine, wisteria, etc.

Objects. — Women, archer, trident spear, umbrella, fans (open and shut), open fan with quotations from the classics written on them, long fans (oblong, square, and round, all having figures of

flowers, animals, birds, or butterflies painted on them), houses, temples, books, arches, coolies carrying chests of tea or other articles suspended from ends of bamboo, soldier, flags, banner, ships, junks, sampans, battle ship, men fishing with cormorants, tobacco pipe, opium pipe, abacus or Chinese calculating machine, dragons, a long dragon lantern borne aloft on poles by eight or ten men, kites of many shapes, men flying kites, men playing with shuttlecock with feet, wedding chair, wedding procession, lanterns in scores of different shapes, Chinese hats with different colored buttons, mountains, rivers, bridges of granite slabs with high, sharp arch, and canal boats in canal.

Geometrical Figures. — Square, triangle, circle, octagon, square enclosing circle, triangle or octagon and *vice versa*, a circle with triangles pendant, circle with triangles above and below, large octagon enclosing two smaller ones with figures between the lines and a circle in the centre and other combinations of figures, Chinese characters for good luck, happiness, longevity, health, prosperity, double happiness; checkered figures, stripes in bright yellow, green, blue, and red.

Fruit. — Pear, orange, pumalo, banana, grapes, lichee, mango, pineapple, arbutus, persimmon.

Insects. — Caterpillar, dragon fly, cricket, butterflies of many shapes and colors.

. . . . . .

SAMUEL L. GRACEY, *Consul.*

FUCHAU, November 30, 1897.

GERMAN MERCHANDISE MARK LAW

OF MAY 12, 1894.

SECTION 1. Any person who desires to employ in his business a merchandise-mark to distinguish his merchandise from that of others, may declare it for registry in the Roll of Marks (*Zeichen Rolle*).

SECTION 2. The Roll shall be kept at the Patent Office. The declaration of a mark shall be made in writing to the Patent Office. Every declaration must be accompanied by a statement of the enterprise for which the mark is to be employed and a specification of the merchandise for which it is intended, as well

as a distinct representation of the mark and a description thereof so far as it may be necessary.

The Patent Office shall prescribe rules concerning other requirements of the declaration.

A fee of 30 marks (about $7.50) shall be paid with the declaration of each mark, and at each renewal of the declaration a fee of 10 marks. If registration does not result from the first declaration, 20 marks of the fee shall be refunded.

SECTION 3. The Roll of Marks shall contain, first, the date of receipt of the declaration; second, the facts required to accompany the declaration by the first paragraph of section 2 of this law; third, the name and domicile of the proprietor of the mark and of his proxy, if any, as well as changes in the person, the name or the domicile of the proprietor of the mark or his proxy; fourth, the date of renewal of the declaration; fifth, the date of cancellation of the mark.

The Roll shall be free to public inspection.

Every registration and cancellation will be officially published. The Patent Office will publish periodically abstracts of registrations and cancellations.

SECTION 4. Registry on the roll will be refused for free marks (*Freizeichen*) as well as for those merchandise marks, first, which consist exclusively of letters or numerals, or of words containing indications of the mode, time or place of production; or of the quality, destination, price, quantity or weight of the merchandise; second, which contain the arms of German or foreign States, or those of a locality, parish, or union of towns situated in the country; third, which contain scandalous representations, or indications evidently at variance with the facts and liable to cause deception.

Cancelled marks cannot be registered anew in favor of another than the last proprietor for merchandise identical or analogous with that for which they were registered, until after two years from the date of cancellation.

SECTION 5. If the Patent Office shall regard that any declared mark is in conflict with one previously declared for similar merchandise under the law of November 30, 1874, or under the present law, it shall advise the owner of the earlier mark. If within a month he shall make no opposition to the registry of the new declared mark, it may be registered. In the contrary case the Office shall determine whether there is an actual conflict.

The omission of the notice contemplated in the preceding paragraph shall not constitute claim for indemnity.

SECTION 6. If the decision (sec. 5, par. 1) be that there is no conflict between the marks, the new declared one may be registered. If the decision be that conflict exists, registration shall be refused. In case the declarant shall desire to establish his right to registry notwithstanding the conflict, he must do so by action against the opposing party. Registry effected by virtue of a decision in his favor shall be effective as of the date of his original declaration.

SECTION 7. the rights resulting from the declaration or registry of a merchandise-mark pass by inheritance, and can be transmitted to other persons by testamentary disposition. They cannot however pass to others but with the business to which the mark appertains. The transfer shall be entered on the Roll of Marks at the instance of the successor, provided the assent of the original owner is satisfactorily established. If the original owner is deceased the successor must establish his title.

The new owner cannot benefit by the rights accruing from registration until the transfer has been recorded in the Roll of Marks.

Decisions and judgments of the Patent Office which require to be notified to the proprietor of a mark must be addressed to the proprietor of record. If he is deceased the Patent Office may, at its discretion, consider the notice as given, or cause search to be made for the heirs, in order to notify them.

SECTION 8. A mark can be cancelled from the Roll at any time on the demand of the owner.

Cancellation will take place by Office action, first, when ten years shall have expired since the declaration or renewal of the mark; second, when the registration should have been refused.

When there is a question of cancellation without the request of the owner, the Office shall give him notice. If he does not reply within a month the mark shall be cancelled. If he replies the question shall be decided by the Office. If such cancellation is under consideration by reason of expiration of the term of ten years, it will not take place, if, within one month from the notice, the owner of the mark shall renew it by the payment of 10 marks in addition to the renewal fee, when the renewal shall be regarded as having taken place at the expiration of the preceding term.

SECTION 9. A third party may demand the cancellation of a merchandise-mark, first, if by virtue of a prior declaration the mark has been registered in his name for similar merchandise in the Roll of Marks or in the registers of marks kept under the law of November 30, 1874; second, if the enterprise to which it appertains has not been maintained by the owner of record; third, if facts establish that the contents of the mark do not agree with actual conditions, and are liable to mislead.

When a mark, excluded from registry under the law of November 30, 1874, has been considered in commercial circles up to the enactment of this law as the distinctive sign of the merchandise of a particular concern, and this mark has been entered in the Roll of Marks in the name of another person under this law, the owner of said concern shall have until October 1, 1895, to demand its cancellation. If the demand is granted the mark may be registered in the Roll in the name of the applicant before the expiration of the period fixed by section 4.

The demand for cancellation is to be made in the form of an action at law against the record owner, or against his heirs if he is deceased.

If, before or after the beginning of the action, the mark has been assigned, the decision shall be effectually operative as regards the assignee. The provisions of sections 63–66 and 73 of the Code of Civil Procedure apply to the right of the assignee to intervene in the suit. In the second case contemplated in the first paragraph of this section, the demand for cancellation may be addressed in the first place to the Patent Office, which shall give notice thereof to the person registered as proprietor. If he makes no opposition in one month the mark shall be cancelled. If he makes opposition, the applicant may prosecute his demand for cancellation by an action at law.

SECTION 10. Declarations, assignments for record, and objections to cancellation, will be despatched by a summons and a decision, as in the procedure concerning patents. In the case contemplated in section 5 there will be no summons.

An appeal is open to the applicant from a rejection of his application, and also to the owner of a mark from a decree of cancellation in the face of his protest. These appeals are to be filed in the Patent Office within a month of notice.

Notifications concerning registry, assignment or cancellation of marks shall be given by registered letter. If notification can-

not be given in Germany, it shall be sent by mail as provided in sections 161 and 175 of the Code of Civil Procedure.

SECTION 11. The Patent Office shall give opinions upon questions concerning registered merchandise-marks on request of the courts, when the inquiry relates to a legal proceeding in which experts differ.

SECTION 12. The effect of registration of a mark shall be to confer on the registrant the exclusive right to affix the mark to merchandise of the species named in the declaration, or to its wrappers or envelopes; to put on the market goods so marked; and to employ the mark on advertisements, price-lists, business-letters, press-notices, invoices, and analogous matter.

In case of cancellation no right shall be inferred from registration for the period during which the cause of cancellation existed.

SECTION 13. Registration of a mark shall not prevent any person from employing, even in an abridged form, on his goods or on their inclosure, his name, firm-name, or residence, nor indications concerning the mode, time or place of manufacture, or the quality, destination, price, quantity or weight of the goods, nor from making use of similar indications in trade.

SECTION 14. If any person shall knowingly or by gross carelessness illegally apply to his goods or their inclosures, or to his advertisements, business-letters, price-lists, and the like, the name or firm-name of another or a mark protected under the present law, or shall put in circulation or on sale merchandise thus illegally marked, he shall be bound to indemnify the injured party. If he shall commit this act knowingly he shall be further punished by a fine of 50 to 5,000 marks, or imprisonment not exceeding six months. Penal action shall not proceed but on complaint, and it may be withdrawn.

SECTION 15. If any one, with the intent to cause deception in commerce, shall without authority use upon goods, or their inclosures, or on advertisements, price-lists, business-letters, press-notices, invoices, etc., a device considered in commercial circles as the distinctive sign of another person's similar merchandise; or if any one, with the same intent, shall put in circulation or offer for sale goods so marked, he shall be bound to indemnify the injured party, and shall be liable to a fine of from 100 to 3,000 marks, or imprisonment not exceeding three months Penal action shall only take place on a complaint, and it may be withdrawn by the plaintiff.

SECTION 16. Any one who, with intent to cause deception as to the quality or value of goods, shall have falsely affixed thereto, or to their wrappers or envelopes, or used in his advertisements, price-lists, business-letters, press-notices, invoices, etc., the arms of a State, or the name or arms of a locality, community, or more extended communal union, and any one one who with the same object shall have put in circulation or offered for sale goods so marked, shall be liable to a fine of from 50 to 5,000 marks, or imprisonment not exceeding six months.

The employment of names, which by the usages of trade serve to designate certain goods without indicating their origin, does not come within the scope of this provision.

SECTION 17. Foreign goods unlawfully marked with the name of a German firm or place, or with the merchandise-mark registered in the Roll of Marks, shall be liable to seizure and confiscation upon entry into Germany for importation or transit, on the demand of the injured party, who shall give security. Seizure may be effected by the officers of custom and revenue. Confiscation shall be adjudged by a penal decision of the executive authority (section 459, Code of Penal Procedure).

SECTION 18. In lieu of the damages contemplated in this law, on the demand of the injured party, there may be awarded in excess of the penalty an indemnity to be paid to him not exceeding 10,000 marks. Persons condemned to pay this indemnity are held for it jointly. The allowance of this indemnity excludes all other claims for damages.

SECTION 19. On a condemnation under sections 14, 15, 16, or 18, the judgment shall order the illegal mark effaced from all articles in possession of the condemned. If it cannot be otherwise done, the destruction of the goods may be ordered.

In case of a penal condemnation there shall be accorded to the injured party in the cases contemplated in sections 14 and 15 the privilege of publishing the judgment at cost of the convicted party. The judgment shall determine the nature of the publication and the period within which it shall be made.

SECTION 20. The application of the provisions of this law shall not be prevented by any modifications that may be employed in the reproduction of foreign names, firms, marks, arms, and any other distinctive signs of merchandise, if, in spite of such modifications, the possibility of mistake is not avoided.

SECTION 21. In civil suits in which by complaint or rejoinder

a claim is made founded on the provisions of this law the hearing and final decision shall be referred to the Imperial Court under section 8 of the introductory act to the judicature law.

SECTION 22. Whenever German goods introduced into a foreign country, either as imported or in transit, shall be required to be marked to show their German origin, or shall be treated less favorably by officers of customs than the goods of any other country in respect to the marks they are required to bear, the Federal Council is empowered to impose a corresponding charge upon foreign goods on importation into Germany or introduced for transit, and it may ordain the seizure and confiscation of the goods in case of contravention. Seizure shall be made by the customs and revenue officers. Confiscation shall be adjudged by a penal decision of the executive authorities (section 459, Code of Penal Procedure).

SECTION 23. A person not having an establishment in Germany can have a claim to the protection of this law only when according to a publication in the *Reichs-Gesetz-Blatt*, the State in which his establishment is situated accords to German merchandise-marks protection to the same extent as to domestic marks.

The protection of a merchandise-mark and the rights resulting from registry can be claimed only through the medium of a proxy residing in the country. Such proxy shall have power to represent his principal in the procedure before the Patent Office under this law, as well as in civil actions concerning the mark; he shall also be empowered to institute penal actions. Either the court within whose protection the proxy is domiciled or that of the place where the Patent Office is situated is competent to try suits against the registered owner of a mark.

Any one who shall make declaration of a foreign mark, will have to show at the same time that he has applied for and obtained legal protection for it in the State where his establishment is situated. Unless otherwise provided in international conventions, registration cannot take place if the mark does not satisfy the requirements of this law.

SECTION 24. The provisions of the law of November 30, 1874, for the protection of marks, shall up to October 1, 1898, continue applicable to merchandise-marks registered in conformity with said law. At any time up to October 1, 1898, these marks may be declared for registry in the Roll of Marks as provided in this law, and shall be subject to all its provisions. Registry cannot

be refused to marks inserted in the Register of Marks under an ancient provincial law. The registration shall be made without expense and as of the date of the first declaration. With respect to the contents of the first registration a certificate must be produced from the authority formerly presiding over registration.

Protection hitherto assured to merchandise-marks shall expire when registry has been effected on the Roll of Marks, or, in default of registry, on October 1, 1898.

SECTION 25. Necessary rules for the execution of this law in matters concerning the organization and conduct of business at the Patent Office, as well as the procedure to be followed therein, shall be established by an imperial ordinance with the assent of the Federal Council.

SECTION 26. This law shall go into force the 1st of October, 1894.

From that date declarations of merchandise-marks will no longer be accepted under the law of November 30, 1874, for the protection of marks.

ADDENDA.

THE Act of June 23, 1857, was modified as follows by the President of the French Republic on May 3, 1890:

ARTICLE 1. Article 2 of the law of June 23, 1857, relative to marks of trade and commerce are modified as follows:

No one can claim the exclusive property of a mark who has not deposited the same with a clerk of the Tribunal of Commerce of his domicile;

1. Three copies of the *fac-similes* of said mark;
2. The stereotype plate of said mark.

In case of the deposit of several marks belonging to the same person, a single application only is required; but there should be deposited for every trade-mark three *fac-similes*, or as many stereotypes as there are different variations of the mark. One of the copies deposited shall be retained by the depositor, with the signature of the clerk attached, and bearing the indication of the day and the hour of deposit.

The dimension of the stereotype must not exceed 12 centimetres each way. The stereotypes shall be returned to the depositor on the official publication of the mark.[1]

[1] 36 Annales, 154.

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