THE LAW OF TRADE-MARKS

AND

UNFAIR TRADE

A DIGEST

OF THE

LAW OF TRADE-MARKS

AND

UNFAIR TRADE

BY

NORMAN E. HESSELTINE

OF THE SUFFOLK BAR

BOSTON

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TO THE

HONORABLE WILLIAM L. PUTNAM

JUDGE OF THE CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT

WHOSE KNOWLEDGE OF LAW AND SENSE OF EQUITY HAVE
GREATLY INFLUENCED THE DEVELOPMENT OF
THE PRINCIPLES OF THIS SUBJECT

THE AUTHOR RESPECTFULLY DEDICATES
THIS VOLUME.

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INTRODUCTION

THIS book states concisely the principles of the law of trade-marks and unfair trade, for ready application by the lawyer. The legal profession now wants the law and cases, not pages of text-book discussion. The digest of cases in the book shows the basis for the rule preceding. The rule is stated from a study of the cases according to the inductive method.

The digest includes all cases on this subject in the United States Courts, the decisions on trade-marks of the Commissioner of Patents, and the important State and English decisions.

It has been impossible for even the Federal Courts to reconcile all their cases. "Pocahontas" has, for instance, by *Atwater* v. *Castner*, 88 Fed. R. 642, been declared a valid trade-mark, and by *Coffman* v. *Castner*, 178 U. S. 168, declared invalid. So far as possible, however, I have sought to evolve a consistent statement of rules of law. Where certain cases could not be harmonized with rules which I believed to be supported by the weight of decisions, I put them under *Contra*.

It is difficult to readily distinguish between strictly trade-mark cases and unfair-trade cases. Sometimes one of the latter class will be decided as one of the former, especially in the earlier years of the law. To this day, after several readings, I have not fully decided if in the Anatolia licorice case "Anatolia" was properly a trade-mark. *McAndrew* v. *Bassett*, 4 De G. J. & S. 380.

It is rarely that one life sees the genesis and maturity of law. Yet it has almost seen them of Trade-mark law. In the eighteenth century there were a few scattered decisions which turned almost wholly on the question of fraud. With the rise and growth of machine-made merchandise in the earlier part of the last century the matter of private marks of merchants to dis-

tinguish wares going out into the public markets of the world assumed importance and cases multiplied. Trade-mark law is one of the results of machinery. It is safe to say that the great mass of trade-mark and unfair-trade law is the development of the last forty years. But much was still nebulous. There appeared to be no distinction between trade-marks proper and unfair trade. Singularly enough, the courts seemed to think that they were bound to find a trade-mark in order to grant relief.

In 1868, in *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402, the court granted an injunction against the fraudulent use of sets of thirty-two different numbers, such as "2340," arbitrarily chosen to designate grades of silverware on the ground that these numbers were trade-marks. In 1876 *Collins* v. *Reynolds Card Mnfg. Co.*, 7 Abb. Pr. n. cas. 17, decided similarly in cases of numbers 1 to 50 to designate styles of cards. In 1882 the Circuit Court of United States decided that series of numbers, 1 to 35, to designate various kinds of medicine, were trade-marks and infringed by a similar use. *Humphrey's Specific Homeopathic Med. Co.* v. *Wenz*, 14 Fed. R. 250. In 1886 the court in *American Solid Leather Button Co.* v. *Anthony Lovell Co.*, 15 R. I. 338, gave a similar decision in cases of numbers applied to grades of nails, basing it largely on a Massachusetts case which declared in 1880, *Lawrence Mnfg. Co.* v. *Lowell Hosiery Mills*, 129 Mass. 325, that a number "523," to designate a grade of hosiery was a valid trade-mark. The case of *Shaw Stocking Co.* v. *Mack*, 12 Fed. R. 707 (1882), was similar. In all of these cases it was evident that relief should have been granted, not on the ground of trade-marks, but of unfair trade. The reasoning was wrong, but the conclusion was right.

During the same period there was another line of cases refusing relief (where it might have been granted) on the ground that the marks were not strictly trade-marks, but used to distinguish grade and quality. Such was *Stokes* v. *Landgraff*, 17 Barb. 608 (1853), where arbitrary words "Galen," "Lake," "Cylinder," etc., were applied to grades of glass. In 1870 *Candee* v. *Deere*, 54 Ill. 439, decided that series of letters and numbers to designate parts and kinds of ploughs were not trade-marks, and refused relief against imitation. The law was finally ably stated

and the doctrine of unfair trade given a sound basis in *Avery* v. *Meikle*, 81 Ky. 73, in 1883. Although this was only twenty-three years ago, there were few, almost no, decisions to guide the court. Yet for breadth of judicial reasoning and soundness of views it is surpassed by few cases, and is one of the most important opinions in the whole subject. The whole case occupied forty-three pages, the opinion of the court thirty-five pages. A rival manufacturer had adopted the same series of letters and numbers for ploughs and parts thereof, under which another had gained a reputation, and defended on the ground that they were not trade-marks. The court held that it was a fraud, and that it was not necessary to find infringement of a strict trade-mark to grant relief. The case is based on the authority of *McLean* v. *Fleming*, 96 U. S. 245, decided in 1877, and the court quoted those famous words which have in their way become historic: "Nor is it necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed; but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant, and that he persists in so doing after being requested to desist." It was *McLean* v. *Fleming*, in the United States Supreme Court, which laid the foundation for the law of unfair trade, and to this day is one of the most important cases on the subject. Applying the principles in this Kentucky case, the court said, —

"You cannot, under pretence of exercising common right of use, and by reason of the fact that the means represent the quality and size of your goods, so use them that while they perform this simple and innocent purpose, apparently, of representing quality and size, caution and description, you cause them to do more, to represent your goods as those of another, and, by the seeming fairness which follows the selection of a legal or innocent instrument or means, escape the consequences of an illegal use thereof. This would be stealing the livery of heaven to serve the devil in." Since that period, on the same subject of infringement of series of descriptive marks, we have had in the Federal Courts *Humphrey's Homeopathic Medicine Co.* v. *Hillon*, 60 Fed. R. 756; *Deering Harvester Co.* v. *Whitman & Barnes Mfg.*

Co., 91 Fed. R. 376, and *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651, which have settled the question of series of descriptive marks.

Trade-mark law is being gradually merged into that of unfair trade. Except where the jurisdiction is to be determined, the courts do not consider so much whether there is a valid trade-mark as whether one who has built up a valuable business under some sign is being defrauded by another in the use of a similar sign. If such is the fact, relief is granted without any decision as to the question of trade-mark. *Colgate* v. *Adams*, 88 Fed. R. 899. Formerly courts waded through pages of reasoning as to what a trade-mark was and whether there was one in the case before them; now the court seeks to learn if there is fraud. And even if there is a trade-mark or one claimed, all the attendant circumstances as bearing on the equity of the case are carefully considered, such as the length of use, reputation acquired, amount of money spent in building up the reputation, etc. This is seen especially in two cases in the last published report, 139 Federal Reporter, which illustrate the latest development of trade-mark law. *Walter Baker & Co. Ltd.* v. *Puritan Pure Food Co.*, 139 Fed. R. 680; *Siegert* v. *Gandolfi*, 139 Fed. R. 917.

Yet, rapid as has been the growth of law in the past, so that it may be said to have arrived at a certain stage of maturity, it has still an age of great expansion before it. For that reason there has been great difficulty in framing general abstract rules which will stand future test. I believe that there is yet much to be modified, enlarged, and re-cast in trade-mark law. It has been stated that a descriptive mark, a geographical mark, and a person's name could not be a valid trade-mark, and yet all three may be and frequently are valid trade-marks in the strict sense of the term. In the future the strict essentials of trade-marks will be lost sight of in the effort to do equity according to certain defined equitable principles in the individual instances before the court. The decision that the geographical name "Waltham" on watches was to be protected as against another dealer in watches at Waltham is difficult to justify by any sound American case of twenty years ago, and it is now difficult to see how on nearly the same principles "Elgin" is refused protection to an

old established watch company in that city. Yet the principle laid down both in the Massachusetts state court and in the Federal Court on the Waltham watch case is very narrow, and its application to future circumstances should be made with extreme care. See *American Waltham Watch Co.* v. *U. S. Watch Co.*, 173 Mass. 85; *American Waltham Watch Co.* v. *Sandman*, 96 Fed. R. 330; *Ill. Watch-case Co.* v. *Elgin Natl. Watch Co.*, 94 Fed. R. 667.

The rule regarding ownership in several trade-marks in the same line of goods in the same market stated in IV, 11, points a new development of the law justified by the decisions. Yet here we should be careful in our application, and while it might invalidate a trade-mark the result might be no more than to bring the relief prayed for under the rules of unfair trade.

New questions are continually arising, as how far a mark used by a manufacturer on a certain integral part of a machine, which integral part is never sold separately, may be under certain circumstances a valid trade-mark.[1]

What are the respective rights of parties who have concurrently in good faith built up a valuable interest in the same mark in the same line of business in different parts of the United States? This situation may cause a good deal of litigation in the future.

Courts may also refuse protection in undoubted cases of infringement on drugs claiming through secret formulas of alcohol and opium to perform wonderful cures, and on food composed of cheap adulterants and substitutes. The case of the Dr. Miles Drug Company, of Elkhart, Indiana, in which the court refused relief because their business "is contrary to public policy" in the Court of Common Pleas, No. 1 of Alleghany County, Pennsylvania, is the last case on that line.

When a lawyer has a case on this general subject he should *first* ascertain if the issue is one of a trade-mark or of unfair

[1] This question has just arisen as I am writing these pages. *Richards* v. *Williamson*, 30 L. T. N. S. 746, may be in point. A party who used a certain trade-mark on lock-plates and levers which he embodied in rifles from assembled parts which were by the said mark known as his make was protected against a party who bought discarded rifles and made them over, preserving the old marks to the deceit of the public.

trade. This can be done by observing the principles and cases in sections *II* and *III*. A registered mark is *prima facie* evidence of a valid trade-mark, but not conclusive. When that matter has been decided,

Second, the fact of the infringement should be ascertained. That would appear under section XI. In case of evident copying of a trade-mark it is not *necessary* to prove the fact that persons have been deceived or that reputation has been acquired, other than a user of the trade-mark in question. But it is advisable to show, if it can be done, special instances of deceit, especially where there is doubt about the fact of imitation. This evidence may be obtained in several ways, as by inquiry among customers, or in certain cases by sending to stores and calling for goods by the alleged infringing mark, as was done in one instance in New York hotels in a case on infringement of a mark on champagne. As to acquisition of a reputation under a trade-mark, courts have on a number of occasions considered as material the length of use, the extent and value of the business, and the amount of money spent in advertising and building it up. This is stated in IV, 6, and the case of Walter Baker & Co., in 139 Federal Reporter substantiates it.

Third, if the case is one of unfair trade, an acquired reputation is essential, and where the general appearance of the goods is likely to be imitated more than particular features of a trade-mark the proof of actual deceit is of especial importance. But even here the two branches of law merge in holding that imitation with knowledge is fraud.

Fourth, consider the rights of the opponent. Has he a trade-mark, or only rights claimed under the principle of unfair trade? In either case, what is the extent of the reputation acquired, and how far will the public recognize, especially in the locality of the suit, the mark or *indicium* as signifying the goods of the plaintiff or of the defendant? On this line see VIII.

Fifth, a point which is important to consider, and this may be for either the plaintiff or defendant, is that of abandonment. Many cases of infringement arise where one has revived an old mark under which another has acquired or is acquiring a new reputation. The rules applicable to such cases are laid down in

XIV, and here there has been difficulty in stating rules, for it is on this branch that there is some conflict of cases. But I deem the true test to be as stated in *Royal Baking Powder Co. v. Raymond*, 70 Fed. R. 376. Has the mark lost its former signification of a certain specific good-will? The matter of intention should have really little to do with it. As there can be no abstract right of property in a trade-mark apart from good-will, intention to maintain the use of a discontinued mark as applied to an existing good-will is material, but when that good-will has vanished, intention to maintain a property right in a meaningless mark is of no consequence. Good-will is the recognition of the public; intention is the mental attitude of an individual. Intention to claim a mark for a trade or good-will which does not exist to be marked is immaterial.

Sixth, the question of laches is also important. This is covered in XIII. Has the alleged infringement been continued for such a length of time that the real owner is debarred from objecting? And here the general rule is that while a party does not lose his rights by submitting to numerous acts of infringement, yet there comes a period when the court will say that a party has slept on his rights. The vital question here would seem to be, Has one allowed another, acting in good faith without knowledge of the other use or on the assumption that an owner did not claim exclusive right to a mark, to build up a valuable business under that mark to the extent of its being a vested right against which no injunction will lie?

Seventh, consider the honesty and truth of a trade-mark on the familiar principle that he who comes into equity must have clean hands. This subject appears in V. For although a trade-mark bearing a valid face may undoubtedly be infringed so as to deceive the public, yet if itself deceives the public equity will not grant relief.

Eighth, the title to the mark may be defective, especially if the proprietor claims under an assignment which does not in fact convey any business or else conveys a business which is so personal to the former owner that its continued use by another is deceptive.

Ninth, the jurisdiction of the court is an important matter.

That is stated in XV, 1 and 2. It is generally advisable to bring cases in the Federal Courts.

Tenth, the form of pleadings and the method of practice are according to the general principles of equity.

In England for many years trade-marks have been regulated by statute to such an extent that many decisions turn on the construction of the Act. In our country they have had a more natural growth at common law and developed largely the doctrine of unfair trade.

The subject has within the last few years in this country become so important that it has led to the passage of the Act of 1905 which affords valuable protection to proprietors of trade-marks and shapes future litigation. It is not yet safe to say that even that Act marks the end of legislation, for there are now amendments pending in Congress which the student would do well to watch.

Attention is called to the numerous cross references, and to the table of cases which discloses the various points involved in several digests of the same case.

THE LAW OF TRADE-MARKS

I. DEFINITIONS.

"What is a trade-mark? A 'mark' means to make a visible sign upon something; to affix a significant mark to; to draw, cut, fasten, brand; a token upon, indicating or intimating something; to affix an indication to; to attach one's name or initials to. A trade-mark, therefore, consists of the use in trade of such a mark, placed upon goods manufactured by a particular person and placed in market with such marks, for sale and trade." *Adams* v. *Heisel*, 31 Fed. R. 279.

"Every one is at liberty to affix to a product of his own manufacture any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer." *Amoskeag Mnfg. Co.* v. *Trainer*, 101 U. S. 51 (Field, J.).

"Symbols or devices used by a manufacturer or merchant to distinguish the products, manufactures, or merchandise which he produces, manufactures, or sells, from that of others, are called and known by the name of trade-marks." *Amoskeag Mnfg. Co.* v. *Trainer*, 101 U. S. 51–56.

"Words or devices, or even a name in certain cases, may be adopted as a trade-mark which is not the original invention of the party who appropriates the same to that use. Phrases, or even words or letters in common use, may be adopted for the purpose, if at the time of their adoption they were not employed by another to designate the same or similar articles of production or sale." *Amoskeag Mnfg. Co.* v. *Trainer*, 101 U. S. 51 (Clifford, J.).

"It is a mode of designating goods as being the goods which have been, in some way or other, dealt with by A. B., the person

who owns the trade-mark." *Australian Wine Importers (In re)*, 41 Ch. D. 278–281.

"A trade-mark is a sign or symbol primarily confined exclusively to the indication of the origin or ownership of the goods to which it may be attached, and it may be composed of any name, device, line, figure, mark, word, letter, numeral, or combination, or arrangement of any or all of these which would serve the sole purpose of a trade-mark, and which no other person can adopt or use with equal truth." *Avery* v. *Meikle*, 81 Ky. 73.

"The office of a trade-mark is to designate the true origin or ownership of the article or fabric to which it is affixed." *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402.

"A trade-mark is a word, symbol, figure, form, or device, or a combination thereof, adopted or devised and used by a manufacturer or vendor of goods, to designate the origin or ownership of his goods, and is used by him to distinguish his goods from those which are manufactured or sold by others." *Burke* v. *Cassin*, 45 Calif. 478.

"A trade-mark is a symbol arbitrarily selected by a manufacturer or dealer, and attached to his wares to indicate that they are his wares." *Cady* v. *Schultz*, 19 R. I. 193; 61 Am. St. Rep. 763.

"A trade-mark consists of a word, mark, or device adopted by a manufacturer or vendor to distinguish his productions from other productions of the same article." *Cigar-makers' Protective Union* v. *Conheim*, 40 Minn. 243.

"A trade-mark is some arbitrary or representative device attached to or sold with merchandise and serving to designate the origin or manufacture of that merchandise." *Davis* v. *Davis*, 27 Fed. R. 490–491.

"The office of a trade-mark is to point out distinctively the origin, or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may, in many cases, be done by a name, a mark, or a device well known but not previously applied to the same article." *Del. & H. Canal Co.* v. *Clark*, 13 Wall. 311.

"Any name, symbol, letter, figure, or device adopted by the persons manufacturing or selling goods, and used to put upon such goods to distinguish them from those manufactured or sold by others, and employed so often and for such a length of time, as to raise the presumption that the public would know that it was used to indicate ownership of the goods in the person manu-

facturing or selling them, constitutes his trade-mark." *Derringer* v. *Plate*, 29 Calif. 292.

"The books are full of authorities establishing the proposition that any contrivance, design, device, name, symbol, or other thing, may be employed as a trade-mark which is adapted to accomplish the object proposed by it — that is, to point out the true source and origin of the goods to which said mark is applied, or even to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers." *Filley* v. *Fassett*, 44 Mo. 168; 100 Am. Dec. 275.

"A trade-mark is an arbitrary character or characters without special meaning, adopted by persons, firms, or corporations for the purpose of identifying the goods manufactured by them or of which they have the sale." *Friebery*, *ex parte*, 20 O. G. 1164.

"A trade-mark may consist of a name, or a device, or a peculiar arrangement of words, lines, or figures in the form of a label, which has been adopted and used by a person in his business to designate goods of a particular kind manufactured by him, and which no other person has an equal right to use." *Gilman* v. *Hunnewell*, 122 Mass. 139.

"They may consist of pictures or symbols or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in." *Hier* v. *Abrahams*, 82 N. Y. 519.

"A trade-mark consists of a word, mark, or device adopted by a manufacturer or vendor to distinguish his product from other products of the same article." *Hostetter* v. *Fries*, 17 Fed. R. 620.

"It is a sign or mark by which the manufactured articles produced by one person, or firm, or maker, are distinguishable from those produced by rival manufacturers." *Hoyt* v. *Hoyt*, 143 Penn. St. 623.

"A trade-mark is any proper mark by which goods and wares of the owner or manufacturer are known in the trade." *Humphreys' Specific Med. Co.* v. *Wenz*, 14 Fed. R. 250–252.

"A trade-mark is . . . the name, symbol, figure, letter, form, or device used by a manufacturer or merchant to designate the goods he manufactures or sells, to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and to secure such profits as result

from a reputation for superior skill, industry, or enterprise." *Larrabee* v. *Lewis*, 67 Ga. 561.

"A trade-mark properly so called, may be described as a particular mark or symbol, used by a person for the purpose of denoting that the article to which it is affixed is sold or manufactured by him or by his authority, or that he carries on business at a particular place." *Leather Cloth Co.* v. *American Leather Cloth Co.*, 35 L. J. Ch. 61.

"A trade-mark has been very well defined as one's commercial signature to his goods. It may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, to distinguish the same from those manufactured or sold by another, so that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity." *Leidersdorf* v. *Flint*, 8 Biss. 327.

"It seems to be the office of a trade-mark to point out the true source, origin or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers." *Marshall* v. *Pinkham*, 52 Wis. 572.

"The trade-mark must be used to indicate not the quality, but the origin or ownership of the article to which it is attached. It may be any sign, mark, symbol, word, or words, which others have not an equal right to employ for the same purpose." *Newman* v. *Alvord*, 51 N. Y. 189–193.

"Our word 'trade-mark' comprehends both the *marque de fabrique* and *marque de commerce* of France." *République Française* v. *Schultz*, 57 Fed. R. 37.

"A trade-mark is a peculiar name or device by which a person dealing in an article designates it as an article of a peculiar kind, character, or quality, or as manufactured by or for him." *Rogers* v. *Taintor*, 97 Mass. 291.

"A trade-mark is a mere notice, an arbitrary mark or sign put on an artificial product, whereby any person interested in the information may be assured as to the origin of said product." *Royal Baking Powder Co.* v. *Raymond*, 70 Fed. R. 376–380.

"A trade-mark is a name, sign, symbol, mark, brand, or device of any kind, used to designate the goods manufactured or sold, or the place of business of the manufacturer or dealer in such goods." *Shaver* v. *Shaver*, 51 Ia. 208.

"Broadly defined, a trade-mark is a mark by which the wares of the owner are known in trade. Its object is two-fold: First, to protect the party using it from competition with inferior articles; and second, to protect the public from imposition. . . . Anything which can serve to distinguish one man's productions from those of another may be used. The trade-marks brand the goods as genuine, just as the signature to a letter stamps it as authentic." *Shaw Stocking Co.* v. *Mack*, 12 Fed. R. 707–710.

"A trade-mark is a peculiar name or device, by which a person dealing in an article designates it as of a peculiar kind, character, or quality, or as manufactured by or for him, or dealt in by him, and of which he is entitled to the exclusive use." *Weener* v. *Brayton*, 152 Mass. 101–102.

II. WHAT IS A VALID TRADE-MARK.

A trade-mark is (1) an arbitrary sign (2) affixed (3) by a proprietor (4) to his goods (5) with the intention of designating their origin (6) by a use thereon.

1. An arbitrary sign is (A) a word, (B) a combination of words, (C) letters, (D) a name, (E) a number, (F) a figure or symbol, (G) not necessarily disclosing on its face the origin of the goods, affording by association a ready means of recognition of their origin.

A. A word.

"Eureka Ammoniated Bone Superphosphate of Lime," on fertilizer, good only for the word "Eureka." *Alleghany Fertilizer Co.* v. *Woodside*, 1 Hughes, 115.

"Eureka," good trade-mark in "Eureka Ammoniated Bone Superphosphate of Lime," but not the five following words.

"The natural or proper designation of an article can never become a trade-mark, because anybody making the article has a right to call it by its proper name. . . . But a purely arbitrary or fanciful appellation, for the first time used to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation, and subsequent use, become a trade-mark." *Alleghany Fertilizer Co.* v. *Woodside*, 1 Hughes, 115.

"Bromidia," on medicine containing bromide of potassium, arbitrary.

"The word is an arbitrary word, descriptive of nothing, unless it is of the complainants' goods, and that only for the reason that the complainants have introduced them to the public under such arbitrary name." *Battle* v. *Finlay*, 45 Fed. R. 796.

"Excelsior White Soft Soap," protected on account of word "Excelsior." *Brahom* v. *Bustard*, 1 H. & M. 447; 11 W. R. 1061; 9 L. T. N. S. 199.

If the trade-mark consists of words they must indicate ownership and origin, and not merely other attributes, such as quality, kind, texture, composition, utility, destined use, or class of consumers." *Corwin* v. *Daly*, 7 Bos. 222.

"The word 'quality' is used in different senses in the cases. It is employed in some to denote the grade, ingredients or properties of an article, and in others to indicate generally the merit or excellence of an article as associated with or coming from a certain source. While there can be no valid trade-mark on denoting quality when used merely in the former sense, there may be a valid trade-mark as indicating quality when used in the latter sense." *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651.

"It is not necessary to deny that a name may in some cases be rightfully used and protected as a trade-mark, but this is only true when the name is used merely as indicating the true origin and ownership of the article offered for sale — never where it is used to designate the article itself, and has become by adoption and use its proper appellation." *Fetridge* v. *Wells*, 4 Abb. Pr. 144; 13 How. Pr. 385.

"A trade-mark must, in a case like this, as the term imports, be one consisting of a word, an expression, a device, or a mark invented or adopted by the owner, which designates and distinguishes his production from the general manufacture of the same article, and it cannot be the appropriation of words belonging to the general public which describe truly a known product." *Helmbold* v. *Helmbold*, 53 How. Pr. 453.

"When a manufacturer has produced an article of merchandise, calling it by a particular name and vending it with a particular mark, he has acquired an exclusive right to the use of such name and mark, which becomes what is usually called his trade-mark, and is entitled to prevent all other persons from using such name and mark to denote articles of a similar kind and appearance." *Hirst* v. *Denham*, L. R. 14 Eq. Cas. 542.

"A trade-mark which designates the true origin or ownership of the article manufactured or sold, will be protected, but words which have no other relation to the origin or ownership of the goods than merely to indicate the name or quality, will not be protected." *Larrabee* v. *Lewis*, 67 Ga. 561; 44 Am. Rep. 735.

"It may properly be conceded that words of common use may be so employed as to acquire a limited additional significance by way of designating a particular article of manufacture or production, and in that sense be entitled to the protection of the court by way of injunction against infringement by another person or persons." *Stokes* v. *Allen*, 56 Hun, 526.

(1) Examples.

"Alderney," oleomargarine. *Lauferty* v. *Wheeler*, 11 Abb. N. Cas. 220; 63 How. 488; 11 Daly, 194.

"Anchor Brand," wire. *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.

"Antiphlogistene," chemical preparation. *Macmahan Pharmacal Co.* v. *Denver Chemical Mnfg. Co.*, 113 Fed. R. 468.

"Anti-washboard," soap. *O'Rourke* v. *Central City Soap Co.*, 26 Fed. R. 576.

"Baffle," safes. *Talbot's Trade Mark*, 3 R. P. C. 276.

"Boss," washers. *Greacen* v. *Bell*, 115 Fed. R. 553.

"Bovilene," pomade. *Lockwood* v. *Bostwick*, 2 Daly, 521.

"Bovril," beef extract. *Bovril Trade Mark*, *in re*, 65 L. J. Ch. 715.

"Brittlenut," sugar, syrup, and peanuts. *Lion Fig & Date Co.*, *ex parte*, 102 O. G. 823.

"Bromidia," medicine containing bromide of potassium. *Battle* v. *Finlay*, 50 Fed. R. 106; affirming 45 Fed. R. 796.

"Bromo-caffeine," drug. *Keasbey* v. *Brooklyn Chemical Works*, 142 N. Y. 467; reversing 21 N. Y. Supp. 696, and 16 N. Y. Supp. 318.

"Candy Cathartic," laxative drug. *Sterling Remedy Co.* v. *Gorey*, 110 Fed. R. 372.

"Carrom," game board. *Williams* v. *Mitchell*, *Mitchell* v. *Williams*, 106 Fed. R. 168.

"Carroms," game board. *Ludington Novelty Co.* v. *Leonard*, 127 Fed. R. 155; affirming 119 Fed. R. 937.

"Celery Compound," medicine. *Wells & Richardson Co.* v. *Siegel*, 106 Fed. R. 77.

"Celluloid," compound of pyroxyline. *Celluloid Mnfg. Co.* v. *Cellonite Mnfg. Co.*, 32 Fed. R. 94.

"Centennial," wines. *Boehm & Co.*, 8 O. G. 319.

"Charter Oak," on stoves. *Filley* v. *Fassett*, 44 Mo. 168.

"Chicken Cock," whiskey. *G. G. White Co.* v. *Miller*, 50 Fed. R. 277.

"Clipper," canned peas. *Manitowoc Pea-Packing Co.* v. *Nueen*, 93 Fed. R. 196.

"Club," cocktails. *Heublein* v. *Adams*, 125 Fed. R. 782.

"Club soda," carbonated water. *Cochrane* v. *McNish*, 74 L. T. R. n. s. 109; 65 L. J. P. C. n. s. 20.

"Coal Oil Johnny," soap. *Petrolia Mnfg. Co.* v. *Bell & Bogart Soap Co.*, 97 Fed. R. 781.

"Cocoaine," hair wash. *Burnett* v. *Phalon*, 3 Keyes, 594; 5 Abb. Pr. N. s. 212.

"Cottolene," substitute for lard. *N. K. Fairbank Co.* v. *Central Lard Co.*, 64 Fed. R. 133.

"Cough Cherries," confectionery. *Stoughton* v. *Woodard*, 39 Fed. R. 902.

"Cream," baking powder. *Price Baking Powder Co.* v. *Fyfe*, 45 Fed. R. 799.

"Cuticura," medicated toilet soap. *Potter Drug & Chemical Co.* v. *Miller*, 75 Fed. R. 656.

"Dyspepticure," medical preparation. *Ex parte Foley & Co.*, 87 O. G. 1957.

"Elastic," sectional bookcases. *Globe Wernicke Co.* v. *Brown*, 121 Fed. R. 185.

"Electro-Silicon," white powder for polishing metals. *Electro-Silicon Co.* v. *Hazard*, 29 Hun, 369; *Electro-Silicon Co.* v. *Trask*, 59 How. Pr. 189. See II. 1, A (2).

"Elk," cigars. *Lichtenstein* v. *Goldsmith*, 37 Fed. R. 359.

"Epicure," canned salmon. *George* v. *Smith*, 52 Fed. R. 830.

"Eureka," steam packing. *Symonds* v. *Greene*, 28 Fed. R. 834.

"Eureka," fertilizer compound. *Alleghany Fertilizer Co.* v. *Woodside*, 1 Hughes, 115.

"Eureka," shirts. *Ford* v. *Foster*, 7 Ch. App. 611.

"Excelsior," soap. *Braham* v. *Bustard*, 9 L. T. N. s. 199; 1 H. & M. 447.

"Express, American," sealing wax. *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651.

"Family salve," medical preparation. *Reinhart* v. *Spaulding*, 49 L. J. Ch, 57; 28 W. R. 300.

"Favorita, La," specially selected flour. *Menendez* v. *Holt*, 128 N. S. 514.

"Fibre Chamois," interlining fabric. *American Fibre Chamois Co.* v. *De Lee*, 67 Fed. R. 329.

"Filo-Floss," silk manufacture, *filo* being arbitrary and never having been used with floss. *Rawlinson* v. *Brainard & Armstrong Co.*, 59 N. Y. Supp. 880.

"Flinch," a game of cards. *H. B. Chaffee Mnfg. Co.* v. *Selchow*, 131 Fed. R. 543.

"Fruit salt," powder for effervescent drink. *Eno* v. *Dunn*, L. R. 41 Ch. D. 439; 63 L. T. N. s. 6; L. R. 15 App. Cas. 252.

"Galena," antifriction metal. *Magnus Metal Co., ex parte*, 100 O. G. 451.

"Golden Wedding," whiskey. *Pontefact* v. *Isenberger*, 106 Fed. R. 499.

"Grand Master," on cigars. *C. A. Yale Cigar Mnfg. Co.* v. *Yale*, 30 O. G. 1183.

"Grenadine," "Grenade," syrup. *Rillet* v. *Carlier*, 61 Barb. 435.

"Heliotype," prints of a certain kind. *Osgood* v. *Rockwood*, 11 Blatch. 310.

"Hero," "Heroine," glass jars. *Rowley* v. *Houghton*, 2 Brew. 303.

"Home," sewing machines. *New Home Sewing Mch. Co.* v. *Bloomingdale*, 59 Fed. R. 284.

"Hygeia," mineral water. *Waukesha H. M. S. Co.* v. *Hygeia S. D. W. Co.*, 63 Fed. R. 438. *Hygeia S. D. W. Co.* v. *Waukesha, H. M. S. Co.*, 63 Fed. R. 445. *Hygeia Distilled Water Co.* v. *Hygeia Ice Co.*, 70 Conn. 516.

"Hygieniques," suspenders: suggestive of the good quality of the suspenders, . . . but does not directly characterize the article. *Bailly* v. *Nashaannuck Mnfg. Co.* 10 N. Y. Supp. 224.

"Ideal," fountain pen. *Waterman* v. *Shipman*. 130 N. Y. 301.

"Indian Root," pills. *Comstock* v. *Moore*, 18 How. Pr. 421.

"Insectine," liquid preparation to kill insects. *Arthur* v. *Howard*, 19 Penn. Co. Ct. 81.

"Insurance," oil. *Insurance Oil Tank Co.* v. *Scott*, 33 La. Ann. 946.

"Invigorator," spring bed bottoms. *Heyman, ex parte*, 18 O. G. 922.

"Junket," rennet tablets. *Hansen* v. *Siegel-Cooper Co.*, 106 Fed. R. 691.

"Kaiser," beer. *Kaiserbrauerie* v. *Blatz Brewing Co.*, 71 Fed. R. 695; Aff'd 74 Fed. R. 222.

"King Bee," tobacco. *Sarrazin* v. *W. R. Irby Cigar & Tob. Co.*, 93 Fed. R. 624.

"Koffio," cereal coffee. *Sleepy Eye Milling Co.* v. *C. F. Blanke Tea & Coffee Co.*, 85 O. G. 1905.

"Lacto-Peptine," medicinal preparation. *Carnrick* v. *Morson*, Cox Man. Tr. Mk. Cas. 543.

"Leopold," woollen cloth. *Hirst* v. *Denham*, L. R. 14 Eq. 542; 27 L. T. N. S. 56; 41 L. J. Ch. 752.

"Lightning," hay knives. *Hiram Holt Co.* v. *Wadsworth*, 41 Fed. R. 34.

"Lion," medicines. *Weaver, in re*, 10 O. G. 1.

"Lone Jack," smoking tobacco. *Carroll* v. *Ertheiler*, 1 Fed. R. 688.

"Magico," cleaning compound. *American Chemical Co., ex parte*, 62 O. G. 588.

"Magnetic Balm," liquid preparation, not magnetic. *Ransom* v. *Ball*, 7 N. Y. Supp. 238; *Smith* v. *Sixbury*, 25 Hun, 232.

"Maizena," corn-flour. *Glen Cove Mnfg. Co.* v. *Ludeling*, 22 Fed. R. 823.

"Marvel," flour. *Listman Mill Co.* v. *Williams Listman Milling Co.*, 88 Wis. 334.

"Mufflet," neck scarf. *Hygienic Fleeced Underwear Co.* v. *Way*, 137 Fed. R. 595.

"Napthol-Methane," carbon black. *Castle Brook Carbon Co., ex parte*, 100 O. G. 683.

"Nickel," soap. *Butler, ex parte*, 87 O. G. 1781.

"Nickel-In," cigars. *Schendel* v. *Silver*, 63 Hun, 330.

"Non-Tox," carbonated root and herb extract. *MacDonald, ex parte*, 85 O. G. 150.

"Norma," cigarettes. *Egyptian Tobacco Co., ex parte*, 85 O. G. 1905.

"No-To-Bac," medicine to cure tobacco habit. *Sterling Remedy Co.* v. *Eureka Chem. Mnfg. Co.*, 80 Fed. R. 105; 70 Fed. R. 104.

"Old Crow," whiskey. *Guines* v. *Leslie*, 54 N. Y. Supp. 421.

"Osman," towels. *Barlow* v. *Johnson*, 7 R. I. C. 395.

"Otaka," biscuits. *Lorenz, ex parte*, 89 O. G. 2067.

"Pain Killer," medicine. *Davis* v. *Kendall*, 2 R. I. 566; *Davis* v. *Kennedy*, 13 Grant Ch. U. C. 523. *Contra: Davis* v. *Hardy*, 63 L. T. N. S. 389; 60 L. J. Ch. 16; L. R. 15 App. Cases, 316.

"Parabola," needles. Although eye had a parabolic curve. *Roberts* v. *Sheldon*, 20 Fed. Cas. 930; App. 8 Biss. 398.

"Pepto-Mangan," medicinal preparation. *M. J. Breitenbach Co.* v. *Spangenberg*, 131 Fed. R. 160.

"Pharaoh's serpents," firework toy. *Barnett* v. *Leuchars*, 13 L. T. N. S. 495; 14 W. R. 166.

"Pigs in Clover," puzzle. *Lyman* v. *Burns*, 47 O. G. 660.

"Pride," cigars. *Hier* v. *Abrahams*, 82 N. Y. 519.

"Puck," cigars, cigarettes, etc. *Jacoby* v. *Lopez*, 23 O. G. 342.

"Queen," shoes. *Thos. G. Plant Co.* v. *May Co.*, 105 Fed. R. 375.

"Red Cross," absorbent cotton. *Johnson* v. *Brunor*, 107 Fed. R. 466.

"Roachsault," insecticide. *Stern* v. *Barrett Chemical Co.*, 61 N. Y. Supp. 221; 29 Misc. 609.

"Royal," total product of factory of baking powder. *Royal Baking Powder Co.* v. *Raymond*, 70 Fed. R. 376; 85 Fed R. 231. But see *Royal Baking Powder Co.* v. *Sherrell*, 93 N. Y. 331.

"Royal Blue," not descriptive of color, carpet sweep. *Grand Rapids School Furniture Co., ex parte*, 87 O. G. 1957.

"Saponifier," soap, suggestive through Latin meaning, but not descriptive. *Penn. Salt Mnfg. Co.* v. *Myers*, 79 Fed. R. 87. Aff'd 82 Fed. R. 1003.

"Sefton," woollen cloth. *Hirst* v. *Denham*, L. R. 14 Eq. 542; 27 L. T. N. S. 56; 41 L. J. Ch. 752.

"Shawknit," stockings. *Shaw Stocking Co.* v. *Mack*, 12 Fed. R. 707.

"Sliced Animals," "sliced birds," "sliced objects," picture puzzles. *Selchow* v. *Baker*, 93 N. Y. 59.

"Solid-Comfort," furnaces. *Fieberger, ex parte*, 99 O. G. 2101.

"Solio," photographic materials registrable. App. Cas. 571 (1881); *Farbenfabriken Application, in re*, 1 Ch. 645, overruled; 76 L. T. N. S. 730.

"Star," oil. *American Lubricating Oil Co., in re*, 9 O. G. 687.

"Star," shirts. *Hutchinson* v. *Blumberg*, 51 Fed. R. 829; *Hutchinson* v. *Covert*, 51 Fed. R. 832; *Morrison* v. *Case*, 9 Blatch. 548.

"Star," soap. *Cornwall, in re*, 12 O. G. 138.

"Star," tobacco. *Liggett & Myer Tob. Co.* v. *Hynes*, 20 Fed. R. 883.

"Success," stoves and ranges. *Huenefeld, ex parte*, 100 O. G. 1329.

"Sunlight," soap. *Lever* v. *Pasfield*, 88 Fed. R. 484.

"Swan Down," complexion powder. *Tetlow* v. *Tappan*, 85 Fed. R. 774.

"Sweet Caporal," cigarettes. *Kinney Tobacco Co.* v. *Maller*, 53 Hun, 340; 6 N. Y. Supp. 389.

"Tabloid," drug compressed into small biconvex disc. *Wellcome* v. *Thompson*, L. R. 1 Ch. 736 (1904).

"Tidal Wave," tobacco. *Sorg* v. *Welsh*, 16 O. G. 910.

"Tin Tag" or "Wood Tag," on tobacco, but not exclusive use of tin or wood to designate goods. *Lorillard* v. *Pride*, 28 Fed. R. 434.

"Triumphant," flour. *Lyon, Dupuy & Co., ex parte*, 28 O. G. 191.

"Twin Brothers," yeast. *Burton* v. *Stratton*, 12 Fed. R. 696.

"Uneeda," biscuits. *National Biscuit Co.* v. *Baker*, 95 Fed. R. 135.

"Valvoline," lubricating oil. *Leonard* v. *White's Golden Lubricator Co.*, 38 Fed. R. 922. *Contra: Leonard* v. *Wells*, 53 L. J. Ch. 233; *Leonard, in re*, 26 Ch. D. 288; *Horsburgh, in re*, 53 L. J. Ch. 233.

"Vanity Fair," cigarettes. *Kimball, in re*, 11 O. G. 1109.

"Vitrified," asbestos. *Chicago Fire Proof Covering Co., ex parte*, 104 O. G. 852.

"Vulcan," matches. *Taendsticksfabriks Akticbolaget Vulcan* v. *Myers*, 139 N. Y. 364.

"Warren Hose Supporter," hose supporter, perhaps not alone, but with cut. *Frost* v. *Rindskopf*, 42 Fed. R. 408.

"Waukeasy," corn cure. *Peck, ex parte*, 96 O. G. 425.

"Waukwell," shoes. *Parker Holmes & Co., ex parte*, 100 O. G. 1111.

"Waverly," good on bicycles, it not appearing that it has a clearly recognized geographical meaning; its romantic signification from the novels is more important. *Indiana Bicycle Co., ex parte*, 72 O. G. 654.

"Weck," sterilizing and preserving apparatus. *Van Eyck, ex parte*, 107 O. G. 542.

"Welcome," soap. *Lever Bros. Ltd. Boston Works* v. *Smith*, 112 Fed. R. 998.

"Ynsea," incandescent gas mantles. *Welsbach Light Co.* v. *Adam*, 107 Fed. R. 463.

(2) A compound word.

"Momaja," on coffee, a word compounded from Mocha, Maracaibo, and Java, a valid trade-mark. *American Grocery Co.* v. *Sloan*, 68 Fed. R. 539.

"Mazawattee," a compound of Hindustani "mazadhar," luscious, and Cingalese "wattee," growth or garden, as applied to tea or coffee, not descriptive, as it conveys no meaning to an Englishman, Hindoo, or Cingalese. *Densham's Trade Mark*, [1895] 2 Ch. 176.

"Electro-silicon," polishing powder; "silicon" descriptive, but "electro-silicon" good. *Electro-Silicon Co.* v. *Levy*, 59 How. 469; *Electro-Silicon Co.* v. *Trask*, 59 How. Pr. 189; *Electro-Silicon Co.* v. *Hazard*, 29 Hun, 369.

B. A combination of words.

"Superphosphate of Lime," chemical compound. *Bradley* v. *Norton*, 33 Conn. 157.

"Dr. Morse's Indian Root" Pills, valid. *Comstock* v. *White*, 18 How. Pr. 421.

"Samaritan's Gift," medicine; but word "Samaritan" cannot be exclusively appropriated. *Desmond's Appeal*, 103 Pa. St. 126.

"The name 'Charter Oak,' with the combined device, in no possible view or application of them, are either descriptions or suggestive of the style, character, or qualities of a cast-iron cooking stove. The name and device selected by the plaintiff were adapted to point out the true source and origin of the stoves to which he applied them, and were therefore possessed of the requisite characteristics of a trade-mark." *Filley* v. *Fussett*, 44 Mo. 168.

"American Volunteer," shoes, valid. *Joseph Banigan Rubber Co.* v. *Bloomingdale*, 89 O. G. 1670.

"Lady & the Bear," fur goods. *Jay* v. *Ladler*, 40 Ch. D. 649.

"Syrup of Red Spruce Gum," medicine. *Kerry* v. *Toupin*, 60 Fed. R. 272.

"Medicated Mexican Balm," hair tonic. *Perry* v. *Truefit*, 6 Beav. 66.

"Coal Oil Johnny," soap. *Petrolia Mufg. Co.* v. *Bell & Bogart Soap Co.*, 97 Fed. R. 781.

"Universal Magnetic Balm," medicine. *Ransom* v. *Ball*, 7 N. Y. Supp. 238.

"American Cold Japan," paint, good. *Reeder* v. *Brodt*, 6 Oh. Dec. 248.

"The words 'Cough Cherries' are not properly merely descriptive of the qualities of the thing manufactured and sold, but are to a large extent arbitrary and fanciful. . . . If the label adopted had been 'Cough Candy,' 'Cough Remedy,' or 'Cough Confection,' or if the article sold had been cherries in fact, and labeled as these goods were, the case would come within the ordinary rule." *Stoughton* v. *Woodard*, 39 Fed. R. 902.

C. Letters or initials.

See II. 2 B. 21. *Moet* v. *Pickering*, L. R. 6 Ch. D. 770.

See X. 1 A. (1). 219. *Frank* v. *Sleeper*, 150 Mass. 583.

"There can be no reasonable doubt that the letters 'G. E.' might constitute a valid trade-mark." They were initials affixed

to electric lamps. *General Electric Co.* v. *Re-New Lamp Co.*, 121 Fed. R. 164; 128 Fed. R. 154.

Complainant's trade-mark "G. F." on velvet ribbons infringed by that of respondent's "G. & F." so arranged in reference to ampersand as to be greatly similar to complainant's. *Giron* v. *Gartner*, 47 Fed. R. 467.

The initials "A. G." standing for Alexis Godillot, Jr., protected as a trade-mark in the grocery business. *Godillot* v. *American Grocery Co.*, 71 Fed. R. 873.

The initials "B. B. H." surmounted by crown, good trade-mark on iron; the initials standing for former proprietors, Bradley, Barrows, & Hall. *Hall* v. *Barrows*, 4 De G. J. & S. 150, etc.

"A–V–H," initials of complainant blown into glass bottles for gin, good trade-mark. *Van Hoboken* v. *Mohns*, 112 Fed. R. 528.

D. A name.

(1) The proper name of a distinguished historical personage may be a valid trade-mark.

See XV. 3 C. (1). 309. *Goldstein* v. *Whelan*, 62 Fed. R. 124.

"Roger Williams," on cotton cloth, valid trade-mark. "'Roger Williams,' though the name of a famous person, long since dead, is, as applied to cotton cloth, a fancy name, as would be so applied, the names of Washington, Greene, Perry, or of any other heroes, living or dead." *Barrows* v. *Knight*, 6 R. I. 434.

"Delsarte," as applied to shoes, may be a fancy name, and a valid trade-mark, although it may also be applied descriptively to shoes made on certain hygienic principles. *Medlar & Holmes Shoe Co.* v. *Delsarte Mufg. Co.*, 46 Atl. R. 1089.

"Bismarck," on collars, good trade-mark. *Messerole* v. *Tynberg*, 4 Abb. Pr. 410; 36 How. Pr. 14.

Contra: "Shakespeare" not a fancy word. "The word 'Shakespeare' is well-known in the English language and in common use." *Banks & James's Trade Mark*, 44 Wk. R. 32.

(2) A fictitious name, if not calculated to deceive, may be a valid trade-mark.

See V. 5. 127.

(3) The name of a flower is a valid trade-mark only when used arbitrarily and not deceptively.

"Edelweiss," on perfume, good trade-mark, there being no scent from the flower. *Rosing* v. *Atkinson*, 27 Sol. Jr. 534.

(4) The name or figure of an animal used in an arbitrary sense, especially if with some unique feature, may be a valid trade-mark.

See XVI. 2. 337. *Taylor, ex parte,* 93 O. G. 2531.

Figure of an ox on mustard, which from the figure had come to be called "ox mustard," protected as a trade-mark. *Harrison* v. *Taylor*, 11 Jur. N. S. 408; 12 L. T. N. S. 339.

"I cannot see why, according to English law, a fish should not be a distinctive mark of a fishing-line, though I can understand that a picture of a fish may not be a distinctive mark of that particular kind of fish. Why a pig should not be, according to English law, a distinctive mark for lard, or something made out of a pig, I do not know. Supposing you tanned pig-skin into leather, I do not know why a pig should not be a good trade-mark for tanned pigs' hide. I am not inclined to apply to English Acts of Parliament the American cases which have been cited." *James's Trade Mark, in re,* 33 Ch. D. 392. *Contra: Pratt, in re,* 10 O. G. 866 III. 1, 3.

The word "Elk" with the figure of the head of an elk, good trade-mark on cigars. *Lichtenstein* v. *Goldsmith*, 37 Fed. R. 359.

Figures of two elephants used on a label for yarn exported to India, which had come to be known as "Elephant Yarn," protected as trade-mark. *Orr-Ewing* v. *Johnston*, 13 Ch. D. 434, etc.

Both the word "Lion" and the pictorial representation of a lion are good trade-marks for medicines. *Weaver, in re,* 10 O. G. 1.

E. A number.

"140," allowed registration as trade-mark on umbrellas. *Daves & Fanning, ex parte,* 1 O. G. 27.

"It may be that numerals, which are arbitrarily selected, without any purpose of identifying the article to which they are affixed from other articles of a similar class, may become the subject of a trade-mark." *Humphrey's Homeopathic Medicine Co.* v. *Hilton*, 60 Fed. R. 756.

F. A figure or symbol.

See XIII. 2. 289. *Virginia Hot Springs Co* v. *Hegeman*, 138 Fed. R. 855.

See XI. 15. 276. *Johnson & Johnson* v. *Bauer & Black*, 82 Fed. R. 662.

Words "Twin Brothers," with portraits of the twins, a good trade-mark on yeast. *Burton* v. *Stratton*, 12 Fed. R. 696.

A cross with letters "C. B." with words "à Broder à la Croix" on cotton, under which mark cotton had come to be known as cross cotton, good trade-mark. *Cartier* v. *Carlile*, 8 Jur. N. S. 183.

"Red Cross" and a symbol of a Greek cross allowed to be registered as trade-mark for elastic fabrics. The Greek cross has attained such a wide-spread use in history that it is not against public policy to register it. *E. & A. H. Batcheller Co., ex parte*, 85 O. G. 1583. *Contra: Chichester Chemical Co., ex parte*, 52 O. G. 1061; *Zuack & Co., ex parte*, 76 O. G. 1855. V. 1 C. 123.

An emblem of an anchor on wire good trade-mark; wire had come to be designated "anchor brand." *Edelsten* v. *Edelsten*, 7 L. T. N. S. 768; 1 De G. J. & S. 185.

"A device consisting chiefly of a letter of the alphabet nine times repeated, the repetitions being arranged in three vertical columns, separated by lines or bars, so as to form three groups of three B's (B B B), and when applied to the goods, each of three sides of the package presents to the eye one of these triple combinations of B in conspicuous type." *Foster* v. *Blood Balm Co.*, 77 Ga. 216.

"Perhaps, as argued for the defendants, the words 'Warren Hose Supporter' alone would not constitute a valid trade-mark; but, in connection with the cut (hose supporter engaged with stocking), they appear to be more than merely descriptive, and sufficiently arbitrary to denote fairly the origin of the goods when used to that purpose." *Frost* v. *Rindskopf*, 42 Fed. R. 408.

Eagle with outstretched wings on mortar and pestle, good trade-mark on labels of medicinal preparations. *Hegeman* v. *O'Byrne*, 9 Daly, 264.

"Trade-marks are of two kinds. They may consist of pictures or symbols or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in." *Hier* v. *Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589.

Word "Star," with symbol of star on shirts and underwear, valid trade-mark. *Hutchinson* v. *Blumberg*, 51 Fed. R. 829.

A dome affixed to black lead which may be sold in different shapes can be registered as a trade-mark, but not the shape of a dome. *James's Trade Mark*, L. R. 33 Ch. D. 392.

Preliminary injunction against use of packages of cotton bearing the representation of a red cross or the designation "Red Cross" see *E. & A. H. Batcheller Co., ex parte*, 85 O. G. 1583. *Johnson* v. *Brunor*, 107 Fed. R. 466.

A design consisting essentially of the letters "G. A. R." and the representation of an eagle, a flag, and a star, being an exact representation of the well-known badge of the Grand Army of the Republic, can be registered as a trade-mark for writing paper, there being no sacredness or exclusive right in the abstract symbol. "As to mere emblems which have been used by societies, it seems to be settled by the decisions of the Office that there is no sanctity or sacredness about them which precludes their being used and applied as trade-marks." *King, ex parte*, 46 O. G. 119, 120.

Figure ½ in large, bold, red characters in a certain form and style, and used four years as trade-mark on cigarettes, and registered in Patent Office at Washington indicating that goods were composed of two kinds of tobacco, good trade-mark in particular form, size, color, and style in which it had been registered and used, but not otherwise. *Kinney* v. *Allen*, 1 Hughes 106.

NOTE. — This should properly be a case for unfair trade.

"The illustration of a boy in a position indicating suffering from cramps," good trade-mark for cramp-cure medicine. *L. H. Harris Drug Co.* v. *Stucky*, 46 Fed. R. 624.

Tin tags of peculiar shape, form, and size to mark tobacco long used by plaintiff before any one else adopted that style, held to be trade-marks, not as to the material tin alone, but as to the peculiar style adopted. *Lorillard* v. *Wight*, 15 Fed. R. 383.

Figure of a crown a valid trade-mark for paints. *Smith* v. *Reynolds*, 10 Blatchf. 100.

"There is nothing in the law or in public policy opposed to the registration of Masonic or other society symbols as trade-marks," overruling *Tolle's appeal*, 2 O. G. 415. *Thomas' appeal*, 14 O. G. 821.

G. Not necessarily disclosing on its face the origin of the goods, affording by association a ready means of recognition of their origin.

"The trade-mark must therefore be distinctive in its original signification pointing to the origin of the article, or it must have become such by association." *D. & H. Canal Co.* v. *Clark*, 13 Wall. 311.

"The position taken by Upton in his work on trade-marks, that the trade-mark must show either the owner's name or place of business, or both, I believe, is sustained neither by reason nor by the decisions of the courts." *Dawes & Fanning*, 1 O. G. 27.

"It is of course no fatal objection to the validity of a trade-mark that it does not include the name of the manufacturer or producer." *Deering Harvester Co.* v. *Whitman & Barnes Mnfg. Co.*, 91 Fed. R. 376.

"It is not necessary that a trade-mark should on its face show the origin, manufacture, or ownership of the articles to which it is applied. It is sufficient that by association with such articles in trade it has acquired with the public an understood reference to such origin, etc." *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651.

"Eureka" good trade-mark in "Eureka Ammoniated Bone Superphosphate of Lime," but not the five following words. "But it was argued the name adopted by the complainants did not sufficiently indicate origin and ownership to be regarded as a trade-mark. This was a mistake. It served to distinguish the complainants' manufacture quite as effectively as names ever serve to distinguish things. *Alleghany Fertilizer Co.* v. *Woodside*, 1 Hughes, 115.

It is not essential that a trade-mark should indicate name and address of the manufacturer and seller of articles. *Insurance Oil Tank Co.* v. *Scott*, 33 La. Ann. 946.

"La Favorita," on flour. "The brand did not indicate by whom the flour was manufactured, but it did indicate the origin of its selection and classification." *Menendez* v. *Holt*, 128 U. S. 514.

"When the mark has become recognized by purchasers as a distinctive designation of a particular maker, manufacturer, or seller of a certain quality of goods, it will be sufficient indication of the origin or ownership, within the rule requisite to its protection as such, although purchasers may not, from the work or otherwise, be able to tell who is the particular maker or seller of the article." *People* v. *Fisher*, 3 N. Y. Supp. 786; 50 Hun, 552.

"A trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied." *Stachelberg* v. *Ponce*, 23 Fed. R. 430.

G. (1) A word in a foreign language may be a valid trade-mark.
"La Favorita," good trade-mark on flour. *Menendez* v. *Holt*, 128 U. S. 514.

2. Affixed.

A. To be protected in the courts as a trade-mark, a sign should be affixed by imprint on the merchandise which it serves to designate.

See I. 1.

"That it must be attached to the article manufactured, in such a way as to be reasonably durable and visible, is also conceded. It must have a practical existence, not resting in the thought of the owner, but stamped or impressed, or attached in some way to the article itself." *Candee* v. *Deere*, 54 Ill. 439.

Advertising embroidery work under name "Priscilla" does not give a party a right to that name as a trade-mark, where it is not affixed to the goods. *Hartshorn* v. *Philbrick*, 101 O. G. 2077.

The designation of boilers as "Hazelton" in circulars and advertisements was not such a use as would constitute a trade-mark. "A trade-mark owes its existence to the fact that it is actually affixed to a vendible commodity." *Hazelton Boiler Co.* v. *Tripod Boiler Co.*, 142 Ill. 494.

"What is it," used in advertising certain candy, not a trade-mark because not affixed. "A trade-mark which is not in some manner attached or affixed or stamped on the article indicated by it involves a contradiction in itself, the idea of some distinctive brand or mark being inherent in the expression itself." *Oakes* v. *St. Louis Candy Co.*, 146 Mo. 391.

The use of words "Yorkshire Relish" on packing cases was not such a use as would indicate a trade-mark or other than as a description of the contents. *Powell* v. *Birmingham Vinegar Brewery Co.*, 66 L. J. Ch. 763.

"Hero" and "Heroine" stamped on glass jars, good affixation. *Rowley* v. *Houghton*, 2 Brew. 303.

Trade-marks, properly so called, consist of some description or device in some way or other affixed to the article sold, and that description or device may be either affixed to, or impressed upon the goods themselves by means of a stamp, or an adhesive label or ticket, or it may be made to adhere to an envelope or case containing them. *Singer Mnfg. Co.* v. *Wilson*, 2 Ch. D. 434.

"Bell Treble" would have been good trade-mark on pianos if affixed, and not simply used in advertisements. *St. Louis Piano Mufg. Co.* v. *Merkel*, 1 Mo. App. 305.

"From this it will be seen that it is of no consequence whatever who was first to suggest and urge the adoption of the trade-mark; but the point is who was first to actually adopt and use the same for the purpose of indicating the ownership or proprietorship of the articles to which the mark is applied." *Swift* v. *Peters*, 11 O. G. 1110.

B. Or, if that is not feasible, on the boxes, bags, or receptacles.

Where a standing female figure clothed in a tight-fitting garment with uplifted arms holding aloft a scroll, had been shown on pictures and catalogues, placed in boxes of knit goods, and used on posters and in advertisements during several years, there was a sufficient association of the mark claimed as a trade-mark, although it was not actually affixed. *Hay & Todd Mufy. Co.* v. *Querns Bros.*, 86 O. G. 1323.

Dome printed on boxes or impressed on blocks of lead, sufficiently affixed. *In re James's Trade Mark*, L. R. 33 Ch. D. 392; L. R. 31 Ch. D. 340.

The use of trade-mark of figure of a lady and a bear as applied to furs on wrapping paper or boxes containing the goods, a sufficient affixation. *Jay* v. *Ladler*, 40 Ch. D. 649.

"M. & C." with figure of a star, all inclosed in a ring on the bottom of a champagne cork, is a good trade-mark; and the affixation is sufficient, although the mark is not seen till the cork is withdrawn. *Moet* v. *Pickering*, L. R. 6 Ch. D. 770.

The stamping of a trade-mark on the inside of a cork of wine bottle sufficient affixation. *Richards* v. *Butcher*, L. R. 2 Ch. D. (1891) 522.

"Parabola," a valid trade-mark on needles, affixed by printing on the package. *Roberts* v. *Sheldon*, 8 Biss. 398.

"Sometimes you do not find anything put on the goods themselves, the reason often being that the goods are not capable of it; for instance, where there are liquids, upon which of course you cannot put a mark, and therefore a mark is put on the bottle containing the liquid, or on the cork which is in the bottle and helps to retain the liquid. These are again true trade-marks, whether affixed in the shape of a label on a bottle of liquid or in the shape of a device on the cork, or in the case of other goods, such as cigars, affixed to the box which contains the cigars or

the string which encircles them, they are in some way or other attached to the goods, and go along with the goods on sale." *Singer Mnfg. Co.* v. *Wilson*, L. R. 2 Ch. D. 434.

"Of course, in some cases, the work of manufacture itself which is to be thus distinguished cannot receive the mark, as would be the case in respect of a powder or liquid which is advertised or offered for sale. But, in such instances, the package or bottle containing the article can receive, and, as far as we are able to see, always has received, the mark in which a property is claimed." *St. Louis Piano Mnfg. Co.* v. *Merkel*, 1 Mo. App. 305.

"It is essential that the trade-mark the use of which is claimed by any party shall be connected with the articles of sale; of course not necessarily connected by its own nature with the articles, but connected by the act of the party, as, for instance, placing it as a label on his goods which are sold, or advertising his goods in connection with it." *Wheeler* v. *Johnston*, L. R., 3 Ir. 284.

3. By a proprietor.

A. A manufacturer, a middleman, or dealer may have a trade-mark to designate his merchandise.

"The meaning and use of a trade-mark is, that some person dealing in goods, no matter of what kind, whether of his own manufacture or not, having a certain defined shape, if he stamps upon them some indication that that particular article is his and his only, may thereby acquire so far an exclusive right to it as that no man may imitate his mark, and the legal right goes no further than that." *Ford* v. *Foster*, L. R. 7 Ch. App. 611, note; 27 L. T. N. S. 219; 20 W. R. 311; 41 L. J. Ch. 682.

A dealer in soup preparations which were made up for him in Paris protected in use of a label. "It is not essential to property in a trade-mark that it should indicate any particular person as the maker of the article to which it is attached." *Godillot* v. *Harris*, 81 N. Y. 263.

"La Favorita," good trade-mark of dealers in flour.

"There is no merit in the proposition that the complainants' trade-mark cannot be sustained for the reason that the flour is not manufactured by them. The proof is uncontradicted that selection and classification require skill, judgment, and expert knowledge, and add value and reputation to the flour when made by those in whom purchasers have confidence. The case of

Godillot v. *Harris*, 81 N. Y. 267, seems conclusive upon this point," *Holt* v. *Menendez*, 23 Fed. R. 869. Aff'd 128 U. S. 514.

"A corporation is entitled to have its trade-mark as well as a private individual, and may sue for its infringement." *Insurance Oil Tank Co.* v. *Scott*, 33 La. Ann. 946.

"Such a proprietor, if he owns or controls the goods which he exposes to sale, is entitled to the exclusive use of any trade-mark adopted and applied by him to the goods, to distinguish them as being of a particular manufacture and quality, even though he is not the manufacturer, and the name of the real manufacturer is used as part of the device." *McLean* v. *Fleming*, 96 U. S. 245.

A party may be entitled to a trade-mark in a name which he uses arbitrarily either on articles which he manufactures or has manufactured for him. *Selchow* v. *Baker*, 93 N. Y. 59.

"The party, then, whose interests are directly affected by the wrong, is entitled to proceed in his own name to secure its suppression; and the person for whom goods are manufactured has the same legal right to affix and maintain a special trade-mark, as the manufacturer himself." *Walton* v. *Crowley*, 3 Blatchf. 440.

But see following cases.

A carpet cleaner is not such a trade or manufacture as to be entitled to a trade-mark, as there are no goods to which it could be affixed. *Hankinson*, 8 O. G. 89.

A trade-mark cannot be registered for the real estate business, and printing the mark on cards and business stationery is not affixation within the meaning of the law. *Roy & Nourse, ex parte*, 54 O. G. 1267.

"The proposition that an author can protect his writings by a trade-mark is unique and, at first blush, seems somewhat startling. It is certainly offensive to the æsthetic and poetic taste to place such poems as the 'Recessional' and 'The Last Chantey' in the same category with pills and soap, to be dealt in as so much merchandise. We do not intend to decide that such a trade-mark is sanctioned by the law, but even if it were, it is manifest that the mark does not lose its characteristics because used to designate an unusual variety of 'goods.' In other words, the author, assuming that he may have such protection, must comply with the law if he would have a valid trade-mark." *Kipling* v. *G. P. Putnam's Sons*, 120 Fed. R. 631, 635.

(*But see:* XI. 12.) 267.

B. A voluntary association of laborers, or of manufacturers, having no property interest as an association in goods of their manufacture is not entitled to a trade-mark on such goods.

Letters "A.-A. L." standing for Anti-Adulteration League, a voluntary association of several manufacturers using said mark on wheat flour, each on its own product and not as an association making, dealing in, or selling wheat flour, cannot be granted registration to such voluntary association, as it is not an "owner" within the meaning of the statute. *Anti-Adulteration League, ex parte*, 86 O. G. 1803.

A symbol adopted by an association of local unions of cigar-makers to show that the person or persons who use it are members of that union is not a trade-mark in the legal sense of the word. *Cigar-makers' Protective Union* v. *Conhaim*, 40 Minn. 243.

"The organization that devised, registered, and owns the label is neither a manufacturer nor dealer, and has no trade in which a trade-mark can be used. The second question would seem to go with the first. Trade-marks are provided for by the Act of Congress of July 8th, 1870. . . . This provision of the act clearly contemplates an actual business conducted by the person or persons named, the adoption of a trade-mark in that business, and its appropriation to a particular 'class of merchandise' produced or sold by the parties making the registration." *McVey* v. *Brendel*, 144 Pa. St. 235.

A label used by parties to indicate membership in a voluntary association lacks the essential characteristics of a trade-mark. It does not indicate origin and there is no exclusive right to its use. It indicates membership, and is used by many persons unknown to each other. *Weener* v. *Brayton*, 152 Mass. 101.

Contra: "The fact that their work is not performed under a single employment, but under many different employers in as many widely separated shops, may go to the value of the mark in its application to the cigars made by them, rather than to the right to its protection as such. *People* v. *Fisher*, 50 Hun, 552.

But see: "The case at bar differs from those cases [*Cigar-makers Protective Union* v. *Conhaim*, 40 Minn. 246, and *Schneider* v. *Williams*, 44 N. J. Eq. 391], however, in the respect before mentioned, that complainant is himself the manufacturer of cigars, and, according to the averments of the bill, has built up a profitable trade by the use of the union label, which trade has

been . . . damaged by the fraudulent acts of the defendants." *Carson* v. *Ury*, 39 Fed. R. 777.

Complainant was a member of an unincorporated voluntary association of cigar-makers. As a manufacturer he had used labels of the association, and he averred in his bill that his trade was injured by the fraudulent use of labels by the defendant. On the ground, not of trade-marks, but of fraud in unfair trade, he had stated a-ground for relief. Demurrer overruled. *Carson* v. *Ury*, 39 Fed. R. 777.

But see: An association of manufacturers using in common a name as a trade designation, as "California," entitled to be protected in the name on ground of fraud. *California Fruit Canners Ass'n* v. *Myer*, 104 Fed. R. 82.

(1) *Except it may be given by statute.*

Protection may be afforded the label of an unincorporated trade union of voluntary members under c. 462 of 1895, which extends protection to label of "any person, association, or union." *Tracy* v. *Banker*, 170 Mass. 266.

C. The right to affix or to use a distinguishing mark on merchandise which may be handled by a public official or dealt in by a merchant, does not thereby necessarily give to such a party a right to use such a mark as his own trade-mark.

See XVI. 2. 337. *Stewart* v. *Einstein*, 64 O. G. 1533.

An official inspector of fish, packed by him in his business, with his official brand, does not thereby gain a private right in the brand as a trade-mark. *Chase* v. *Mayo*, 121 Mass. 343.

A dealer furnishing a label for a cigar manufacturer to put on boxes of cigars for him, with manufacturer's name on the label, as a trade-mark, in the absence of special agreement which will enable him to enjoin use by manufacturer on other cigars, has no right in label as a trade-mark. *Hirsch* v. *Jonas*, 3 Ch. D. 584.

"The defendants were simply the servants of the company during the period covered by the agreement. The transfer of the wood-cuts to the latter was simply to enable them to place the labels upon the pomade manufactured by them under the company's supervision, and was not intended to, and did not have the effect of transferring to the defendants any property in the trade-mark. In fact, the defendants by their own acts after-

ward acknowledged the company's continuing ownership and right to use the trade-mark." *Lockwood* v. *Bostwick*, 2 Daly, 521.

A party who has merely an interest in certain sewing machines which bear the trade-mark "National" does not by proof of that fact alone establish an interest in the trade-mark. *New Home Sewing Machine Co., ex parte*, 107 O. G. 2529.

4. To his goods.

Goods may be (A) a manufactured product, or it may be (B) a natural product of a certain locality limited by nature, or by monopoly.

A. A manufactured product.

(1) Goods, wares, and merchandise.

See II. 1 A (1). 8.

B. Or it may be a natural product of a certain locality.

(1) Mineral springs.

See III. 2 D., 68. VIII. 1 B. (2). 157. II. 1 A. (1) 8, "Hygeia."

City of Carlsbad had long prepared, from a spring in that city of which it had exclusive right, a product called "Carlsbad Sprudel Salts;" held that respondent without the authority of complainant could not label a preparation not derived from the genuine springs "Improved Effervescent Carlsbad Powder." (The court, without specifically deciding on question of trade-mark or trade name in Carlsbad, held that complainant had exclusive right to name "Carlsbad" as applied to mineral waters there drawn.) *City of Carlsbad* v. *Kutnow*, 71 Fed. R. 167. Affirming 68 Fed. R. 794.

Complainant for many years sole owner of a mineral spring from which it made salts called "Carlsbad Sprudel," entitled to injunction restraining respondent, a corporation in Chicago, from using on salts chemically similar, the name "Carlsbad Sprudel," or "Carlsbad Salts," and using name "Carlsbad" as designation of respondent's salts. *City of Carlsbad* v. *W. T. Thackery & Co.*, 57 Fed. R. 18.

"Congress Water," and "Congress Spring Water," valid trade-marks as applied to water from spring discovered 1792 and

named by a member of Congress "Congress Spring"; and since 1825 the name applied to water; and from 1865 for about five years applied by parties who bought the spring without special mention of good-will or trade-mark. Protected against parties who applied name to water from High Rock Spring. *Congress & Empire Spring Co.* v. *The High Rock Congress Spring Co.*, 45 N. Y. 291, reversing 57 Barb. 526.

Plaintiff owner of mineral spring whose water was sold as "Clysmic Water," contracted with defendant that he was to have sole right during a series of years to sell that water. Although defendant had been the first to use the name, held, that during the contract he could not use the name "Clysmic," on mineral waters except from the spring of the plaintiff. *Hill* v. *Lockwood*, 32 Fed. R. 389.

"Limiting this decision, as we do, to an adjudication of the rights of the complainant and the defendant Lockwood during the continuance of the contract relations subsisting between them, we must hold that the name 'Clysmic,' became affixed and appurtenant to the complainant's spring, as indicating the source of the water known to the public as 'Clysmic Water,' and that the complainant cannot be deprived, in the manner attempted by the defendant, of the advantage which has accrued to her, as the purchaser of the spring, from such designation." *Hill* v. *Lockwood*, 32 Fed. R. 389.

"It may seem hard to deprive a man of the right to use a picture or an engraving of a natural object on his own premises as he sees fit in advertising spring water coming from a spring on the same premises; but if the owner of springs on lands formerly constituting part of the same premises has appropriated such picture as his trade-mark and uses it without objection, it may be he is to be protected, even as against the owner of the object itself." *Virginia Hot Springs Co.* v. *Hegeman*, 138 Fed. R. 855, 859.

"Cromac Springs," held good trade-mark on mineral water from springs in Cromac District. *Wheeler* v. *Johnston*, L. R. 3 Ir. 284.

NOTE. — The later tendency has been to consider the geographical names of mineral spring waters as trade names or as deserving protection on the ground of unfair trade. See "Carlsbad" and "Vichy" cases in VIII. 1 B. (2). 157.

(2) There can be no valid trade-mark on natural products whose cultivation is open to all the world, deriving their value from innate qualities and not from the skill or ingenuity of man.

There can be no trade-mark or trade name on a grape vine. Sale of seeds, plants, or vines carries with it right to the natural increase. "Neither the common law nor the statutes relating to trade-mark extend the protection of trade names to things which are valued more for their natural powers of reproduction and increase than for any other qualities." *Hoyt* v. *J. T. Lovett Co.*, 71 Fed R. 173.

5. With the intention of designating their origin.

A sign, in order to become a valid trade-mark, should be used with the intention and for the purpose of designating the origin of goods; if used for another purpose it cannot be a valid trade-mark.

See IV. 6. 100.
See I. 1.

"Stamps or trade-marks of the kind are employed to point to the origin, ownership, or place of manufacture or sale of the article to which it is affixed, or to give notice to the public who is the producer, or where it may be purchased." *Amoskeag Mufg. Co.* v. *Trainer*, 101 U. S. 51.

"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." *Amoskeag Mufg. Co.* v. *Trainer*, 101 U. S. 51.

"These cases [cited] establish the following general propositions: (1) that to acquire the right to the exclusive use of a name, device, or symbol, as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others." *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460.

"The function of a trade-mark is to indicate to the public the

origin, manufacturer or ownership of articles to which it is applied, and thereby secure to its owner all benefit resulting from his identification by the public with articles bearing it." *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R., 651.

"A trade-mark is defined to be the name, symbol, figure, letter, form, or device, used by a manufacturer or merchant to designate the goods he manufactures or sells, to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and to secure such profits as result from a reputation for superior skill, industry, or enterprise." *Larrabee* v. *Lewis*, 67 Ga. 561.

"Stamps or trade-marks of the kind are employed to point out the origin, ownership, or place of manufacture or sale of the article to which it is affixed, or give notice to the public who is the producer, or where it may be purchased." *McLean* v. *Fleming*, 96 U. S. 245–254.

"Royal" would not be a good trade-mark if used to designate grade or quality, but would if used to designate entire output of a factory and had come to designate origin. *Raymond* v. *Royal Baking Powder Co.*, 85 Fed. R. 231.

A. The registration of a sign affixed to merchandise is good evidence of intention to claim it as a trade-mark.

See XVI. 2. 336. *Richter* v. *Reynolds*, 59 Fed. 577.

Registration of word "celluloid" as a trade-mark, evidence of intention to use it as a trade-mark. *Celluloid Mnfg. Co.* v. *Celonite Mnfg. Co.*, 32 Fed. R. 94.

Registration of "Puck" for cigars under law of 1874 subsequently declared unconstitutional. Evidence that at that time registrants claimed said word as a trade-mark. *Jacoby* v. *Lopez*, 23 O. G. 342.

The registration of a sign at the U. S. Patent Office and its use thereafter for four years considered as evidence of acquisition of trade-mark and right to protection. *Kinney* v. *Allen*, 1 Hughes, 106.

Registration is best evidence of intention to adopt trade-mark.

Parties who employ word in an experimental way and do not actually adopt it as a trade-mark cannot claim it against one who actually adopts and uses it. *Sternberger* v. *Thalheimer*, 3 O. G. 120.

6. By a use thereon.

A sign, in order to become a legal trade-mark at common law, should be actually used on merchandise for such time and in such manner as would show an intention to acquire a trade-mark.

See IV. 6 A. 100; IV. 2. 89. *Filkins* v. *Blackman*, 13 Blatchf. 440, and other cases there cited; II. 2. 20.

"Any name, symbol, letter, figure, or device adopted by the persons manufacturing or selling goods, and used or put upon such goods to distinguish them from those manufactured or sold by others, and employed so often and for such a length of time as to raise the presumption that the public would know that it was used to indicate ownership of the goods in the person manufacturing or selling them, constitutes his trade-mark." *Derringer* v. *Plate*, 29 Calif. 292.

"It goes without saying that a trade-mark or trade-name can be acquired only by adoption accompanied with actual use." *Kathreiner's Malz Kaffee Fab.* v. *Pastor Kneipp Med. Co.*, 82 Fed. R. 321.

III. WHAT IS NOT A VALID TRADE-MARK.

(1) A descriptive sign, (2) a geographical sign, (3) the proper name of a private party, (4) a form or material substance, or shape, (5) a color, (6) a style of dressing goods, (7 A) a label, (B) advertisement, (C) or mark for a useful or ornamental purpose and not distinctive, is not the subject of a valid trade-mark.

1. A descriptive sign.

A. A sign describing the purposes of the article to which it is applied, the grade or quality of the manufacture, its essential characteristics, or the ingredients of which it is composed is not a valid trade-mark.

"The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the article to which they are affixed; but he has no right to an exclusive use of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality." *Amoskeag Mnfg. Co.* v. *Spear*, 2 Sandf. 599.

"But this is certain, that names, whether they of themselves do or do not indicate grade or quality, cannot be employed to designate grade or quality of goods, or be exclusively appropriated as valid trade-marks." *Beadleston* v. *Cooke Brewing Co.*, 74 Fed. R. 229.

"No principle of the law of trade-marks is more familiar than that which denies protection to any word or name which is descriptive of the qualities, ingredients, or characteristics of the article to which it is applied. An exclusive right to the use of such a word as a trade-mark, when applied to a particular article or class of articles, cannot be acquired by the prior appropriation of it, because all persons who are entitled to produce and vend similar articles are entitled to describe them, and to employ any appropriate terms for that purpose." *Bennett* v. *McKinley*, 65 Fed. R. 505.

"If the law permitted words which are essentially descriptive of kind, quality, or properties to be appropriated by a merchant or manufacturer to advance the sale of his own goods, the English language would be speedily impoverished in these days when competition in all lines of trade and manufacture is both selfish and keen." *Brennan* v. *Emery-Bird-Thayer Dry Goods Co.*, 108 Fed. R. 624.

The test as to whether a mark is descriptive or not "is to consider whether the public will on the whole regard the mark as an arbitrary symbol denoting only the origin and ownership of the goods, or as an advertisement of some desirable quality of the goods themselves." *Brigham, ex parte*, 20 O. G. 891.

"The general proposition is well established that words which are merely descriptive of the character, qualities, or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark." *Brown Chemical Co.* v. *Myer*, 139 U. S. 540; Affirming 31 Fed. R. 453.

"No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection." *Delaware & H. Canal Co.* v. *Clark*, 13 Wall. 311.

"Nor is the question, whether the name used as a trade-mark will convey an exact notion of how to compound an article, so that one reading it will be able to make a like article. If the necessary effect is to inform the reader or hearer of the general characteristics and composition of the thing, it is a name which may be used, with equal truth, by any one who has made and offers for sale a thing compounded of the same ingredients, and who desires to express to the public the same facts." *Caswell* v. *Davis*, 58 N. Y. 223.

"Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word 'flour' as his trade-mark, and prevent others from applying it to their packages of flour." *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.*, 32 Fed. R. 94.

"The mark, however, must possess the requisite characteristics, pointing out the source and origin of the goods, and not be

merely descriptive of the style, quality, or character of the goods themselves." *Filley* v. *Fassett*, 44 Mo. 168; 100 Am. Dec. 275.

"A word that is well known in the language and which is the name of an article, or words that merely indicate the quality of an article, cannot, it seems, be so exclusively appropriated as a trade-mark." *Gillott* v. *Esterbrook*, 47 Barb. 455; 48 N. Y. 374.

A mere general description, by words in common use, of a kind of article, or of its nature or qualities cannot of itself be the subject of a trade-mark. *Gilman* v. *Hunnewell*, 122 Mass. 139.

"No one has the right to appropriate to his own exclusive use a sign or symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose. It is because of this principle that a trade-mark cannot be acquired by the adoption of a word which is merely descriptive of the quality, ingredients, or characteristics of a commodity." *Humphreys Homeopathic Medicine Co.* v. *Hilton*, 60 Fed. R. 756.

"No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself." *Improved Fig Syrup Co.* v. *California Fig Syrup Co.*, 54 Fed. R. 175.

"Nothing is better settled than that an exclusive right to the use of the words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired." *Laurence Mnfg. Co.* v. *Tennessee Mnfg. Co.*, 138 U. S. 537.

"Words and names having a known or established signification cannot within the limits of such specification be exclusively appropriated to the advancement of the business purposes of any particular individual, firm or country." *Newman* v. *Alvord*, 49 Barb. 588.

"It will not do to say that any one manufacturer may exclude all others in the use of labels or marks which, differing in terms and characteristics, are honestly designed and used to obtain the same advantages. In other words, one cannot make an exclusive appropriation of words or marks which he puts upon his goods, and which simply indicate their superiority or popularity, or universality in use, and no more." *Proctor & Gamble Co.* v. *Globe Refining Co.*, 92 Fed. R. 357.

"Acid phosphate," descriptive.

"It is not to be gainsaid that as a complete and exhaustive indication of all that the preparation contains the phrase 'acid

phosphate' is inexact. It does not indicate that it is a solution, which it is, while a proper acid phosphate is a solid until it is dissolved. It does not indicate the character of the acid, and it does not indicate what base or bases have been used. But this criticism is true of most words or phrases in common use. . . . The true test, it appears to me, must be not whether the words are exhaustively descriptive of the article designated, but whether in themselves, and as they are commonly used by those who understand their meaning, they are reasonably indicative and descriptive of the thing intended. If they are thus reasonably descriptive, and not arbitrary, they cannot be appropriated from general use, and become the exclusive property of any one." *Rumford Chemical Works* v. *Muth*, 35 Fed. R. 524, 526, 527.

(1) A descriptive word.

"Imperial," one of several names to designate grades of beer, descriptive and not good trade-mark. *Beadleston* v. *Cooke Brewing Co.*, 74 Fed. R. 229.

"It goes without saying that the words 'Iron Bitters' are merely descriptive of an ingredient and quality of the article, and for that reason cannot be appropriated as a trade-mark." *Brown Chemical Co.* v. *Myer*, 31 Fed. R. 453; Aff'd 139 U. S. 540.

"The word 'cresylic,' when applied to distinguish an ointment made of soap and the article known in commerce as cresylic acid, is descriptive of the nature and quality of the compound." *Carbolic Soap Co.* v. *Thompson*, 25 Fed. R. 625.

(a) Examples.

See also cases under III. 2 A. 61.

"Absorbine," a preparation for absorbing swellings. *Christy* v. *Tipper*, L. R. 1 Ch. 1 (1905).

"Acid Phosphate," drug. *Rumford Chemical Works* v. *Muth*, 35 Fed. R. 524.

"Air brush," machine for distributing pigments. *Air Brush Mnfg. Co.* v. *Thayer*, 84 Fed. R. 640.

"Air Cell," fireproofing material. *N. Y. Asbestos Mnfg. Co.* v. *N. Y. Fire Proof Covering Co.*, 62 N. Y. Supp. 339; *N. Y. Asbestos Mnfg. Co.* v. *Ambler Asbestos Air Cell Covering Co.*, 99 Fed. R. 85.

"Aluminum," washboard, etc. *American Washboard Co.* v. *Saginaw Mnfg. Co.*, 103 Fed. R. 281.

"Apple and Honey," medicine. *Heublein, ex parte*, 87 O. G. 179.

"Bank," paper. *Pirie* v. *Goodall*, L. R. 1 Ch. D. 35 (1892).

"Barber's Model," razors. *Krusius, ex parte*, 82 O. G. 1687.

"Beaver Brand," cutlery and edge tools (but "Beaver" alone would be good). *F. P. May & Co., ex parte*, 111 O. G. 2223.

"Best Soap," soap. *Babbitt* v. *Brown*, 23 N. Y. Supp. 25.

"Best" flour. *Guenther Milling Co., ex parte*, 86 O. G. 1986.

"Blue Label," canned soups. *Curtice Bros., ex parte*, 85 O. G. 610.

"Borax," soap. *Dreydoppel* v. *Young*, 14 Phil. 226.

"Bourbon," whiskey. *Hardy* v. *Cutter*, 3 O. G. 468.

"Bromo-quinine," drug. *Grove, ex parte*, 67 O. G. 1447.

"Bromo Soda Mint" drug. *Spayd, ex parte*, 86 O. G. 631.

"Cachemire Milano," black silk. *Warburg, in re*, 13 O. G. 44.

"Cantripum," clothing. *Hooker, Corser and Mitchell Co., ex parte*, 108 O. G. 289.

"Cascara," drug. *Sterling Remedy Co.* v. *Gorey*, 110 Fed. R. 372.

"Catarrhal Jelly," jelly-like remedy for catarrh. *Kenyon, ex parte*, 100 O. G. 2383.

"Centennial" medals. *Hentell* v. *Viney*, Fed. Cas. 6158.

"Chill Stop," chills and fever medicine. *Hance Bros., ex parte*, 87 O. G. 698.

"Cherry Pectoral," medicine. *Ayers* v. *Rushton*, 7 Daly, 9.

"Cellular," clothing of cellular construction. *Cellular Clothing Co.* v. *Maxton*, 68 L. J. P. C. N. S. 72.

"Clinton Hematite Red," paint. *Clinton Metallic Paint Co.* v. *N. Y. Metallic Paint Co.*, 50 N. Y. Supp. 437.

"Computing" scales. *Computing Scale Co.* v. *Standard Computing Scale Co.*, 118 Fed. R. 965.

"Crack proof," rubber goods. *Goodyear Rubber Co., in re*, 11 O. G. 1062.

"Cresylic" from cresylic acid. *Carbolic Soap Co.* v. *Thompson*, 25 Fed. R. 625.

"Croup Tincture," medicine. *Roach, in re*, 10 O. G. 333.

"Crystalline" artificial stones. *Kipling, ex parte*, 24 O. G. 899.

"Crystallized Eggs," egg meat preserved by secret process. *Lamont* v. *Leedy*, 88 Fed. R. 72.

"Desiccated," codfish. *Town* v. *Stetson*, 3 Daly 53; 5 Abb. Pr. N. S. 218.

"Druggists Sundries," cigars. *Cohn, ex parte*, 16 O. G. 680.

"Dry Monopole," champagne. *Richards* v. *Butcher*, L. R. 2 Ch. D. 522 (1891).

"Egg," macaroni. *Dole Brothers, in re*, 12 O. G. 939.

"Elastic Seam" drawers, having elastic material at seams. *Seriven* v. *North*, 124 Fed. R. 894.

"Electric velveteen," cloth. *Leaf, in re*, 34 Ch. D. 623.

"Emolliolorum" preparation for softening leather. *Talbot, in re*, 63 L. J. Ch. 264.

"Essence of Anchovies," sauce. *Burgess* v. *Burgess*, 3 De G. M. & G. 896; 17 Jur. 292; 22 L. J. Ch. 675; 21 L. T. 53.

"Evaporated," food products. *Alden, ex parte*, 15 O. G. 389.

"Ever-ready" coffee mills. *The Bronson Co., ex parte*, 87 O. G. 1782; *Bronson Co.* v. *Duell*, 93 O. G. 1491.

"Everybody's Soap," soap. *Proctor & Gamble Co.* v. *Globe Refining Co.*, 92 Fed. R. 357.

"Famous," cooking stoves. *Brand Store Co., ex parte*, 62 O. G. 588.

"Favorite," stationery. *Cooke & Cobb Co.* v. *Miller*, 65 N. Y. Supp. 730; 53 App. D. 120.

"Felt-less," sweat pads for horses. *McClain, ex parte*, 99 O. G. 2101.

"Elixir of Calisaya Bark," drugs. *Caswell* v. *Davis*, 58 N. Y. 223.

"Fire-board," fire-proofing material. *New York Asbestos Mnfg. Co.* v. *Ambler Asbestos Air-cell Covering Co.*, 99 Fed. R. 85.

"Fire Proof Oil," oil. *Scott* v. *Standard Oil Co.*, 106 Ala. 475.

"Fitmeeasy," corsets, waists and underwear. *Miller, ex parte*, 95 O. G. 1452.

"Fruit," vinegar. *Alden* v. *Gross*, 25 Mo. App. 123.

"Fullcut," clothing. *Miami Clothing Mnfg. Co., ex parte*, 100 O. G. 1975.

"Gem," air gun. *Arbenz Application, in re*, 35 Ch. D. 248.

"Gold Label," bread. *Stuhmer, ex parte*, 86 O. G. 181.

"Gold Leaf," flour. *Purdy* v. *Todd*, 17 Can. Sup. Ct. 196.

"Gold Medal," saleratus. The term indicates that at some exhibition a gold medal has been awarded proprietor. *Taylor* v. *Gillies*, 59 N. Y. 331.

"Guaranteed," corsets. *Symington* v. *Footman*, 56 L. T. N. S. 696.

"Gyrator," bolting machine having gyratory motion. *Wolf, ex parte*, 80 O. G. 1271.

"Health," candy. *Geron, ex parte*, 108 O. G. 288.

"Holophane," pressed glass ware for illuminating purposes. *Holophane Glass Co., ex parte*, 100 O. G. 450.

"Homeopathic Specifics," medicines. *Humphrey's Specific Homeopathic Med. Co.* v. *Wenz*, 14 Fed. R. 250.

"Hygienic," underwear. *Jaros Hygienic Underwear Co.* v. *Fleece Hygienic Under. Co.*, 65 Fed. R. 424.

"Imperial," beer (dissenting opinion). *Beadleston* v. *Cooke Brewing Co.*, 74 Fed. R. 229.

"Imperial," oysters. *Whistable Oyster Fishery Co.* v. *Hayling Fisheries*, 17 R. P. C. 461.

"Indurated Fiber" wood pulp wares. *Indurated Fiber Co.* v. *Amoskeag Indurated Fiber Ware Co.*, 37 Fed. R. 695.

"Instantaneous," tapioca. *Bennett* v. *McKinley*, 65 Fed. R. 505.

"Iron Bitters," medicine. *Brown Chemical Co.* v. *Myer*, 31 Fed. R. 453; 139 U. S. 540; *Brown Chemical Co.* v. *Sterns*, 37 Fed. R. 360.

"Iron Stone," drain pipes. *Ruder, in re*, 13 O. G. 596.

"Jubilee," paper made about jubilee year. *Tongood* v. *Pirie*, 56 L. T. 394.

"Just Right," overcoats. F. B. Q. Clothing Co., *ex parte*, 119 O. G. 2236.

"Kas-K-Rilla," medicine. *Seager, ex parte*, 97 O. G. 749.

"Kid Nee Kure," kidney and liver medicine. *Henderson, ex parte*, 85 O. G. 453.

"Kidney & Liver Bitters," medicine. *Spicker* v. *Lash*, 102 Calif. 38.

"Kleanwell," massage sponges. *Smith, ex parte*, 110 O. G. 601.

"Lotion," lotion. *Star Lotion Remedy Co., ex parte*, 100 O. G. 2603.

"Malted Milk," infant food preparation. *Horlick's Food Co., ex parte*, 84 O. G. 1870.

"Malt Myrrh," malt liquors. *Barrett & Barrett, ex parte*, 100 O. G. 1976.

"Masonic," cigars. *Smith, ex parte*, 16 O. G. 764.

"Metallic Clinton," paint. *Clinton Metallic Paint Co.* v. *N. Y. Metallic Paint Co.*, 50 N. Y. Supp. 437.

"Microbe Killer," medicine. *Aff* v. *Radam*, 77 Tex. 530; *Radam* v. *Capital Microbe Destroyer Co.*, 81 Tex. 122.

"Minute," coffee. *Whitman Grocery Co., ex parte*, 100 O. G. 1763.

"Monobrut," champagne. *Vignier's Trade Mark*, 61 L. T. N. s. 495.

"National," newspaper. *Snowden* v. *Noah*, Hopkins' Ch. R. 347.

"National Sperm," candles. *Price's Patent Candle Co.*, 51 L. T. N. S. 653.

"Native Guano," fertilizer. *Native Guano Co.* v. *Sewage Manure Co.*, 8 R. P. C. 125.

"Nevers-Tick," lubricants. *Woolworth, ex parte*, 100 O. G. 1976.

"Nickel Soap," soap, the word "soap" being an essential part of the mark; but "nickel" alone is registrable. *Butler, ex parte*, 87 O. G. 1781.

"Nourishing London," stout. *Raggett* v. *Findlater*, L. R. 17 Eq. 29.

"Night Blooming Cereus," perfume. *Phalon* v. *Wright*, 5 Phil. 464.

"No-Rip," harness pad. *Crescent Mnfg. Co., ex parte*, 97 O. G. 750.

"Old London Dock," gin. *Binninger* v. *Wattles*, 28 How. Pr. 206.

"Ox Blood," paints. *Jewell & Vinson*, 106 O. G. 1242.

"Pain-Ease," medicine. *Evans & Shepard, ex parte*, 96 O. G. 425.

"Pain-Killer," medicine. *Davis* v. *Harbord*, 63 L. T. N. S. 389; 60 L. J. Ch. 16; 15 App. Cas. 316. *Contra*: *Davis* v. *Kendall*, 2 R. I. 566; *Davis* v. *Kennedy*, 13 Grant Ch. U. C. 523.

"Pancreopepsine," compound of pancreatin and pepsin. *Searle & Hereth Co.* v. *Warner*, 112 Fed. R. 674.

"Parchment," paper. *Pirie* v. *Goodall*, L. R. 1 Ch. D. 35 (1892).

"Pastry," baking powder. *A. B. Barnum Co., ex parte*, 102 O. G. 227.

"Pepsin-Punch," non alcoholic beverage. *Birkhead, ex parte*, 97 O. G. 749.

"Perfect Face Paste," medicinal compound. *Rall, ex parte*, 85 O. G. 453.

"Pictorial," almanac. *Spottiswoode* v. *Clark*, 10 Jur. 1043.

"Pony," plows. *Avery* v. *Meikle*, 81 Ken. 73.

"Prize Medal 1862," pickles. *Batty* v. *Hill*, 1 H. & M. 264; 8 L. T. N. S. 791; 11 W. R. 745.

"Puddine," ingredients for pudding. *Clotworthy* v. *Schepp*, 42 Fed. R. 62.

"Prime Leaf," lard. *Popham* v. *Cole*, 66 N. Y. 69.

"Perfection," candy. *St. Louis Candy Co., ex parte,* 101 O. G. 220.

"Purity," oleomargarine. *Capital City Dairy Co., ex parte,* 83 O. G. 295.

"Purity," peanuts. *C. M. Taylor & Co., ex parte,* 114 O. G. 972.

"Radium radia," liniment. *Mitchell, ex parte,* 113 O. G. 1970.

"Reversi," a game involving the principles of reversing. *Waterman* v. *Ayres,* 39 Ch. D. 29.

"Rose," ingredients for pudding. *Clotworthy* v. *Schepp,* 42 Fed. R. 62.

"Royal," best grade of baking powder. *Royal Baking Powder Co.* v. *Sherrell,* 93 N. Y. 331; but see *Royal Baking Powder Co.* v. *Raymond,* 70 Fed R. 376. Aff'd, 85 Fed. R. 231.

"Rubberback," billiard-cloth. *Goodman-Leavitt-Yatter Co., ex parte,* 107 O. G. 834.

"Rye & Rock," mixture of rock candy and whiskey. *Van Beil* v. *Prescott,* 82 N. Y. 630.

"Safety," explosive caps. *Safety Powder Co., ex parte,* 16 O. G. 136.

"Sanitary," water filter. *Atkins, in re,* 3 R. P. C. 164.

"Sarsaparilla & Iron," medicine. *Schmidt* v. *Brieg,* 100 Calif. 672.

"Satin," shoe polish. *Brigham, ex parte,* 20 O. G. 891.

"Silicon," powder. *Electro-Silicon Co.* v. *Levy,* 59 How. Pr. 469.

"Smith's Medicated Prunes," drugs. *Smith, ex parte,* 16 O. G. 679.

"Snowflake," biscuits or crackers, indicating that they are white, light, and pure. *Larrabee* v. *Lewis,* 67 Ga. 561.

"Somatose," meat extract. *Farbenfabriken's Trade-Mark,* 70 L. T. N. S. 186.

"Special," base ball. *Kiffe, ex parte,* 110 O. G. 604.

"Splendid," flour. *Stokes, ex parte,* 64 O. G. 437.

"Standard," scales. *Computing Scale Co.* v. *Standard Computing Scale Co.,* 118 Fed. R. 965.

"Standard A," cigars. *Cohn, ex parte,* 16 O. G. 680.

"Steel shod," shoes. *Brennan* v. *Emery-Bird Thayer Dry-goods Co.,* 99 Fed. R. 971; 108 Fed. R. 624.

"Sterling," wagon. *Abingdon Wagon Co., ex parte,* 102 O. G. 230.

"Sterling Nickel," nickel culinary ware. *Sterman, ex parte,* 112 O. G. 252.

"Straight cut," cigarettes. *Ginter* v. *Kinney Tobacco Co.*, 12 Fed. R. 782.

"Sweet Opoponax of Mexico," perfumery. *Smith* v. *Woodruff*, 48 Barb. 438.

"Swing," swing socket of scythe-snath. *Thompson, ex parte*, 16 O. G. 136.

"Taffy Tolu," chewing gum. *Colgan* v. *Danheiser*, 35 Fed. R. 150.

"Tasteless," drugs. *Dick, in re*, 9 O. G. 538.

"Telegraphone," telegraphophone. *Hutchins, ex parte*, 100 O. G. 1330.

"Timekeeper," watches. *Strasburger, ex parte*, 20 O. G. 155.

"Toothache Gum," medicinal preparation. *Devlin* v. *McLeod*, 135 Fed. R. 164.

"Trade Mark," soap. *Babbitt* v. *Brown*, 23 N. Y. Supp. 25.

"Valvoline," lubricating oil. *Leonard, in re*, 26 Ch. D. 288; *Leonard* v. *Wells*, 53 L. J. Ch. 233. *Contra: Leonard* v. *White's Golden Lubricating Co.*, 38 Fed. R. 922.

"Vanilla," ingredients for pudding. *Clotworthy* v. *Schepp*, 42 Fed. R. 62.

"Valvoline," lubricating oil. *Horsburgh, in re*, 53 L. J. Ch. 237.

"Vogue," boots and shoes. *P. W. Minor, ex parte*, 101 O. G. 2079.

"Washing Powder," washing powder. *Falkinburg* v. *Lucy*, 35 Calif. 52.

"Whirling Spray," or "Whirlspray," syringe. *Marvel Co.* v. *Pearl*, 133 Fed. R. 160.

"Wine," wine. *Brandsville Fruit Farm Co., ex parte*, 103 O. G. 660.

"1904," coffee. *Schotten & Co., ex parte*, 105 O. G. 1532.

(b) A compound word.

See *ante* for examples of compound words.

(2) A descriptive combination of words.

"Trade-Mark Best Soap," soap. *Babbitt* v. *Brown*, 23 N. Y. Supp. 25.

"Old London Dock," gin. *Binninger* v. *Wattles*, 28 How. Pr. 206.

"Brooklyn White Lead," lead, invalid trade-mark; geograph-

ical and descriptive. *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416.

"Brown's Iron Bitters," medicine. *Brown Chemical Co.* v. *Myer*, 31 Fed. R. 453.

"Complainant's counsel does not, in express terms, assert that the words 'Brown's Iron Bitters,' either singly or collectively, constitute a trade-mark. Such a proposition, if asserted, could not be maintained, as it goes without saying that the words 'Iron Bitters' are merely descriptive of an ingredient and quality of the article, and for that reason cannot be appropriated as a trade-mark." *Brown Chemical Co.* v. *Myer*, 31 Fed. R. 453. Aff'd 139 U. S. 540.

"Buffalo Pitts," on agricultural machinery not registrable. Pitts being a surname, and Buffalo being a geographical name and part of applicant's name. *Buffalo Pitts Co., ex parte*, 89 O. G. 2069.

"Aromatic Schiedam Schnapps," liquor (Schiedam being place, and schnapps a kind of liquor). *Burke* v. *Cussin*, 45 Calif. 467; *Wolfe* v. *Hart*, 4 V. L. R. Eq. 125; *Wolfe* v. *Alsop*, 10 V. L. R. Eq. 40; 12 V. L. R. Eq. 421; *Wolfe* v. *Lang*, 13 V. L. R. 752. *Contra: Wolfe* v. *Barnett*, 24 La. Ann. 97.

"Ferro-Phosphorated Elixir of Calisaya Bark," chemical compound. *Caswell* v. *Davis*, 58 N. Y. 223.

"Nor does the coupling together, in a new combination, of words which before that had been used apart, and had entered into the common or scientific vocabulary, give a right to the exclusive use of such combination, where it is indicative not of origin, maker, use and ownership alone, but also of quality and other characteristics." *Caswell* v. *Davis*, 58 N. Y. 223.

A combination of words must express only origin of the article to which they are affixed, not the description, in order to be good trade-mark. *Caswell* v. *Davis*, 58 N. Y. 223.

"Improved Patent Gold Medal Self-Cleaning Rapid Water Filters," water filters. *Chaurin* v. *Walker*, 5 Ch. D. 850.

"Better than Mother's," mince meat. "The words clearly import that the article so marked is to be compared with some other known article, and that when so compared will be found of superior quality." *Erwin A. Rice Co., ex parte*, 83 O. G. 1207.

"Black Package Tea," not a distinctive appellation. *Fischer* v. *Blank*, 138 N. Y. 244.

"Headache Wafers," as applied to medicine, descriptive. *Gessler* v. *Grieb*, 80 Wis. 21.

"The plaintiffs cannot have a trade-mark in the descriptive words 'Cough Remedy,' or in the more extended description, 'A sure remedy for chronic or common cough, sore throat, and other minor throat complaints so often by neglect the forerunner of consumption.'" *Gilman* v. *Hunnewell*, 122 Mass. 139.

"Chill Stop," medicine for chills and fevers.

"It is doubtless true that the arrangement of the words is somewhat different from the ordinary, and they do not express the quality in the most grammatical form. They are 'catchy' and 'slangy.' The usual order in which they would naturally be used is transposed and the phraseology is abbreviated. Still they remain descriptive as well as advertising." *Hance Bros.*, *ex parte*, 87 O. G. 698.

"Hand Grenade Fire Extinguisher," glass vessels of fire extinguishing fluid. *Harden Star Hand Grenade Co.*, *In re*, 55 L. J. Ch. 596; 54 L. T. N. S. 834.

"Ferrated Elixir of Bark," or "Elixir of Calisaya Bark," "Celebrated Remedy for Diarrhoea," medicine. *Hegeman* v. *Hegeman*, 8 Daly, 1.

"Highly Concentrated Compound Fluid Extract of Buchu," invalid. *Helmbold* v. *Henry T. Helmbold Mnfg. Co.*, 53 How. Pr. 453.

"Celebrated Stomach Bitters," medicine.

When a new article is made, a name must be given to it, and this name becomes by common acceptation the appropriate descriptive term by which it is known, and therefore becomes public property. *Hostetter* v. *Adams*, 20 Blatch. 326.

"It cannot be successfully maintained that the words 'Homeopathic Specifics,' standing alone, can be appropriated by any one as a trade-mark; they are too broad, and if allowed, would give the taker a monopoly in a school of medicine, which Hahnemann, its founder, threw open to all disciples." *Humphrey's Specific Homeopathic Medicine Co.* v. *Wenz*, 14 Fed. R. 250.

"The words 'Cramp Cure' are therefore descriptive of the purpose and character of the medicine, and cannot, under the rulings, be exclusively appropriated by the manufacturer of a remedy for the disease." *L. H. Harris Drug Co.* v. *Stucky*, 46 Fed. R. 625.

"Parson's Purgative Pills, P. P. P.," "Johnson's American Anodyne Liniment, Established A. D. 1810," medicine. *Johnson*, *in re*, 2 O. G. 315.

"Braided Fixed Stars," on a particular kind of matches, descriptive.

"I understand 'fixed stars' to mean cigar lights, and the word 'braided' to indicate their having been prepared in a particular way." *Palmer's Trade-Mark*, 24 Ch. D. 504.

"Greatest value for the Money," footwear, invalid. *Parker Holmes & Co., ex parte*, 85 O. G. 287.

"Hydro-Bromo Soda Mint," medicine, invalid. *Spayd, ex parte*, 86 O. G. 631.

"No manufacturer can acquire a special property in an ordinary term or expression, the use of which as an entirety is essential to the correct and truthful designation of a particular article or compound." *Town* v. *Stetson*, 5 Abb. Pr. n. s. 218; 3 Daly, 53.

"Selected Shore Mackerel," as applied to fish, descriptive.

"A man cannot adopt any set of words that may happen to suit his fancy, without any reference to their purport or meaning, and then, by simply branding or otherwise placing them on every package of a commodity sold by him, acquire an exclusive right to their use as a trade-mark." *Trask Fish Co.* v. *Wooster*, 28 Mo. App. 408.

"Granulated Dirt Killer," soap. *Waeferling, ex parte*, 16 O. G. 764.

"Schiedam Schnapps," descriptive; Schiedam, a town in Holland, and Schnapps, German for dram.

"When a person forms a new word to designate an article made by him which has never been used before, he may obtain such a right to that name as to entitle him to the sole use of it as against others who attempt to use it for the sale of a similar article, but such an exclusive use can never be successfully claimed of words in common use previously, as applicable to similar articles." *Wolfe* v. *Goulard*, 18 How. Pr. 64.

(3) Descriptive letters or figures.

See III. 1 J. 52.

Numbers "60" and "70" used by manufacturers to designate grade of nails, descriptive and not trade-marks. *American Solid Leather Button Co.* v. *Anthony Lorell & Co.*, 15 R. I. 338.

"A C A," on cotton tickings, "A C" standing for "Amoskeag Co." and "A" for first quality, held not a valid trade-mark. *Amoskeag Mnfg. Co.* v. *Spear*, 2 Sandf. 599.

"It is immaterial whether words, or letters, or figures, or any other signs are used, if the single fact which they are used to indicate or declare, is a truth that other manufacturers or dealers

have an equal right to express and communicate." *Amoskeag Mnfg. Co.* v. *Spear*, 2 Sandf. 599.

"A. C. A.,"on cotton goods representing first quality, not good trade-mark. "As it was pertinently observed in the case in Sandford, if purchasers of the ticking read the name of the company, the letters can give no additional information, even if it be admitted that they are intended to indicate the name of the Company. And if they do not read the name as printed, the letters are unintelligible." *Amoskeag Co.* v. *Trainer*, 101 U. S. 51.

Letters "A. O.," "B. O.," and "C. O.," to designate steel series, and numbers "½," "1," "2," "3," and "8," to designate cast series branded on ploughs, although known and recognized by the public are not good trade-marks. *Avery* v. *Meikle*, 81 Ky. 73.

The word and letter "Standard A," not registrable as a trade-mark for cigars, it indicating highest standard of quality. *Cohn, ex parte*, 16 O. G. 680.

It being customary to adopt letters and numerals on lead pencils to signify quality, numbers with fractions, as 1½, 2½, 3½, cannot be registered as trade-marks. *Eagle Pencil Co., in re*, 10 O. G. 981.

Letters "L. L.," on sheetings, indicating quality, are descriptive and not a trade-mark.

"The letters have for years been understood generally as signifying grade or quality, and have been so used by different manufacturers, and there is no proof justifying the inference of fraudulent intent, or deception practised on the plaintiff or on the public." *Laurence Mnfg. Co.* v. *Tennessee Mnfg. Co.*, 138 U. S. 537.

Where number "27" originally used by a manufacturer to designate a certain wire mattress made according to a specification of a patent, the patent was held void, and manufacturers began to use the number so that it became descriptive of a mattress of a certain grade and style: *held*, that the number could not properly be a trade-mark. *Smith & Davis Mnfg. Co.* v. *Smith*, 89 Fed. R. 486.

After figures "600" have been long used by manufacturers to indicate quality of oil by denoting numbers of degrees of heat for fire test, a manufacturer has no right to appropriate 600 as a trade-mark. *Vacuum Oil Co.* v. *Climax Refining Co.*, 129 Fed. R. 254.

Contra: "303," one of several marks used to designate grades of pens, protected as a legal trade-mark. *Gillott* v. *Esterbrook*, 47 Barb. 455. Aff'd 48 N. Y. 374.

Contra: "523," stamped on hosiery for many years to indicate a certain grade, constitutes part of a trade-mark which would be protected by injunction from infringement. *Lawrence Mnfg. Co.* v. *Lowell Hosiery Mills*, 129 Mass. 325.

Contra: "830," to distinguish a certain line of hosiery, protected as a trade-mark. *Shaw Stocking Co.* v. *Mack*, 12 Fed. R. 707.

(4) Descriptive symbols.

The figure of a star and the word "star" are *publici juris* and not good trade-marks. *Dexter's Application, in re*, 2 Ch. D. (1893) 262.

On sapolio package plaintiff had picture of a human face reflected in bright pan; defendants on similar soap had figure of monkey looking at what was apparently mirror in his hand; no infringement.

"The mere idea represented by some figure, on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, cannot be appropriated in a trade-mark." *Enoch Morgan's Sons Co.* v. *Troxell*, 89 N. Y. 292; reversing 23 Hun, 632; 57 How. Pr. 121.

A "representation of a barrel consisting of light and dark wood, the staves being alternately composed of each color," is not registrable as a trade-mark for flour, as it is descriptive of such a barrel of flour, but when applied to sacks of flour or barrels with staves of one color it may be arbitrary. *Halliday Bros., ex parte*, 16 O. G. 500.

A "picture of a bag having the open end thereof held closed by a tie" is not registrable as a trade-mark for powdered soap, it being descriptive. *Martin, ex parte*, 89 O. G. 2258.

"The next matter to be considered is the charge that defendant uses the device of a book, with the words 'Webster's Dictionary' printed thereon, on its circulars, bill-heads, etc., in imitation of a like practice pursued by the complainants. In my judgment, no person engaged in publishing and selling a book or books can acquire an exclusive right to use the device of a book on letter-heads and bill-heads, or on wrappers or boxes containing books. The device in question, when used in that connection or relation, is not sufficiently arbitrary to constitute a valid trade-mark. When so used by a publisher or book-seller, such a device serves to indicate the kind of business in which a party is engaged, or it is descriptive of the contents of particular packages." *Merriam* v. *Famous Shoe, etc., Co.*, 47 Fed. R. 411.

A picture of a corn plaster is not registrable as a trade-mark for corn plasters, although not a representation of the applicant's particular plaster. *Spoo, ex parte,* 101 O. G. 661.

B. An arbitrary name or sign which may have been applied with the intention of describing a product can never become a valid trade-mark or be protected as such, although it may have come to indicate origin, against those rightfully making that product.

"As to the numerals '½,' etc., they were used by appellants to denote the size and quality of their cast series. This is the evidence, and although the letters and numerals on both sides may have come to indicate to the public the origin or ownership of appellants' ploughs, as they did not appropriate them by adoption, use or claim, as a part of their trade-mark, they cannot be treated as a part of it simply because they appear capable of serving the same purpose." *Avery* v. *Meikle,* 81 Ky. 73.

The word "Disque" applied by inventor in France to denote form of a battery patented by him, and the word "Pile-Leclanche" ("Pile" being French for battery) not protected as against those having right to manufacture under patent, as the words were used descriptively.

"When an article is made that was theretofore 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 who deal in the article have the right to designate it by the name by which alone it is recognizable." *Leclanche Battery Co.* v. *Western Electric Co.,* 23 Fed. R. 276, 277.

"Valvoline," held descriptive of a new kind of oil. *Leonard's Trade-Mark, in re,* L. R. 26 Ch. D. 288.

"Linoleum," applied to new product derived by oxidizing linseed oil, held to have been applied as descriptive of that product and on expiration of the patent open to the world. *Linoleum Mnfg. Co.* v. *Nairn,* 38 L. T. N. S. 448; 47 L. J. Ch. 430; 26 W. R. 463.

Plaintiff invented method of extracting oil from bituminous coal and called it "Paraffine Oil" and manufactured it under that name; defendant, who invented another way of extracting same oil, allowed to use same name, as it was descriptive. *Young* v. *Macrae,* 9 Jur. N. S. 322.

C. A sign primarily arbitrary may become, by long use and association by the general public, descriptive of merchandise and cannot be protected as a valid trade-mark.

See IV. 9 A. 111. *Bissell Chilled Plow Works* v. *T. M. Bissell.* III. 1 A. (3) 44. *Smith & Davis Mnfg. Co.* v. *Smith*, 89 Fed R. 486. XIV. 1 A. 292. *Ford* v. *Foster*, L. R. 7 Ch. App. 611. IV. 8. 110. *Corbin* v. *Gould*, 133 U. S. 308.

"Albany Beef," having become a descriptive term for canned sturgeon, cannot be registered as a trade-mark. *Ams, ex parte*, 23 O. G. 344.

"Gem," applied to air gun held to have become descriptive after 3 years' use. "I think, whatever it may have been originally, it is not now a fancy word. I think it indicates commendation of the article, and is therefore descriptive, and not a fancy word within this section." *Arbenz Appeal*, 35 Ch. D. 248.

"New Manny," as applied to a harvesting machine, descriptive. The word "*Manny*" had become descriptive, having been applied for a number of years to a large class of machines throughout the country. *Graham, in re*, 2 O. G. 618.

"Calhoun," having become descriptive of ploughs and having been so used during many years by different parties, cannot be registered as a trade-mark. *Hall and Atkinson*, 13 O. G. 229.

The word "Holophane" for prismatic glass, having been long used as descriptive of a patented article, is not registrable. *Holophane Glass Co.*, 100 O. G. 450.

"Magnolia," having become descriptive of a metal, is not entitled to registration as a trade-mark for metals. *Magnolia Metal Co.'s Trade-Marks*, 76 L. T. N. S. 672.

An oil-burning lamp called the "Astral Lamp," having been long well known and in common use, without the range of lawful appropriation for trade-mark. *Pratt Mnfg. Co.* v. *Astral Refining Co.*, 27 Fed. R. 492.

Bitters made by secret process at town formerly named Angostura in Venezuela, had come to be known as "Angostura Bitters" and therefore descriptive; proprietor was entitled, however, to injunction against one using the name on a spurious article, while the name could be used by one rightfully in possession of the secret. *Siegert* v. *Findlater*, L. R. 7 Ch. D. 801.

"La Normanda," had become descriptive of a particular kind of cigars and could not be appropriated as a trade-mark.

"The adoption by Bijur of the words 'La Normandi,' as part of his trade-mark, could not take away the right previously acquired by the public in the use of the words 'La Normanda,' as indicating a particular kind of cigars." *Stachelberg* v. *Ponce*, 128 U. S. 686.

"Old Innishower," as applied to whiskey, descriptive, it having been formerly used in Ulster to designate a class of illicit whiskey. *Watt* v. *O'Hanlon*, 4 R. P. C. 1.

D. A name employed by a proprietor which might designate the origin of his merchandise may by his subsequent conduct be allowed to become descriptive of his merchandise and *publici juris* so that he will not be protected in its exclusive use.

See XIII. 2. 287; XIV. 1 A. 292. *Ford* v. *Foster*, 7 Ch. D. 611. XIV. 1 A. (1) 299. *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19. XV. 3 A. 303. *Hostetter* v. *Fries*, 17 Fed. R. 620.

An arbitrary name may be protected as a trade-mark on goods if it has become descriptive of those goods of the proprietor alone. "But if the name be suffered to come into general use without objection from the original proprietor, it becomes merely generic, or indicative of quality." *Burton* v. *Stratton*, 12 Fed. R. 696.

Cocks invented and sold sauce which he called "Reading" from the town. Other persons used the same name, and he then called his "Original Reading Sauce," which name was protected; and if he had not acquiesced in use of "Reading" by others he might have been entitled to injunction on that word. *Cocks* v. *Chandler*, L. R. 11 Eq. Cas. 446.

In 1837 Baron von Liebig discovered and published a process for making an extract of meat. It became popular and was known as "Liebig's." Held, that it had become descriptive and the original inventor could not grant to a company exclusive right to use the name. *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298.

The name "Liebig" having been used in Germany many years to designate an extract of beef and having become descriptive, the assent of the originator Liebig to the use of his name by complainant corporation does not confer any exclusive right in the name in the United States; but injunction might issue against simulation of class of goods by the respondent. *Liebig's Extract of Meat Co.* v. *Libby*, 103 Fed. R. 87.

Liebig in Germany invented a process for extracting juices from meat; he made public the process and allowed the preparation to be called after him "Liebig's Extract of Meat." Held, that the name had become generic and that the name "Liebig" used in that connection was not a valid trade-mark, or entitled to protection. *Liebig's Extract of Meat Co.* v. *Walker*, 115 Fed. R. 822.

(1) Or it may become descriptive by death of original proprietor without successors.

See X. 1 B. 225. *Emerson* v. *Badger*, 101 Mass. 82.

"It would also seem to follow, from the cases cited, that on the death of old Samuel Marshall (assuming that no one succeeded to the good-will of his business), any citizen would have the legal right to manufacture liniment composed of the same ingredients and made in the same way as he manufactured that sold by him, and also, in making sales, to describe it as such. Upon that assumption the words, 'Old Dr. S. Marshall's Celebrated Liniment' were merely descriptive of the compound, and, if truthfully applied by the defendant in making sales, no one could rightfully complain, as no one had any patent upon it or exclusive right to the use of any words which aptly described it. Upon his death, with no successor to the good-will of his business, those words would cease to indicate origin or ownership, and hence cease to be a trade-mark." *Marshall* v. *Pinkham*, 52 Wis. 572.

E. A name in a foreign language descriptive of a certain product is not a valid trade-mark on that product in this country and can be used by all rightfully dealing in that product.

See III. 2 A. 67. *Wolfe* v. *Goulard*, 18 How. Pr. 64; *Wolfe* v. *Hart*, 4 V. L. R. Eq. 125; *Wolfe* v. *Alsop*, 10 V. L. R. Eq. 40, 12 V. L. R. Eq. 421; *Wolfe* v. *Lang*, 13 V. L. R. Eq. 752; *Burke* v. *Cassin*, 45 Calif. 467. *Contra*: *Wolfe* v. *Barnett*, 24 La. Ann. 97.

"Matzoon," meaning in Armenian "fermented milk," is descriptive and cannot be protected as a valid trade-mark, and the party who introduced the beverage into this country is not entitled to the exclusive use of the name. *Dadirrian* v. *Yacubian*, 72 Fed. R. 1010. Aff'd 98 Fed. R. 872; 90 Fed. R. 812.

Contra: "Matzoon," an adaptation of an Armenian word mean-

ing "fermented milk," a good trade-mark of one who had used it for many years in this country. "It would be absolutely meaningless to all but a little group of Armenians in the millions of inhabitants of the United States." *Dadirrian* v. *Theodorian*, 37 N. Y. Sup. 611.

"Bokol," being the Norwegian word for beer, is descriptive, and not a good trade-mark in England.

"I am of the opinion that, in reference to an article produced in a foreign country and imported into England where it was previously unknown and without a name, the word used in that foreign country as the common term to describe or denote the article is not a fancy name within the meaning of the Act." *Davis* v. *Strübolt*, 59 L. T. N. s. 854.

The name "Parcheesi" as applied to a game well known in India and similarly designated cannot be a trade-mark in this country; *but* where it had been used by complainant for 35 years and so that he had acquired a reputation under it, the use by another, especially connected with the name "Selchow," for purposes of fraud, is unfair trade which would be enjoined. *Selchow* v. *Chaffee & Selchow Mnfg. Co.*, 132 Fed. R. 997.

"Schiedam Schnapps," descriptive; Schiedam, a town in Holland, and Schnapps, German for dram.

"When a person forms a new word to designate an article made by him which has never been used before, he may obtain such a right to that name as to entitle him to the sole use of it as against others who attempt to use it for the sale of a similar article, but such an exclusive use can never be successfully claimed of words in common use previously, as applicable to similar articles." *Wolfe* v. *Goulard*, 18 How. Pr. 64.

F. A descriptive word in a well-known foreign language should not be upheld as a valid trade-mark in this country.

"Le Bon," meaning "the good" in French, not registrable as trade-mark for baking powder. *Grocers Specialty Mnfg. Co., ex parte*, 102 O. G. 465.

"Für Familien Gebrauch," signifying "For Family Use," and "Lawrence Feiner Familien Flannel" applied to flannel goods not lawful trade-marks, as descriptive. *Lawrence & Co.*, 10 O. G. 163.

"Filtre Rapide," on water filters, descriptive. *Maigen's Application, in re*, 28 W. R. 759.

The English words "Gold Label," which are descriptive, do not become registrable by being reproduced in Hebrew characters, although unintelligible to most people. *Stulmer, ex parte*, 86 O. G. 181.

(1) But a descriptive word in an uncommon foreign language or used only in a limited area may be protected as a valid trade-mark in this country.

See III. I. E. 49. *Dadirrian* v. *Theodorian*, 37 N. Y. Sup. 611.

"Oomoo," for wines, in Australia among aborigines meaning "choice," good trade-mark in England. *Burgoyne's Trade Mark*, 61 L. T. N. S. 39.

But see: Figure of owl and word "kokoko" not a good trade-mark on cotton goods, first, because owl had been a common symbol in Manchester cotton trade, and, second, because the word among Chippeway Indians of North America meant an owl whose cry resembled it, and it was possible that trade might be extended to those Indians. *Jackson & Co.'s Application*, 60 L. T N. S. 93.

G. No rule can be given for the use of descriptive words in a dead language. Each case must be decided on its merits. A good test is whether the word has been used descriptively, or whether it would convey a descriptive meaning to the public.

"Emollio," on perfumed toilet cream, meaning in Latin "I soften," descriptive and not registrable. *Grossmith's Trade-Mark*, 60 L. T. N. S. 612.

"Ore of Life," on medicinal preparation would be descriptive, but the Latin words "Vitae-Ore" are arbitrary. *Noel* v. *Ellis*, 89 Fed. R. 978.

"Coming to the case before the court, the question is, has the complainant a valid trade-mark in the words 'Vitae-Ore'? If he had used the words 'Ore of Life,' and applied them to his product, they perhaps might not have been a valid trade-mark, inasmuch as it might be a generic term, and descriptive. But he does not do so, and instead uses the word 'Vitae,' which, even though it is the Latin of 'Life,' is still a fanciful word; and he couples the word 'Vitae' with the word 'Ore' and calls it 'Vitae-Ore,' bringing in another word which had not been heretofore connected with the word 'Ore,' or applied to a medicine or a preparation of a medicinal nature, so far as the court is advised

or has been able to discover; so that the complainant has proprietary rights in the name, inasmuch as he has been the first person to thus apply the words 'Vitae Ore' to a medicine." *Noel* v. *Ellis*, 89 Fed. R. 978, 980.

Property may exist in the word of a dead language though the English translation would be descriptive. *Partlo* v. *Todd*, 17 Can. S. C. R. 196.

"Sanitas," as applied to medicines, refused registration as descriptive. "The truth is, that if this word were applied to medicines, it would mean to any ordinary person that the medicines were health medicines — that is to say, health-giving medicines; and that is descriptive of the quality or of the effect of the use of these medicines. How is it possible that it is not descriptive?" *Sanitas Co., in re*, 58 L. T. N. S. 166.

H. The name of a flower used in a descriptive sense cannot be a valid trade-mark.

"Night Blooming Cereus," on perfumery, descriptive. The name of a flower cannot be protected as a valid trade-mark, as it is descriptive. *Phalon* v. *Wright*, 5 Phila. 464.

Contra: "Sweet Opoponax of Mexico," on perfumery made from the flower, good trade-mark. *Smith* v. *Woodruff*, 48 Barb. 438.

(NOTE. — This should be unfair trade case.)

I. The name or figure of an animal used in a descriptive sense is not a valid trade-mark.

See III. 1 F. (1). 51. *Jackson & Co.'s Application*, 60 L. T. N. S. 93.

Figure of a fish refused registration as trade-mark for fishing-lines, being descriptive. *Pratt, in re*, 10 O. G. 866.

J. Several marks or a series of marks used by a proprietor with or without a common symbol to designate the different grades, styles, or qualities of a class of his merchandise are not trade-marks.

See III. 1 A. (1). 31. *Beadleston* v. *Cooke Brewing Co.*, 74, F. R. 229.

Note references under VIII. 1 A. 2. 153.

Letters designating steel series of ploughs "AO," "BO," and "CO," with numerals of cast series "½," "1," "2," etc., and with trade-mark a Maltese cross, etc., besides words of caution, the

brands of letters and numerals indicating grade of ploughs not good trade-marks, but were protected on the ground of unfair trade, proof of fraud in imitation being clear. *Avery* v. *Meikle*, 81 Ken. 73.

Letters and figures "A No. 1," "A X No. 1," "No. 1," "X No. 1," "No. 3," and "B No. 1" used by manufacturer to designate size, shape, and quality of his different ploughs not good trade-marks, and could be used by other manufacturers to indicate like varieties of same article. *Candee* v. *Deere*, 54 Ill. 439.

Numbers and letters of a system to designate style and parts of mowers and reapers, for convenience of identification in ordering, does not give right to party to claim them as trade-marks.

"Any office which these marks perform as designations of origin is purely accidental. The fact that no two distinct parts in the same machine bear the same numerals is altogether persuasive of the fact that their purpose is not that of indicating the producer." *Deering Harvester Co.* v. *Whitman & Barnes Mnfg. Co.*, 91 Fed. R. 376; affirming 86 Fed. R. 764.

"Without explanation, such a multitude of different marks would convey no meaning. When explained, as they always have been and always must be, the explanation is that they are intended to designate size, shape, and place in the machine, and are to be used to distinguish one piece or part from another having a different function. This purpose does not tend, in any but the most remote way, to indicate the producer or maker." *Deering Harvester Co.* v. *Whitman & Barnes Mnfg. Co.*, 91 Fed. R. 376.

"While letters or figures arbitrarily chosen may not, and often do not, of themselves indicate shape, size, style, grade or quality, yet, if they be attached to articles to distinguish different shapes, sizes, styles, grades or quality, they may become by association just as descriptive as words expressly defining the same." *Denison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651.

A series of numbers from 1 to 35 to designate certain kinds of medicines not valid trade-marks. *Humphrey's Homeopathic Medicine Co.* v. *Hilton*, 60 Fed. R. 756.

"But the use of numerals as a short method of identifying the several members of a class, and distinguishing one of them from another, is as old as the use of written words. When so used, they are, in substance and effect, descriptive terms,—the number conveys to the reader details which otherwise would have to

be amplified in words." *Humphrey's Homeopathic Medicine Co.* v. *Hilton*, 60 Fed. R. 756.

"Royal," "English," and "London" to designate grades of baking powder, not good trade-marks. *Royal Baking Powder Co.* v. *Sherrell*, 93 N. Y. 331.

Letters of the alphabet used to distinguish various grades of crash towels, not valid trade-marks. *Stevens Linen Works* v. *William & John Don & Co.*, 121 Fed. R. 171. Aff'd 127 Fed. R. 950.

"Cylinder," "Lake," "New York" used to designate various qualities of glass, according to practice of manufacturers in using similar names, not good trade-marks. *Stokes* v. *Landgraff*, 17 Barb. 608.

Contra: Numbers "30," "40," "111," etc., used on nails with leather heads to designate grade, protected as legal trade-marks. *American Solid Leather Button Co.* v. *Anthony Lovell & Co.*, 15 R. I. 338.

Contra: Nuuibers arbitrarily selected, as "2340," 32 in all, to designate different grades of spoons, by which numbers they were known and ordered, held to be trade-marks and protected. *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402.

NOTE. — They were not trade-marks, but relief should have been granted on ground of unfair trade.

Contra: An extra fine quality had become known by number "303;" defendant initated labels and used number "303"; the number held to be a trade-mark and protected. *Gillott* v. *Esterbrook*, 47 Barb. 445; 48 N. Y. 374.

NOTE. — Dissenting opinion sound law. See VIII. 1 G. 182. *Gillott* v. *Kettle*, 3 Duer, 624.

Contra: Numbers 1 to 35 as applied to certain kinds of medicines in conjunction with words "Humphrey's Specifics," by which numbers the medicines had become known to the public, protected as trade-marks. Protection might have been granted on ground of unfair trade. *Humphrey's Specific Homeopathic Med. Co.* v. *Wenz*, 14 Fed. R. 250.

Contra: Number "523" used with eagle and wreath, being one of several numbers to designate grade, a valid trade-mark on hosiery, and protected. *Lawrence Mnfg. Co.* v. *Lowell Hosiery Mills*, 129 Mass. 325.

NOTE: — In all foregoing cases marked contra, an injunction might have been issued on the ground of unfair trade.

K. The name of a proprietor or his established trade-mark plainly appearing is considered evidence that an accompanying mark is not used to denote origin, but description.

Where the name of the complainant plainly appeared on a label it was considered that the accompanying letters "A C A" were intended for description.

"It was doubtless of importance to the plaintiffs to make known to the public by a declaration in their label, that they are the manufacturers of the excellent tickings which they send into the market, and for this reason the name of their corporation, 'Amoskeag Manufacturing Company' appears in full upon their label." *Amoskeag Mnfg. Co.* v. *Spear*, 2 Sandf. 599.

"As it was pertinently observed in the case in Sandford, if purchasers of the ticking read the name of the company, the letters can give no additional information, even if it be admitted that they are intended to indicate the name of the company. And if they do not read the name as printed, the letters are unintelligible." *Amoskeag Mnfg. Co.* v. *Trainer*, 101 U. S. 51.

Trade-mark Maltese cross with name of proprietor, "Avery," marked on ploughs considered as evidence that letters and numbers used in addition to designate grades had no signification of origin. *Avery* v. *Meikle*, 81 Ky. 73.

"The upper part of the brand or label of the trade-mark discloses the full name of the complainant as the manufacturer of the article, and is in no way supplemented or made clearer by the word 'Columbia.' It can no more be said that it was intended to designate origin or ownership than to denote the quality of the flour on which the brand was placed, and the proof tends strongly to show that the whole label was intended to indicate the quality, or class, or character of the flour, as being made of spring wheat instead of winter wheat." *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460.

"Where origin and ownership is otherwise indicated, as by the use of the manufacturer's name, then the symbol, mark, or device which is intended to designate grade, class, or quality cannot properly be also employed to denote origin or manufacture, and thus confer exclusive right to its use." *Lawrence Mnfg. Co.* v. *Tennessee Mnfg. Co.*, 31 Fed. R. 776.

Where a party used letters of the alphabet on various grades of towels, such as by universal custom were used to designate

grade, the use with such letters on all grades of the registered trade-mark "Stevens Crash" was evidence that such letters were used to designate grade. *Stevens Linen Works* v. *William & John Don & Co.*, 127 Fed. R. 950; affirming 121 Fed. R. 171.

Contra: Numbers to designate grade of hosiery held to be part of a general trade-mark, although numbers appeared underneath words "trade-mark" applying to eagle and wreath above, which had been long used as a trade-mark. *Lawrence Mnfg. Co.* v. *Lowell Hosiery Mills*, 129 Mass. 325.

NOTE.—The above should be considered a case of unfair trade.

Contra: "830" designating a certain grade of hosiery, held valid trade-mark, although in conjunction with word "Shawknit" under which party had built up reputation. *Shaw Stocking Co.* v. *Mack*, 12 Fed. R. 707.

NOTE.—Case of unfair trade.

EXCEPTIONS

L. A sign affixed primarily for the purpose of denoting origin but incidentally indicating the character or quality of merchandise may be protected as a valid trade-mark.

See II. 1 A. (1), 8, "Celery Compound." *Wells & Richardson Co.* v. *Siegel*, 106 Fed. R. 77. II. 1 A. (1), 10, "Junket." *Hansen* v. *Siegel Cooper Co.*, 106 Fed. R. 691.

"Fibre Chamois," good trade-mark for interlining for women's dresses.

If the words were descriptive it was not so pronounced, obvious, and usual as to render them invalid as a trade-mark. *American Fibre Chamois Co.* v. *De Lee*, 67 Fed. R. 329.

"Whether a word claimed as a trade-mark is available because it is a fanciful or arbitrary name, or whether it is obnoxious to the objection of being descriptive, must depend upon the circumstances of each case. The word which would be fanciful or arbitrary when applied to one article may be descriptive when applied to another. If it is so apt, and legitimately significant of some quality of the article to which it is sought to be applied, that its exclusive concession to one person would tend to restrict others from properly describing their own similar articles, it cannot be the subject of a monopoly. On the other hand, if it is merely suggestive, or is figurative only, it may be a good trade-mark, notwithstanding it is also indirectly or remotely descriptive." *Bennett* v. *McKinley*, 65 Fed. R. 505, 506.

"Pain Killer," as applied to medicine, good trade-mark.

"I take the word to fall within the class of trade-marks usually called fancy names or 'trade-marks,' which are arbitrarily selected by an inventor or manufacturer to catch the eye or ear of the public and to distinguish his article from others of the like nature. It is true that the term 'painkiller' is suggestive of the use of medicine, but it is not an adjective nor is it used adjectively." *Davis* v. *Kennedy*, 13 Grant Ch. (U. C.), 523.

"The word quality is used in different senses in the cases. It is employed in some to denote the grade, ingredients, or properties of an article, and in others to indicate generally the merit or excellence of an article as associated with or coming from a certain source. While there can be no valid trade-mark as denoting quality when used merely in the former sense, there may be a valid trade-mark as indicating quality when used in the latter sense." *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651.

"Slate Roof Paint," as trade-mark for roof paint not containing over two per cent of slate, not descriptive, registrable.

"Upon careful consideration, I am inclined to think that they are not in any sense such terms as would naturally be employed in the ordinary use of the language to describe any composition of this general description, and that therefore the words are arbitrarily chosen and sufficiently out of the ordinary signification to constitute a peculiar mark." *Glines, ex parte*, 8 O. G. 435.

"Invigorator," good trade-mark on spring-bed bottoms.

"A distinction should be made between words which are the legitimate accepted terms in describing 'the qualities, ingredients, or characteristics of an article,' and words which are but inferentially or remotely descriptive." *Heyman, ex parte*, 18 O. G. 922.

"Insurance," good trade-mark on oil.

"While the word *insurance* may, by some process of association of ideas, suggest the notion of safety, it is not synonymous with *safe*, nor can it be said to describe any possible quality of oil." *Insurance Oil Tank Co.* v. *Scott*, 33 La. Ann. 946.

"Bromo-Caffeine," good trade-mark on a drug.

"In this case the term perhaps suggests that some one among the hundreds of substances that bromine may combine with has been used in such combination together with caffeine. There are, however, some seven different ingredients in the plaintiffs' preparation, and there is no free bromine among them, and there is no evidence as to what the substance is which the bromine (if any)

had combined with before being used in the preparation, and so it is plain that the words 'Bromo-Caffeine' do not in fact describe the ingredients or even give any clear general idea as to what they are." *Keasbey* v. *Brooklyn Chemical Works*, 142 N. Y. 467.

Figure ½ on cigarettes in large bold, red characters in certain form and style, was used originally to indicate the idea that the goods were composed of two kinds of tobacco in proportions of half and half, but except so far as it *indicates* this idea which it does not *express* it is merely an arbitrary device. *Kinney* v. *Allen*, 1 Hughes, 106.

"Saponifier," good trade-mark for soap.

"To a student who is familiar with the Latin language and the rules of etymology, it may be true that the word 'Saponifier,' made up of words 'sapo' (soap) and 'facere' (to make), would suggest some of the characteristics and qualities of the article to which it referred." But by itself it imparts no information as to what it is. *Penn. Salt Mnfg. Co.* v. *Myers*, 79 Fed. R. 87.

"Parabola," on needles, valid trade-mark.

"In answer to the first point, namely, that the eye of the needle has a parabolic form, it perhaps would be enough to say that there is nothing upon the package tending to show that the word 'Parabola' has any reference to the eye of the needle." *Roberts* v. *Sheldon*, 8 Biss. 398.

"Queen," for shoes, good trade-mark.

If the general purpose of the word be to denote origin or ownership, it will not be affected by the fact that it incidentally has the effect to denote quality, and it made no legal difference if the word "Quality," was sometimes added, so as to read "Queen Quality." *Thos. G. Plant Co.* v. *May Co.*, 105 Fed. R. 375; affirming 100 Fed. R. 72.

M. A word descriptive of some articles may be protected as a valid trade-mark on other articles of which it is not descriptive if it is not thereby misleading or deceptive.

See III. 1 L. 56. *Bennett* v. *McKinley*, 65 Fed. R. 505.

"Napthol Methane," registrable for carbon black, because it is well known that such substance does not contain the chemicals indicated by the trade-mark, and it is not deceptive. *Castle Brook Carbon Black Co., ex parte*, 100 O. G. 683.

"Galena," as applied arbitrarily to an antifriction metal al-

lowed registration, although it is the name of one of the principal of lead ores — viz. lead sulfid; and although some antifriction metal contains some lead in composition. *Magnus Metal Co.*, *ex parte*, 100 O. G. 451.

"Magnetic," as applied to medicine in "Miller's Universal Magnetic Balm," arbitrary and not descriptive or deceptive.

"It is not pretended that the liquid possessed any of the properties of magnetism in the scientific sense of the word; nor do we think it clear that the use of the word 'Magnetic' in its title was intended to deceive the public in that respect. The word, so far as any meaning was attached to it, was probably used rather in a figurative, than in a literal or scientific, sense; and there was but little danger of its being misunderstood." *Ransom* v. *Ball*, 7 N. Y. Supp. 238.

"Magnetic Balm," as applied to liquid medicine *not magnetic*, valid trade-mark. *Smith* v. *Sixbury*, 25 Hun, 232.

N. A sign affixed to merchandise and used by the proprietor with the intention of designating origin will be protected as a valid trade-mark although it may have subsequently become descriptive, and a proprietor does not thereby lose his trade-mark except by laches on his part.

See IV. 7. 106.

"Twin Brothers," on yeast, valid.

"But if the primary object of the trade-mark be to indicate the origin or ownership, the mere fact that the article has obtained such a wide sale that the mark has also become indicative of quality is not of itself sufficient to debar the owner of protection or make it the common property of the trade. To hold otherwise would be to deprive the owner of the exclusive use of his trade-mark just at the time when it had become most valuable to him and stood most in need of protection." *Burton* v. *Strutton*, 12 Fed. R. 696.

"Celluloid," having been used for many years as a trade-mark, retained its character although stamped on a new compound described by that name. *Celluloid Mnfg. Co.* v. *Cellonite Mnfg. Co.*, 32 Fed. R. 94.

"When the word (Celluloid) was coined and adopted, it was clearly a good trade-mark. The question is whether the subsequent use of it by the public, as a common appellative of the substance manufactured, can take away the complainant's right.

It seems to me that it cannot. As a common appellative, the public has a right to use the word for all purposes of designating the article or product, except one, — it cannot use it as a trade-mark, or in the way that a trade-mark is used, by applying it to and stamping it upon the article." *Celluloid Mnfg. Co.* v. *Cellonite Mnfg. Co.*, 32 Fed. R. 94.

"While the fact that the term has become generic would be fatal to its subsequent adoption by these or any other applicants, it certainly is not fatal to its continued use or to its registration by the lawful assignees of those whose use rendered it generic, any more than to its continued use or registration by the assignors themselves. Otherwise a trade-mark, as soon as it should become valuable enough to be generic, would expire." *Consolidated Fruit Jar Co., ex parte*, 16 O. G. 679.

"And while if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection, and make it the common property of the trade, (*Burton* v. *Stratton*, 12 Fed. R. 696,) yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture or ownership, but was placed upon the article to denote class, grade, style or quality, it cannot be upheld as technically a trade-mark." *Lawrence Mnfg. Co.* v. *Tennessee Mnfg. Co.*, 138 U. S. 537, 547–548.

"I do not at all mean to say that it is impossible that a word which is used to describe an article, may also, if the proper means are taken at the proper time, be used as a trade-mark; but when any such double use takes place, it is most important to remember the difference between the use of a name as a trade-mark and the use of it as a descriptive term." *Leonard's Trade-Mark, in re*, 26 Ch. D. 288.

"The fact that flour so marked acquired an extensive sale, because the public had discovered that it might be relied on as of a uniformly meritorious quality, demonstrates that the brand deserves protection rather than that it should be debarred therefrom, on the ground, as argued, of being indicative of quality alone." *Menendez* v. *Holt*, 128 U. S. 514, 520–521.

A manufacturer of steel stamped his product "Crowley Millington," protected from infringement although words had acquired descriptive meaning having reference to the quality of the steel (Crowley Millington name of manufacturer, case of unfair trade). *Millington* v. *Fox*, 3 Myl. & Cr. 338.

"Our conclusion is, that where a manufacturer has invented a new name (as 'Sliced Animals,' 'Sliced Birds,' 'Sliced Objects') consisting either of a new word or a word or words in common use which he has applied for the first time to his own manufacture or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients or characteristics, but is arbitrary or fanciful and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article." *Selchow* v. *Baker*, 93 N. Y. 59.

2. A geographical sign.

A. A geographical name applied in its ordinary signification to merchandise is not a valid trade-mark.

"York," as applied to stoves and ranges, geographical and not registrable. *Abendroth Brothers, ex parte*, 104 O. G. 1119.

"Clinton," as a trade-mark for wagons, refused registration as geographical. *Abingdon Wagon Co., ex parte*, 102 O. G. 229.

"Alabamatube," refused registration for iron and steel tubes, as it meant a tube manufactured in Alabama. *Alabama Tube & Iron Co., ex parte*, 99 O. G. 2321.

"Old Country," on soap is a geographical mark. *Allen B. Wrisley Co.* v. *Iowa Soap Co.*, 122 Fed. R. 796.

"Trenton," on tools having a positive geographical meaning cannot be registered. *American Saw Co., ex parte*, 58 O. G. 521.

The name "Budweis" designating a place in Bohemia, Austria, being a geographical name, the word "Budweise" cannot be a valid trade-mark for beer, and its use will not be restrained unless there is also fraudulent imitation of labels. *Anheuser Busch Brewing Ass'n* v. *Fred Miller Brewing Co.*, 87 Fed. R. 864.

"London Dock (Old)" gin, invalid. *Binninger* v. *Wattles*, 28 How. Pr. 206.

"Durham," on tobacco, not valid trade-mark as against one who manufactures in the same town. *Blackwell* v. *Wright*, 73 N. C. 310.

"Brooklyn White Lead," lead, invalid trade-mark. Geographical and descriptive. *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416.

"Buffalo Pitts," on agricultural machinery not registrable, Pitts being a surname and Buffalo being a geographical name and part of applicant's name. *Buffalo Pitts Co., ex parte,* 89 O. G. 2069.

"Loch Katrine," on whiskey is descriptive of water used in distillery. *Bulloch* v. *Gray,* Seb. 452.

"Moline, Ill.," branded on ploughs made at Moline, not a trade-mark. *Candee* v. *Deere,* 54 Ill. 439.

"Is it possible, can it be tolerated for a single moment, that a maker of ploughs at Moline shall not be permitted to sell his work as a Moline plough — to advertise them in every form as the Moline plough? Would it not be the truth, and shall a manufacturer be prevented from publishing to the world where his wares are made? . . . Any number of plough-makers can go with impunity to Moline and establish there plough factories, and brand on their ploughs their own name and the name of the town, and send them broadcast over the country, to the joy of our farmers, and to the common benefit of all." *Candee* v. *Deere,* 54 Ill. 439.

Clinton, being a geographical location, not protected as a valid trade-mark for paint (Clinton Hematite Red). *Clinton Metallic P. Co.* v. *N. Y. Met. Paint Co.,* 50 N. Y. Supp. 437; 23 Misc. 66.

"Pocahontas," valley in coal fields of Virginia, cannot be exclusively appropriated by any one party for coal mined there. *Coffman* v. *Castner,* 87 Fed. R. 457. Aff'd 178 U. S. 168. *Contra: Atwater* v. *Castner,* 88 Fed. R. 642.

"Columbia," on incandescent lamps not registrable, geographical. *Columbia Incandescent Lamp Co., ex parte,* 96 O. G. 1036.

"Columbia," on flour, geographical and invalid. *Columbia Mill Co.* v. *Alcorn,* 150 U. S. 460. Aff'ng 40 Fed. R. 676. *See also Morgan Envelope Co.* v. *Walton,* 86 Fed. R. 605; 171 U. S. 686. *But see: Whitfield* v. *Loveless,* 64 O. G. 442. III, 2 E. 73.

"The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have been to the use of the word 'America,' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated and made the subject of an exclusive property. They do not, in and of themselves, indicate anything in the nature of origin, manufacture or ownership." *Columbia Mill Co.* v. *Alcorn,* 150 U. S. 460.

"St. Johnsbury," geographical, registration not allowed for crackers. *Cross, ex parte,* 96 O. G. 643.

"Manhattan," as a trade-mark for sewing-machines, held to be geographical. *Davis Sewing Machine Co., ex parte*, 112 O. G. 1752.

A party who early and long had mined coal in a valley in Pennsylvania called Lackawanna and called it "Lackawanna coal," under which name it had achieved a reputation, cannot claim the exclusive right to that geographical name as against others who subsequently mine coal in the same valley. *Delaware & H. Canal Co.* v. *Clark*, 13 Wall 311.

"Elgin," cannot be protected as against parties who may be lawfully carrying on butter and creamery business there. *Elgin Butter Co.* v. *Elgin Creamery Co.*, 51 Ill. App. 231; 155 Ill. 127.

"Amherst," is geographical and not a trade-mark for cotton and worsted dress goods. *Elmira Cotton Mills Co., ex parte*, 111 O. G. 2493.

"Monsterrat," on lime juice not protected as a valid trade-mark as against its use on lime juice coming from there, although defendant's article may be far inferior to that of plaintiff's which has acquired a reputation. *Evans* v. *Von Laer*, 32 Fed. R. 153.

"Mattawan" refused registration as a trade-mark for shirts as it is a geographical name of a village in Michigan and in New Jersey. Its Indian meaning is comparatively unknown. *Falkinberg, ex parte*, 115 O. G. 1065.

"Havana," may have become descriptive of tobacco grown in America from Cuban seed. *Feder* v. *Brudno*, 5 Oh. N. P. 275.

"Lancaster," on licking, refused registration, it being a geographical name. *Farnum, ex parte*, 18 O. G. 412.

"Hamburg," on tea, not valid trade-mark. *Frese* v. *Bachof*, 13 Blatchf. 234; 14 Blatchf. 432.

"Genesee," on salt made in that valley, cannot be a valid trade-mark. *Genesee Salt Co.* v. *Burnap*, 73 Fed. R. 818; affirming 67 Fed. R. 534.

"Glendon," name of a borough, on iron work.

A corporation adopted the mark "Glendon" on their iron; the place where their furnaces were was afterwards made a borough named Glendon. Another company afterwards used the mark "Glendon." Held, that the second company could lawfully have use of the mark while manufacturing there as the name was geographical. *Glendon Iron Co.* v. *Uhler*, 75 Penn. St. 467.

"Caledonia" being the name of a township and used by complainant on his mineral water there, "Caledonia Water," respondents had right to use it as "from new springs at Caledonia" on

newly discovered springs there. *Grand Hotel Co.* v. *Wilson*, L. R. 1 App. Cas. (1904) 103.

"Green Mountain," applied to grape-vine discovered in Green Mountains, geographical. *Hoyt* v. *J. T. Lovett Co.*, 71 Fed. R. 173.

"Elgin," on watches not protected as against resident manufacturer, although complainant had acquired reputation under name. *Ill. Watch Case Co.* v. *Elgin Nat. Watch Co.*, 94 Fed. R. 667; reversing 89 Fed. R. 487. *But see Elgin Nat. Watch Co.* v. *Loveland*, 132 Fed. R. 41. VIII, 1 B. (3). 161.

"The word 'Elgin' was not, and could not be, made a trade-mark. The fact that the word had acquired that signification might be forceful if the word was shown to be used to palm off the goods of one as the goods of another, which, coupled with other evidence evincing intent to mislead and to defraud, would be operative to move a court of equity to prevent the wrong." But United States Court has no jurisdiction in cases of unfair trade between courts of same state. *Illinois Watch Case Co.*, *Elgin Nat. Watch Co.*, 94 Fed. R. 667; reversing 89 Fed. R. 487.

"Ozark" refused registration as trade-mark for shirts, etc., as it is geographical and its Indian meaning comparatively unknown. *Kert* v. *Rountree Dry Goods Co.*, 115 O. G. 1849.

"London," on animal food, refused registration; name of noted city. *Knapp, ex parte*, 16 O. G. 318.

"Cloverdale," for canned fruits and vegetables, not registrable, being geographical. *Hendley, ex parte*, 72 O. G. 1654.

"Worcestershire Sauce," had become generic — plaintiff resided in England and defendant in Wisconsin. *Lea* v. *Deakin*, 11 Biss. 23. *But see: Lea* v. *Wolf*, 15 Abb. Pr. n. s. 1. VIII, 1 B. (1). 156.

"Somman," denoting specific territory of considerable extent, geographical and not good trade-mark on coal. *Laughman's Appeal*, 128 Penn. St. 1.

"Aurora," on shoes, name of geographical locality in at least twenty states of the Union not registrable. *Little & Co., ex parte*, 85 O. G. 1221. *Contra: Aspegren & Co.*, 100 O. G. 684. III, 2 E. 69.

"I do not think that merely because a word appears in the Postal Guide as the name of a post-office it acquires such a geographical meaning as to prevent its adoption as a trade-mark when it has a primary significance not geographical; but reference is not necessary to the Postal Guide in the present case to show the geographical character of the word 'Aurora.' In at least

twenty of the States of the Union there are villages, towns, and cities bearing the name 'Aurora.' The principal one of these is a city which in 1890 had a population of over 19,000." In this instance it was not the size of the place but the number of places that was especially significant. And the fact that to the mythological student it would have another meaning did not alter the opinion. A manufacturer starting in any one of these towns could not be enjoined from using the name. "It being once admitted that a word sought to be registered as a trade-mark has a geographical meaning, it should be the rule of the Office not to register such word unless it appears beyond a shadow of a doubt not only that its fanciful or arbitrary meaning is so generally known and understood that the meaning of the name would be at once recognized, but, furthermore, that the name could not be rightfully used upon the same class of goods by any one making them in the locality bearing the name." *Little & Co., ex parte,* 85 O. G. 1221.

"Yale," as applied to hosiery, not registrable, as it is geographical. *Masters & Co., ex parte,* 109 O. G. 1069.

"Lexington," mustard, invalid. *Metcalfe* v. *Brand,* 86 Ken. 331.

"Columbia," on stationery, not good trade-mark. *Morgan Envelope Co.* v. *Walton,* 86 Fed. R. 605; 171 U. S. 686; reversing 82 Fed. R. 469. *See also Columbia Mill Co.* v. *Alcorn,* 150 U. S. 460.

"Gibraltar," on lamp chimneys, while having certain arbitrary meaning, is yet geographical. The fact that no one carries on the manufacture of lamp chimneys there not controlling. *Nave & McCord Mercantile Co., ex parte,* 86 O. G. 1985.

"Red River Special," on agricultural machinery, geographical, although not the name of the locality in which the machines are made, and claimed to be used in an arbitrary sense.

The test as to the registrability of a mark which has geographical significance is whether the arbitrary or fanciful meaning of the mark so overcomes its geographical meaning that the mark would ordinarily be accepted in its arbitrary or fanciful sense and not as designating locality. In order, therefore, to warrant the refusal of registration the geographical meaning of the mark must be predominant. In the case of the words "Red River" the geographical meaning is predominant. *Nichols & Shepard Co., ex parte,* 99 O. G. 1623.

"Raleigh," refused registration, it appearing that it was name

of city in large tobacco-growing region. *Oliver, ex parte*, 18 O. G. 923.

"Yale," not allowed as trade-mark for belt-supporters, it being a geographical name. *Peats, ex parte*, 96 O. G. 1649.

"Mexican Balm, (medicated)" hair tonic, invalid. *Perry* v. *Truefit*, 6 Beav. 66.

"P-I-T-T-S-B-U-R-G-H P-U-M-P," on pumps, geographical and descriptive, and merely hyphenating the letters does not make the words less so. *Pittsburgh Pump Co.*, 84 O. G. 309.

"Yorkshire Relish," held to have been used descriptively on packing-cases of bottles of sauce. *Powell* v. *Birmingham Vinegar Brewing Co.*, L. R. (1894) 3 Ch. D. 449.

The word "Cromarty," being the name of a town in Scotland famous for its herring fisheries, is not registrable as a trade-mark for cured fish. Others with at least equal truth might use it upon packages containing the same article of merchandise. *Proctor, Jr., ex parte*, 51 O. G. 1785.

"Vichy," not infringed by "Lithia-Vichy," upon artificial distilled waters. *République Française* v. *Schultz*, 115 Fed. R. 196.

"Vichy," as applied to still mineral waters from Vichy, France, is not a trade-mark, and where respondent has for thirty years manufactured a product of mineral water in this country, selling it under entirely dissimilar labels, and achieving a reputation, he cannot be enjoined on the theory of unfair trade. *République Française* v. *Schultz*, 94 Fed. R. 500; reversing 57 Fed. R. 37.

"Eboli" being a geographical name, "Eboline" was considered geographical. The word formed by adding a common adjectival suffix is still geographical. *Salt & Co.'s Application, in re*, 63 L. J. Ch. 756; 3 Ch. 166 [1894]; 71 L. T. 386.

"Angostura," descriptive of a certain kind of bitters made at Angostura, Venezuela. *Siegert* v. *Findlater*, 7 Ch. Div. 801; *Siegert* v. *Abbott*, 72 Hun, 243.

"Ozark," for mineral water, held to be geographical. *Siloam Spring Water Co., ex parte*, 113 O. G. 1420.

"New Orleans Mead," on mead manufactured and sold in St. Louis, the name having been used a long time before appropriated by plaintiff. *St. Louis Carbonating & Mnfg. Co.* v. *Eclipse Carbonating Co.*, 58 Mo. App. 411.

"Mobile," for playing cards, geographical and invalid. *United States Playing Card Co., ex parte*, 96 O. G. 1855.

"Melrose," on hair restorer, not entitled to registration.

"In my opinion it suggests a description as to the place of

origin of the hair restorer, and if it does not, in my opinion it is calculated to mislead the minds of the ignorant, and lead them to think so." *Van Duzer's Trade-Mark, in re,* L. R. 34 Ch. D. 623.

"Milano (cachemire)," black silks. If not geographical it is descriptive. *Warburg, in re,* 13 O. G. 44.

"Yucatan," on leather is geographical. *Weil, ex parte,* 83 O. G. 1802.

"Copenhagen," on snuff, not a good trade-mark. Moreover, such dissimilarity between jars and labels of complainant and those of respondent that there was no infringement on ground of unfair trade. *Weyman* v. *Soderberg,* 108 Fed. R. 63.

"Schiedam Schnapps," liquor (Schiedam being place, and schnapps a kind of liquor in Holland, not a valid trade-mark. *Wolfe* v. *Goulard,* 18 How. Pr. 64; *Wolfe* v. *Hart,* 4 V. L. R. Eq. 125; *Wolfe* v. *Alsorp,* 10 V. L. R. Eq. 41; 12 V. L. R. Eq. 421; *Wolfe* v. *Lang,* 13 V. L. R. 752; *Burke* v. *Cassin,* 45 Calif. 478; *Contra: Wolfe* v. *Barnett,* 24 La. Ann. 97.

B. The name of a people is a geographical name which cannot be legally appropriated as a trade-mark.

"Grecian," should not be registered as a trade-mark for bust girdles, and athletic and negligé corsets. *Classic Corset Co., ex parte,* 100 O. G. 1329.

"French Tissue," on paper dressing for corns, not good trade-mark, the first word being geographical, the second descriptive. *Draper* v. *Skerrett,* 116 Fed. R. 206.

"French," not a proper subject of trade-mark for paints, it being a geographic name. *Marsching & Co.,* 15 O. G. 294.

"Modoc," associated with portrait of an Indian, as trade-mark for a liquid car cleaner, not registrable, as it is name of an Indian tribe and therefore geographical. *Modoc Soap Co., ex parte,* 104 O. G. 2150.

"Roman," for knit underwear refused registration. *Rome Textile Co., ex parte,* 91 O. G. 820.

(1) But the nickname of a people in certain localities has been upheld as a valid trade-mark.

"Hoosier," on machinery, good trade-mark. *Julian* v. *Hoosier Drill Co.,* 78 Ind. 408.

"Yankee," applied to label of soap, valid trade-mark.

"It is not a geographical term, nor a proper name, but a designation applied by the dwellers in one locality, to the dwellers in

another place. It was not the name of any certain locality, and it seems to me complainants had the right to adopt it as their trade-mark." *Williams* v. *Adams*, 8 Biss. 452.

Whether party has exclusive right to use of word "Yankee" as applied to soap, *quaere;* but protection extended to labels as a whole. *Williams* v. *Johnson*, 2 Bosw. 1.

"Yankee," as applied to soap, good trade-mark. *Williams* v. *Spence*, 25 How. Pr. 366.

Contra: "John Bull," on beer not good trade-mark, since it means an Englishman, and on beer would signify English beer. *Paine's Trade-Mark, in re*, 61 L. J. Ch. 365; 66 L. T. N. s. 642.

C. A geographical name may become descriptive of a certain class of merchandise produced in that locality and be open to use by all parties anywhere making similar goods.

"Worcestershire Sauce," had become a generic term, and complainants at Worcestershire, England, could not restrain respondent residing in Wisconsin and preparing sauce in London called "Improved Worcestershire Sauce." *Lea* v. *Deakin*, 11 Biss. 23.

EXCEPTIONS

D. A geographical name of a certain locality in which the proprietor has the exclusive right or privilege to produce a certain class of merchandise may become a valid trade-mark when applied thereto.

See II. 4 B. (1). 26; VIII. 1 B. (2). 157.

Plaintiff owned and mined practically all collieries of parish of Radstock, and in addition to regular trade-name added "Radstock Collieries"; defendants had used at Radstock trade-name "Radstock Coal Company" and mined in neighborhood coal known as Radstock coal. Later they established themselves in Surrey and used trade-name "The Radstock Colliery Proprietors;" held, that plaintiff could enjoin them until such time as they acquired right to sell coal from Radstock collieries. *Braham* v. *Beachim*, 47 L. J. Ch. 348; 7 Ch. D. 848; 38 L. T. 640.

Where a party has been established in business at Number 10 South Water Street, and for many years his establishment has been known as "Number 10 South Water Street" he is entitled to protection against a party who fraudulently establishes himself on said street and assumes the "Number 10." *G. & H. Mnfg. Co.* v. *Hall*, 61 N. Y. 226.

"I can perceive no reason why it may not be the name of a place. Suppose one owns the only coal mine situated in a town or near a city, and he names his coal after the town or city, and it becomes known as such in the market, why may not such name become his trade-mark? The same name could not be truly applied to coal obtained from any other place."

(Parties resident in Akron, N. Y., held to have rights of trade-mark in "Akron" as applied to cement as against non-residents). *Newman* v. *Alvord*, 51 N. Y. 189.

The word "Leopoldshall," being a place in the Duchy of Anhalt where a special kind of salt was mined, the exclusive exportation of which beyond the sea was given to plaintiff, after several years became a trade-mark of the plaintiff, the plaintiff thereby establishing a title to the exclusive use of a particular word as a trade-mark; injunction granted against defendant, who attempted to use the word fraudulently on salt not imported from there. *Rudde* v. *Norman*, L. R. 14 Eq. Cas. 348.

"I shall restrain the defendant from using the words 'Cromac Springs' in connection with his trade or business as a manufacturer or seller of mineral waters, so as to represent that his said waters are so manufactured or sold by the plaintiffs at their works in the bill mentioned, called 'The Cromac Springs,' or from using the words 'Cromac Springs' as the name of defendant's place of business, so as to represent as aforesaid." *Wheeler* v. *Johnston*, L. R. 3 Ir. 284.

E. A geographical name applied to articles of merchandise in an arbitrary sense in a locality where it conveys no reference to the geographical designation of the articles may be protected as a valid trade-mark.

"The word 'Alpine' is not of itself a fancy word, but the application of it to cotton embroidery is shown by the evidence to be novel and fanciful, and I hold that it ought to be registered." *Alpine Trade-Mark*, 53 L. T. N. S. 79.

"Aurora," as trade-mark for oils, lard, syrup, and honey on appeal allowed registration, not geographical. *Aspegren & Co., ex parte*, 100 O. G. 684. *Contra: Little & Co., ex parte*, 85 O. G. 1221. III, 2 A. 65.

"The fanciful meaning of the word 'Aurora' has undoubtedly led to its adoption as a name of locality in various parts of the country. . . . It is true that by this use the word has acquired

a geographical significance of considerable extent; but it cannot be said that this geographical significance has divested it in any degree of its mythological or arbitrary meaning. On the contrary, this meaning is understood by a large part of the persons to whom its geographical significance is best known, while by a majority of the people in this country it is understood only in its arbitrary sense." *Aspegren & Co., ex parte*, 100 O. G. 684.

"Pocahontas" valley in coal fields of Virginia, renowned through complainant's industry, protected as a trade-mark. *Atwater* v. *Castner*, 88 Fed. R. 642. *Contra: Coffman* v. *Castner*, 87 Fed. R. 457. Aff'd 178 U. S. 168.

"Angostura," for bitters, formerly a name of a town, but upward of half a century since change of name no town having existed of that name, good trade-mark. *Bauer* v. *Siegert*, 120 Fed. R. 81.

"Defiance," good trade-mark for writing papers, made at Dalton, Mass., although there is a town in Ohio named Defiance. *Byron Weston Co., ex parte*, 99 O. G. 861.

"Cashmere Bouquet" soap infringed by "Violets of Cashmere." Complainant had built up large business and acquired great reputation under that name. Court did not explicitly decide that "Cashmere" was valid trade-mark. "I doubt, however, if the word carries to the senses any conception of place or geography. It was adopted, probably, because of its familiar sound to the public ear in connection with shawls, and conveys, if anything, an impression rather of fineness and softness than of place." Case decided on ground of unfair competition. *Colgate* v. *Adams*, 88 Fed. R. 899.

The word "Dublin," admitted to registry for soap, on the ground that a general practice existed throughout the country of designating soap by similar words, such as "Irish," "Scotch," "Limerick," and the public, being fully aware that such terms were fanciful, could not be deceived.

"It is thus found impossible to lay down a rule that would cover all cases of this kind. Each case must stand upon its own ground. A certain geographical name applied to an article might be either descriptive or deceptive. Another geographical name applied to the same article might be neither." *Cornwall & Bros., ex parte*, 12 O. G. 312.

"Brazilian Silver," forks and spoons, valid. *Daniel* v. *Whitehouse*, (1898) 1 Ch. 685.

"Dover," on household articles made in Cambridge and Boston

and having nothing to do with Dover, and used continuously last eighteen years, allowed registration. *Dover Stamping Co., ex parte,* 51 O. G. 1784.

"Vienna," as applied to bread made in New York, arbitrary and fanciful. *Fleischmann* v. *Schuckmann,* 62 How. Pr. 92.

"German," admitted to registration as applied to Syrup. "German Syrup," not being a German product and not made in Germany, fanciful name. *Green, ex parte,* 8 O. G. 729.

"Menlo Park," although name of small town in New Jersey and California (but not where watches are made), valid trade-mark for watches. *Hampden Watch Co., ex parte,* 81 O. G. 1282.

"Liverpool," or "Turin," woolen cloths, valid. *Hirst* v. *Denham,* L. R. 14 Eq. Cas. 542; 27 L. T. N. S. 56; 41 L. J. Ch. 752.

"Selma," on washing machines, although name of town in Alabama, registrable in view of its classic origin and use as a Christian name, having no geographical significance. *Huenefeld, ex parte,* 98 O. G. 1968.

"Ethiopian," on black cotton stockings in England, good trade-mark. *Hine* v. *Lart,* 10 Jur. 106.

"Waverly," although in use to designate localities, yet has a private significance not geographical, and can be registered as a trade-mark for bicycles. *Indiana Bicycle Co., ex parte,* 72 O. G. 654.

"Vienna," arbitrarily applied to flour, allowed registration. It appeared that applicant had used it extensively and had expended large sums under it in his business. "It also appears from affidavits of experts that no flour made in any town called 'Vienna' in this country has been placed upon the market under the name 'Vienna;' that no flour is upon this market coming from Vienna, Austria; that the word was arbitrarily selected by the petitioner, and that it is the custom in the flour trade to use fanciful names to designate flour, rather than the names of places of production." *Jenkins, ex parte,* 53 O. G. 759.

"Gibraltar," registered as trade-mark for belting.

"It undoubtedly has a geographical meaning; but when seen upon goods one of the essential characteristics of which is strength it is believed that the arbitrary meaning of the word would so far transcend its geographical meaning in the mind of the ordinary purchaser as to render the geographical meaning of comparative insignificance" (overruling *Nave & McCord Mercantile Co., ex parte,* 86 O. G. 1985). *Jewell Belting Co., ex parte,* 110 O. G. 309.

"Magnolia," whiskey, valid. *Kidd* v. *Johnson*, 100 U. S. 617; *Kidd* v. *Mills*, 5 O. G. 337.

"Blackstone," on cigars, good trade-mark, although name of river and town in Mass. *Levy* v. *Waitt*, 56 Fed. R. 1016; 61 Fed. R. 1008.

"Magnolia," on metals, not geographical.

"The objection to the word 'Magnolia,' as being a geographical name within the section, in our opinion fails as to both the marks (2) and (3). It is no doubt shown by the evidence that there are places in the United States called by the name 'Magnolia.' . . . It must, we think, in the absence of special circumstances, be interpreted so as to be in accordance in some degree with the general and popular meaning of the words, and a word does not become a geographical name simply because some place upon the earth's surface has been called by it." *Magnolia Metal Co's Trade-Mark*, [1897] 2 Ch. 371; 76 L. T. 672.

"Galena," on an antifriction metal not geographical, especially in view of fact that applicants do not carry on business at Galena, but at Buffalo. *Magnus Metal Co., ex parte*, 100 O. G. 451.

"Delta," as a trade-mark for hardware, allowed registration; although there are numerous instances of its use as geographical locations yet its significance as a Greek letter is far more important. *Manogue-Pidgeon Iron Co.*, 97 O. G. 2084.

"Florentine," on glass allowed registration, Florence not being noted for glass manufacture and applicants' factory not being located at Florence. *Mississippi Glass Co., ex parte*, 64 O. G. 713.

"Germania," allowed registration by a German citizen for Portland cement. *Portland-Cement-Fabrik Co., ex parte*, 64 O. G. 858.

"Persian," applied to thread made in England, valid trade-mark. *Taylor* v. *Taylor*, 23 L. J. Ch. 255; 2 Eq. R. 290; 22 L. T. 271.

"Persian," as applied to thread in England, good in this country. *Taylor* v. *Carpenter*, 2 Sand. 603.

"Hansa," name formerly applied to league of German cities dissolved in 1630, valid trade-mark on lard, sausages, and bacon. *Tietgens & Robertson, ex parte*, 87 O. G. 2117.

"Portland," applied to stoves in Newark, N. J., exclusively by plaintiff who had achieved great reputation, protected. *Van Horn* v. *Coogan*, 52 N. J. Eq. 380.

"Columbia," as applied to hotel, not geographical name.

"In the selection of the word 'Columbia' the complainant chose merely a fanciful name. It indicates no people, no locality, no particular service which his hotel will render. It does not hold out the idea that people patronizing his hotel will have any accommodations or advantages different from those offered by any other hotel. So that, in the case cited, in the selection of this name, it is not such as to indicate the composition or quality of the article to which it is applied or the particular country or district where produced or manufactured, or to indicate the particular manner in which the business is there carried on." *Whitfield* v. *Loveless*, 64 O. G. 442. *But see: Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460; *Morgan Envelope Co.* v. *Walton*, 86 Fed. R. 605; 171 U. S. 686.

3. The proper name of a private party.

"Adriance," not allowed registration as a trade-mark for reaping and mowing machines, it being name of a member of the firm. *Adriance, Platt & Co.*, 20 O. G. 1820.

"Engelhard," an ordinary surname, not registrable as trade-mark for tea. *A. Engelhard & Sons Co., ex parte*, 109 O. G. 1886.

"W. H. Baker & Co.," having acquired reputation in chocolate under that name and having enjoined respondent from using the same name or a similar name without plainly indicating a difference, is not injured by the respondent using the name "William H. Baker, Syracuse, N. Y.," on his wares. *Baker* v. *Baker*, 115 Fed. R. 297.

"Gibson Girl," refused registration as a trade-mark for shoes, as it refers to Charles Dana Gibson, the artist, and his name cannot be used without his consent. *Bishop, ex parte*, 107 O. G. 1973.

"Brown's Iron Bitters," on drugs, not infringed by "Brown's Iron Tonic," the name being descriptive, Brown having given his name in good faith, and bottles, labels, etc., not being imitated. *Brown Chemical Co.* v. *Myer*, 139 U. S. 540; affirming 31 Fed. R. 453.

"It is hardly necessary to say that an ordinary surname cannot be appropriated as a trade-mark by any one person as against others of the same name, who are using it for a legitimate purpose; although cases are not wanting of injunctions issued to restrain the use of one's own name where a fraud upon another is manifestly intended, or where he has assigned or parted with his

rights to use it." *Brown Chemical Co.* v. *Myer*, 139 U. S. 540; affirming 31 Fed. R. 453.

"A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property. If such use be a reasonable, honest and fair exercise of such right, he is no more liable for the incidental damage he may do a rival in trade than he would be for injury to his neighbor's property by the smoke issuing from his chimney, or for the fall of his neighbor's house by reason of necessary excavations upon his own land. These and similar instances are cases of *damnum absque injuria.*" *Brown Chemical Co.* v. *Myer*, 31 Fed. R. 453; 139 U. S. 540.

"Sandow," name of noted athlete, not allowed registration for paper. Nor would registration be allowed a symbol of a muscular arm supporting a weight together with the word "Sandow," without his consent. *Capital Paper Co., ex parte*, 91 O. G. 1616.

The word "Cobb's," extending across a pair of corn cobs, for baking materials, etc., not registrable as a trade-mark, as the salient feature is a surname. *Cobb, ex parte*, 103 O. G. 1913.

The mere name of a corporation will not be registered as a trade-mark, in conformity with well known principles of law. *Creedmore Cartridge Company*, 56 O. G. 1333.

"Dalsimer," ordinary surname, not registrable as a trade-mark on bicycles. *Dalsimer, ex parte*, 85 O. G. 149.

"Burt," ordinary surname, although used by applicant and predecessors for nearly 60 years on boots and shoes and having achieved great reputation, not registrable, being surname. *Edwin C. Burt Co., ex parte*, 96 O. G. 1430.

"R. Esterbrook & Co," title of old and extinct firm, refused registration as trade-mark for pens. Applicant might have the right to protection in case of unfair trade. *Esterbrook Steel Pen Mnfg. Co., ex parte*, 97 O. G. 1597.

Respondent Faber had right to use his own name on pencils manufactured by him. It was unfortunate for complainant that both parties had the same name. *Faber* v. *Faber*, 49 Barb 357; 3 Abb Pr. N. S. 115.

"Fairchild," name of the applicant, not allowed registration as a trade-mark for pens. *Fairchild, ex parte*, 21 O. G. 789.

The word "Featherstone," in script letters in a diagonal line and with a forwardly extending understroke or flourish, being merely the name of the applicant, not registrable. *Featherstone, ex parte*, 86 O. G. 1497.

"Gilson," ordinary surname refused registration for photograph albums. *F. H. Gilson Co., ex parte*, 83 O. G. 1992.

"Gale," surname, not allowed registration on agricultural implements. *Gale Mnfg. Co., ex parte*, 85 O. G. 1907.

"Guenther," being ordinary surname, not registrable as trade-mark, nor the words "Guenther's Best." *Guenther Milling Co., ex parte*, 86 O. G. 1986.

"But it is well settled that a personal name cannot be exclusively appropriated by any one as against others having a right to use it; and as the name "Remington" is an ordinary family surname, it was manifestly incapable of exclusive appropriation as a valid trade-mark, and its registration as such could not in itself give it validity."

"In our opinion the Remingtons and Sholes made a reasonable and fair use of their names in adopting the name 'Remington Sholes' for their machine, and in giving that name to the corporation formed for its manufacture and sale."

"The name 'Remington Sholes Company,' is not identical with, or an imitation of 'Remington Standard Typewriter Company,' or 'Remington Typewriter Company,' or 'E. Remington and Sons.' Defendants' marks 'Rem-Sho,' 'Remington-Sholes Co., Mfrs., Chicago,' are not identical with, or an imitation of, complainants' marks 'Remington'; Large Red Seal; 'Remington Standard Typewriter, manufactured by Wyckoff, Seamans and Benedict, Ilion, N. Y., U. S. A.'; 'Remington Standard Typewriter.'"

Injunction refused, bill dismissed. *Howe Scale Co.* v. *Wyckoff Seamans & Benedict*, 198 U. S. 118, 134, 135, 138, 139; reversing 110 Fed. R. 520 and 122 Fed. R. 348.

"Wedgewood," as trade-mark for stoves, refused registration, as it is an ordinary surname. *James Graham Mnfg. Co., ex parte*, 104 O. G. 2149.

"Hoxie," as a trade mark for non-alcoholic brewed beer not registrable, being a surname. *Maloney & Caldwell, ex parte*, 97 O. G. 2084.

"Cross," not registrable as a trade-mark, being a surname, although the letters are peculiarly arranged, the peculiarities not dominating the name.

"The peculiarities must dominate the mere name and reduce it to a position of relative obscurity." *Mark Cross Co., ex parte*, 102 O. G. 622.

Defendant was allowed to use his own name in the bell busi-

ness, but not so as to deceive people into thinking that he was the other Meneely.

"The manner of using the name is all that would be enjoined, not the simple use of it; for every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person having the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead." *Meneely* v. *Meneely*, 62 N. Y. 427.

"A person cannot make a trade-mark of his own name, and thus debar another having the same name from using it in his business, if he does so honestly, and without any intention to appropriate wrongfully the good-will of a business already established by others of the name." *Russia Cement Co.* v. *Le Page*, 147 Mass. 206.

The name "Tabor," on the cross arm of a Latin cross, with "B" in the centre and on the upright arm, so that the letter serves for both, is not registrable as trade-mark for washing solutions; the cross might be, but not the whole with the proper name. *Tabor, ex parte*, 96 O. G. 1036.

"Dr. Hoffman's Drops," refused registration as trade-mark for medicines, "Hoffman" being a surname and "Drops" descriptive. *Traudt, ex parte*, 100 O. G. 2383.

The word "Van Horn," associated with a ram's forehead with horns, held not registrable as a trade-mark for surgical dressings since the salient feature of the mark is the surname. *Van Horn, ex parte*, 109 O. G. 1069.

A party having the right to use the name EBERHARD FABER on his goods is entitled to use E. FABER. *Von Faber-Castell* v. *Faber*, 139 Fed. R. 257.

"Vassar," on corsets, refused registration, as it is an ordinary surname, and the use in connection with a locality does not change that character of it. *Weingarten Brothers, ex parte*, 101 O. G. 3108.

Party had the right to use the ordinary abbreviation of his name "Wm. A. Rogers," and although it might cause some confusion with complainant's goods he would not be enjoined. *Wm. Rogers Mufg. Co.* v. *Rogers*, 84 Fed. R. 639.

William Rogers with his two brothers acquired during many years considerable reputation in the silverware business so that the name became known to the public. A company succeeded to the business and stamped its product "(Anchor) Wm. Rogers

& Son," etc. The son, also named William Rogers, formed a partnership and used mark, " (Eagle) Wm. Rogers (Star)." The accompanying marks were held to sufficiently differentiate the product, although there might be to some purchasers a confusion in similarity of names. In this case the son had skill and knowledge in the silverware business. *William Rogers Mnfg. Co.* v. *Simpson*, 54 Conn. 527.

Contra: "A person may have a right in his own name as a trade-mark as against a person of a different name." *Gilman* v. *Hunnewell*, 122 Mass. 139.

But see: "Parker Holmes & Co., Boston," allowed registration with figure of a shoe as a trade-mark for boots and shoes.

"In including the firm name as a part of the essential features of the mark I do not lose sight of the well-settled general rule that an ordinary surname cannot be appropriated as a trade-mark by any one person as against others of the same name who are using it for a legitimate purpose. The courts would not hesitate to enjoin a firm of the same name carrying on the same business from placing upon the market shoes bearing as a mark the name of the firm arranged as shown in the mark now sought to be registered when used in connection with the shoes placed as shown in the applicant's mark." *Parker Holmes & Co., ex parte*, 85 O.G.287.

See also: The words "J. A. Bowen," and the arbitrary symbols of a shield on which is emblazoned the arms of the United States may be registered as a trade-mark for whiskey by the successors of Bowen.

"It may be true in this case, as it is in many cases, that the name of the person associated with a particular trade or business carries with it the good-will of the establishment with which he was connected. If it is the good-will simply that is sought, then it should not be registered as a trade-mark; but if the name of a person possessing the characteristics of a trade-mark in itself, not an applicant, is adopted by any person, firm, or corporation to identify their particular goods, I see no good reason why it may not be used as a trade-mark and be registered as such." *Friedberg & Workum, ex parte*, 20 O. G. 1164.

A. But if the letters of the name are arranged in a fancy and distinguishing style. and if the name be combined with a portrait by consent of the owner, the Commissioner may allow registration.

See III. 3. 75. *Mark Cross Co., ex parte*, 102 O. G. 622. 77. *Parker Holmes & Co., ex parte*, 85 O. G. 287.

A party cannot register a portrait of another without his consent or some contractual right which would debar the other from asserting his exclusive right to it in a business. *Richmond* v. *Dr. S. A. Richmond Nervine Co.*, 52 O. G. 307.

Name "Bob Ingersoll," associated with representation of bust and head of a man, good trade-mark for cigars, Mr. Ingersoll having filed his consent in writing. *Sullivan & Burke, ex parte*, 16 O. G. 765.

The name "Bayard," and portrait of the United States Senator by that name, proper trade-mark for chewing tobacco. *Pace, Talbott & Co.*, 16 O. G. 909.

B. The name of a living celebrity without his consent will not be allowed registration as a trade-mark on the ground of public policy.

"King Edward VII," refused registration as trade-mark for whiskey.

A public man's name cannot be used without his consent for the purposes of private gain of another. *John Dewar & Sons, Limited*, 98 O. G. 1037.

"Dewey," refused registration as trade-mark for candy.

"A living celebrity is entitled to protection from the ordinary trader." *McInerney, ex parte*, 85 O. G. 148.

"Roosevelt Rose," refused registration as a trade-mark for groceries, partly on account of prior use of "Rose," but particularly on account of fact that Roosevelt is a living personage, and that it is against public policy to allow registration of name of President of the United States. *R. I. Sherman Mnfg. Co., ex parte*, 101 O. G. 3105.

C. A name which is used arbitrarily and is not calculated to lead the public to believe that it signifies the name of a private party, although it is in fact a surname, may be a good trade-mark.

See III. 3. 77. *Frieberg & Workum, ex parte*, 20 O. G. 1164.

"Weck," is abbreviation of German word "wecken," meaning to awaken, and it is sometimes in Germany used as a surname; but it is arbitrary as applied to sterilizing apparatus, and a good trade-mark. *Van Eyck, ex parte*, 107 O. G. 542.

4. A form, shape, or material substance.

"It is well settled that a person cannot obtain the monopoly incident to a trade-mark by the mere form of a vendible commodity that may be adopted. In this case the complainants could not obtain a trade-mark for the form of the sticks of chewing gum they might manufacture, nor by the use of a peculiar form and decoration of the boxes they may use to hold the sticks of gum, nor in the manner in which the gum might be placed in the boxes. These qualities and forms are common to the manufacture, and may be made similar, without injury to others who may use the same forms." *Adams* v. *Heisel*, 31 Fed. R. 279.

"The shape and construction of the ploughs do not form any part of the trade-mark of the appellants." *Avery* v. *Meikle*, 81 Ky. 73.

"I do not think that the merchandise itself, or any method of arranging the various packages, can be registered as a trade-mark. In the very nature of the case, as it seems to me, the trade-mark must be something other than, and separate from, the merchandise." *Davis* v. *Davis*, 27 Fed. R. 490.

A square bottle cannot be registered as a trade-mark for celery compounds, as a form cannot constitute a trade-mark. *Dunkley Celery & Preserving Co.*, *ex parte*, 84 O. G. 310.

A cigar band of paper, brown in color, wider at one end than the other, is not a good trade-mark. *E. Regensburg & Sons* v. *Juan F. Portuondo Cigar Mfg. Co.*, 136 Fed. R. 866.

"Stress is laid upon the fact that the bottles are alike, but, bearing in mind that the evidence discloses that most lime-juice bottles are quite similar in size and design, I do not deem this very important." *Evans* v. *Von Laer*, 32 Fed. R. 153.

"An invention of structure a patent for the invention secures; a design is secured by a patent for that. Apart from these, anyone may make anything in any form, and may copy with exactness that which another has produced, without inflicting any legal injury, unless he attributes to that which he has made a false origin, by claiming it to be the manufacture of another person." *Fairbanks* v. *Jacobus*, 14 Blatchf. 337.

"The box, barrel, or wrapper, containing merchandise, whatever its form, cannot, per se, be the trade-mark."

A narrow strip of leaf-tobacco placed in a wrapper around the

mouth-piece of a cigarette varying in size of the cigarette, which performs a useful function, not subject of a trade-mark. *Gordon, in re*, 12 O. G. 517.

Tin pail with handle to it, the tin ornamented with geometrical pattern and used to contain paper collars for sale cannot be used as a trade-mark.

"It will be observed, that it is not a mark at all which is claimed, but the whole enveloping package, the whole surface of which is covered by an ornamental pattern." *Harrington* v. *Libby*, 14 Blatchf. 128.

Complainant not entitled to monopoly of form of selling drawing paper in rolls, it being a convenient and usual form. *Heuffel & Esser Co.* v. *H. S. Crocker Co.*, 118 Fed. R. 187.

The size or shape, or mode of construction of a box, barrel, bottle or package, in which goods may be put is not a trade-mark. *Hoyt* v. *Hoyt*, 143 Penn. St. 623.

A dome affixed to black lead which may be sold in different shapes can be registered as a trade-mark, but not the shape of a dome.

"A mark must be something distinct from the thing marked. The thing itself cannot be a mark of itself." *James's Trade-Mark*, L. R. 33 Ch. D. 392; L. R. 31 Ch. D. 340.

"Galvanized iron hoops for barrels have so long been used that their use on whiskey-barrels can hardly be regarded at this time as an original appropriation by petitioners. But, if now first adopted for liquor barrels, it is not sufficiently distinguishable from the same mark on similar barrels to either protect the applicant in the sale of his goods, or to afford notice to the public of original ownership." *Kane, in re*, 9 O. G. 105.

"Tin Tag," or "Wood Tag," good trade-marks on tobacco; but the person so using them would have no right to the exclusive use of tin or other well-known material substance to designate the goods. *Lorillard* v. *Pride*, 28 Fed. R. 434.

"A person may appropriate any word, figure, or emblem as a trade-mark, but that does not give an exclusive right to the use of the well-known material substances upon which the word, figure, or emblem may be impressed or engraved."

The plaintiffs claim "that the defendants have produced and sold labels bearing the words 'Henry Lee,' in violation of their rights. . . . It is apparent from an inspection of both labels that they are designed to be used by cigar-box makers and the manufacturers of cigars, and that they are valueless for any other

purpose and could not be used by or sold to the public generally. Plaintiffs do not seek to stop a cigar dealer or the public from using the name 'Henry Lee,' but ask that they be protected against interference with their trade by rival manufacturers of labels, and claim that labels are an article of merchandise." *Schumacher* v. *Schwenke*, 36 O. G. 457.

Where frames for sewing machines in the form of the letter G. had been so extensively manufactured and sold under a patent that they came to be known thereby, the patentee cannot restrain such manufacture and sale after expiration of the patent under a claim that the form is a trade-mark. *Wilcox & Gibbs Sewing Machine Co.* v. *The Gibbens Frame*, 17 Fed. R. 623.

But see: "A waved band of ribbon of rectilinear form longer than it is wide, which is fastened to the two ends of a cigar-box, and so placed with reference to the cigars within the box as to be below some of said cigars and above the remaining cigars," allowed registration as trade-mark. *Straiton & Storm*, 18 O. G. 923.

5. A color.

See III. 6. 83. But see VIII. 1 E. 171.

Registration of orange-colored strand in rope conflicts with red-colored strand. A difference in color does not make a mark registrable. *Broderick & Bascom Rope Co.* v. *Leschen & Sons Rope Co.*, 96 O. G. 1647.

"There is no doubt a general resemblance between the heads of all spools containing a black and gold label which might induce a careless purchaser to accept one for the other. Defendants, however, were not bound to any such degree of care as would prevent this. Having, as we have already held, the right to use the black and gold label, and the periphery embossed with the number of the thread, they were only bound to take such care as the use of such devices, and the limited space in which they were used, would allow. In short, they could do little more than place their own name conspicuously upon the label, to rearrange the number by placing it in the border instead of the centre of the label, etc. Having done this, we think they are relieved from further responsibility." *Coats* v. *Merrick Thread Co.*, 149 U. S. 562. Aff'd 36 Fed. R. 324.

A party has no exclusive right to a certain kind or color of paper to put up his wares. *Faber* v. *Faber*, 49 Barb. 357; 3 Abb. Pr. n. s. 115.

"The manufacture of this article is open to all competitors, and they cannot be held liable in any action to restrain them where they plainly put their name upon the label, even though they do happen to use light yellow for the background of the paper upon which the description of the commodity is given." *Fleischmann* v. *Newman*, 4 N. Y. Supp. 642.

"The position is taken by the complainants that the essential part of their trade-mark consists of a label having a yellow color, and that, therefore, they cover all yellow-colored labels used upon compressed yeast, and that the use by the defendant of a yellow-colored label upon the compressed yeast made and sold by him constitutes an unlawful imitation of their trade-marks. . . . The color of a label, apart from a name or device, can hardly be the subject-matter of a trade-mark." *Fleischmann* v. *Starkey*, 25 Fed. R. 127.

Red, white, and blue label for coffee with words "Red, White, & Blue" is not entitled to registration, it not being distinctive. *Hanson's Trade-Mark, in re*, 37 Ch. D. 112.

A red bag for seed peas with no limitation as to the bag in shape or size or material, only as to the color, is not a device to be registered, as color alone cannot constitute a trade-mark. *Landreth, ex parte*, 31 O. G. 1441.

"The complainants use a rose-colored capsule upon bottles containing wine made by them known as 'Extra Dry.' They seek by this suit to prevent the defendant from using a capsule of similar color. . . . It was necessary for him to use a capsule of some kind. Almost all colors harmonious for this use, such as gold, silver, and white, had previously been appropriated by other dealers in champagne. He could hardly select a capsule without coming in contact with some of them. He chose rose color, as he had a right to do. If he had simulated the complainants' labels in other respects, a different proposition would have been presented." *Mumm* v. *Kirk*, 40 Fed. R. 589.

Word "olive," refused registration as trade-mark for bicycle, it merely indicating the color of the machines. *Olive Wheel Co., ex parte*, 84 O. G. 1871.

The word "red," for snuff, refused registration. *Pearson Tobacco Co.*, 85 O. G. 287.

6. A style of dressing goods.

But see VIII. 1 F. 173.

Plaintiff sold soap marked "B. T. Babbitt 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 same color and about the same size, but different in general appearance. Held no infringement since no trade-mark could be acquired in size and color of the packages or in the words "Trade-Mark" and "Best Soap." *Babbitt* v. *Brown*, 23 N. Y. Supp. 25.

"The boxes in which appellees' corsets are placed to be sold, are of the same shape, size, and general color as those in which appellants' corsets are placed to be sold. It does not appear, however, that there is anything unusual in the shape or structure or color of these boxes, and, so far as we perceive, this similarity may result from the use required, and the convenience of the makers of the boxes — at all events, it does not appear that this may not be so, and we regard it a reasonable inference in the absence of all proof as to the purpose or motive." *Ball* v. *Siegel*, 116 Ill. 137.

Peculiar method of packing not trade-mark. Relief not granted because it did not appear that complainant had established a reputation in the market before defendants, and that he was the first to introduce the goods in that peculiar way. *Colgan* v. *Danheiser*, 35 Fed. R. 150.

Soap packed in a box, with alternate red and yellow wrappers, so as to produce a representation of a trade-mark of the same combination of colors, is not an infringement of that trade-mark. A peculiar method of arranging soap in a box is not a trade-mark which can be legally registered. *Davis* v. *Davis*, 27 Fed. R. 490.

Form of package of cleaning and polishing soap and arrangement of labels not subject of trade-mark. *Enoch Morgan's Sons Co.* v. *Troxell*, 89 N. Y. 292; reversing 23 Hun, 632; 57 How. Pr. 121.

"It has been too often reiterated to be now questioned, that under ordinary circumstances the adoption of packages of a peculiar form and color alone, having no distinguishing symbol, letter, sign, or seal, is not sufficient to constitute a trade-mark." *Fischer* v. *Blank*, 138 N. Y. 244.

"I am by no means clear, that, as the case stands, the plaintiffs

have made out any appropriation of their own exclusive use of the colored wrappers and form of packages employed. On the contrary, in these particulars, I am inclined, upon the proofs, to the conclusion that both plaintiffs and defendants have employed the common method used in Germany for putting up medicinal teas." *Frese* v. *Bachof*, 13 Blatchf. 234; 13 O. G. 635.

There is no trade-mark in the size, shape, and arrangement of bottles and labels. *Hoyt* v. *Hoyt*, 143 Penn. St. 623.

"After a careful examination of the question, my conclusion is, that the barrel in question, without any other marks, or symbols, is not, and that it cannot become, a lawful trade-mark or a substantive or integral part of a lawful trade-mark, and that complainants have no exclusive right to its use as such." *Moorman* v. *Hoge*, 2 Sawyer, 78; 4 Am. L. T. 217.

7. Or a label, or advertisement, or marks serving merely some useful or ornamental purpose.

A. A label containing ornamental or advertising features beyond an arbitrary sign intended to designate origin of the goods is not a valid trade-mark.

(N. B. This does not mean that a trade-mark on a label may not be protected.)

See VIII. 1 F. 173 & G. 181, where protection is granted not on ground of infringement of trade-mark but of unfair trade.

A colored streak in a wire rope not restricted to any particular color is not a good trade-mark, or not distinctive, since the color might be varied at pleasure, and the streak might be either a straight, circular, or spiral line. *A. Leschen & Sons Rope Co.* v. *Broderick*, 134 Fed. R. 571; affirming 123 Fed. R. 149.

Cautionary words on ploughs, "Keep all taps screwed up," are not the subject of a trade-mark. *Avery* v. *Meikle*, 81 Ky. 73.

"It is well settled, moreover, that directions, advertisements, notices, etc., constitute no part of a trade-mark, and that no one can obtain a trade-mark in the form, appearance, or finish of his goods, so that another cannot lawfully make his goods like them." *Ball* v. *Siegel*, 116 Ill. 137; 56 Am. R. 766.

"Any manufacturer of goods which are sold by the piece, such as cloths, for instance, must have the right by marks or lines to indicate where to cut, in order to remove each yard, or part of a yard, or other specific quantity." *Dausmann & Drummond Tobacco Co.* v. *Buffner*, 15 O. G. 559.

"The plaintiffs cannot have a trade-mark in the descriptive words, 'Cough Remedy,' or in the more extended description, 'A sure remedy for chronic or common cough, sore throat, and other minor throat complaints so often by neglect the forerunner of consumption.'" *Gilman* v. *Hunnewell*, 122 Mass. 139.

A representation of a hand with eyelets therein, and cross lacings connecting the eyelets, not registrable as a trade-mark for gloves, as it is purely decorative. *Peyser & Co., ex parte*, 62 O. G. 588.

IV. PROPERTY RIGHTS IN TRADE-MARKS.

1. A proprietor has in his trade-mark a right of property which the courts will protect from infringement.

See X. 1 A. (1) 218; XI. 7 A. 258.

"Judicial protection is granted in such a case upon the ground that the honest, skilful, industrious manufacturer or enterprising merchant who has produced or brought into the market an article of use or consumption that has found favor with the public, and who by affixing to it some name, mark, device, or symbol which serves to distinguish it as his and from that of all others, shall receive the first reward of his honesty, skill, or enterprise, and shall in no manner and to no extent be deprived of the same by another who to that end appropriates the same or a colorable imitation of the same to his production, so that the public are or may be deceived or misled." *Amoskeag Mufg. Co.* v. *Trainer*, 101 U. S. 51.

"Courts of equity proceed 'on the principle of protecting property alone' and the promotion of honesty and fair dealing. The protection of the public alone is not sufficient ground for the jurisdiction. However, it is an element which enters, and ought to enter, into every case." *Avery* v. *Meikle*, 81 Ky. 73.

The dealer has property in his trade-mark. This is allowed him because of the right which every man has to the rewards of his industry and the fruits of his discovery, and because of the wrong of permitting one man to use as his own that which belongs to another. *Blackwell* v. *Armistead*, 3 Hughes, 163.

"His right to the trade-mark accrues to him from its adoption and use for the purpose of designating the particular goods he manufactures or sells, and although it has no value except when so employed, and indeed has no separate abstract existence, but is appurtenant to the goods designated, yet the trade-mark is property, and the owner's right of property in it is as complete as that which he possesses in the goods to which he attaches it, and the law protects him in the enjoyment of the one as fully as of the other." *Derringer* v. *Plate*, 29 Calif. 292.

"It is plain, therefore, that in the trade-mark the plaintiff has all the essentials of a right of property claimed by him, and that

this right extends to two things, — first, — the device or emblem of an anchor attached to the wire; and, secondly, the name, 'anchor brand wire' or 'anchor wire' which has resulted from the use of the device, and has become the distinctive appellation in the market of the wire manufactured by the plaintiff." *Edelsten* v. *Edelsten*, 9 Jur. N. S. 479; 7 L. T. N. S. 768.

"The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trade-mark, as in the case of the violation of any other right of property." *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. Cas. 523.

An element of the right to the property in a trade-mark may be represented as being the fact of the article being in the market as a vendible article, with that stamp or trade-mark, at the time when the defendants imitate it. *McAndrew* v. *Bassett*, 33 L. J. Ch. 561; 10 Jur. N. S. 550; 10 L. T. N. S. 442; 4 De G. J. & S. 380; 12 W. R. 777.

"Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it." *McLean* v. *Fleming*, 96 U. S. 245.

"But the court proceeds upon the ground that the complainant has a valuable interest in the good-will of his trade or business; and that having appropriated to himself a particular label, or sign, or trade-mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good-will of the complainant's friends, or customers, or of the patrons of his trade or business, by sailing under his flag without his authority or consent." *Partridge* v. *Menck*, 2 Barb. Ch. 101; 47 Am. Dec. 281.

The value of a trade-mark may be considered in fixing franchise tax of a corporation. *People* v. *Kelsey*, 105 N. Y. App. Div. 132.

"By the law of this country, and the like law prevails in most other civilized countries, he obtains a property in the mark which he so affixes to his goods. The property thus acquired by the manufacturer, like all other property, is under the protection of the law, and for the invasion of the right of the owner of such property the law affords a remedy similar in all respects to that by which the possession and enjoyment of all property is secured to the owners." *Ransome* v. *Graham*, 47 L. T. N. S. 218; 51 L. J. Ch. 897.

"It is now settled that the jurisdiction of this court as to trade-marks is not confined to cases of fraud, but extends to property, and that when the right to property can be acquired the Court may be called on to interfere." *Wheeler* v. *Johnston*, L. R. 3 Ir. 284.

2. A trade-mark is the sign of the good-will or reputation of a business, and it is not an abstract property right apart from its use in that business.

See X. 1 A. (1). 220. *Morgan* v. *Rogers*, 26 O. G. 1113. II. 6. 30; II. 2. 20; IV. 6. 100; X. 3. 229; X. 5. 233; X. 6 A. 234; XII. 1 D. 281; V. 3. 123.

"He has no property in that mark *per se* any more than in any other fanciful domination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with his mark upon them, the court has said no one shall be at liberty to defraud that man by using that mark, and passing off goods of his manufacture as being the goods of the owner of that mark." *Ainsworth* v. *Walmsley*, 1 L. R. Eq. Cas. 518.

"There is no exclusive right to the use of a name or symbol or emblematic device except to denote the authenticity of the article with which it has become identified by association. The name has no office except to vouch for the genuineness of the thing which it distinguishes from all counterfeits; and until it is sought to be used as a false token to denote that the product or commodity to which it is applied is the product or commodity which it properly authenticates, the law of trade-mark cannot be invoked." *Apollinaris Co.* v. *Scherer*, 27 Fed. R. 18.

"There is no abstract right in a trade-mark. It is property only when appropriated *and* used to indicate the origin or ownership of an article on goods." *Avery* v. *Meikle*, 81 Ky. 73.

"On the contrary, it is distinctly laid down by the authorities that it is only *the actual use* of the mark, device, or symbol by the dealer which entitles him to it, and gives him the right to be protected in the enjoyment of it." *Blackwell* v. *Dibrell*, 3 Hughes, 151.

"It is the *actual use* of the trade-mark affixed to the merchandise of the manufacturer, and this alone which can impart to it the element of property. The mere declaration of a person,

however long, and however extensively published, that he claims property in a word as his trade-mark, cannot even tend to make it his property." *Candee* v. *Deere*, 54 Ill. 439.

"Property in trade-marks, *is not property* in the words, letters, marks or symbols as things, or as signs of thought, or as products of the mind, like that of patent or copyright; but simply, and solely property as a means of designating things — the things thus designated being the production of human skill, or industry, whether of the mind, or the hands, or a combination of both; and this property has no existence apart from the thing designated, or separable from its actual use in accomplishing the present and immediate purpose of its being." *Congress & Empire Spring Co.* v. *The High Rock Congress Spring Co.*, 57 Barb. 526.

If a trade-mark is put on the registry, and there is no business in which it is used, it cannot be assigned. *Cotton* v. *Gilliard*, 44 L. J. Ch. 90.

"It is also to be noticed, that an assignee of a trade-mark does not obtain a right to restrain copyists of his mark, merely by virtue of his assignment, but he must also show that it has actually been used and applied upon an article, so that the public have come to understand that 'the article to which it is attached is the manufacture or production which is generally known in market under that denomination.'" *Filkins* v. *Blackman*, 13 Blatchf. 440.

A party named Marler wrongfully obtained registration of a trade-mark belonging to petitioners. The court held that he could not assign the trade-mark to the petitioners, because he had no good-will or business and the assignment would convey nothing. *Lawrence Bros., ex parte*, 44 L. T. N. S. 98.

"I fully concur in the observations on both sides, not only that the good-will is a valuable and tangible thing in many cases, but it is never a tangible thing unless it is connected with the business itself, from which it cannot be separated, and I never knew the case in which it has been so treated." *Robertson* v. *Quiddington*, 28 Beav. 529.

Actual use of a mark upon goods put on the market and sold by the adopter is necessary to create ownership. Three things are necessary:

First. — Adoption of a mark not used by another to designate goods of the same kind on market.

Second. — Application of a mark to an article of traffic.

Third. — Article bearing trade-mark must be put on market by owner. *Schneider* v. *Williams*, 44 O. G. 1400.

The widow of Capt. Simeon Pepper who had been in the oil business and used the trade-mark "Capt. S. Pepper's Signal Oil," or "Pepper's Signal Oil," had no right, he having no such business and the widow succeeding to none, to assign the trade-mark to another, and an assignment of the trade-mark in gross gave the assignee no rights under it to maintain a bill against its use by a third party. "There is no such thing as a trade-mark in 'gross,' to use that term by analogy." *Weston* v. *Ketcham*, 51 How. Pr. 455.

"There is no exclusive ownership of the names, devices, symbols, or marks which constitute a trade-mark apart from the use or application of them when applied to a vendible commodity." *Weener* v. *Brayton*, 152 Mass. 101.

But see: Where complainant who had acquired a trade-mark in his own initials "A. C." on groceries had sold the right and on bankruptcy of owner the receiver had reconveyed right to him, and the stock of goods to respondent, he was entitled to maintain his right against respondent, as the trade-mark did not go with the goods. *Godillot* v. *American Grocery Co.* 71 Fed. R. 873.

A. Good-will is the reputation of a business in addition to the material assets and is the subject of property.

"But the term good-will seems wholly inapplicable to the business of a solicitor, which has no legal existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs." *Auten* v. *Boys*, 2 De G. & J. 626.

"The good-will of an established business, which is a common subject of contract, is nothing but the chance of being able to keep the business which has been established." *Barber* v. *Connecticut Mutual Life Ins. Co.*, 15 Fed. R. 312.

"It is difficult to see how the good-will, consisting in the habit of the trade being carried on in the same place, can be distinguished; and separated from the lease of the house." *Crawshay* v. *Collins*, 15 Ves. 224.

"The good-will, which has been the subject of sale, is nothing more than the probability, that the old customers will resort to the old place." *Cruttwell* v. *Lye*, 17 Ves. 346.

"The good-will of an inn or tavern is local, and does not exist independent of the house in which it is kept." *Elliott's Appeal*, 60 Pa. St. 161.

"The case at bar, properly considered, is a species of 'good-will,' analogous to a trade-mark. . . It does not mean simply the advantage of occupying particular premises which have been occupied by a manufacturer, etc. It means every advantage, every positive advantage that has been acquired by a proprietor, in carrying on his business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business." *Glen & Hall Mufg. Co.* v. *Hall*, 61 N. Y. 226; 19 Am. R. 278.

"Good-will resolves itself into reputation." *Howe* v. *Searing*, 19 How. Pr. 14.

"The good-will of a business comprises those advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and repute of his predecessor." *Knoedler* v. *Boussod*, 47 Fed. R. 465.

"It is property of a very peculiar and exceptional character. It is intangible property which, in the nature of things, can have no existence apart from a business of some sort that has been established and carried on at a particular place." *Metropolitan Bank* v. *St. Louis Dispatch Co.*, 36 Fed. R. 722.

"Nor can I comprehend how it existed independently of the property." *Musselman's Appeal*, 62 Pa. St. 81.

"The good-will is a valuable and tangible thing in many cases, but it is never a tangible thing unless it is connected with the business itself, from which it cannot be separated, and I never knew a case in which it has been so treated." *Robertson* v. *Quiddington*, 28 Beav. 529.

"Good-will has been defined as 'all that good disposition which customers entertain toward the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it.' There is nothing marvellous or mysterious about it. When an individual or a firm or a corporation has gone on for an unbroken series of years conducting a particular business, and has been so scrupulous in fulfilling every obligation, so careful in maintaining the standard of goods dealt in, so absolutely honest and fair in all business dealings that customers of the concern have become convinced that

their experience in the future will be as satisfactory as it has been in the past, while such customers' good report of their own experience tends continually to bring new customers to the same concern, there has been produced an element of value quite as important — in some cases, perhaps, far more important — than the plant or machinery with which the business is carried on. That it is property is abundantly settled by authority, and, indeed, is not disputed. That in some cases it may be very valuable property is manifest." *Washburn* v. *National Wall-Paper Co.*, 81 Fed. R. 17, 20.

"There is considerable difficulty in defining, accurately, what is included under this term *good-will;* it seems to be that species of connection in trade which induces customers to deal with a particular firm. It varies almost in every case, but it is a matter distinctly appreciable, which may be preserved (at least to some extent), if the business be sold as a going concern, but which is wholly lost, if the concern is wound up, its liabilities discharged, and its assets got in and distributed." *Wedderburn* v. *Wedderburn*, 22 Beav. 84.

"Good-will has been defined by this court to be 'the favor which the management of a business has won from the public, and the probability that old customers will continue their patronage." *Williams* v. *Farrand*, 88 Mich. 473.

3. The right of property in a trade-mark will be protected from infringement by the courts, irrespective of fraud or the intent of the infringer.

See XI. 7 A. 258.

4. The property rights in a certain trade-mark do not extend beyond the exclusive right to that mark as applied to that class of goods for which it has been appropriated.

See IV. 5. 95.

Plaintiff had for a number of years used its corporate name on cotton goods, but not on prints and calicoes. Defendant used word "Amoskeag" on prints and calicoes. Held that the goods were in the same class and public was liable to be deceived. Injunction. *Amoskeag Mnfg. Co.* v. *Garner*, 54 How. Pr. 297; reversing 55 Barb. 151.

"While the revenue laws, for purposes of taxation, distin-

guished between smoking tobacco and cigarettes, there is, we believe, no substantial difference. Cigarettes consist of smoking tobacco, similar in all material respects to that used in pipes. The circumstance that a longer 'cut' than that commonly used in pipes is most convenient for cigarettes is not important, nor that the tobacco is smoked in paper instead of pipes. It may all be used for either purpose, and is all embraced in the term 'smoking tobacco.' We do not believe the public or the trade draw such a distinction as the defendant sets up." *Carroll* v. *Ertheiler*, 1 Fed. R. 688; 21 Alb. L. J. 503.

Complainant had trade-mark in word "Celluloid" used in compound of pyroxyline in giving glossy surface to collars and cuffs. Respondent used the word as applied to starch which complainant had never made or undertook to make. The prospect that the complainant would in the future want to manufacture starch or some article which has the use of and simulates starch, was too shadowy to base an injunction upon. *Celluloid Mnfg. Co.* v. *Read*, 47 Fed. R. 712.

Sheet iron is not in the same class as wire, and a trade-mark on wire is not likely to deceive the public if the same as one used on sheet iron.

"In the course of the argument it was asked, what is to be done if a man extends his business? . . . In my opinion, if a man wishes to extend his business to a new description of goods and to use his trade-mark in connection with the goods, he ought to register it in respect of those goods." *Edwards* v. *Dennis*, 30 Ch. D. 454.

"La Norma," having been registered as trade-mark for cigar boxes, does not preclude registration of "Norma" for cigarettes the two goods not being in the same class. *Egyptian Tobacco Co., ex parte*, 85 O. G. 1905.

"Carmencita," had been registered as trade-mark for cigarettes. "Carmen" allowed as trade-mark on cigarettes. The goods belonged to the same general class of merchandise, but not to the same particular class. *Egyptian Tobacco Co., ex parte*, 85 O. G. 1741.

"The right to the use of a trade-mark cannot be so enjoyed by an assignee, that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached." *Filkins* v. *Blackman*, 13 Blatchf. 440.

"The reasoning of some of the authorities would indicate that

the defendants had a right to use the brand in connection with other fruits and vegetables, analogous to tomatoes and peaches, but to assert that they have the right to use it on all canned goods is carrying the doctrine far beyond any reported case. . . . The fact that the defendants have subsequently extended their business so as to include fish and other like articles of food does not avail them, neither would the fact, if it existed, that, at the time they adopted the word 'Epicure' they intended in the future to embrace these articles. . . . It is the party who uses it first as a brand for his goods, and builds up a business under it, who is entitled to protection, and not the one who first thought of using it on similar goods, but did not use it."

Coinplainants, by first using the word "Epicure" on canned salmon, acquired right to so use it, although respondents had previously used it on canned fruit and vegetables. *George* v. *Smith*, 52 Fed. 830.

There may be several classes of goods under the general designation of iron.

"Although the applicants contend that they have used this mark for twenty-five years in the market, these particular goods have not been known by it. That point was argued by a man who had used a mark for whiskey which he thought he could extend to beer, though it was very like Allsopp's mark, but I did not think so. . . . The applicants say that, if they are allowed to use this mark in respect to certain goods, it is hard upon them that they should not be allowed to use it for the whole of their trade; but if they are going to sell goods which they never sold before, the answer is that they can adopt a new mark upon them." *Jelley, in re*, 51 L. J. Ch. 639.

A party could not register mark "Ironclad" on drawers and pantaloons when it had already been registered by a prior party for overalls. *Kyle, ex parte*, 57 O. G. 274.

"Heliotype," good trade-mark on prints of a certain kind protected by a patent, but good only on prints of that process and no other; hence one could use word on prints of another kind. *Osgood* v. *Rockwood*, 11 Blatchf. 310.

Registration of a symbol of a crown for a trade-mark for "paints" by A, who had previously acquired the exclusive use of such trade-mark for only particular kinds of paints, does not enable A to restrain B from using such trade-mark upon other kinds of paint to which B had been in the habit of fixing such trade-mark prior to registration.

Plaintiff had right to use mark upon Paris white, Venetian red, drop black, Indian reds, Tuscan reds, patent drier, oak stain, dry ochres, ochres in oil, and various other colors. Defendant had meanwhile acquired right to use mark on white lead, and *blanc de zinc*. The white lead of plaintiff bore another mark. The rule was that both parties had acquired limited rights at common law. *Smith* v. *Reynolds*, 13 Blatchf. 458.

See XVI. 2. 336. *Smith* v. *Reynolds*, 10 Blatchf. 100.

Trade-mark on dry white oxide of zinc not infringed by use of same mark on white oxide of zinc ground in oils, the first mark never having been applied to the latter class of goods. *Société Anonyme* v. *Baxter*, 14 Blatchf. 261.

"The fact that the defendants sell a paint composed of a white oxide of zinc ground in oil, and represent it as containing white oxide of zinc made by the plaintiffs, when it does not contain white oxide of zinc made by the plaintiffs, is no violation of any trade-mark of the plaintiffs. . . . So, flour is intended to be made into bread. But, if a baker should falsely stamp his bread with the mark of a particular brand of flour, the maker of such brand, if having a trade-mark therefor, could not claim that the baker had violated his trade-mark. And so of any other raw material which enters as an ingredient into a compound or article of manufacture." *Société Anonyme* v. *Baxter*, 14 Blatchf. 261.

"Different persons may apply the same mark to different sorts of goods in the same class, provided the nature and resemblance of the goods are not so nearly the same as that the identity of the trade-mark would deceive the public as to their origin or ownership." *Sorg* v. *Welsh*, 16 O. G. 910.

Garters included in the same class of goods as "all kinds of wearing apparel for men and boys." *Stein & Co., ex parte*, 85 O. G. 147.

Complainant using word "Swift," on "stock food," and "poultry food," entitled to injunction against its use by respondent on similar articles; but not against its use on lemon juice. *Swift & Co.* v. *Groff*, 114 Fed. R. 605.

5. Goods are considered to be of the same class if they are of the same character, serve the same general purpose, and might reasonably be expected to be the product of the same business.

See IV. 4. 92; IV. 6 B. 105. *Macmahan Pharmacal Co.* v. *Denver Chemical Mnfg. Co.*, 113 Fed. R. 468.

One trade-mark cannot be registered for "implements, apparatus, and goods used in athletic games and sports." There is not stated the "particular description" required by statute. *A. G. Spalding & Bros., ex parte*, 120 O. G. 325.

The word "Aladdin," having been registered for bicycle lamps, its subsequent registration was refused for gas or vaporizing lamps generally, excepting bicycle lamps, as they were all of the same class. *Aladdin Gas Light Co., ex parte*, 100 O. G. 450.

"Pale ale and half-and-half must, as against an infringer of a trade-mark for the former, be treated as malt liquors, substantially similar to each other and belonging to the same class. Courts should not be astute to recognize in favor of an infringer fine distinctions between different articles of merchandise of the same general nature, and should resolve against the wrong-doer any fair doubt whether the public may or may not be deceived through the application of the spurious symbol." *Bass, Ratcliffe & Gretton (Ltd.)* v. *Feigenspan*, 96 Fed. R. 206.

Application to register a trade-mark for the general class of "alcoholic spirits" allowed. "I know of no decision of the courts, nor does the Examiner cite any in support of his position, that the law contemplates that different descriptions of the same class of goods should be made the subjects of separate applications. On the contrary, the most recently published decision which has come to my notice gives the clause of the statute under consideration (sec. 4937 U. S. R. S.) quite a different interpretation. *Smith* v. *Reynolds*, 3 O. G. 214. . . . It is true that the use of such comprehensive terms is a very bad practice, but the evil results appear to fall on those applicants alone who take the risk. . . . This danger of including within the terms of a registration more than applicants can maintain, will probably serve to restrict the practice of making the descriptions too comprehensive." *Boehm, in re*, 8 O. G. 319.

One trade-mark "Centennial," can be registered for Bourbon, wheat and rye whiskies, wines, brandies, gins, and bitters. *Boehm, in re*, 8 O. G. 319.

Bush & Co. sought to register "Centennial," as a trade-mark for "Sparkling Wines," but were rejected upon the registration by F. Boehm & Co. of said word for "wines of which alcoholic spirits is an ingredient." "It is denied, however, by the applicants that the word 'Centennial,' as registered by Frank Boehm & Co., covers the class of merchandise to which they claim the

right to apply it, *i. e.*, sparkling wines, but is confined to those wines of which alcoholic spirits is an ingredient. Frank Boehm & Co. set forth that their trade-mark is applied to that class of merchandise containing alcoholic spirits, and they include wines in the enumeration of the particular goods comprising such class. All wines contain alcohol, and as they have not expressly limited themselves to such as are compounded with alcoholic spirits, it seems not inconsistent with their registration to say that they really include all such wines as contain alcohol." *Bush, in re,* 10 O. G. 164.

An applicant for trade-mark for "railway supplies" such as "car-doors, their trimmings and journal-bearings," required to state more particularly the goods, as "car doors" and "journal-bearings," are not of the same "particular description." *Camel Co., ex parte,* 108 O. G. 288.

"Goods are in the same class whenever the use of a given trade-mark or symbol on both would enable an unscrupulous dealer readily to palm off on the unsuspecting purchaser the goods of the infringer as the goods made by the owner of the trade-mark, or with his authority and consent."

Baking powder in same class with baking soda and saleratus, the powder containing a large proportion of soda. *Church & Dwight Co.* v. *Russ,* 99 Fed. R. 276.

One trade-mark may be registered in application for trade-mark for groceries under designation of particular goods, "canned goods, flour, tobacco, cigars, dried fruit, condiments, farinaceous goods, flavoring extracts, coffee, lard, hams, bacon, and canned beef." It would be an onerous requirement to require five separate registrations. *Clark-Jewell-Wells Co., ex parte,* 83 O. G. 915. *But see: Faxon, ex parte,* 103 O. G. 891, 98, and *Silvers, ex parte,* 67 O. G. 811. 99.

Since 1834 plaintiff and its predecessors, under whom it claimed, had manufactured edge tools of steel, stamping thereon "Collins & Co.," under which it had obtained great reputation in United States and in Australia. Defendant in 1856 began to stamp shovels "Collins & Co.," and sell them in Australia where plaintiff had never sold shovels, but where the mark was highly respected on edge tools and picks. The purpose of defendant was to avail himself of reputation of plaintiff. Held a fraud; and injunction issued. *Collins & Co.* v. *Oliver Ames & Sons Corp.* 18 Fed. R. 561; 20 Blatch. 542.

"Old Government," refused registration as a trade-mark for

fruit brandy, in view of its prior registration for whiskey, the two goods being in the same class.

"The essential thing to be determined now is the proper scope of the word 'class' as it is used in the statute, and it must be held that in contradistinction to the 'particular description of goods' mentioned in the statute, the 'class' of goods means that genus which includes as species such goods as if exposed to the purchasing public side by side with the 'particular' goods to which the trade-mark has been applied will result in the 'deception' mentioned in section eight of the statute, whereby the purchasing public, misled by the application of the single title to the various 'particular' goods comprised within the class, will conclude that they have originated from the same source and will purchase one under the impression that it was made by the maker of the other." *Crown Distilleries Co., ex parte,* 89 O. G. 2590.

Application for registration of trade-mark should not be for more than one class of goods, and a trade-mark for "grocers' supplies," cannot include butter, eggs, dried beef in packages, coffee, oat-meal wafers, cracker meal, butters, saltines, gems, banquets, grahams, sodas, ginger snaps, teas, and ale." *Faxon, ex parte,* 103 O. G. 891. *But see: Clark-Jewell-Wells Co., ex parte,* 83 O. G. 915; and *Silvers, ex parte,* 67 O. G. 811, and cases in IV. 5. 95.

Suspenders for trousers are not in the same particular class of goods as garters for half hose, as the latter are not considered suspenders. *Frank* v. *Macwilliam,* 117 O. G. 1165.

"Between glazed kid and chamois skins there are many intrinsic distinctions, and although both are leather goods I do not think they are of 'substantially the same descriptive properties.'" *Keystone Chamois Co., ex parte,* 101 O. G. 3109.

"Knives, forks, scissors, razors, shears, chisels, augers, drills, taps, dies, adzes, sickles, scythes, saws, files, and rasps" cannot all be included under one trade-mark.

Scissors and shears might be classed together; so taps and dies; axes and adzes; scythes and sickles; files and rasps; but not all together. *Marsh Brothers Co.,* 108 O. G. 288.

"Plumbers' supplies," comprising pipes, pipe fittings, valves, tanks, basins, closet-bowls, urinals, bath tubs, faucets, cocks, and nozzles used to convey and contain water are not all of the same class.

"The words 'substantially the same,' do not mean exactly the same; but they do mean that the articles are so nearly alike in

characteristics and use that the purchasing public seeing them sold under the same mark would naturally suppose that they were made by the same manufacturer." *Peck Brothers Company, ex parte,* 106 O. G. 764.

Registration of trade-mark allowed in one application for grocers' drugs, flavoring extracts, coffee "and the particular description of goods comprised in said class on which it is used by us is extracts of essences of vanilla, lemon, peppermint, and Jamaica Ginger, Bateman's drops, paregoric, castor oil, sweet oil, sewing-machine oil, glycerin, sirup of ipecac, sirup of squills, spirits of nitre, and coffee." "There is no authority for requiring the subdivision of applications to accord with the Office classification of trades. The registration can be limited by nothing narrower than the actual and lawful use of the mark in the place where the business is located." *Silvers, ex parte,* 67 O. G. 811. *But see: Clark-Jewel-Wells' Co.,* 63 O. G. 915, 97, and in IV. 5. 95.

A large number of goods of different purposes and uses cannot all be included under registration of word "Banner," as a trade-mark, merely because are all made of rubber.

"The question whether goods are of substantially the same descriptive properties depends not merely upon the substance of which they are made, but also upon the character and use of the articles themselves. For instance bath tubs and dolls cannot be said to be of the same descriptive properties because made of the same material. The use of a particular mark upon one would certainly not infringe the right to use it upon the other." *Tallmadge, ex parte,* 104 O. G. 2443.

Gin considered to be substantially the same as geneva (the latter a corruption of genever). *Vanden Bergh* v. *Blankenheym,* 108 O. G. 563.

Toilet soap and laundry soap are of substantially the same descriptive properties. *Willard Chemical Co., ex parte,* 107 O. G. 1972.

The same mark cannot be registered for "ready-mixed paints, driers, white lead, stove-polish, stove and furnace cement, and roofing-cement." *William Connors Paint Mnfg. Co., ex parte,* 119 O. G. 2522.

6. A. Although no specified length of time may be necessary for a party to acquire a trade-mark at common law, yet the duration, manner, and extent of use of a sign are material in determining whether a party has acquired the rights of a trade-mark under it.

See IV. 8 A. 111.

See II. 5. 28. III. 2 E. 70. *Colgate* v. *Adams*, 88 Fed. R. 899. XIV. 1 A. 291. *Brower* v. *Boulton*, 53 Fed. R. 389. XI. 15. 279. *Walter Baker & Co. Ltd.* v. *Puritan Pure Food Co.*, 139 Fed. R. 680.

"A purely arbitrary or fanciful appellation, for the first time used to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation and subsequent use, become a trade-mark. . . . The same might be said of a symbol or sign, such as a cross, a star, or lion, which, when stamped upon a particular article, may become its distinctive mark, and will be upheld as such as soon as the article becomes known and distinguished by that mark." *Alleghany Fertilizer Co.* v. *Woodside*, 1 Hughes, 115.

Use two years of "cocaine," on hair oil and expenditure of $10,000 in advertising evidence of acquisition of rights of trade-mark in the word. *Burnett* v. *Phalon*, 9 Bosw. 193. Aff'd 5 Abb. Pr. n. s. 212; 3 Keyes, 594.

The complainant was incorporated under the laws of New York in 1871, and has ever since that time used its corporate name in carrying on its business of the manufacture and sale of various compounds of pyroxyline; in order to designate its said manufactured product, and to distinguish it from similar compounds manufactured by others, the complainant, from the first, adopted and used the word 'celluloid' . . . and used the word as a trade-mark. In 1873 complainant caused said word 'celluloid' to be registered, and again in 1883, under the subsequent act. Word protected as a trade-mark. *Celluloid Mnfg. Co.* v. *Cellonite Mnfg. Co.* 32 Fed. R. 94.

"No definite length of time is requisite to confer this right of property, provided the injured party has, by priority of adoption, appropriated the name or symbol as peculiar to his merchandise, and indicative of its place of manufacture." *Cleveland Stone Co.* v. *Wallace*, 52 Fed. R. 431, 436.

Where parties had used term "Club Soda," on carbonated

water from 1877 to 1896, held that they had acquired a trade-mark in it, it having come to designate their product. *Cochrane v. McNish*, 74 L. T. N. S. 109; 65 L. J. P. C. N. S. 20.

"It appears from the evidence that at the time of the adoption of the words, 'Kentucky Club Bourbon,' as a trade-mark by defendant, the complainant was selling very little, if any, of its 'Kentucky Club,' whiskey in this city and county, and that even at the time this suit was brought the complainant's product was not known to many of the largest liquor dealers there. They testified that they had never come in contact with it, and their only acquaintance with it was in the printed lists or quotations of some liquor publications. The complainant itself does not show that it has lost any sales by reason of defendant's product." Injunction refused. *Daviess County Distilling Co. v. Martinoni*, 117 Fed. R. 186, 188.

Use of mark "Old Crow" on whiskey by plaintiff and predecessors for sixty years sufficient to establish right, although mark is not registered. *Gaines v. Leslie*, 54 N. Y. Supp. 421.

"But if the word 'elastic,' were deemed to be so descriptive of these articles as to be inadmissable as a technical trade-mark, still, under the proofs, the word has acquired such a secondary signification, denoting sectional book-cases and like furniture of the plaintiff's manufacture, that the plaintiff should be protected in its use." *Globe Wernicke Co. v. Brown*, 121 Fed. R. 185, 187.

"The interference of a Court of equity cannot depend on the length of time a manufacturer has used it. If the mark or brand be an old one, formerly used, but since discontinued, the former proprietor of the mark undoubtedly cannot retain such a property in it, or prevent others from using it; but provided it has been originally adopted by a manufacturer, and continuously and still used by him to denote his own goods when brought into the market and offered for sale, then I apprehend, although the mark may not have been adopted a week, and may not have acquired any reputation in the market, his neighbors cannot use that mark. Were it otherwise, and were the question to depend entirely upon the time the mark had been used or the reputation of it had been acquired, a very difficult, if not insoluble inquiry would have to be opened in every case; namely, whether the mark had acquired in the market a distinctive character denoting the goods of the person who first used it." *Hall v. Barrows*, 32 L. J. Ch. N. S. 548.

"It is not sufficient in the case of a trade-mark, as in the case of an invention, to show that it has once been recognized and used, but the right thereto can only be maintained by constant use of the same upon a particular class of goods. The owner of a trade-mark may forfeit or abandon his right by discontinuing its use and it may then fall into the public domain, or be appropriated by another manufacturer as his trade-mark." *Jacoby* v. *Lopez*, 23 O. G. 342.

"It is enough, we think, if the article with the adopted brand upon it is actually a vendible article in the market, with intent by the proprietor to continue its production and sale. It is not essential that its use has been long continued, or that the article should be widely known, or should have attained great reputation. The wrong done by piracy of the trade-mark is the same in such case as in that of an article of high and general reputation, and of long continued use. The difference is but one of degree, and in the quantum of injury. A proprietor is entitled to protection from the time of commencing the user of the trade-mark." *Kathreiner's Malz Kaffee Fab.* v. *Pastor Kneipp Med. Co.* 82 Fed. R. 321, 326.

Fact that plaintiff had built up an extensive business and expended $400,000 in nine years under word "bromo-caffeine," on a drug material in determining plaintiff's right to the name as a trade-mark. *Keasbey* v. *Brooklyn Chemical Works*, 142 N. Y. 467, reversing 21 N. Y. Supp. 696.

The registration of a sign at the United States Patent Office and its use thereafter for four years considered as evidence of acquisition of trade-mark and right to protection. *Kinney* v. *Allen*, 1 Hughes, 106.

Where parties have expended large sums of money in building up soap business under a certain mark, "Welcome," their right to relief is clearer. *Lever Bros. Ltd. Boston Works* v. *Smith*, 112 Fed. R. 998.

Fact that complainant and predecessors used word "Home," on sewing machines for twenty-five years and during that time have acquired great reputation, material in granting injunction against use of "Home Delight." *New Home Sewing Machine Co.* v. *Bloomingdale*, 59 Fed. R. 284.

"It seems to be the law that when manufacturers have educated the public to ask for a certain article by its trade-mark name, they have acquired the right to insist that products manufactured by others shall not be given to the public under that

name." *N. K. Fairbank Co.* v. *Central Lard Co.*, 64 Fed. R. 133.

Period of more than forty years considered material in determining acquisition of trade-mark. *Penn. Salt Mnfg. Co.* v. *Myers*, 79 Fed. R. 87. Aff'd 82 Fed. R. 1003.

"Cuticura," on medicated toilet soap used continuously 1878–1896, good. *Potter Drug & Chemical Co.* v. *Miller*, 75 Fed. R. 656.

"If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device." *Seixo* v. *Provezende*, L. R; 1 Ch. 192; 12 Jur. N. S. 215; 14 L. T. N. S. 314; 14 W. R. 357.

"The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use rather than a sudden invention. It is often the result of accident rather than design." *Trade-Mark Cases*, 100 U. S. 82.

A party who uses the word "Centennial," on shirts in an experimental way and then abandons it, is not entitled to the mark as against another who in the meanwhile has adopted it and put it into use as a trade-mark. *Sternberger* v. *Thalheimer*, 3 O. G. 120.

B. A casual, intermittent, and limited use of a sign subsequently discontinued will not create the rights of a trade-mark against one who has adopted such sign as a trade-mark.

See XIV. 1 A. 293. *Menendez* v. *Holt*, 128 U. S. 514.

Complainant's predecessor in 1873 on a special order and at request, put brand "La Venezolana," on flour sent to La Guaira. After that it was not used. Held, that he could not enjoin respondents who had begun to use it in 1884 and used it extensively till 1892 at bringing of bill. *Brower* v. *Boulton*, 58 Fed. R. 888; affirming 53 Fed. R. 389.

Complainant's assignor in 1866 originated the word "Chatterbox," as applied to an annual series of juvenile books; held, that it was not defeated on the ground of a prior application on a publication in 1852 for two successive months of a monthly newspaper called "Chatterri's Chatterbox," not intended for young people; nor by publication in 1807 in a volume of poems

of a poem called "The Chatterbox;" nor by publication in 1861 of a book called "The Favorite Scholar," containing a prose story "Little Chatterbox." *Estes* v. *Worthington*, 31 Fed. R. 154.

Complainants adopted and used word "Club," as applied to cocktails from 1892 to 1903, spending large sums in advertising, and acquiring by an uninterrupted, uniform, and notorious use great reputation. Respondents for a while used "Outing Club Cocktails," in 1892, but discontinued use; held, that they did not have a right in 1898 and later to resume the name where it has previously had a transitory, spasmodic, and inconsiderable use as contrasted with use of word "Club" by complainants. *Henblein* v. *Adams*, 125 Fed. R. 782.

A stamp of an elephant's head on the binding of a single edition of the author's works without any registration or any claim to the public that it was a trade-mark, and which might have been an ornamental stamp of the publisher, is not such use as would entitle an author to claim it as a trade-mark, even admitting that an author could have a trade-mark on his writings. *Kipling* v. *G. P. Putnam's Sons*, 120 Fed. R. 631.

The occasional use in this country by a foreign manufacturer of the words "One Night Cough Cure," on a medical preparation of a few dozen bottles upon special order, is not sufficient to create rights in the collocation of words of a trade-mark. "The occasional use of the written label prior to the fall of 1891 was unimportant. It was insufficient to make any public impression; and the period between the fall of 1891 and February following, when suit was commenced, was too short, in the most favorable view of the evidence, to have established or fixed the label (whatever it was) in the public mind as a known sign or indicia of the plaintiff's manufacture of cough medicine." *Kohler Mnfg. Co.* v. *Beshore*, 53 Fed. R. 262.

"Nevertheless, however short the time may be in which a person may acquire a title to a trade-mark, there must be shown an actual intention to acquire such a title. A merely casual use, interrupted, or for a brief period, would not support a claim to a trade-mark. *Menendez* v. *Holt*, 128 U. S. 514. Nor will a court of equity recognize by injunction a proprietary right in a phrase or name, unless it has been used in such circumstances as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article." *Kohler Mnfg. Co.* v. *Beshore*, 59 Fed. R. 572; affirming 53 Fed. R. 262.

Complainants applied name "Blackstone," widely known by reason of local geographical uses, to small lots of cigars manufactured and sold by them, — one in 1878 on a special order; one in 1884, in competition with a trade-mark for a limited market; one in 1885; and no more till 1889. Before the sale in 1885, defendants, without knowledge of what had been done by 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 such appropriation or actual occupation of the market by complainants as to entitle them to assert a right to a trade-mark, as against defendants. *Lery* v. *Waitt*, 61 Fed. R. 1008; affirming 56 Fed. R. 1016.

"We believe no case can be found where, with intermittent offers of merchandise bearing a certain name, with such long lapses on the one side, and on the other the uninterrupted and innocent use of the same name for five years without question, and a consequent growth of an extensive and valuable business, the equity courts have interfered in favor of the former against the latter." *Lery* v. *Waitt*, 61 Fed. R. 1008.

"The right to a trade-mark at common law, independent of the registration statutes, is not created by invention or priority of adoption alone. A word, symbol, or deviee, to be a valid trade-mark constituting a right of property, must have been used by the owner in connection with the sale of his goods for such length of time, and under such circumstances, as indicates to the trade that the goods in connection with which it appears are his goods, as distinguished from those of other manufacturers or dealers. The mere adoption of such word, symbol, or service, unaccompanied by such a use, is not sufficient to create our exclusive right thereto." *Macmahan Pharmacal Co.* v. *Denver Chemical Mnfg. Co.*, 113 Fed. R. 468.

A pharmacist in New York for twenty years made and sold a liquid preparation for use by dentists under name "Macmahan's concentrated (or saturated) Tincture, Aconite with Iodine." After that time he was succeeded by a corporation which made the preparation, using also name, "Antiphlogistine." On cards and circulars it was described as "Macmahan's Antiphlogistine," but such cards and circulars were not used to any great extent and it was not advertised in any other manner. In ten years the company made only 362 sales, to ninety-eight different customers, almost exclusively dentists purchasing for their own

use. The article was not known in the market generally, even in the city. Held, that the company did not have exclusive right to word "antiphlogistine" as a trade-mark, and especially as another company which had adopted it, without knowledge of such use as a trade-mark, to designate a plastic preparation, not for dentists but for external application, and which during a number of years it had advertised extensively and in which it had built up an extensive trade. Macmahan Company was in New York; the Denver Company was in Denver. *Macmahan Pharmacal Co.* v. *Denver Chemical Mnfg. Co.*, 113 Fed. R. 468.

Sales of medicines under a certain mark of an anchor to a a limited extent upon special orders to supply particular customers is not use "in such circumstances, as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article." *Richter* v. *Reynolds*, 59 Fed. R. 577; affirming 52 Fed. R. 455.

7. Property right in a trade-mark or trade-name exists and will be protected so long as it is used or represents a live reputation and good-will, and is claimed exclusively by the original proprietor or his successors.

See III. 1 N. 59.

See X. 1 A (1). 219. *Fish Bros. Wagon Co.* v. *La Belle Wagon Works*, 82 Wis. 546.

See X. 1 B. 226. *Jennings* v. *Johnson*, 37 Fed. R. 364.

The trade-name "Day & Martin" in blacking business continued by executors of survivor and protected from infringement. *Croft* v. *Day*, 7 Beav. 84.

Joseph Hall established business at Number 10 South Water St., Rochester, N. Y. more than thirty years before trial and carried on business till death in 1865. His establishment was known as "Number 10 South Water Street." It passed by assignment and purchase from executors of Hall to Charles S. Hall who continued business using same designation. In 1874, held entitled to injunction against party fraudulently using "Number 10 South Water Street." *Glen & Hall Mnfg. Co.* v. *Hall*, 61 N. Y. 226.

Trade-mark on iron "B. B. H." surmounted by a crown used since 1836 by successive partnerships engaged in carrying on the iron business, good in 1863. "But it must be borne in mind that a name, though originally the name of the first maker, may in

time become a mere trade-mark or sign of quality, and cease to denote or be current as indicating that any particular person is the maker." *Hall* v. *Barrows*, 4 De G. J. & S. 150, etc.

"Thorley's Food for Cattle" was a condiment made according to a particular recipe (not invented by Thorley) first by Thorley and afterwards by his executors. Subsequently a company called "J. W. Thorley's Cattle Food Co.," was started, and made a condiment very nearly identical with that made at Thorley's Works, and sold it in packets closely resembling those of executors. Held that name assumed by company and imitation of packages showed intention to defraud and did in fact mislead, and injunction should issue. *James* v. *James* criticised. *J. W. Thorley's Cattle Food Co.* v. *Massam*, 42 L. T. N. S. 851.

"Suppose a partnership to have been formed a century ago under a style or firm composed of the names of the then partners, and that the partnership has been continued by the admission of new partners in an unbroken series of successive partnerships, trading under the same original style, although the names of the present partners are wholly different from those in the original firm; is it an imposition on the public that such partners should continue to use the style or firm of the original partnership? This question must be answered without any doubt in the negative." *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137.

Complainants and predecessors had carried on business as brewers at town of Stowe for upwards of a century, and protected in use of "Stowe" which had come to designate their ales, the respondent having fraudulently established himself as brewer at Stowe for purpose of using that name to deceive. *Montgomery* v. *Thompson*, 60 L. J. Ch. N. S. 757.

Early in eighteenth century one Crowley invented a method of making steel and stamped his steel "Crowley." The business was continued till 1782 when plaintiff's grandfather became partner, and then steel was sometimes stamped "Crowley" and sometimes "Crowley Millington;" business descended to plaintiff, the marks still continuing to be used. Held that in 1838 plaintiff was entitled to injunction against defendant who used said marks. Steel had meanwhile come to be known as "Crowley" steel, or "Crowley Millington" steel. *Millington* v. *Fox*, 3 My. & Cr. 338.

William Rogers and his son William Rogers, Jr. had built up under their names, "Wm. Rogers & Son," with anchor and trade-

mark, "1865 Wm. Rogers Mnfg. Co.," an extensive business and great reputation in silver plating of knives, forks, and spoons. The plaintiff corporation succeeded to their business and trade-marks. Lorenzo Spurr and George W. Spurr at Greenfield induced David C. Rogers and George E. Rogers, by payment of royalty to them, to use a mark registered at patent office without any business "Rogers & Son," on silver-plated ware. Held a fraudulent attempt to trade on the name Rogers. Injunction. *William Rogers Mnfg. Co.* v. *Rogers & Spurr Mnfg. Co.*, 11 Fed. R. 495.

Contra: "When a person has discovered a valuable invention, and has not patented it, any one who has discovered the ingredients (I am not talking of the case of a breach of trust, or of fraud, or the like), may sell those ingredients, and may use the name of the person who has discovered them after his death, but not in his lifetime, so as to suggest that they are made by him." *James* v. *James*, L. R. 13 Eq. 421; 41 L. J. Ch. 353; 26 L. T. N. S. 568; 20 W. R. 434.

Contra: Plaintiff was the assignee of Lieutenant James who had invented a formula for horse blister: held that defendant who was rightfully in possession of secret had the right to call his product "Lieutenant James' Blister," because the name had become generic, but he would have to put on it his full name, "Robert James." *James* v. *James*, 26 L. T. N. S. 568. Criticised unfavorably in *J. W. Thorley's Cattle Food Co.* v. *Massam*, 42 L. T. N. S. 851.

Contra: Court held that without a patent a party did not have exclusive right to designate his medicines as "Thomsonian," if that name (apparently without any laches on his part) had acquired generic meaning; and that defendant had right to use the name. *Thomson* v. *Winchester*, 19 Pick. 214.

A. But the name or sign may, by permission, laches, or lack of transmission, become *publici juris* and be used by others.

See III. 1 C. 47.

Upon the death of old Samuel Marshall who compounded a liniment known by his name without any successors to his business any one who knew the secret was at liberty to compound the liniment and use that name. *Marshall* v. *Pinkham*, 52 Wis. 572.

The plaintiff's father made and sold a compound known as

"Dr. Johnson's Yellow Ointment"; after his death plaintiff made the medicine marked in same way, also defendant; inasmuch as the defendant had not sold it as made by the plaintiff and only used name of original inventor, and the plaintiff not having shown property, as there were no letters of administration and no patent, held, no exclusive right in name by plaintiff. *Singleton* v. *Bolton*, 3 Dougl. 293.

A liniment had come to be known as "Ward's Liniment," and when neither of two parties could show exclusive title from the original "Dr. Ward" court refused to enjoin use of it. *Watkins* v. *Landon*, 52 Minn. 389.

8. For a proprietor to acquire a trade-mark it is essential that no other party at the time has a prior right to use the sign in his business, and that the mark has not been previously in general use.

Where it appears that at least fifteen years prior to the adoption in the flour business by complainant of a mark of a picture of a white swan on water, with the words "White Swan" those words had been generally used in the flour trade and the picture itself had been used by at least two other firms, it cannot be held that the complainant originated the design as a trade-mark. *Bulte* v. *Igleheart Bros.*, 137 Fed. R. 492.

"It is further shown by the proof that the word 'Columbia,' before its adoption by the complainant, was used by the Columbia Mill Company of Columbia, Brown County, Dakota; by the Columbia Elevator and Grain Mills, of Providence, Rhode Island; by the Columbia Mill Company of Oakland, Indiana; and by S. S. Sprague & Company, of Providence, Rhode Island. The word 'Columbia' having been thus previously appropriated and used upon barrels and sacks of flour, was not subject to exclusive appropriation thereafter by the complainant, so as to make it a valid trade-mark such as the law will recognize and protect." *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460.

"With respect to the word 'Tycoon,' the evidence shows beyond question that it has been used as a name or brand for Japan tea for many years. Invoices of 'Tycoon Tea' were received at the custom house in San Francisco as early as May 15th, 1873, as shown by a copy of the official records of that office filed in this case; and the evidence of dealers and merchants of California is all to the effect that the word was in common use as a

brand for Japan tea for several years prior to that date." Its use was common and open to all. *Corbin* v. *Gould*, 133 U. S. 308.

"In order that the claimant of the trade-mark may primarily acquire the right of property in it, it must have been originally adopted and used by him — that is, the assumed name or designation must not be one that was then in actual use by others; and such adoption and use confer upon him the right of property in the trade-mark." *Derringer* v. *Plate*, 29 Cal. 292.

"Upon the first of these two points, the testimony establishes the fact that the complainant was the first person to use a star made of tin and fastened upon plug tobacco, as described above; but that he was not the first person to use the design of a star upon plug tobacco. The priority of use, therefore, by the complainant extended only to the tin star, and not to the design of a star generally." *Liggett & Myer Tobacco Co.* v. *Finzer*, 128 U. S. 182.

The word, "Kaiser" could not be legally registered as a trade-mark for mineral water, it having been used as the name of several springs in Europe previous to its registration in 1883, and injunction against its use by others refused. *Luyties* v. *Hollender*, 24 Blatchf. 353; 30 Fed. R. 632.

The trade-mark "Triumphant" having been used a number of years by a party in the flour trade, a subsequent use by another party does not give him the right to register it, although the first may have registered his mark under the unconstitutional statute of 1870. *Lyon, Dupuy & Co., ex parte*, 28 O. G. 191.

"Phrases, or even words in common use, may be adopted for the purpose, if, at the time of their adoption, they were not employed by another to designate the same or similar articles of production or sale." *McLean* v. *Fleming*, 96 U. S. 245.

"Astral" as applied to petroleum in "Pratt's Astral Oil."

"In the first place, I strongly incline to the opinion that the word 'Astral' was without the range of lawful appropriation as a trade-mark for refined petroleum, by reason of the fact that long before it was employed by Charles Pratt, the appellation had been given to an oil-burning lamp well known and in common use." *Pratt Mnfg. Co.* v. *Astral Refining Co.*, 27 Fed. R. 492.

A. But a party must have clearly acquired a prior substantial right in a mark to prevail against one who has subsequently in good faith registered and used for a number of years such mark as a trade-mark, and under it built up a considerable business.

See VIII. 7. 202.
See XVI. 2. 336. *Smith* v. *Reynolds*, 10 Blatchf. 100.
See XIV. 1. B. 293.
See IV. 6. B. 103.
See XVI. 2. 332. *Flint & Walling Mnfg. Co., ex parte*, 85 O. G. 148.

Where a trade-mark is impeached after it has been on the register for ten years, and has been openly and largely used, and there is a doubt as to its validity, the registered proprietor is entitled to the benefit of the doubt. "Tabloid," on compressed drug, held valid although very near the line. *Wellcome* v. *Thompson*, L. R. 1 Ch. 736 (1904).

Complainant, owner of trade-mark "Yusea," registered Feb. 20, 1900, on gas mantles, allowed preliminary injunction against party who had adopted "U-C-A" December, 1899, and registered it Oct. 23, 1900; respondent's mark was so near as to deceive and when registered it was "six months after complainant had expended a large sum of money in advertising its trade-mark 'Yusea' and subsequently to the time that complainants' goods had become popularly known." *Welsbach Light Co.* v. *Adam*, 107 Fed. R. 463.

9. A. The right of a trade-mark is co-extensive with the United States, and courts will protect it throughout the country.

Right to protection from infringement of name "Bissell," as applied to ploughs may be granted as against a corporation in a distant city if the goods compete in the same market. *Bissell Chilled Plow Works* v. *T. M. Bissell Plow Co.*, 121 Fed. R. 357.

Right to use a trade-mark is not limited to territory or in point of time unless so stated; right to use is co-extensive with whole country and perpetual. *Kidd* v. *Johnson*, 100 U. S. 617, 619.

B. But it has been sometimes held that a limited use in a small area does not give a party rights of a trade-mark as against other interests in sections of the country where no deception would be likely to result.

See XIV. 1. A. 291. *Brower* v. *Boulton*, 53 Fed. R. 389.
See IV. 6. B. 103.

"Moreover, the defendant's wares are intended for, shipped to, and circulate in the California market alone, where only recently the plaintiffs have followed them. Of course the latter cannot claim their trade-mark to be prior in time there; they have not monopolized all the markets in the world, and cannot exclude the defendant's ware." *Corwin* v. *Daly*, 7 Bosw. 222.

A party having a good common law right in a trade-mark cannot be deprived of it by the prior use of the mark in foreign commerce. *Sleepy Eye Milling Co.* v. *C. F. Blanke Tea & Coffee Co.*, 85 O. G. 1905.

Previous use of mark by another at same place, or near enough to create a similar right would not prevent subsequent use from showing origin. "The other use might be so far away, or so small, as to have no effect upon the use in question to prevent it from becoming a representation of origin." Plaintiff resided in Philadelphia. Use by another, in a small way, of name on complexion powder (Swan Down) being same kind of goods, in Providence before and at time of plaintiff's use (to whom he subsequently assigned the right), did not defeat plaintiff's right, as nobody would be likely to think that his goods were goods of the other party. *Tetlow* v. *Tappan*, 85 Fed. R. 774.

10. A trade-mark gives one no greater right over the goods to which it is affixed than he had at common law. It may be used by third parties rightfully dealing in the article to which it is affixed.

Plaintiff purchased exclusive right to export water of mineral spring in Hungary to United States under name "Hunyadi Janos." Defendant bought the genuine water in Europe, and sold it in the United States under name "Hunyadi Janos." Held no infringement of name or label, as he was not a party to contract regarding exportation. *Apollinaris Co.* v. *Scherer*, 23 Blatchf. 459.

A contract between plaintiff proprietor of a registered trade-

mark and a vendee whereby goods stamped with the mark are not to be sold at less than a certain figure by vendee cannot in the absence of fraud be enforced in equity against a party who has purchased from vendee and is selling them at a price lower than that fixed in the contract. *Garst* v. *Hall & Lyon Co.*, 179 Mass. 588.

Auctioneers innocently sold eye-water bearing counterfeited trade-marks and signatures. Vendees refused to pay. Held original fraud in counterfeiting trade-marks does not attach itself to the goods in the hands of an owner ignorant of the offence and fasten upon him the qualities of a wrong of which he is innocent. *Rudderow* v. *Huntington*, 3 Sand. 252.

It is not unfair competition for the respondent to purchase in bulk glue from a third party, who in turn has purchased it from complainant under the trade-mark "Le Page," and to bottle it and sell it as "Le Page's Glue" bottled by the respondent. *Russia Cement Co.* v. *Frauenhar*, 133 Fed. R. 518; affirming 126 Fed. R. 228.

Where plaintiff has purchased exclusive right to the use of a trade-mark it was held that he could not enjoin the sale of goods to which the trade-mark had been attached by owner previous to assignment. *Samuel* v. *Berger*, 24 Barb. 163.

Parties contracted with Edison for him to make and them to buy machines invented by him which they designated "Vitascopes," and by consent they were called "Edison Vitascopes;" they did not take all the machines agreed, and Edison sold the balance to reimburse him. Held that purchasers of these machines could designate them "Edison Vitascopes." *Vitascope Co.* v. *U. S. Phonograph Co.*, 83 Fed. R. 30.

A contract between parties that one is to use word "Hygeia," and the other to use the same word in a certain combination is binding between parties and their assigns, and does not need to be recorded as against *bona fide* purchaser, as it is not an assignment of a right. *Waukesha Hygeia Mineral Springs Co.* v. *Hygeia Sparkling Distilled Water Co.*, 63 Fed. R. 438.

But see: An innocent owner of matches made in London in boxes stamped "New Zealand" had to suffer forfeiture in New Zealand under act there against fraudulent trade-marks, etc. *Bell & Co., Ltd.* v. *Commissioner*, L. R. App. Cas. (1902) 563.

11. A. A proprietor should not have more than one trade-mark in the same line of goods in the same market, so as to confuse the public by indiscriminate use of signs.

See III. 1 A. (1). 34. *Beadleston* v. *Cooke Brewing Co.*, 74 Fed. R. 229.

See III. 1 J. 54. *Royal Baking Co.* v. *Sherrell*, 93 N. Y. 331.

See IV. 4. 94. *Jelley, in re*, 51 L. J. Ch. 639.

Complainant filed bill to restrain respondent from suing 13 different brands on toilet paper, "Pacific," "Clover Leaf," "Club," "Standard," "Cabinet," etc., all with one exception apparently used to designate size or quality. Held that such a use of trade-marks was not justified, and that the marks would not be considered as trade-marks. *Albany Perforated Wrapping-Paper Co.* v. *John Hoberg Co.*, 102 Fed. R. 157.

"The principal question which is suggested by the bill and the evidence is whether the manufacturer of a single article has the right to use, and to be protected in the use of, more than one trade-mark for that article. I find little authority upon the subject, and have given to the question much consideration. Upon principle, I think that he cannot. A trade-mark must denote origin. . . . How can that purpose be accomplished, if a manufacturer dealing in a single article used a thousand different trade-marks to designate the article and its origin? Such use necessarily produces confusion, and fails of the single purpose of the trade-mark, — to designate with certainty the origin of the product. *Albany Perforated Wrapping-Paper Co.* v. *John Hoberg Co.*, 102 Fed. R. 157.

"No man can have more than one mark or brand. . . . If the owner could have more than one mark by which to distinguish his property great confusion and uncertainty would be produced to such an extent as to defeat the object in view." *Candee* v. *Deere*, 54 Ill. 439, 457.

"It is further shown by the proof that for the particular grade of flour on which the brand, including the alleged trade-mark 'Columbia' was used, the complainant had at least three other trade-names, such as 'Golden Rod,' 'Best' and 'Superlative,' which were used indiscrimately, and for different sections of the country, with the word 'Columbia.' The quality and process of manufacture were identically the same, and all made from spring wheat, whether one trade-name or the other was used

thereon." This was evidence, that "Columbia" was not used as a trade-mark. *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460, 467.

"As to whether one person or firm can appropriate two or more trade-marks for the same goods in the same commerce, one registered and the other not, we are not prepared to say. The books, so far as we are acquainted with them, furnish no instance of such double marks; and if there can be two, we see no reason why there may not be twenty." *Foster Millburn & Co.* v. *The Blood Balm Co.*, 77 Ga. 216.

Contra: "It is not inconsistent with this that they have also another trade-mark, for a man may have two or three or more trade-marks, which he may put on his goods as he likes. Therefore, the fact that the plaintiffs have a trade-mark consisting of the figure of a wheel and the letters "E. R.", does not militate against their right to the trade-mark in controversy." *Wheeler* v. *Johnston*, L. R. 3 Ir. 284, 295.

(Case of unfair trade.)

B. But where a party uses more than one mark on goods sold in different markets, if not done to deceive, such use is not fraudulent.

"The proof shows that the practice is quite general among stove manufacturers to make a stove for a single dealer in one market by a certain name, and to make the same stove for another dealer in another market, by a different name." Such custom is not fraudulent. *Van Horn* v. *Coogan*, 52 N. J. Eq. 380, 386.

V. GOOD FAITH IN TRADE-MARKS.

1. A sign or label must be used by a proprietor in good faith, so as not to deceive the public, in order to receive protection from the courts; and if it is calculated to deceive the public as to the (A) character, (B) geographical locality, (C) or origin of the goods, the courts will not protect a party seeking relief against infringement.

A. Character.

See III. 1 A. (1), (a). 38. *Birkhead, ex parte*, 97 O. G. 749. XI. 4 A. 251. *Siegert* v. *Gandolfi*, 139 Fed. R. 917. VII. 5, 146, and 6. 147.

"Fruit," on vinegar, deceptive as well as descriptive.

"But whether the word 'fruit,' in this connection is purely indicative of the character or quality of the article or not, the plaintiff's exclusive claim to it must fail on the further ground that the use of the word in that connection is clearly deceptive." *Alden* v. *Gross*, 25 Mo. App. 123, 130.

"American Sardines," on fish which are not sardines, deceptive mark, and not allowed registration. *American Sardine Co.*, 3 O. G. 495.

"This is upon the ancient and familiar principles that those who do iniquity must not ask nor expect equity. It is worthy of all acceptation; it is a hoary maxim hallowed by its age, and unlike some other sacred antiquities, as yet unassailed by the spirit of change or reckless progress. I adhere to it." *Blackwell* v. *Armistead*, 3 Hughes, 163, 169.

"Malt Myrrh," not registrable as a trade-mark for malt liquors which do not in fact contain myrrh. *Barrett & Barrett, ex parte*, 100 O. G. 1976.

"Syrup of Figs," applied to a laxative preparation which contains only a suspicion of fig syrup and which by advertisements and labels represents it to be what the name proclaims it is, deceitful and will not be protected as against another who for the purpose of getting advantage of advertisements uses that name. *California Fig Syrup Co.* v. *Frederick Stearns & Co.*, 73 Fed. R. 812; affirming 67 Fed. R. 1008.

The complainant not entitled to relief, the alleged trade-mark being deceptive. *California Fig Syrup Co.* v. *Putnam*, 69 Fed. R. 740; affirming 66 Fed. R. 750.

"We cease to smile when we remember that the plaintiff, who boldly claims the aid of a court of equity, is filling his pockets by abusing the credulity of the young, the inexperienced, the weak and the ignorant, and that he resorts to misrepresentation and falsehood to induce those to purchase who would not otherwise buy, and those who buy to give a higher price than they would otherwise pay. If this is not deceiving and defrauding the public, what is?"

"Balm of Thousand Flowers," ou ordinary soap, deceitful. *Fetridge* v. *Wells*, 13 How. Pr. 385.

Contra: (Same name might be held arbitrary and protected. *Fetridge* v. *Merchant*, 4 Abb. Pr. 156.)

"Balm of Thousand Flowers," a fancy name, and not a false representation.

"'Medicated Mexican Balm,' had nothing in its composition peculiar to the land of Montezuma, 6 Beav. 66; and 'Chinese Liniment,' was, in all its ingredients, a stranger to the Celestial Empire, 4 McLean 516." *Fetridge* v. *Merchant*, 4 Abb. Pr. 156.

No principles are better settled in the law of trade-marks than that the use of a name or term which is likely to deceive the public in reference to the components or nature of the article to which it is applied, will not be tolerated. *Ginter* v. *Kinney Tobacco Co.*, 12 Fed. R. 782.

A party who uses on cigarettes a label on which was printed "guaranteed hand made," when in fact they were not hand made, but were machine made, is, although the tobacco is not inferior and the goods were of as good quality as hand made, guilty of an offence toward the act against "false trade description." *Kirshenboim* v. *Salmon*, L. R. 2 Q. B. (1898) 19.

A false representation on a trade-mark that article is patented when it is not, and that the article is tanned leather cloth when it is untanned, is sufficient to justify denial of injunction. *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 Jur. N. S. 513, etc.

"Bromo," used on a drug in conjunction with "Quinine," so as to read "Bromo Quinine," with the intention of leading the public to believe that there was bromine in the preparation, when there was not, fraudulent and will not justify injunction against use of "Bromide Quinine," by respondent. *Paris Medicine Co.* v. *W. H. Hill Co.*, 102 Fed. R. 148.

"One defence set up by the defendants is, in fact, a *quasi* admission that they were simulating the trade-mark of the plaintiffs, but that the plaintiffs were simulating the trade-mark of Palmer, and therefore could not complain of them. It is a plea of confession and avoidance, but it still would be a good plea if sustained by the proof; for if the evidence does show that the plaintiffs were committing, by the use of their trade-mark, a fraud on Palmer, they are in no condition to complain of the defendants' fraud on them." *Parlett* v. *Guggenheimer*, 67 Md. 542.

"The rule is well settled that the party claiming protection against the fraudulent conduct of another, must himself be free from the imputation of fraud. There is a third reason why this motion should not be granted. A comparison of plaintiffs' label with that used on the brand of cigars known as the 'Henry Clay,' cigar, will make it plain that the plaintiffs' label is as close an imitation of the 'Henry Clay,' label as the defendants' is of the plaintiffs'." *Schumacher* v. *Schwenke*, 36 O. G. 457.

Representations in circulars that plasters were of a certain vegetable compound of great value discovered by celebrated chemist and that remedy was called *capcine* when in fact there was no such article in chemistry or medicine, are false, and there can be no trade-mark in word "Capcine" in "Benson's Capcine Plasters," prepared by complainant. *Seabury* v. *Grosvenor*, 14 Blatchf. 262.

"Angostura bitters," put up in bottles so labelled and the labels representing that it was prepared by Dr. Siegert, formerly of Angostura, then at Port of Spain, whereas Dr. Siegert had been dead some years and had never lived in Port of Spain, false representations and did not entitle plaintiffs to decree against infringers. Court did not agree with English court that it did not find false representations. *Siegert* v. *Abbott*, 61 Md. 276. *Contra: Siegert* v. *Findlater*, 7 Ch. D. 801; V. 7. 132.

"The only plausible defence arises from the allegation of the defendant, that the plaintiffs are as wicked as he is, in that they attempt to impose upon and defraud the public, while he attempts only to defraud the plaintiffs. The justice and morality of this defence is not very high, in the present instance; but this rule of law or equity has been recognized in several cases, and must be followed if the case is brought within its application." *Smith* v. *Woodruff*, 48 Barb. 438.

"Syrup of Figs," used on a medicinal compound of which the

laxative ingredient is senna, with only a suspicion of fig juice to give a weak support to the statement that it is syrup of figs, deceptive, and the proprietors being engaged in a fraud on the public are not entitled to injunction against infringement. *Worden* v. *California Fig Syrup Co.*, 187 U. S. 516; reversing 86 Fed. R. 212; 95 Fed. R. 132, 102 Fed. R. 334.

Contra: "Syrup of Figs," on a medicinal preparation, is not descriptive, and while not strictly correct in its application there being no attempt to practise fraud or impose on the public, it is not deceitful so far as to justify refusal of injunction against infringement. *Improved Fig Syrup Co.* v. *California Fig Syrup Co.*, 54 Fed. R. 175; affirming 51 Fed. R. 296.

B. Geographical locality.

See V. C. 122. *Perry* v. *Truefit*, 6 Beav. 66. V. C. 122. *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218.

"Old Country Soap," used on soap and set out in advertisements so as to lead people to believe that it is made in the old country when it is made in Chicago, deceptive. *Allen B. Wrisley Co.* v. *Iowa Soap Co.*, 104 Fed. R. 548.

"This is a bill in equity to restrain the defendant from infringing upon an exclusive right claimed by the plaintiffs in the words 'East Indian,' used, together with the word 'remedy' or 'remedies,' as a trade-mark upon bottles of medicine. . . . But the conclusive answer to this suit is, that the Master has found, upon evidence which appears to us to be satisfactory, that the plaintiffs have adopted and used these words to denote and to indicate to the public that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which is the fact. Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public." *Connell* v. *Reed*, 128 Mass. 477; 35 Am. R. 397.

"Were I to admit the word 'Lancaster,' to be an essential feature of the mark, the case would then seem to be open to the further objection that the use of such word would convey a false impression to the public — viz: that the goods were manufactured in Lancaster, when, in fact, they were made in Philadelphia, and that any one making like goods in Lancaster might obtain an injunction against the use of such word by parties manufacturing elsewhere. . . . Words calculated to deceive the public as to the place of manufacture should not be allowed registration." *Farnum & Co., ex parte*, 18 O. G. 412.

Plaintiff made what he called on labels "The Celebrated Chinese Skin Powder"; labels also said it was "Patronized by her Majesty the Queen," and that proprietor was sole agent in United States. It was in fact put up in New York. Injunction refused. *Hobbs* v. *Francais*, 19 How. Pr. 567.

"The plaintiff is seeking to enjoin the defendant from using a trade-mark which he himself is not, in equity or good conscience, entitled to use, because it is a fraud upon the public. The evident purpose of the defendant's [plaintiff's, probably] stamp upon the razor and his advertisement and label, as the court below said, were 'to cause the purchasing public to believe that these razors are manufactured by a firm known as the "Queen's Own Co.," and in Sheffield, England,' when in point of fact he did not know where they were manufactured, nor by whom. The positive assertion of a thing not known to be true is as reprehensible as the assertion of a thing which is known to be untrue." *Joseph* v. *Macowsky*, 96 Calif. 518.

"From these statements the casual reader of them would certainly understand that there was a kind of tea in *China* called 'He-No Tea,' and that this tea was the kind the Chinese drank, and that this very tea the appellees imported direct from China, and was by them guaranteed to be the pure and genuine article. We were so impressed and believed, until we knew the contrary; and we do not think the most scrutinizing reader would ever imagine it to be a tea compounded of several varieties in the City of Baltimore, as the evidence clearly and undeniably shows it to be prepared in the house of the appellees, and that it was not imported, as sold, from China." Protection refused. *Kenney* v. *Gillet*, 70 Md. 574.

Label bearing name "Golden Crown," and underneath "L. P." and under that "Habana," representing that cigars were product of Cuban factory in Havana, false, and not entitled to protection as trade-mark. *Palmer* v. *Harris*, 60 Penn. 156.

"The whole purpose of the manufacturer was evidently to lead the public to believe that the cigar was made of that tobacco which is so much sought after and preferred by the smoking public. Yet it was not wholly true. The plaintiff admitted that the cigars sold under that brand were made of Havana filler, seed binder and Sumatra wrapper. Nothing but the filler came legitimately within the definition of Havana tobacco. . . . Such a course is in contravention of the principles observed by courts of equity in the administration of this branch of the law.

. . . Judged by these rules, as they have been communicated and applied, this case had no standing in court, and the bill was properly dismissed." *Solis Cigar Co.* v. *Pozo*, 16 Colo. 388.

A proprietor who fraudulently represents by plates, circulars, and booklets that his whiskey, under the name of "Parker Bourbon," "Old Parker Rye," etc., is manufactured in Nelson County, Kentucky, when it is not, will not be entitled to protection in a court of equity. *Uri* v. *Hirsch*, 123 Fed. R. 568.

C. Origin.

See cases X. 5. 233. See cases X. 6 A. 234.

"Knights of Labor," as a trade-mark on whiskey, held to be deceitful, as it was intended and designed to lead people to believe that it was a mark of a product of the labor organization. *Bloch & Co., ex parte*, 40 O. G. 443.

Registration of red cross on black ground in diamond-shaped border and accompanied by words "Red Cross" for medicinal compound refused, since it might lead the public to believe that the goods had the sanction or endorsement of the Red Cross Society. *Chichester Chemical Co., ex parte*, 52 O. G. 1061. *Contra: E. & A. H. Batcheller Co., ex parte*, 85 O. G. 1583; H. 1 F. 17.

"If what the plaintiff states upon the wrappers of his bottles containing the medicine, and which has been hereinbefore set forth is remembered, it will appear, as has also been stated, that he undertakes to sell his compound, not only under the name and alleged trade-marks which Henry T. Helmbold formerly used, and which he still claims to use under and through the corporation with which he is now connected, but upon a representation that said Helmbold superintends, personally, its manufacture, and by his own signature certifies to the genuineness of each bottle. This clearly and confessedly is false, and the plaintiff is entitled to no protection in a business carried on by means of untrue representations and statements." *Helmbold* v. *Henry T. Helmbold Mnfg. Co.*, 53 How. Pr. 453, 457.

Fac-simile of certificate issued by State Board of Pharmacy to registered pharmacists not registrable as a trade-mark for cigars. Registered pharmacists might desire to use them, or the use by applicant might lead purchaser to believe that cigars were approved or guaranteed by the Board of Pharmacy. *Kuppenheimer Brothers, ex parte*, 60 O. G. 439.

"A court of equity will extend no aid to sustain a claim to a

trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were original circumstances to guide the purchaser of the medicine. . . . It is not honest to state that a medicine is manufactured by Moses Atwood, of Georgetown, Massachusetts, when it is manufactured by the Manhattan Medicine Company of New York." *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218, 222.

"I do not think it is a favorable case for the interposition of this Court, to say the least of it, when a party, having bought a secret invented by a Mr. Leathart, represents to his customers and the world that his 'admirable composition is made from an original recipe of the learned Von Blumenbach, and was recently presented to the proprietor by a very near relation of that illustrious physiologist.' The Plaintiff states also a circumstance, not in the least degree supported by evidence, that the composition is formed of a vegetable balsamic production from Mexico." Protection refused. "Medicated Mexican Balm," for hair oil claimed as trade-mark. *Perry* v. *Truefit*, 6 Beav. 66.

"Any material misrepresentation in a label or trade-mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. . . . And although the false article is as good as the true one, 'the privilege of deceiving the public, even for its own benefit, is not a legitimate subject of commerce.'" *Prince Mnfg. Co.* v. *Prince's Metallic Paint Co.*, 135 N. Y. 24, 38, 39.

Labels representing that baking powder was prepared only by "Austin, Marshall, Hall & Co., Purveyors by appointment to Her Majesty, 181 Tottenham Court Road, London, & New Cross, Surrey," when it was made by a different firm, in New York, a falsehood which the courts would not sustain. "It was adapted and intended to deceive the public. Under such circumstances, no right arises which the law will countenance. Courts will not lend their aid to protect imposition and falsehood." *Raymond* v. *Royal Baking Powder Co.*, 85 Fed. R. 231.

"Masonic" not registrable as a trade-mark for cigars, as it would connect them with the order. "The words 'Presbyterian,' 'Methodist,' or 'Roman Catholic,' used as trade-marks for cigars, would stand on the same footing. Such words are not registrable as trade-marks." *Smith, ex parte*, 16 O. G. 764.

Symbol of a red Greek cross refused registration for bitters, as it would be liable to create impression that the article marked was manufactured or its use sanctioned by the Red Cross Society. *Zwack & Co., ex parte,* 76 O. G. 1855. *Contra: E. & A. H. Batcheller Co., ex parte,* 85 O. G. 1583; II. 1 F. 17.

2. A trade-mark should be a certificate of genuineness of the goods to which it is affixed.

See IV. 2. 88. *Apollinaris Co.* v. *Scherer,* 27 Fed. R. 18.

"The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer." *Amoskeag Mnfg. Co.* v. *Trainer,* 101 U. S. 51, 53.

"It must not be overlooked, however, in these exclusions, that a trade-mark is indirectly the guaranty of the quality of an article to which it is attached, as well as of its origin and ownership, for in all cases the trade-mark, in indicating the origin, by necessary implication represents the quality of the article which is the true source of its reputation in the market." *Avery* v. *Meikle,* 81 Ky. 73, 86.

"It has, indeed, been likened to his business autograph." *Cigar Makers' Protective Union* v. *Conhaim,* 40 Minn. 243, 245.

"A trade-mark has been very well defined as one's commercial signature to his goods." *Leidersdorf* v. *Flint,* 8 Biss. 327, 330.

"La Favorita," on flour. "It was equivalent to the signature of Holt & Co., to a certificate that the flour was the genuine article which had been determined by them to possess a certain degree of excellence." *Menendez* v. *Holt,* 128 U. S. 514, 520.

"The trade-mark brands the goods as genuine, just as the signature to a letter stamps it as authentic." *Shaw Stocking Co.* v. *Mack,* 12 Fed. R. 707, 711.

3. The use of a trade-mark by a proprietor on goods of a different origin from what it has formerly designated is a fraud on the public, and the courts will treat it as a deceptive mark.

See IV. 2. 88; XI. 10. 264.

Where complainant alleges that the public are deceived by use of name Pettijohn, which has become associated with product of mill in Minneapolis, injunction would not be granted where

it appears that said mill has been burnt down, and customers are supplied with product from Akron, Ohio, although that product may be just as good. *American Cereal Co.* v. *Eli Pettijohn Cereal Co.*, 72 Fed. R. 903. Aff'd 76 Fed. R. 372.

A contract between plaintiff and defendant for the sale and purchase of a quantity of empty papers or bags for seeds, with the plaintiff's labels thereon, to be filled with seeds by the purchaser, and the seeds thus put up to be offered for sale by the purchaser of such papers where such sale would amount to infringement, held to be void. *Bloss* v. *Bloomer*, 23 Barb. 604.

"But if it be a crime to counterfeit labels, words or devices previously appropriated to distinguish property, or to vend goods thus stamped, without disclosing the fact to the purchaser, it is equally an offence against the spirit of the law, equally injurious to trade or commerce, and equally an imposition upon the public to palm off spurious goods under cover of genuine labels and devices." *Bloss* v. *Bloomer*, 23 Barb. 604, 610.

When party sells oil not made for him under his regular trade-mark "Insurance Oil," which he has used on oils made for him, and under his directions it is reprehensible; but if done in only a few instances and then when delay in shipments had arisen it is not sufficient to invalidate the mark. *Insurance Oil Tank Co.* v. *Scott*, 33 La. Ann. 946.

Protection refused a trade-mark of a shield on a label accompanied by the words "Old Pepper Whiskey," and "Consumers should satisfy themselves that the whiskey is distilled by Jas. E. Pepper & Co.," "This whiskey is distilled under the same formula and process used by the grandfather and father of our Mr. Jas. E. Pepper more than one hundred years ago," when such statements were false, in that 35 per cent of the whiskey was foreign and not Pepper whiskey. *Krauss* v. *Jos. R. Peebles' Sons Co.*, 58 Fed. R. 585.

Complainant who in good faith had built up business in manufacture and sale of shoes under trade-mark "Delsarte," entitled to protection against party who after using it for several years as applied to especially selected shoes gave an order for general manufacture and thus changed its original signification. *Medlar & Holmes Shoe Co.* v. *Delsarte Mnfg. Co.*, 46 Atl. 1089.

Plaintiff's acquiescence in defendant's use of name "Nolan Bros." for 10 years in a wholesale shoe business does not preclude him from objecting to its use in a retail shoe business, since mere use of trade-name in one business does not give the

right to use it in another business. *Nolan Bros. Shoe Co.* v. *Nolan*, 63 Pacif. 480; 131 Calif. 271.

Plaintiff had adopted mark "Prince's Metallic Paint" on paint manufactured from iron of a certain mine. Later he applied it to paint from a different ore. Held, a fraud which prevented him from obtaining relief against infringement. *Prince Mufg. Co.* v. *Prince's Metallic Paint Co.*, 135 N. Y. 24.

The government contracted with the Gun Powder Company to furnish a certain amount of gunpowder. The factory blew up and the company imported as good powder from Germany and put it in barrels with its own label and trade-mark. There was no contract that the gunpowder should be of its own manufacture. The government accepted it and did not complain of the quality. It was held to be a false trade description. The trade-mark had come to mean that the goods were manufactured by the company. It had no right to misapply it to the goods manufactured by others, and was liable to conviction for false trade description. *Starey* v. *Chilworth Gun Powder Co.*, L. R. 24 Q. B. D. 90.

Party should not apply the same trade-mark to different kinds and qualities of goods, nor should he apply different names to the same kind or quality of goods. "Portland" stove different from "Canopy" stove. *Van Horn* v. *Coogan*, 52 N. J. Eq. 380.

But see: Complainant had for several years been engaged in a pool of companies supplying scythe-stones under names "Quinnebog," "Star," "Western Red End," etc., but subsequently acquired sole right to the use of the names, and for two or three years had been the only party using the names. Held, that there had not been such a confusion or indiscriminate use of the names as to deprive complainant of right to injunction. *Cleveland Stone Co.* v. *Wallace*, 52 Fed. R. 431.

A. But it has been held that misuse may not entitle another party having an interest in the same mark to an injunction against the wrongdoer, as it is a public wrong for which no private suit will lie.

See VIII. 1 A. (3). 154 (A.).

"The court, however, cannot compel such nicety or fulness of expression or go into the business of arranging the language in which merchants shall place their goods upon the market. An absolutely false statement may, in certain circumstances, be restrained, but it is beyond the power of a court of equity to

compel commercial men to tell all they know about their goods. There is not the slightest proof that the defendant has tried to deceive the public or palm off its goods as those of the complainant. . . . In controversies like the present it is much wiser to leave the decision to the sure and just arbitrament of public opinion. No man who unfairly describes his goods can long succeed. He cannot advertise one article and sell another and an inferior article without being detected. The public will surely find him out. Confidence in the man is gone, and loss of business is sure to follow. This record shows that both parties were ascribing to their own manufactures unusual and peculiar merits, but I cannot think that in this competition the defendant has been guilty of fraudulent and dishonest practices." Both advertised their nails as "hammer-pointed," when strictly they were not. *Putnam Nail Co.* v. *Ausable Horsenail Co.*, 53 Fed. R. 390, 392, 394.

If a party has a right to use a trade name or trade-mark in his business to designate machines made by him as it is so known and understood, he has a right so far as others claiming same trade-name or trade-mark to use it on machines made by others and bought by him. *Rogers* v. *Taintor*, 97 Mass. 291.

4. A sign contrary to good morals and public policy is not a valid trade-mark.

See XVI. 2. 337. *Standard Fashion Co., ex parte,* 89 O. G. 189.
See XVI. 2. 330. *Ball, ex parte,* 98 O. G. 2366. II. 1 F. 18. *King, ex parte,* 46 O. G. 119. III. 3 B. 78.

The coat of arms of the United States is not registrable as a trade-mark even under the "ten year" clause. *American Glue Co., ex parte,* 120 O. G. 324.

A simulation of the shield of the United States with alternate red and white stripes, not registrable as trade-mark, it being contrary to public policy. *Brandsville Fruit Farm Co., ex parte,* 103 O. G. 660.

The coat of arms of Maryland not registrable as a trade-mark even under the "ten year" clause. *Cahn, Belt & Co., ex parte,* 118 O. G. 1936.

Applicant sought to register two trade-marks for flour, one for each of his two establishments, combined with a masonic emblem, square and compass; held, against public policy to allow the emblem as a trade-mark. *Tolle's Appeal,* 2 O. G. 415.

A simulation of the coat of arms of the United States cannot be registered as a trade-mark. *William Conners Paint Mnfg. Co., ex parte*, 119 O. G. 2522.

But see: "There is nothing in law or in public policy opposed to the registration of Masonic or other society symbols as trade-marks." *Thomas Appeal*, 14 O. G. 821; overruling *Tolle's Appeal.*

5. But the use of a fictitious name as a trade-mark may not be such a deception as would disentitle the proprietor to relief in case of infringement.

Fact that fictitious person's name is on trade-mark no defence to infringer, the trade-mark not used with fraudulent intent and not in fact deceptive.

Thomas Nelson Dale protected in use of label "Courtria Flax, Thomas Nelson & Co., warranted. Fast colors and sixteen ounces." *Dale* v. *Smithson*, 12 Abb. Pr. 237.

Representation that name of manufacturers on thread trade-marks is fictitious no defence in an application for injunction against infringement. *Stewart* v. *Smithson*, 1 Hilt. 119.

6. A. A collateral false representation not on the face of a trade-mark, but embodied in circulars, labels, or advertisements, may be considered so far material as to disentitle the party to relief.

See V. 1 B. 121. *Uri* v. *Hirsch*, 123 Fed. R. 568. VII. 5. 146.

"Puddine," name for pudding represented on packages as being "fruit" puddine, and a picture of pears, grapes, etc., prominently displayed, when it did not contain any fruit, but only corn starch, saccharine matter, flavoring extract, and coloring matter, refused protection by preliminary injunctions. *Clotworthy* v. *Schepp*, 42 Fed. R. 62.

Complainant brought bill against respondent to restrain him from unfair competition in use of name Hoffman, and in advertisements and labels on cigars. Held, that while there would have been unfair competition, yet the complainant lost right to injunction by placing an advertisement in boxes saying, "We use only the very best grades of Havana tobacco. . . . We manufacture only genuine Havana cigars. . . . Our cigars are guaranteed only choice Havana tobacco, and not American tobaccos raised from

Spanish seed," when in fact inferior grades of tobacco were used, and not all Havana tobacco. *Hilson* v. *Foster*, 80 Fed. R. 896.

"It is, indeed, said that the court cannot take notice of the contents or statements of the complainant's statement in the patent office, because it was neither set up in the bill, nor put in evidence. However, it seems to have come into the case as an exhibit attached to one of the complainant's affidavits used on a motion for a preliminary injunction; and, as the correctness of the copy is not denied, we think that the court below, where it had been read on the preliminary argument, might legitimately refer to it at the final hearing." *Kohler Mnfg. Co.* v. *Beshore*, 59 Fed. R. 572, 576.

"If one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public, and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers. To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when in fact it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance." *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218, 223.

Plaintiff brought tea from China and compounded it in England, representing it to be very fine tea even in China, grown in a certain province and not purchasable in England, and made especially for Howgua, a Chinese merchant. It was, in fact, a cheap imitation. Court refused injunction on ground of false representation till title had been tried at law. *Pidding* v. *How*, 8 Sim. 477.

"The evidence is clear that the plaintiffs were systematically and knowingly carrying on a fraudulent trade. Although they may have omitted the fraudulent and deceptive and untrue language from their circulars before this suit was commenced, yet if they have any property in the trade-mark which they claim the title to, they acquired such property by the use, for a considerable time, of such language in the circulars which accompanied the articles they sold, and in respect of which the trade-mark is claimed. . . . Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark, ac-

quired by advertising their wares under such representations as those cited, if they are false. It is shown that there is no such article as Capcine known in chemistry, or medicine, or otherwise. The authorities are clear that, in a case of this description, a plaintiff loses his right to claim the assistance of a court of equity." *Seabury* v. *Grosvenor*, 14 Blatchf. 262.

"Angostura Bitters," put up in bottles so labelled and the labels representing that the contents were prepared by Dr. Siegert, formerly at Angostura, then at Port of Spain, when Dr. Siegert had been dead some years and had never lived in Port of Spain, false representations disentitling plaintiffs to decree against infringement. *Siegert* v. *Abbott*, 61 Md. 276. *Contra: Siegert* v. *Findlater*, 7 Ch. D. 801.

B. And the court may not consider the character of the goods sold if they are not against public policy, as in the case of medicines and drugs.

Defendant claimed that plaintiff's "Mrs. Winslow's Soothing Syrup," was injurious; court held that defence could not be made after twenty-five years of success by plaintiff, and attempt to imitate was not consistent. *Curtis* v. *Bryan*, 36 How. Pr. 33.

"Balm of Thousand Flowers," on a cosmetic, although it may be intended to impose on the credulity of the public, may still be entitled to relief if another attempts to pirate good-will by adopting same name. *Fetridge* v. *Merchant*, 4 Abb. Pr. 156.

"I do not mean to say that I have any sort of respect for this sort of medicines. I have none; but the law protects persons from fraudulent misrepresentations; and this is a species of property which the law does allow; and, so long as the law recognizes it, it must be protected, and persons in the situation of the defendant will not be allowed to practise a fraud like that here complained of." *Holloway* v. *Holloway*, 13 Beav. 209, 213.

"It does not appear that the supreme court of the United States has, in any reported case, expressed an opinion on the right of owners of so-called patent medicines to protection by injunction. The reports do show that that court has dealt with trade-mark cases, in which proprietary medicines, whose composition was not disclosed, were involved, without condemning them as unfit to receive the protection of courts of equity." *Kohler Mnfg. Co.* v. *Beshore*, 59 Fed. R. 572.

"Much of the evidence in the case taken on behalf of the

appellant was for the purpose of showing that the appellee's preparation is a quack medicine and an alcoholic stimulant, and therefore not entitled to the protection of a court of equity. . . . It is one upon which the experts differ. It is enough to advert to the fact that the preparation purports to be a general tonic, and as such efficacious in restoring strength to those weakened by various ailments, and that it has become widely known and largely manufactured and used, and that it has a commercial value." *Samuel Bros. & Co.* v. *Hostetter Co.*, 118 Fed. R. 257, 260.

Where there are no laws making it unlawful for the public to deal in medicinal preparations, courts will not refuse to protect parties in such property. *Worden* v. *California Fig Syrup Co.*, 187 U. S. 516.

7. The court takes a liberal view of the construction of representations regarding the goods, and is not disposed to give them the strictest interpretation.

Complainants as partners used the name Standard Distilling Company; not such a fraud as to debar them of protection in case of infringement. *Block* v. *Standard Distilling and Distributing Co.*, 95 Fed. R. 978.

Representation that an article is "pure old rye whiskey," bearing one stamp, not false, although it is diluted, the undiluted bearing two stamps. *Cahn* v. *Gottschalk*, 2 N. Y. Supp. 13.

A representation on a box cover for spools of thread, "Manufactory Established in 1812," although not strictly true, is not fraudulent; or the word "Paisley," where only a small shipment came from "Paisley, Scotland;" or a statement that the thread was "sold everywhere," since the last was only trade-talk. Such representations were made in a limited space and were not calculated to deceive the public, which would be likely to understand them. *Clark Thread Co.* v. *Armitage*, 67 Fed. R. 896.

Complainant represented scythe-stones to be from "Willow Creek Quarry," "Green Farm Quarry," "Pt. au Barques Quarry," etc., and "from selected Huron Grit," and "from the best Blue Huron Grit." Although they came from the same quarry, yet there was no deceit, as the quality of the stone was not misrepresented and the complainant had a right to apply arbitrary names to subdivisions of the same quarry. *Cleveland Stone Co.* v. *Wallace*, 52 Fed. R. 431.

"It is contended that the law can afford no protection to

plaintiff, because his so-called trade-mark or label was in itself a misrepresentation. This beer, it is said, was not Budweiser beer. That it was not Budweiser beer, in the sense that it was not made in Budweis, is true. Neither was it imported beer. But it does not appear that it was held out to the public, either as actually made in Budweis or as a foreign article. The statement on the label explains that it was not made at Budweis, but by the Budweiser process. . . . If this was not literally true, the testimony is that it was a distinction without a difference. . . . There was no testimony tending to show any imposition upon the public by plaintiff." *Conrad* v. *Joseph Uhrig Brewing Co.*, 8 Mo. App. 277, 283.

Where there is a statement that "Castoria," is a purely vegetable compound, and it is not, and an accompanying formula clearly shows that it has chemical ingredients, it is not such a fraud as will disentitle a party to relief on ground of unfair trade. *Centaur Co.* v. *Robinson*, 91 Fed. R. 889.

The fact that the complainant manufactures a preparation called "Carlsbad Sprudel Lozenges," containing only ten per cent of Carlsbad mineral water and ninety per cent cane sugar not a deceit disentitling it to relief, as a lozenge is a confection. *City of Carlsbad* v. *Hutnow*, 71 Fed. R. 167; affirming 68 Fed. R. 794.

Where label stated article was prepared by "Jos. Dixon & Co.," and it was in fact prepared by Jos. Dixon Crucible Co., there was no false representation, the former having for many years prepared it, and the latter being his successor. *Dixon Crucible Co.* v. *Guggenheim*, 2 Brewst. 321.

Where one manufactured asphalt in New York using eighty per cent of material quarried in the Duchy of Brunswick, Germany, he was entitled to sell it under the name of "Brunswick Rock Asphalt," as against one manufacturing same article in the Duchy.

A geographical name may be in good faith used in the sale of an article whose principal value consists of the name of the place from which its principal ingredient comes. *Gabriel* v. *Sicilian Asphalt Paving Co.*, 52 N. Y. Supp. 722. Aff'd 56 N. Y. Supp. 30.

A label on cigarette papers containing words "Gluckman & Son, Sole Manufacturers, Paris," when they did not have a factory there, but the paper was especially and exclusively made for them there, is not fraudulent, and infringement will be enjoined. *Gluckman* v. *Strauch*, 99 N. Y. App. Div. 361.

"It is not questioned that their brandy is a genuine article, just what it purports to be; and while in their complaint the bottles are described as quart and pint bottles, they appear to be of the ordinary sizes used in the liquor trade; and I think we may assume that the brandy in them is sold by the bottle, and not in reference to measure. Any one purchasing knows just what he is purchasing, and the price is regulated by the size of the bottles. . . . This is, therefore, not a case where it can be said that plaintiffs came into court with unclean hands and guilty consciences, and must therefore be denied equitable relief." *Hennessy* v. *Wheeler*, 69 N. Y. 271; 25 Am. Rep. 188.

Complainant under a patent made and sold nails as "hot-forged and hammer-pointed." Respondent, manufacturing under an expired patented process, made and sold nails as "hot-forged and hammer-pointed." Respondent had long before complainant used the expression "hammer-pointed." Held, that although the expression was not strictly correct, yet there was no apparent fraud; bill dismissed. *Putnam Nail Co.* v. *Ausable Horsenail Co.*, 53 Fed. R. 390.

English case showed that the representations were not considered material. The label was as follows:

AROMATIC BITTERS
and
ANGOSTURA BITTERS
Prepared by Dr. Siegert at Angostura.
(*Now at Port of Spain, Trinidad.*)

"I cannot see that there is in fact anything in that wrapper amounting to a fraudulent misrepresentation by reason of which I ought to debar the plaintiffs from any right they would otherwise have." Court considered *Ford* v. *Foster*, L. R. 7 Ch. 611 applicable. Collateral misrepresentations. *Siegert* v. *Findlater*, 7 Ch. D. 801. *Contra: Siegert* v. *Abbott*, 61 Md. 276; V. 1 A.

"According to the view which the court takes of the case, the only question deserving of serious consideration is whether the complainant is not precluded from obtaining equitable relief by certain representations which it makes to the public concerning the manufacture of its own liquor. It is claimed by the defendant that the *société*, by its labels, seals, advertisements, etc., represents that the Benedictine by it sold is manufactured by Benedictine monks, and, if this contention is sustained by the evidence, it must be conceded that complainant is without right to equitable relief. . . . Evidently the phrase, 'Liquor of the

Benedictine Monks,' etc., is one that may be interpreted in several ways without doing violence to the ordinary use of language; and I am of the opinion that people of ordinary intelligence would generally regard it as a representation that the liquor in question is compounded according to a formula invented or heretofore used by the monks of the abbey of Fecamp, rather than as a representation that the monks of that abbey are still engaged in the manufacture, and that the article is of their production." *Société Anonyme* v. *Western Distilling Co.*, 43 Fed. R. 416, 418.

"Nor do we find that complainant is disentitled to relief in equity by reason of any false representations in its own labels as to the place of origin of the extract it sells. Some of the statements they contain, survivals from the older labels, are not now strictly accurate, notably the words, 'Moritz Fisher, Sole Agent for United States of America,' but they are immaterial. The labels certainly contain no statement that the extract is made in Germany, while the record shows that complainant has been to no inconsiderable expense to advertise its new industry of manufacturing the Johann Hoff's Malt Extract in this country. The criticism that its label states that there is such a factory and brewery in New York when complainant's is at Newark, is too trivial to merit discussion." *Tarrant & Co.* v. *Johann Hoff*, 76 Fed. R. 959, 961.

8. The use by a proprietor of the name of a jobber or dealer in connection with a trade-mark is not deceitful.

"In doing this no real deceit was practised upon the public, because the purchaser obtained the same goods which he would have purchased if the name of the jobber had not been upon them."

Manufacturers of scythe-stones sometimes put on labels bearing their brands the names of jobbers to whom they sold stones. *A. F. Pike Mnfg. Co.* v. *Cleveland Stone Co.*, 35 Fed. R. 896.

Where boxes of cigars are stamped as made at the Elk Factory, which is true, it is not fraud to put upon the box, in accordance with custom of the trade, an additional label of the dealer. *Lichtenstein* v. *Goldsmith*, 37 Fed. R. 359.

VI. PARTNERSHIP.

1. A trade-mark of a partnership business is classed among the assets of the partnership, to be owned jointly by the partners, and subject to the same rules as other property.

See X. 1 A. (1). 220. *Morgan* v. *Rogers*, 26 O. G. 1113.
See X. 2 A. 227. *Edelsten* v. *Vick*, 23 Eng. L. & Eq. 51.

A member of a mutual partnership acting as superintendent, although he may have originated the words "Grand Master" applied to cigars and used by the company as a trade-mark, does not by the fact of such adoption, and use in their employ, and as a member of the partnership, derive such title to its mark as would enable him to register the mark and claim it as his own. *C. A. Yale Cigar Mfg. Co., Ltd.*, v. *C. A. Yale*, 30 O. G. 1183.

"In holding that it is necessary to the validity of a trade-mark that the claimant of it must be entitled to an exclusive right to it, or property in it, we do not mean to say that it may not belong to more than one person, to be enjoyed jointly or severally. Copartners, upon a dissolution of partnership, may stipulate that each of them may use the trade-marks of the firm, and there may be many other cases of joint and several ownership; but such co-owners will together be entitled to the exclusive use of the trade-mark, and perhaps each of them will be entitled to such exclusive use as to all other persons except their associates in ownership." *N. Y. Cement Co.* v. *Coplay Cement Co.*, 45 Fed. R. 212.

A. On dissolution of partnership by death or otherwise.

(1) It may be sold with the other assets in winding up the business, it not passing to survivor.

By partnership articles it was provided that, on the death of a partner, the survivor should have the option of taking the partnership stock on paying to the personal representatives of the deceased partner the value of his share. Held, that the good-will of the business, and also a trade-mark which had been used by the partnership, ought to be included in the valuation. *Hall* v.

Barrows, 9 L. T. N. S. 561; 33 L. J. Ch. N. S. 204; 10 Jur. N. S. 55; 4 De G. J. & S. 150.

"It is, I apprehend, a well-settled rule, that the good-will of a partnership business does not survive to a continuing partner. It belongs to the firm as much as the ordinary stock in trade, and must be disposed of in some manner for the benefit of the firm." *Howe* v. *Searing*, 6 Bosw. 354; 10 Abb. Pr. 264; 19 How. Pr. 14.

"The good-will of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a Court of Equity." *Wedderburn* v. *Wedderburn*, 22 Beav. 84; 25 L. J. Ch. 710; 2 Jur. N. S. 674; 28 L. T. 4.

"It has been a matter of some debate and contrariety of decision by the courts, whether one surviving partner, after the death of the other, succeeds to the good-will of the firm; the better opinion now being that he does not." *Young* v. *Jones*, 3 Hughes, 274.

(2) Or it may be used by all former partners equally.

"Each of them had a right at the moment of the dissolution of the partnership to use the word; and no special right could accrue to the plaintiff, unless he could show that, after the partnership had been dissolved, after both of the former partners had set up their several manufactures, the world was deceived into supposing that the one-half which was represented by Mitchell was selling things made by the other half." *Condy* v. *Mitchell*, 37 L. T. N. S. 268; 26 W. R. 269.

"At the dissolution of the partnership, the partners revert back to their individual rights and responsibilities, and each partner, in the absence of any agreement to the contrary, has an absolute right to control the use of his own name." *Holmes, Booth & Haydens* v. *Holmes, Booth & Atwood Mnfg. Co.*, 37 Conn. 278, 295.

"It being clear upon the evidence that the designs were designs in which three persons were interested, for the purpose of carrying on a business or adventure in which all three were interested, it follows that upon the termination of that adventure, none of the three could claim any title against the other." *Robinson* v. *Findlay*, 9 Ch. D. 487.

"Upon the dissolution of a co-partnership terminable at the pleasure of either partner, neither is entitled to the exclusive

use or to the registration of its trade-mark, unless by virtue of special stipulations." *Wright* v. *Simpson*, 15 O. G. 968; reversing *Simpson* v. *Wright*, 15 O. G. 248.

"It is well-settled law that, upon the dissolution of a partnership, each partner has a right, in the absence of stipulation to the contrary, to use the name and style of the partnership in any way consistent with the facts of their business which does not have the effect of deceiving the public. He may say successor to the late firm and any like representations. In the absence of express stipulations, each partner may use the good-will of the former partnership. It is also held that rights in the trade-mark are analogous to rights in the good-will of a partnership. In the absence of express stipulation at the time of dissolution, each partner may go on and use the trade-mark of the firm." *Young* v. *Jones*, 3 Hughes, 274.

B. It may be reached by creditors.

See X. 2 A. 227. *Bury* v. *Bedford*, 33 L. J. N. S. Ch. 465; 4 De G. J. & S. 352.

C. It may be sold and assigned.

See cases under X. 1 A (2). 221.

2. A. A trade-mark owned by one who enters into a partnership business may in the absence of agreement remain the property of a single partner so as to be resumed by him on retiring from the firm.

A partner in Paris manufacturing corsets and owner of trade-mark "Corset Gants" allows a firm of which he is partner in the United States to use said trade-mark; that license does not render the trade-mark an asset of the firm in this country, and on dissolution of firm he can resume the title and assign his interest. *Batcheller* v. *Thomson*, 93 Fed. R. 660; reversing 86 Fed. R. 630.

A party having the right to the trade-mark "Boss" as applied to washers formed a partnership with another for the manufacture and sale of the washers without any mention of the trade-mark. On a dissolution of the partnership the original proprietor sold all his interest in personal property according to a schedule to the other partner with whom he made a contract to manufac-

ture washers for him according to mould bearing name "Boss Washer." Held, that these facts did not pass any title to the trade-mark to the other partner. *Greacen* v. *Bell*, 115 Fed. R. 553, 554.

"When a trade-mark or trade-name is owned by one who enters into a partnership with another for the manufacture of the article designated, the title of the trade-mark does not pass to the partnership except by express agreement." *Greacen* v. *Bell*, 115 Fed. R. 553.

Trade-mark of Pike remained his property after he had taken into partnership with him two clerks and formed the firm of "S. N. Pike & Co." in the whiskey business. "He did not place his interest in the trade-mark in the concern as a part of the capital stock. He allowed the use of it on packages containing the whiskey manufactured by them; but it no more became partnership property from that fact than did the realty itself, which he also owned and on which their business was conducted, and taking his clerks into partnership with him changed in no respect, by its terms, their relation to his individual property." *Kidd* v. *Johnson*, 100 U. S. 617, 619.

B. But the court may consider from all the circumstances that it was the intention of the parties that it become partnership property.

"This part of the case . . . rests, as it seems to me, upon the simple question whether, upon the formation of a partnership with a person entitled to the benefit of the trade-mark, the trade-mark does not, in the absence of express provisions in relation to it, become an asset of the partnership, and in my opinion it does, for the whole trade is carried into the partnership, and the trade-mark is but an element of the trade." *Bury* v. *Bedford*, 4 De G. J. & S. 352, 373.

"When a partnership is formed in regard to the manufacture of the article to which the trade-mark is properly applied, 'the trade-mark of one partner, in the absence of special regulations, becomes part of the partnership property.'" *Filkins* v. *Blackman*, 13 Blatchf. 440–446.

3. A retiring partner, without claiming use of trade-mark, which is a firm asset, is held to have abandoned it to the partnership.

"*It may be that where a firm is dissolved and ceases to exist* under the old name, each of the former partners would be allowed to obtain 'his share' in the good-will, so far as that might consist in the use of trade-marks, by continuing such use in the absence of stipulation to the contrary; but when a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of possession of the old place of business, and the future conduct of the business by them under the old name, the good-will remains with the latter as of course." *Menendez* v. *Holt*, 128 U. S. 514, 522. Aff'd 23 Fed. R. 869.

"La Favorita," used by firm of dealers arbitrarily to indicate origin of flour selected by their skill and used continuously for more than 20 years protected against a former member of the firm who had retired and surrendered all rights in the brands thirteen years before. *Menendez* v. *Holt*, 128 U. S. 514.

An injunction will lie in favor of former copartner against another restraining the use of signs containing old firm name without sufficient alterations or additions to give distinct notice of change. But defendant is "at liberty to publish in any form that H. is one of the members of the late firm, and carries on the same kind of business as formerly." *Peterson* v. *Humphrey*, 4 Abb. Pr. 394.

VII. TRADE-MARKS IN THEIR RELATION TO PATENTS.

1. Trade-marks have no analogy to patents or copyrights. The former are rights acquired for an indefinite time by intention and use at common law; the latter are monopolies by statute of inventions for a limited time, irrespective of use.

See X. 1 A (1). 220. *Morgan* v. *Rogers*, 26 O. G. 1113.

"The right of property in trade-marks does not partake in any degree of the nature and character of invention or of copyright, to which it has sometimes been referred, nor is it safe to reason from any supposed analogies existing between them.

"Invention is some *creation* of the brain in the nature of an art (mechanical or chemical procedure), — a machine, a manufacture, or a composition of matter, or of a design for an article of manufacture, or the like, to give it a particular appearance. Trade-mark is mere adoption and use of a name or symbol." *C. A. Yale Cigar Mnfg. Co., Ltd.*, v. *C. A. Yale*, 30 O. G. 1183, 1187.

"Property in a trade-mark, or rather in the use of a trade-mark or name has very little analogy to that which exists in copyrights, or in patents for inventions." *Delaware & H. Canal Co.* v. *Clark*, 13 Wall. 311, 322.

"A trade-mark is not an invention. It does not relate to or affect processes of manufacture or mechanical combinations." *Hoyt* v. *Hoyt*, 143 Penn. St. 623, 638.

"Property in the use of a trade-mark, however, bears very little analogy to that which exists in copyrights or in patents for new inventions or discoveries, as they are not required to be new, and may not involve the least invention or skill in their discovery or application." *McLean* v. *Fleming*, 96 U. S. 245, 254.

"Trade-marks are the property of their owners independently of statute, and are not the subject of patents. Inventions and discoveries are different. In those no property exists at common law, and they are protected only in consequence of the courts' provision on the subject, which does not apply to trade-marks." *Rodgers* v. *Solomon* (Suprm. Ct. of D. of C.), 1 O. G. 29.

Property rights in trade-marks distinct from those under copyrights and patents. *Sarrazin* v. *W. R. Irby Cigar Co.*, 93 Fed. R. 624.

"Any attempt, however, to identify the essential characteristics of a trade-mark with inventions and discoveries in the arts and sciences, or with the writings of authors, will show that the effort is surrounded with insurmountable difficulties." *Trade-Mark Cases*, 100 U. S. 82, 93.

2. A. A word used to designate a patented article during the life of the patent is held to be descriptive of that article, and on expiration of the patent it becomes *publici juris* and may be used by any one rightfully making the article.

Where manufacturer of a dating machine, patented, marked the machine with name of patentee and date, *but without giving the name of the manufacturer*, and gave the name "Centennial Dater" or "American Dater," such terms are not trade-marks, and may be used by another manufacturer of the article after expiration of patent, and the use will not be restrained on ground of unfair trade if the respondents sufficiently identify their article by marking thereon their own name. *B. B. Hill Mnfg. Co.* v. *Sawyer Bros. Mnfg. Co.*, 112 Fed. R. 144.

"Descriptive as the name Singer is of machines of a really distinctive character in their construction and principle of operation, when the patents protecting them expired, the right to use that name accompanied the right to make and sell the machines. It would be a poor return for the exclusive privilege which the public gives for a long period to the patentee, if, after the expiration of his patent, he shall be allowed to virtually perpetuate his monopoly, in a measure, by preventing all others from using the name, which will describe and make known the invention that has become dedicated to the public." *Brill* v. *Singer Mnfg. Co.*, 41 Ohio St. 127, 135.

Where a medicine manufactured under a patent, has been designated "Castoria" and that is its descriptive name, the word is free to public use at the expiration of the patent. *Centaur Co.* v. *Heinsfurter*, 84 Fed. R. 955.

"Castoria" having been used on a preparation made under a patent, it will become *publici juris* on expiration of the patent, and former proprietor cannot perpetuate his property right by

claiming that new preparation is not made according to the patent. *Centaur Co.* v. *Marshall*, 92 Fed. R. 605.

The name of a patented article, "Improved Patent Gold Medal, Self Cleaning, Rapid Water Filters," cannot be protected as a trade-mark after expiration of patent. *Cheavin* v. *Walker*, 5 Ch. D. 850; 46 L. J. Ch. 686.

When letters patent to Hezekiah Conant, protecting "a new design for embossing the ends of sewing-thread spools," expired, the public became entitled to use them for the purpose for which the assignee of Conant used them. *Coats* v. *Merrick Thread Co.*, 149 U. S. 562.

Plaintiff obtained patent on egg beaters and applied thereto name "Dover." After expiration of patent it brought bill against defendant to restrain him from using name on egg beaters. Patent had expired and no trade-mark.

"A word which might become a valid trade-mark when applied to an unpatented article may not be so when applied to an article which has the protection of letters patent. In the latter case the letters patent indicate the ownership and origin of the article, and it is more readily to be inferred that the word is used with the name merely to identify the article."

"But where one who has a patented article gives to it and puts upon it a name, and calls it by that name and no other, and it becomes known to the trade and to the public exclusively by the name so given to it by the patentee or person controlling the patent, then certainly it may be said that, as a general rule, the right to the exclusive use of the name ceases with the termination of the exclusive right to make and sell the thing." Plaintiff before the patent was known as "Dover Stamping Company." It sold a number of goods after patent named *Dover*. *Dover Stamping Co.* v. *Fellows*, 163 Mass. 191, 194, 196.

"Certainly, if the words, 'Fairbanks' patent' do not mean to assert the existence of a patent securing the scales, but only that they are made in conformity with, and embody the invention of, the expired Fairbanks' patent, they are free to all the world. What is not free is, to pretend that a scale is made by one person, which is, in fact, made by another." Fairbanks' patent on scales had expired. *Fairbanks* v. *Jacobus*, 14 Blatchf. 337, 341.

Where the word "Gilson" has been used to describe an album, protected by patent known as "Gilson Album" it cannot be registered as trade-mark, as it would become free to the public on expiration of patent. *F. H. Gilson Co.*, *ex parte*, 83 O. G. 1992.

"As the patent has expired, and the defendant has a right to sell cooking stoves embodying the patented improvements, the sole question is, whether the defendant has a right to sell them with the name 'charter oak' upon them. . . . Under such circumstances, the plaintiff cannot, after his patent has expired, and when M. L. Filley has the right to make stoves containing said improvements, prevent him from calling them by the name of 'charter oak,' so long as he does not represent them as being made by the plaintiff, or to induce others to believe that they are made by the plaintiff." *Filley* v. *Child*, 16 Blatchf. 376, 377.

"The first question in this part of the case is whether the defendant corporation is to be enjoined against selling, in the market generally, Universal presses, which contain only the devices described in the expired patents. I see nothing . . . which forbids the Colt's Company from selling, or which implies that it is not to sell to any person, the 'Universal press' after the patents therein have expired. . . . The name 'Universal' or 'Universal printing press,' was adopted, at the time the patents were issued, to designate the patented press. It was not a trade-mark of the plaintiff which became identified with his workmanship, and indicated that the press was of his manufacture, but was a name which characterized the press which he invented. Any manufacturer, who uses the name now, does so to show that he manufactures the Gally press which he may rightfully do, and does not represent to all the public that it is getting any skill or excellence of workmanship which Gally possessed, and does not induce it to believe that the presses are manufactured by the plaintiff." *Gally* v. *Colt's Patent Fire-Arms Mnfg. Co.*, 30 Fed. R. 118, 122.

Preliminary injunction against use of word "Goodyear," the patent having expired, refused. *Goodyear Rubber Co.* v. *Day*, 22 Fed. R. 44.

"It is also held that the complainants have no exclusive right to use the words 'Weymouth's Patent' as a trade-mark, because they are the name which was given to such hay-knives when they were first made and sold, and the name by which they have become recognized and dealt in by the public; and that after the patent expired all persons had the right to deal in the article by that name, and also to print the name upon the article. These conclusions are but the application of familiar law to the facts of the case, and it would be quite superfluous to indulge in any extended discussion of the authorities." *Hiram Holt Co.* v. *Wadsworth*, 41 Fed. R. 31, 36.

"Rahtjen's Composition," used on paints for ships' bottoms not a valid trade-mark after expiration of patent, as the name of inventor had during the life of the patent been used descriptively of the goods. *Holzappels Compositions Company* v. *Rahtjen's American Composition Company*, 183 U. S. 1; reversing 101 Fed. R. 257; affirming 97 Fed. R. 949.

Complainant marked its product "malted milk," as made under a patent of 5 June, 1883. While there was some resemblance to patented formula it was not exactly the same. Held, that having claimed the benefit of a monopoly, whether entitled to it or not, it lost exclusive right to the mark at its expiration. *Horlick's Food Co.* v. *Elgin Milkine Co.*, 120 Fed. R. 264.

"Linoleum," product from oxidized linseed oil, open to public use after expiration of patent. *Linoleum Mnfg. Co.* v. *Nairn*, 38 L. T. n. s. 448.

"Patent," and "A Richardson's Union Leather-Splitting Machine" not entitled to registration as trade-marks on machine, a patent on them having expired, the first word being deceptive and the second having become descriptive. *Richardson's Appeal*, 3 O. G. 120.

"When the patent expires, or in foreign countries where the patent has no force, there is no piracy in making or selling the article under the name by which it has become generally known." *Selchow* v. *Baker*, 93 N. Y. 63, 66; 45 Am. R. 169.

"It would be a dangerous doctrine to concede that a patentee, who has invented a machine which has gone into extensive public use, can, after the patents have become public property, still prevent the public from having the benefit of the invention, until they devise and adopt some new form of construction from that adopted by the manufacturers under the patents, and create a new reputation for their machine." *Singer Mnfg. Co.* v. *June Mnfg. Co.*, 41 Fed. R. 208, 213.

"If a sewing machine has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because that only expresses the kind and quality of the machine." *Singer Mnfg. Co.* v. *Larsen*, 8 Biss. 151, 152.

"It is the consideration now due to the public, when the patents have expired, that it shall have the unobstructed benefit of these inventions, and there is not the least foundation in prineiple or reason for allowing the patentees to continue to enjoy as much of

the monopoly as they can save by the claim to use exclusively the trade names and marks by which they identified and secured to themselves the reputation of their inventions." *Singer Mnfg. Co.* v. *Riley*, 11 Fed. R. 706.

"Inasmuch as the word 'Singer' indicates a machine of peculiar mechanism, and every one has a right to make such a machine, the word 'Singer' attached to such machine is common property." After the expiration of the patent the word could not be protected as a trade-mark. *Singer Mnfg. Co.* v. *Stanage*, 6 Fed. R. 279.

"It seems to me that the name 'Wheeler & Wilson' machine has come to signify the thing manufactured according to the principle of the patent. That being so, I cannot restrain anybody, after the expiration of the patent, from representing his article as being the article which was so patented." *Wheeler & Wilson Mnfg. Co.* v. *Shakespeare*, 39 L. J. Ch. 36, 40.

After expiration of letters patent on sewing machines of which the frame in the form of the letter G, was an essential part, any party had a right to make the machines and use that form of frame. *Wilcox & Gibbs Sewing Machine Co.* v. *Gibbens Frame*, 21 Blatchf. 431; 17 Fed. R. 623.

The word "Yale" refused registration as trade-mark for locks, on ground that it has become public property on expiration of patents. *Yale & Towne Mnfg. Co., ex parte*, 81 O. G. 801.

B. A word used in a descriptive sense on articles made under claim of an invalid patent can be used by the public rightfully making the articles when the patent has been declared void.

"Having adopted this use of tin and given to their goods the name of 'Tin-Tag Tobacco' while they were claiming the rights given them by the patent, it seems to me they have no right now to perpetuate a monopoly which the courts decided they could not have, by falling back upon the popular name given their goods marked in pursuance of the patent. If their goods properly became known and designated in the market as 'Tin-Tag' goods, by virtue of their marking them or tagging them in pursuance of their patent, the right to so indicate or mark the goods became public when the patent expired or was declared void, and they cannot perpetuate or continue this right by claiming it as a trade-mark." *Lorillard* v. *Pride*, 36 O. G. 1150; 28 Fed. R. 434, 438.

3. A sign may by use in an arbitrary sense denoting origin, and not description, be acquired as a trade-mark on a patented article, so that it will not be lost on the expiration of the patent.

"Celluloid" protected as a trade-mark after expiration of patent for making compound, the complainant having had it registered. *Celluloid Mnfg. Co.* v. *Cellonite Mnfg. Co.*, 32 Fed. R. 94.

"Mason," in collocation "Mason Fruit Jar," allowed registration although article had previously been patented.

"While the fact that the term has become generic would be fatal to its subsequent adoption by these or any other applicants, it certainly is not fatal to its continued use or to its registration by the lawful assignees of those whose use rendered it generic, any more than to its continued use or registration by the assignors themselves. Otherwise a trade-mark, as soon as it should become valuable enough to be generic, would expire" *Consolidated Fruit Jar Co.*, 16 O. G. 679, 680; reversing on rehearing 14 O. G. 269.

"But now the applicants assert that by assignment they have become the owners, not only of certain patents with which this trade-mark has been associated, but also of the trade-mark itself, and that it has been used by their assignors seventeen years; that it was used as a common-law trade-mark nearly eight years before 1870. This was a valid trade-mark at common law, subject, of course, to the rights of other persons of the same name whatever they might be. The fact that the owners of the trade mark also owned certain patents with which it was connected did not change its character as a common-law trade-mark. Nor would the expiration of these patents, even if they had covered the article as a whole, and not merely certain parts of it, have terminated the existence of the trade-mark which had been used during the life of the patent." *Consolidated Fruit Jar Co., ex parte*, 16 O. G. 679, 680.

"The applicants allege that the term 'braided fixed stars' was used to describe the articles manufactured under this patent, and that Palmer & Son could not have any trade-mark in that term. Now, I consider it plain that a man can have a patent for a new manufacture, and at the same time a trade-mark in the name used to designate the goods, though they are made under the patent." *Palmer's Trade-Mark, in re*, 24 Ch. D. 504, 509.

"To this suggestion it may be proper to reply that the complainant had a patent for the article of bluing which he was prosecuting and endeavoring to substantiate, but in which he finally failed. His failure to establish his patent (which would have covered all his rights) ought not to preclude him from falling back on his right to the trade-mark." *Sawyer* v. *Kellogg*, 7 Fed. R. 720, 723.

"Thus, as every one at the expiration of the patent had a clear right to manufacture and vend what was known as the 'Singer' sewing machine, the plaintiff could acquire no exclusive right to the name 'Singer,' but could by proper trade-mark appropriate to itself names or devices indicating its own manufacture of such machines." *Singer Mnfg. Co.* v. *Stanage*, 6 Fed. R. 279, 281.

4. A sign on a patented article used as a trade-mark prior to the date of the patent, does not, on the expiration of the patent, cease to be a valid trade-mark on that article.

A party who uses trade-mark "Gants" on corsets two and one half years before patent and continues thereafter to use it, it appearing that excellence of workmanship and skill made the mark valuable and not the patent, the expiration of the patent did not render the mark *publici juris*. *Batcheller* v. *Thomson*, 93 Fed. R. 660.

5. A collateral false representation, even if not on the trade-mark, but on advertisements or labels used as advertisements, that there is a patent on the article to which a trade-mark is affixed, is so far material as to invalidate the trade-mark.

See V. 6 A. 127.

Respondent guilty of simulation of complainant's trade-mark, labels, and packages in selling its compound, but not enjoined by reason of the fact that complainant had falsely represented that its compound was protected by a patent after patent had expired, in circulars accompanying the packages, although no such representations were on the packages or trade-mark.

"The use of fraudulent matter in any considerable part of the advertising media tinges the whole with that fraud upon which equity looks with disfavor. The natural effect of the language used upon the five circulars attached to complainant's bill is to mislead and deceive the public, and complainant cannot be heard

to deny the intention of so doing." *Preservaline Mnfg. Co.* v. *Heller Chemical Co.*, 118 Fed. R. 103, 105.

Contra: False representation that shirts with trade-mark "Eureka" were patented not sufficient to defeat right to protection. Where equitable relief is refused it is generally on ground of some false statement or fraud in trade-mark itself. *Ford* v. *Foster*, 7 Ch. App. 611.

6. A. The intentional false use of the word "patented" on a trade-mark or label used as a trade-mark leading the public to believe that the goods to which it is affixed are patented when they are not is such a material deception as to justify refusal of court to grant relief against infringement. Such a use is contrary to U. S. Rev. Stats. sec. 4901.

Use of word "patented" associated with a trade-mark on playing cards for which patent had expired a fraud which prevented relief. *N. Y. Consolidated Card Co.* v. *Union Playing Card Co.*, 39 Hun, 611.

Where a party intentionally uses the word "patent" in connection with a trade-mark so as to deceive the public into believing that goods are patented he cannot obtain protection for the trade-mark. *Cheavin* v. *Walker*, 5 Ch. D. 580; 46 L. R. Ch. 686; 36 L. T. 938.

"The complainants deduce their asserted right under Mason, who was the patentee of certain alleged improvements in fruit jars. There has been a judicial decision against the validity of his patent; and they do not now assert its validity. But they claim a trade-mark in what I think is not sufficiently distinguishable from a claim of exclusive right in the patented privilege. In other words, the alleged trade-mark is either deceptively obscure, or purports to be for the subject of the patent, or to include it." *Consolidated Fruit Jar Co.* v. *Darflinger*, Fed. Cas. No. 3129.

Protection refused to collocation "Flavel's Patent Kitchener," used on an article which was not patented, on the ground that it was fraudulent. *Flavel* v. *Harrison*, 10 Hare, 467.

"If a trade-mark represents an article as protected by a patent, when in fact it is not so protected, it seems to me that such a statement *prima facie* amounts to a misrepresentation of an important fact, which would disentitle the owner of a trade-mark

to relief in a court of equity against any one who pirated it." *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. Cas. 523, 543.

"Patent Plumbago Crucibles," used on unpatented crucibles, fraudulent and not entitled to protection. *Morgan* v. *M'Adam*, 36 L. J. Ch. 228.

"Applicant petitions for the registration of the words 'A. Richardson's Patent Union Leather-Splitting Machine.' It appears that the leather-splitting machine he proposes to manufacture and place this alleged trade-mark upon, has been patented, manufactured, and put upon the market under the above caption during the last twenty years, and that the patent has expired. The examiner has therefore held that the word 'patent' cannot properly be sanctioned as part of this trade-mark, because it would tend to deceive the public." *Richardson's Appeal*, 3 O. G. 120.

B. ***(1) But the use in good faith of the word "patented" or "copyrighted" on a trade-mark or label as a trade-mark in connection with goods which are not patented does not necessarily disentitle a party to relief if it may be held to refer to the registration of a trade-mark.***

Use of words "Pat. Aug. 13, 1872," on label for whiskey, that being date of registry of trade-mark not false, although whiskey is not patented. *Cahn* v. *Gottschalk*, 2 N. Y. Supp. 13.

If word "patented" is used on a registered trade-mark affixed to goods not patented it is no false representation, the word referring to the trade-mark. *Insurance Oil Tank Co.* v. *Scott*, 33 La. Ann. 946.

(2) Or if there was originally a patent on the goods, or one believed to exist, or if its use was not such as to deceive the public.

Labels which bore trade-mark on carbonated water had printed words "Manufactured in Ireland by Royal Letters Patent." The article was not subject to patent, but machinery was and appellant was sole licensee in Ireland; not fraudulent. *Cochrane* v. *McNish*, 74 L. T. N. S. 109.

"The word 'patent' means not necessarily that there is now current a patent of protection, but that the article in question is one of those articles which had the merits of utility and novelty, and therefore received the protection of the Crown by letters patent." *Adams' Trade-marks, in re*, R. P. C. 174; 66 L. T. 610.

The representation on back of a card bearing complainants'

goods, "De Long Patent Hook and Eye," when only a feature of the hook was patented, is not fraudulent, although not strictly correct. *De Long Hook and Eye Co.* v. *Francis Hook and Eye Fastener Co.*, 139 Fed. R. 146.

"It is no doubt to be much preferred, that no representation should be issued to the public which is not strictly true; but in a case in which the goods have become known by a description which was originally accurate in every part, if I were to hold that the continued use of this description disentitled the party to the assistance of the Court, it would be going much farther than I did in refusing to interfere by injunction where the plaintiff had adopted and used the word 'patent' untruly and without foundation." *Edelston* v. *Vick*, 11 Hare, 78.

It is not fraudulent to stamp with a trade-mark the words "patented Sept.," where it appears that a patent has been examined and allowed and will be issued in September. *Lauferty* v. *Wheeler*, 11 Abb. N. Cas. 220.

"The word 'patent' may be used in such a way as not to deceive the public. For instance, the term 'patent-leather boots' is in constant use, but no one supposes that it is thereby intended to convey the impression that the leather is protected by any patent. It is here stated in the bill, and verified by affidavit, that the term 'patent thread' has been used in the trade for many years past, and is the name by which thread of a certain class is known by manufacturers and in the trade. It has, in fact, become a word of art. I am, therefore, only following the principle of the decided cases, for here there has been no such misrepresentation, designed or undesigned, as to deprive the plaintiffs of their right to an injunction." *Marshall* v. *Ross*, L. R. 8 Eq. 651.

Word "patent" stamped on ploughs not patented, although originally patented and the patent expired, when the parties in circulars and advertisements lay no claim to patent, not a fraudulent representation.

It is not fraud for a concern to use word 'patent' on ploughshares when a patent was obtained in 1803, by predecessors, the advertisements not claiming a patent, but plainly referring to a patent which had expired in 1817. *Ransome* v. *Graham*, 51 L. J. Ch. 897; 47 L. T. N. S. 218.

It is not fraud for a concern to use the words "special registered trade-mark" where an application had been pending for a trade-mark. *Read* v. *Richardson*, 45 L. T. N. S. 54.

"Below the picture of the tobacco plant, it will be remembered, were the words 'Habana,' 'Copyrighted.' . . . The word 'Copyrighted' meant the same to everybody. It implied that the protection of the statute applicable to such matters had been secured. This was probably believed to be true, but was without foundation. The misrepresentation, however, was unimportant." *Solis Cigar Co.* v. *Pozo*, 16 Colo. 388, 395.

Representation that parties whose names appear as manufacturers on trade-marks of certain thread are fictitious, and fact that thread is not patented as represented on the thread trade-marks no defence in a court to enjoin infringement. Parties may be fictitious and thread may not be patented. *Stewart* v. *Smithson*, 1 Hilt. 119.

VIII. UNFAIR TRADE.

1. (A) A descriptive sign, (B) a geographical sign, (C) the proper name of a private party, (D) a form or shape, (E) a color, (F) a style of dressing or marking goods, (G) or a label or advertisement, while not the subject of a trade-mark, will be protected in their distinguishing features on the ground of unfair trade.

A. A descriptive sign not in general use if used by a party with the intention of pirating on the good-will of another who has acquired a reputation under it and of palming off on the public his goods as those of another, may be protected on the ground of unfair trade.

"The tendency of the courts at the present time seems to be to restrict the scope of the law applicable to technical trade-marks, and to extend its scope in cases of unfair competition." *Church & Dwight Co.* v. *Russ*, 99 Fed. R. 276.

"A man is not to sell the goods or manufactures of B., under the show or pretence that they are the goods or manufactures of A., who by superior skill or industry has established the reputation of his articles in the market. The law will permit no person to practise a deception of that kind, or to use the means which contribute to effect it. He has no right, and he will not be allowed, to use the names, letters, marks or other symbols by which he may palm off upon buyers as the manufactures of another, the article he is selling, and thereby attract to himself the patronage that, without such deceptive use of such names, etc., would have inured to the benefit of that other person who first got up, or was alone accustomed to use, such names, marks, letters, or symbols." *Coats* v. *Holbrook*, 2 Sandf. Ch. 586, 594.

"Unfair competition in trade, as distinguished from infringement of trade-marks, does not involve the violation of any exclusive right to the use of a word, mark, or symbol. The word may be purely generic or descriptive, and the mark or symbol indicative only of style, size, shape, or quality, and as such open to public use 'like the adjectives of the language,' yet there may be unfair competition in trade by an improper use of such word,

mark, or symbol." *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651, 659.

A party having for eighteen years used the name "Health Food Company," and having built up a reputation under it, is entitled to an injunction against a party who fraudulently uses the name "Sanitarium Health Food Company," although "Health Food" is descriptive. *Fuller* v. *Huff*, 104 Fed. R. 141; reversing 99 Fed. R. 439.

Respondent, having procured from Dr. B. L. Bull right to use his name and formulas, made and sold a preparation with wrappers so like the complainant's as to deceive the public, using thereon the words "Dr. Bull's Cough Syrup." Held, that, although such words were descriptive, yet where the complainant had acquired a reputation under such name the respondent could not use it on wrappers like those of complainant's so as to deceive, but might use it on wrappers which were not an imitation. *Meyer* v. *Dr. B. L. Bull Vegetable Medicine Co.*, 58 Fed. R. 884.

Complainant had acquired a reputation for its goods under name "Air Cushion Pads;" held, entitled to restrain respondent who had subsequently stamped on its goods of a similar nature the words "Air Cushion" and registered "A. C." as a trade-mark. *Revere Rubber Co.* v. *Consolidated Hoof Pad Co.*, 139 Fed. R. 151.

"It is not essential to the protection of a trader against a rival's fraudulent interference with his business, that he shall have a trade-mark to be pirated. . . . It is enough if the wrong-doing rival uses any letters, marks, shapes, devices, or symbols, so nearly like those previously employed by the complainant to distinguish his wares that purchasers from him may be likely to believe they are getting the goods of the complainant." *Trask Fish Co.* v. *Wooster*, 28 Mo. App. 408, 419.

Respondents enjoined from dressing up their bottles of champagne to resemble those of the complainant's under which they had gained an extensive reputation. "They should also be prohibited from placing the words 'Extra Dry' upon any bottles of their product, of the character that has been described, either in combination or otherwise. This upon the ground that the words 'Extra Dry,' as applied by them to the article they manufacture, constitute an untrue and deceptive reputation, made, not for the purpose of description, but for the purpose of fraud, and which are calculated to deceive, to the injury of the complainants." *Von Mumm* v. *Frash*, 57 Fed. R. 830.

"While a descriptive, or geographical or personal name cannot constitute a technical trade-mark, yet where, as here, an article has come to be known by the descriptive word, one may not use that word to palm off his goods as the goods of another who has first adopted it, and by which appellation the goods have come to be known. One may not use his own name for such purpose when it works a fraud. If he uses the descriptive word or a geographical name, or his own name, it must be so used as not to deprive others of their rights or to deceive the public, or the name must be accompanied with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact." *Williams* v. *Mitchell*; *Mitchell* v. *Williams*, 106 Fed. R. 168.

(1) Words, letters, or numbers chosen to designate the grade or quality of the product of a manufacturer, while not legal trade-marks, on proof of use with fraudulent intent on the part of another will be protected on the ground of unfair trade.

See VIII. I G. 182. *Gillott* v. *Kettle*, 3 Duer, 624.

Numeral "303" impressed on a pen to denote a particular pattern manufactured by plaintiff, distinguished from other patterns, held to be a trade-mark and protected. It is properly a case of unfair trade. *Gillott* v. *Esterbrook*, 47 Barb. 455.

Plaintiff had been accustomed to mark his ploughs "H H" to denote that they were case hardened, and also certain numbers to denote size, as "6." Defendant used "H H 6." Injunction against him. *Ransome* v. *Bentall*, 3 L. J. Ch. N. S. 161.

(2) Several marks or a series of marks used by a proprietor with or without a common symbol to designate the different grades, styles, or qualities of a class of his merchandise, while not trade-marks, may be protected on proof of fraud on the ground of unfair trade.

Note reference under III. 1 J. 52.

The use of descriptive letters and numbers to designate series of ploughs while not trade-marks was enjoined on the ground that the public were deceived by the use of them by another, they having come to be recognized as the series of a certain manufacturer. *Avery* v. *Meikle*, 81 Ky. 73.

While a bill may not lie for unfair competition in use of scheme of numbers on labels to designate bottles and jars, as 3001 to 3007 for 1001 to 1007; nevertheless it might lie for use of identical

numbers and a dismissal of first bill is not *res judicata* as to second. *Dennison Mnfg. Co.* v. *Scharf Tag, Label, and Box Co.*, 121 Fed. R. 313.

But see: A series of numbers used on tags or labels to designate size and not in fact designating origin are not trade-marks, and no injunction will lie against respondent for similar use on labels, especially if accompanied by its true corporate name and not used with fraudulent intent. *Dennison Mnfg. Co.* v. *Scharf Tag, Label, and Box Co.*, 135 Fed. R. 625; second appeal; see 121 Fed. R. 313.

Compiainant used a great many numbers arbitarily chosen, as "223," "2004," "209," and "201," to designate grade and style of tags, paper, sealing wax, and stationers' supplies. Held, not trade-marks, but imitation was so exact as to lead to presumption of fraud, and relief granted on ground of unfair trade. *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651.

(3) Although a name may have become descriptive so as to lose its character as a trade-mark, yet its use by others not rightfully making the product or possessed of the secret will be enjoined.

The name "Angostura" being former name of town, was applied by plaintiff to bitters made there, and became descriptive of those bitters. Defendant who used name not possessed of secret process, although manufacturing there was restrained; if he ever knew the process he could use the name. *Siegert* v. *Findlater*, L. R. 7 Ch. D. 801.

***(a)* But where the right and knowledge are open to all the world the court will not, at the instance of a particular party using the name, issue an injunction against one who fails to maintain the original standard.**

See V. 3 A. 125.

A party had manufactured washboards to which it applied the name "Aluminum," as the rubbing board was made of that metal. Another party began the manufacture, using the same name but instead of using that metal it used zinc. Held, that it did not entitle the first party to an injunction, since the word was descriptive and its misuse was a public wrong not entitling him to a private action. *American Washboard Co.* v. *Saginaw Mnfg. Co.*, 103 Fed. R. 281.

Where party at expiration of patent has lost exclusive right to use the word "Castoria," he is not entitled to injunction against

another who uses the same name with "fake" testimonials. *Centaur Co.* v. *Marshall*, 92 Fed. R. 605; 97 Fed. R. 785.

The process for making an extract of meat termed "Liebig's Extract of Meat," not being a trade secret, a party who uses the name has no right to bring a bill to enjoin another who, under the same name, makes and sells a preparation not according to the original receipt. *Liebig's Extract of Meat Co.* v. *Walker*, 115 Fed. R. 822.

B. A geographical sign.

(1) A geographical name used by a resident proprietor on his goods may be protected in cases of fraud as against non-residents on the ground of unfair trade.

Complainant and its predecessors had for many years manufactured and sold scythe-stones under the trade-mark "Lamoille," "Green Mountain," "Black Diamond," "Indian Pond," "Magic," and "Willoughby Lake." Defendants having succeeded to a company which had contracted to purchase complainant's scythe-stones for a series of years, refused to carry out that contract, but having procured quarries 200 miles distant were manufacturing and selling scythe-stones under above names, except that they used in place of "Willoughby Lake," "Willoughby Ridge," and in place of "Black Diamond," "Diamond Gem," these names never having been used to designate stones taken from defendant's quarries. Held, that preliminary injunction should be granted restraining defendant's use of all names whatever; decision might be on "W. R." and "D. G." alone.

"Assuming that complainant cannot have a valid trade-mark in the names, which I do not decide, it seems to me well settled that a manufacturer will be protected in the use of a geographical name as against one who does not carry on business in the district so designated."

Lamoille was name of county, and the county and lake were 200 miles from defendants' quarries. *A. F. Pike Mnfg. Co.* v. *Cleveland Stone Co.*, 35 Fed. R. 896.

Plaintiff was a brewing corporation at St. Louis and under name "St. Louis" on its labels had acquired a reputation for its beer at Panama. Defendant exported beer from New York to Panama in bottles with similar labels bearing name "St. Louis." Until plaintiff used name no one else had used it. Held, infringement to be enjoined. *Anheuser-Busch Brewing Ass'n* v. *Piza*, 24 Fed. R. 149.

"Durham," as applied to smoking tobacco by manufacturer in Durham, N. C., protected as against use on smoking tobacco in Richmond, Va. *Blackwell* v. *Dibrell*, 3 Hughes, 151.

Canning companies in California, who put up and sell fruits grown in that State, have the right to use thereon the name "California" as a trade designation; and when their products have become well and favorably known by such name, are entitled to protection by injunction against the fraudulent use on cans of the same kind of fruit, grown and put up elsewhere, of labels designating it as California fruit, and falsely stating that it is put up in that State. The complainants were a number of corporations of California engaged in that State in the business of canning pears grown there. Defendants were in Baltimore canning pears not of California. *California Fruit Canners Ass'n* v. *Myer*, 104 Fed. R. 82.

Plaintiff established factory in Key West, and on boxes of cigars had "Key West" branded or on labels, with his name "E. H. Gato" and "Edward H. Gato;" defendant manufactured at Jacksonville and put on his boxes "Key West" and "G. H. Gato," and people were deceived thereby. It was fraud and he was enjoined. *El Modelo Cigar Mnfg. Co.* v. *Gato*, 25 Fla. 886.

One making corset waists at Chicago and labelling them "Chicago Waists," having acquired reputation under that name entitled to injunction *vs.* parties in California and Michigan making and selling corsets under that name. Chicago party one using that name in Chicago. *Gage-Downs Co.* v. *Featherbone Corset Co.*, 83 Fed. R. 213.

Where plaintiff has for 30 years manufactured at Worcestershire an article sold by them under name "Worcestershire Sauce," held, that defendant should be enjoined from using words "Worcestershire Sauce" on labels on article not made in Worcestershire. Modifying 13 Abb. Pr. n. s. 389, which denied relief on ground that name was geographical. *Lea* v. *Wolff*, 15 Abb. Pr. n. s. 1. *But see: Lea* v. *Deakin*, 11 Biss. 23; III 2 A. 64.

Plaintiff manufactured cement from lime quarries near Akron, and called it Akron cement. Defendants started manufacturing near Syracuse and used word "Akron" on their cement, although adding "Syracuse, N. Y." Injunction. *Newman* v. *Alvord*, 51 N. Y. 189; 49 Barb. 588; 35 How. Pr. 108.

Certain mills in Minneapolis, Minn., made high-grade flour and used thereon in different forms "Minnesota Patent," "Minneapolis, Minnesota," "Minneapolis, Minn." etc. Defendant in

Chicago bought Wisconsin flour which he labelled "Best Minnesota Patent, Minneapolis, Minn." and advertised it as made in Minn. Held, Minn. mills could enjoin him. *Pillsbury Washburn Flour Mills Co.* v. *Eagle*, 86 Fed. R. 608; reversing 82 Fed. R. 816.

Respondents, manufacturers in Chicago, enjoined from using "St. Louis" on their cheap, inferior, and adulterated white lead by manufacturers of unadulterated white lead in St. Louis using the name of the city on their article. *Southern White Lead Co.* v. *Cary*, 25 Fed. R. 125.

A manufacturer of white lead in Chicago will be enjoined from the use of the words "White Lead; St. Louis," except as to preparations of white lead manufactured there, such use tending to deceive and defraud the public, and complainant a manufacturer of lead in St. Louis. *Southern White Lead Co.* v. *Coit*, 39 Fed. R. 492.

Contra: "Rosendale," used on cement, manufactured at Rosendale in New York not protected against name used on cement made in Lehigh County, Penn. If the respondent has fraudulently used the name it is a fraud on the public and is no special damage. *N. Y. Cement Co.* v. *Copley Cement Co.*, 44 Fed. R. 277. Aff'd on reargument, 45 Fed. R. 212.

(2) A geographical name, even if used in a geographical sense, under which a party has acquired a reputation so that it has come arbitrarily to designate his goods may be protected as against a party who fraudulently imitates it for the purpose of pirating on the good-will of another.

See II. 4 B (1). 26.

See III. 2 D. 68.

"Carlsbad," applied for many centuries to mineral water at Carlsbad, owned and controlled by the city. Twelve years before regular importation to this country respondent made an artificial water, which he called "Carlsbad," of merit and similar to the genuine water. Some years after importation this bill was brought. Held, that while not entitled to use "Carlsbad" alone, he could use on his waters "Artificial Carlsbad." *City of Carlsbad* v. *Schultz*, 78 Fed. R. 469.

"Keystone" the name of ten cities or towns in United States protected as applied to cigars in New England. *Cohen* v. *Nagle*, Mass. Feb. 1906.

Parties in this country enjoined from use of word "Plymouth" on labels for gin like labels of complainant, the geographical

word being used for purposes of fraud and the gin not being in fact made at Plymouth.

"Whatever may be the decisions in the state courts, it is abundantly settled by authority in the federal courts that they will not tolerate a false use of a geographical name when it is so used to promote unfair competition and to induce the sale of spurious goods." *Collinsplatt* v. *Finlayson*, 88 Fed. R. 693.

"Anatolia," name of Turkish province from which liquorice roots came, held arbitrarily applied to liquorice.

"But then you have the fact here, as I said before, that although the juice had come from Anatolia long before, yet until the plaintiffs set up this manufacture and thought fit to have a new name for the article they were thus introducing, nobody thought of using the name 'Anatolia,' and it was not wanted for the trade." *McAndrew* v. *Bassett*, 10 L. T. N. S. 442; 33 L. J. N. S. 561. Aff'd 10 Jur. N. S. 550; 4 De G. J. & S. 380.

Plaintiffs had for a number of years been doing business and had acquired reputation at Cookston under firm name of "Cookston Marble & Granite Works." Injunction against defendants in same town who formed a corporation and assumed the corporate name of "Cookston Marble Works," as it would cause injury to plaintiffs' trade. *Nesne* v. *Sundet*, 93 Minn. 299.

The Republic of France owned a mineral spring at Vichy whose water was known as Vichy water. It farmed the right to a company to deal in these waters. The respondent, after Vichy water had obtained a reputation in this country, designed a label by which its waters were designated "Saratoga Vichy," with the first name in small print and the name "Vichy" so prominent as to attract attention. Held unfair competition, and injunction issued. *République Française* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427; 107 Fed. R. 459; reversing 99 Fed. R. 753.

The defendant was allowed to use the word "Vichy," but not so as to deceive.

"The defendant should be enjoined against the use of this neck label, or of any other label in which the place of the origin of its water is not as plainly and prominently made known as the fact that it is named Vichy." *Idem*, 107 Fed. R. 462.

"As the waters of Vichy had been known for centuries under that name there is reason for saying the plaintiffs had in 1872 acquired an exclusive right to the use of the word 'Vichy' as against every one whose waters were not drawn from the springs of Vichy or at least, as observed by a French court, from the same

hydrographical region, which may be called generally the basin of Vichy.

"True, the name is geographical, but geographical names often acquire a secondary significance indicative not only of the place of manufacture or production, but of the name of the manufacturer or producer and the excellence of the thing manufactured or produced, which enables the owner to assert an exclusive right to such name as against every one not doing business within the same geographical limits; and even as against them, if the name be used fraudulently for the purpose of misleading buyers as to the actual origin of the thing produced, or of passing off the productions of one person as those of another." *Idem*, 191 U. S. 435.

The name "Vichy (Grand Grille)" had been used by respondent since 1862 on manufactured waters in this country for thirty years. The name *Vichy* was a geographical name applied to a town in France where there were mineral springs of considerable merit owned exclusively by the government and farmed to a private company. The waters had been sold since 1716. Held, that while the name *Vichy* was not a trade-mark, yet the label of respondent bearing the words *Grand Grille*, the name of a famous spring there, was a misrepresentation and did not disclose that the water was artificial water. No injunction issued, as Schultz had meantime died, and there was no evidence that the business was being continued; and no account could be had for profits, because of laches. *République Française* v. *Schultz*, 102 Fed. R. 153; affirming 94 Fed. R. 500; reversing 57 Fed. R. 37.

The use of the words "Lithia-Vichy" on artificial mineral water made in this country, with words on the label inconspicuously printed "Manufactured from Distilled Water," held not to be a fraud, as customers would naturally expect that they were getting, not the natural Vichy, but an artificial product. *République Française* v. *Schultz*, 115 Fed. R. 196.

Complainant's agent, the "Apollinaris Company," had for many years sold Hunyadi Waters in the United States, being the exclusive agent for said water. It adopted and claimed as its trade-mark thereon a red diamond on a yellow ground. When the agency ceased and it began the sale of other waters it had the right to affix the trade-mark to the new waters if there was such a dissimilarity in the labels as not to lead to confusion in purchase of Hunyadi water. *Saxlehner* v. *Graef*, 81 Fed. R. 704.

"Seixo," name of district in Portugal (meaning stony), ap-

plied on wine made in that district by which name it had become known in England, protected as against its use on wine of the defendant, although it may have been made in same district. *Seixo* v. *Provezende*, L. R. 1 Ch. D. 192.

Complainant had during many years built up a lucrative business in bluing under the name "American Ball Blue" and "American Wash Blue." Respondent began to use the same names on their product. Injunction on the ground that although "American" was a geographical name, yet one could not use it to perpetrate a fraud. Dissenting opinion. *Shaver* v. *Heller & Merz Co.*, 108 Fed. R. 821; affirming 102 Fed. R. 882.

A party at Boston who had acquired a valuable good-will under trade-name "Boston Peanut Roasting Company" is entitled to injunction against one who at same place to his injury assumes name "Boston Trade Peanut Roasting Co." *Viano* v. *Baccigalupo*, 183 Mass. 160.

(3) A geographical name of a locality used exclusively by a resident on his goods so that it has come to denote origin may be protected against those who fraudulently, for the purpose of deception, assume the name of that locality.

Plaintiff was the first manufacturer of watches in Waltham and had acquired great reputation before defendant began to do business. Plaintiff had used word "Waltham" on its watches originally in geographical sense, but by long association it had come to designate its watches. Held, that defendant could not use "Waltham" on its watches without some accompanying statement which should clearly distinguish its watches, and word "Waltham" upon dial should be enjoined. *American Waltham Watch Co.* v. *United States Watch Co.*, 173 Mass. 85.

"It was found at the hearing that the word 'Waltham,' which originally was used by the plaintiff in a merely geographical sense, now, by long use in connection with the plaintiff's watches, has come to have a secondary meaning as a designation of the watches which the public has become accustomed to associate with the name." *American Waltham Watch Co.* v. *U. S. Watch Co.*, 173 Mass. 85.

"Waltham," used on complainant's watches fifty years had come to indicate origin and protected as against its use on watches of defendant whose principal had established himself at Waltham for the purpose of pirating the name for watches.

Injunction and accounting. *American Waltham Watch Co.* v. *Sandman*, 96 Fed. R. 330.

A manufacturer or dealer who has built up extensive trade, and his trade-mark has given a designation to the locality of origin, and where for many years he has had unqualified and uninterrupted use of name, is not thereby prevented from having trade-mark right in name although it is geographical. "Pocahontas," therefore, having been used uninterruptedly twenty years protected as a trade-mark on coal mined there despite *Coffman* v. *Castner*, 87 Fed. R. 457. It is material whether or not plaintiff created name or adopted one already in public use. In this case it appears that it was not in common use, but that reputation had been gained by plaintiff's industry. Coal of defendants came from same general locality. *Atwater* v. *Castner*, 88 Fed. R. 642. *Contra: Coffman* v. *Castner*, 87 Fed. R. 457. Aff'd 178 U. S. 168.

Plaintiff at Reading manufactured a sauce called "Reading sauce," from the name of the town. Another at London adopted the name and then he called his sauce "Original Reading Sauce," in which name he was protected, and if he had objected earlier he might have been protected in name "Reading" alone. *Cocks* v. *Chandler*, L. R. 11 Eq. Cas. 446.

Complainant had manufactured its watches at Elgin for thirty years and used the name so continuously on its product that it had acquired a secondary meaning; held, that it was entitled to injunction against respondents who fraudulently assumed name "Elgin Jewelry Co.," as a corporation, had works at Iowa City, and only a mail order place of business at Elgin, and so used the name "Elgin" on clocks and watches as to deceive the public. *Elgin Natl. Watch Co.* v. *Loveland*, 132 Fed. R. 41. *But see: Ill. Watch-Case Co.* v. *Elgin Natl. Watch Co.*, 94 Fed. R. 667; III. 2. A. 64.

Plaintiff manufactured a fluid called "Aromatic Bitters," made by secret process at Angostura in Venezuela. Name was changed by government to Ciudad Bolivar. Defendant started to manufacture there and called product "Aromatic Bitters," but, restrained by court, he called it "Angostura Bitters." Plaintiff's product, meanwhile, had become known as "Angostura Bitters." Plaintiff was entitled to injunction, as defendant was guilty of fraud; he could, however, if possessed of secret, use name "Angostura Bitters." *Siegert* v. *Findlater*, L. R. 7 Ch. D. 801.

Complainants below had carried on business as brewers at town

of Stone, of six or seven thousand inhabitants, for upwards of a century, with no other breweries there. Their ale gained great reputation and was known as "Stone Ale" and so designated. Respondent owning public houses at Liverpool came to Stone and established a brewery for the purpose of using name "Stone" on his ale to obtain the advantage of the name and lead people to believe that his ale was that of the complainants.

"An injunction was accordingly granted on the application of the respondents, restraining the defendant from carrying on business of a brewer at Stone, under the style of 'Stone Brewery,' or 'Montgomery's Stone Brewery,' or under any other title, so as to represent that the defendant's brewery is the brewery of the plaintiffs, and from selling or causing to be sold any ale or beer not of the plaintiff's manufacture, under the term 'Stone Ales' or 'Stone Ale,' or in any way so as to induce the belief that such ale or beer is of the plaintiff's manufacture, and from infringing the plaintiff's registered trade-mark, or any of them." *Montgomery* v. *Thompson*, 64 L. T. R. N. s. 48; affirming 41 Ch. D. 35.

Plaintiffs had one of the springs in the Cromac district of city of Belfast, and adopted term "Cromac Springs" as their trade address, and after using it as such for some years registered it as their trade-mark. The defendant also carried on business as a manufacturer of aërated water, and had a Cromac spring on his own premises. Held, that plaintiffs had acquired right to use the words "Cromac Springs" as a trade-mark, and were entitled to restrain infringement by defendant; but that the injunction should be limited to restraining the defendant from using the words "Cromac Springs" in connection with his trade, or as the name of his place of business, in such a manner as to represent the aërated waters sold by him as having been manufactured or sold by the plaintiffs, and should not extend to prevent the defendant from otherwise describing his aërated waters as manufactured from the water of the "Cromac Springs." In this case, although springs had been previously known as Cromac Springs, yet the use of the term by the plaintiffs had come to be so extensive that it was associated with their product. *Wheeler* v. *Johnston*, L. R. 3 Ir. 284.

(4) A name of a village under which a non-resident has formerly as a resident built up an extensive business may be protected in cases of fraud, even as against residents, on the ground of unfair trade.

"Deer River," name of village and postoffice in New York, where plaintiff had long made ploughs marked "Deer River"; he sold his factory to defendant, who represented that he would turn it into a blacksmith's shop, and moved elsewhere; the defendant started to manufacture ploughs with mark "Deer River"; plaintiff was entitled to injunction on ground of fraud. *Gibbie* v. *Still*, 82 Hun, 93.

Glenfield was an estate where there were a few houses and sixty inhabitants. Complainant had manufactured starch there many years called "Glenfield Starch," and then removed. Respondent came there, got part of a factory, and started to manufacture starch called "Glenfield Starch." He did it with fraudulent intent, and was enjoined, although he used also his own name. *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508.

"Injunction granted restraining the respondent, his servants, and agents, from using the word 'Glenfield' in or upon any labels affixed to packets of starch manufactured by or for him, and from in any other way representing the starch manufactured by or for him to be 'Glenfield Starch,' and from selling or causing the same to be sold as 'Glenfield Starch,' and from doing any act or thing to induce the belief that starch manufactured by or for him, the respondent, is 'Glenfield Starch,' or starch manufactured by the appellants; the respondent to pay the costs of the appellants in the court below." *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, 523.

C. The proper name of a private party.

(1) While a proprietor's proper name is not a technical trade-mark which will entitle him to the exclusive use of that name, he will be protected in its use as against all others not of the same name.

See X. 1 A (2). 223. *Oakes* v. *Tonsmierre*, 49 Fed. R. 447.

See XI. 2. 242. *Singer Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376.

Complainant was proprietor of a drug, "Brown's Iron Bitters," and respondent of another drug called "Iron Tonic Bit-

ters"; respondent should be enjoined from printing on his label the name of Brown & Co., of New York. *Brown Chemical Co.* v. *Stearns*, 37 Fed. R. 360.

Derringer thirty years before had invented a pistol and used his name on it as a trade-mark. Defendant had begun to use the name on pistols of his own make. Held, that he was entitled to injunction. *Derringer* v. *Plate*, 29 Calif. 292.

Plaintiff made a medical preparation which he designated by his own name "Franks' Specific Solution of Copaiba." Defendant started to sell medicine under same name. Held, that he could not use plaintiff's name. *Franks* v. *Weaver*, 10 Beav. 297.

Matthias Holmes at Würtemberg is maker of harmonicas well-known in this country under his own name. Ernest Leitend, for whom respondent is agent, makes harmonicas in Saxony, and on them places in large letters "Improved Holmes," accompanied with word "nach." Held, that use of word "nach" would not show that Holmes was not maker, and that name of Holmes should not be used. *Holmes* v. *Gratz*, 52 Fed. R. 871; 50 Fed. R. 369.

"That any name, symbol, or device, adopted by an individual, corporation, or business firm, for the purpose of designating the origin and ownership of goods manufactured by them, will be protected as a trade-mark, is well-settled law. The name of a corporation or partnership, accomplishing the same object, will be protected upon the same principle." *Holmes* v. *Holmes, etc., Mnfg. Co.*, 37 Conn. 278.

Complainant was owner of a medical preparation known and sold for many years as "Hostetter's Bitters." Respondent put up bitters very similar and labelled them "Hostetter's Bitters"; decree for injunction and accounting. *Hostetter Co.* v. *Sommers*, 84 Fed. R. 333.

Jules Jurgensen, who used his name as trade-mark on watches manufactured by him in Copenhagen and Switzerland, entitled to injunction against defendant who used it on watches not made by the plaintiff. *Jurgensen* v. *Alexander*, 24 How. Pr. 269.

A priest named Kneipp in Germany invented a malt substitute for coffee, which was improved upon by complainant's predecessors, and with his consent they established the business of selling the substitute, using his name and, with his consent, his picture and autograph signature. They assigned with Kneipp's consent all their right, title, and interest in the business to com-

plainant, which carried on an extensive trade in the product, and it became well known under the trade-mark. The respondent, with fraudulent intent, formed a corporation under the laws of Illinois, and under the protest of Kneipp began to use in a similar business his name, picture, and signature. Held, that although Kneipp himself was not appellant, yet having assigned all rights to the complainant, it was entitled to injunction. *Kathreiner's Malz Kaffee Fab.* v. *Pastor Kneipp Med. Co.*, 82 Fed. R. 321.

"Peck Brothers & Co., a Connecticut corporation for manufacture of brass and plumbers' goods, passed into the hands of a receiver on petition of creditors. By order of court all assets, good-will, trade-marks, etc., were sold to a committee representing all stockholders, who formed a new corporation called "The Peck Brothers & Company." A vice-president of old concern and parties connected with receivership, having charge of branch in Chicago, obtained charter from Illinois for a corporation called "Peck Bros. Co." There were no Peck Brothers or Peck in it. Held, that it was a fraud, as many experienced customers were confused, and the name of the company was assumed for the purposes of fraud, and it would be enjoined, the act of incorporation in Illinois being no defence. *Peck Brothers & Company* v. *Peck Bros. Co.*, 113 Fed. R. 291.

Complainant and his predecessors had acquired a reputation for meats, stock food, and poultry food, under proper name "Swift." Protection granted against a party who fraudulently assumed the name for articles of the same class. *Swift & Co.* v. *Groff*, 114 Fed. R. 605.

(2) Every person is entitled to use his own name, but where another of the same name has built up under it a substantial business he must use his name in such a manner as not to deceive the ordinary purchaser in the belief that his goods are those of that other person.

See XI. 4 B. 255. *Lever Bros.* v. *Smith*, 112 Fed. R. 998.

Preliminary injunction against defendant's selling candies unless there appears on packages, signs, or advertisements, the statement, "No connection with the original Allegretti of Chicago," since the younger Allegretti had attempted to create confusion with the elder. *Allegretti Chocolate Cream Co.* v. *Keller*, 85 Fed. R. 643.

Respondents composing a partnership, one member of which was Allegretti, used that name prominently on chocolates; held,

that manner of use was likely to deceive and a fraud. *Allegretti Chocolate Cream Co.* v. *Rubel*, 86 Ill. App. 600.

Where respondent may be a partner and not agent of respondent enjoined in another equity suit, a new preliminary injunction may issue against his use of the name "W. H. Baker," or "Wm. H. Baker," on his chocolates, compelling him to use name "William H. Baker" and "Syracuse" printed distinctly, and so as not to mislead. *Baker* v. *Sanders*, 97 Fed. R. 948.

Defendant of same name as plaintiff on King William Street, not allowed to put up sign with words "late of 107 Strand," the address of plaintiff; or "Burgess' Fish Sauce Warehouse, late of 107 Strand," plaintiff's sign having "John Burgess & Son," and engaged in dealing in same products, but both allowed to use "Burgess' Essence of Anchovies." *Burgess* v. *Burgess*, 17 Jur. 292.

Complainant was assignee of certain formulas and trade-marks in medicines; the respondent, by breach of trust, was making use of the said formulas and selling them under the name of "Simmons' Liver Medicine," and "Simmons' Stomach Compound," being the same names under which complainant's medicines had become known, and so dressing and advertising his wares as to cause confusion. Held, a fraud; injunction issued. *C. F. Simmons' Medicine Co.* v. *Simmons*, 81 Fed. R. 163.

Complainant and its predecessors had manufactured pianos at Boston since 1823. Since 1840 they had been marked Chickering, and for fifty years makers had been doing business as Chickering & Sons. Defendant, whose name was Chickering, organized a corporation under name "Chickering Bros.," and so marked their pianos in similar letters to those of complainant. The circulars of defendant, while not untruthful, were couched so as to convey impression that they were makers of celebrated "Chickering" pianos; preliminary injunction sustained by Circuit Court of Appeals against use of word "Chickering," or "Chickering Bros.," on pianos, and against use of certain pamphlets and circulars. *Chickering* v. *Chickering & Sons*, 120 Fed. R. 69.

Complainant had acquired great reputation after many years in the thread business, and its thread had become known as Clark's thread. Respondent corporation adopted name with its consent, "William Clark Company." Held, that the corporate name could not, after assent, be enjoined, but a studied imitation of complainant's well-known labels should be enjoined, also the

name "Clark" or "Clark's" in connection with thread. *Clark Thread Co.* v. *Armitage*, 67 Fed. R. 896.

Plaintiff, Thomas Holloway, sold a medicine as "Holloway's Pills." The defendant commenced selling medicine as "H. Holloway's Pills" in boxes, labels, and wrappers copied from those of plaintiff. Injunction: he had a right to use his own name, but not to deceive. *Holloway* v. *Holloway*, 13 Beav. 209.

"It is a fundamental principle of law that one cannot make use of a reputation which another has acquired in a trade name or mark for the purpose of deriving such advantage in the manufacture and sale of the goods as arises from the good-will and reputation of the original manufacturer. Courts demand a high order of commercial integrity in the use by competitors of a name under which a rival has gained a business reputation, whether that name is strictly a trade-mark or is descriptive of quality merely, and frown upon all filching attempts to obtain the reputation of another." *Hostetter Co.* v. *Martinoni*, 110 Fed. R. 524.

Elias Howe, Jr., inventor of sewing-machine, granted license to brother, A. B. Howe, to make machines, and he accordingly spent large sums in building up a business, and stamped his machine "Howe, New York." Elias Howe, Jr., had no right afterwards to similarly stamp his machines and use his own name so as to deceive. *Howe* v. *Howe Machine Co.*, 50 Barb. 236.

Defendant Way, manager of a knitting company, invented a muffler which he patented and permitted the corporation to make and sell the article, which became known as "Way's Mufflet." The company registered the word "Mufflet" as a trade-mark. Later, Way severed his connection with the company, and, retaining his patent, began to make and sell the article as "Way's Muffler." Held, that both parties, or their lawful successors, could use the word "Way," provided that it was in such a manner as to indicate the manufacturer. *Hygienic Fleeced Underwear Co.* v. *Way*, 137 Fed. R. 592; reversing, in part, 133 Fed. R. 245.

Duryea was for many years extensively interested in a corporation manufacturing starch called "Duryea's Starch." The company sold all its property, good-will, and trade-marks, and Duryea made an agreement not to allow his name to be used in the starch business for five years. At the end of that time he re-entered the business by furnishing capital to his sons, who prepared an article sold with distinguishing labels, as "Starch Prepared by

Duryea & Co." There was no doubt that he was entitled to the use of his own name, and held that there was no unfair trade, but he could not designate his starch as "Duryea's Starch." *National Starch Mnfg. Co.* v. *Duryea*, 101 Fed. R. 117; affirming 79 Fed. R. 651.

Pillsbury & Co. were engaged many years in the flour business in Minneapolis, and stamped their flour conspicuously with their name. A corporation succeeded to their rights and brands. Later, a party by the name of Pillsbury began business in Illinois, and stamped his flour in such a manner as to deceive. Injunction against his use of the name so as to deceive. *Pillsbury* v. *Pillsbury-Washburn Flour Mills Co.*, 64 Fed. R. 841.

Complainant had for many years used the arbitrary word "Royal" on his baking powder as a trade-mark. Respondent began the manufacture of baking powder and used his name, "Royal," on the front labels of cans so as to deceive the public. Held a fraud which should be enjoined. The respondent could use his own name, but should "present his own name in the least conspicuous manner possible consistent with the right to place his name and address upon the goods made by him." In the absence of custom of trade he should not place it upon the front label. *Royal Baking Powder* v. *Royal*, 122 Fed. R. 337.

Every one has the right to honestly use his own name in business. "But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other, beyond that which results from the similarity of the name." *Russia Cement Co.* v. *Le Page*, 147 Mass. 206.

Plaintiff was proprietor of dental rooms in St. Louis, and had out sign "New York Dental Rooms"; defendant opened office near by and called it "Newark Dental Rooms." Injunction granted. *Sanders* v. *Jacob*, 20 Mo. App. 96.

"Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, in itself amounts to an artifice calculated to produce the deception alluded to in the foregoing adjudications." *Singer Mnfg. Co.* v. *June Mnfg. Co.*, 163 U. S. 169, 188.

A party had, during a number of years and at considerable expenditure of money, built up a business in manufacturing a medicine called "Stuart's Dyspepsia Tablets." Respondent

started into the business of manufacturing "Dr. Stewart's Dyspepsia Tablets." Held a fraudulent use of his own name. *Stuart* v. *F. G. Stewart Co.*, 91 Fed. R. 243; reversing 85 Fed. R. 778.

Complainant had for twenty years built up extensive trade in United States as exclusive agent of "Johann Hoff's Malt Extract," the product sometimes being known as "Hoff's Malt Extract." The respondent subsequently entered into the trade in selling extract of "Leopold Hoff." Held that he should be enjoined from designating it "Hoff's Malt Extract," and should plainly indicate that it was made by Leopold Hoff. *Tarrant* v. *Johann Hoff*, 76 Fed. R. 959; affirming 71 Fed. R. 163.

Defendaut Van Stan, son of a man who had invented and made a cement and sold right to plaintiff who made and vended it as "Van Stan's Stratena Cement" under which name it became known, after working several years with plaintiff had no right to use his name "Van Stan's Cement," in his business, irrespective of question of fraudulent intent. *Van Stan's Stratena Cement Co., Ltd.*, v. *Van Stan*, 209 Penn. St. 564.

Complainant was successor to original pencil business begun in Bavaria in 1761, and known under name of "A. W. Faber." Respondent, whose father was formerly an agent in United States, John Eberhard Faber, made and sold pencils in United States, marking them Faber. Held that it was an unfair attempt to use his own name, as pencils had acquired a reputation under that name, and while he could not be enjoined from using the family name, yet he must prefix to it "Eberhard," "John E.," or "J. Eberhard." *Von Faber* v. *Faber*, 124 Fed. R. 603.

Complainant and predecessors engaged in chocolate business since 1780 at Dorchester, Mass., and since 1845 business had been carried on substantially under present name, and chocolate had been sold under "W. Baker," "W. Baker & Co.," "Walter Baker," and "Walter Baker & Co.," and known as "Baker's Chocolate." Respondent purchased chocolate from a manufacturer, remoulded it in style of complainant's goods, and relabelled it, with intent to deceive, "W. P. Baker's," and "W. P. Baker, New York, U. S. A." Such chocolate had been sold as "Baker's." Held that he should so mark his chocolate as not to deceive, that he should not use word "Baker" or "Baker's" alone; that he should not use initial "W." with his name "Baker," but that he could use his full name as "William P.

Baker." *Walter Baker & Co. (Ltd.)* v. *Baker*, 87 Fed. R. 209; following *idem*, 77 Fed. R. 181.

Complainant and its predecessors had been doing business at Dorchester, Mass., since 1780 in manufacture of chocolate, and the chocolate had become known as "Baker's Chocolate." Held that respondent in New York should so distinguish his chocolate goods in New York as not to cause confusion, and not use the name "Baker" alone. *Walter Baker & Co.* v. *Sanders*, 80 Fed. R. 889.

"W. H. Baker's legitimate use of his own name is not interfered with so long as he is allowed to use it in connection with his chocolate goods, setting forth on labels or advertisements that the chocolate is 'made by' or 'for,' or 'prepared by' or 'for,' or 'sold by' 'W. H. Baker,' or even that it is made or prepared at W. H. Baker's factory." *Walter Baker & Co. (Ltd.)* v. *Sanders*, 80 Fed. R. 889.

The name "Baker" had so far become identified with chocolate and cocoa that such product made by them was known as "Baker's Chocolate," etc. In 1897, one W. H. Baker was enjoined from using his name on chocolate without clearly distinguishing it from complainant's. Defendant, a retail grocer, selling chocolate to customers who could not distinguish between the two products, was enjoined from using the name "Baker" on chocolate or cocoa not made by complainant. *Walter Baker & Co. (Ltd.)* v. *Slack*, 130 Fed. R. 514.

"One may not use his own name for such purpose when it works a fraud. If he uses the descriptive word or a geographical name, or his own name, it must be so used as not to deprive others of their rights, or to deceive the public, and the name must be accompanied with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact." *Williams* v. *Mitchell*; *Mitchell* v. *Williams*, 106 Fed. R. 168, 171.

(3) But a name which has become descriptive of a mechanical mechanism, whether patented or not, is not protected as against a party rightfully dealing in such machine.

But see: XI. 2. 243. *Singer Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376.

VIII. 6. 201. *Singer Mnfg. Co.* v. *June Mnfg. Co.*, 163 U. S. 169; *Idem* v. *Bent*, 163 U. S. 205.

See VII. 2 A. 140.

III. 1 D. 49. *Liebig's Extract of Meat Co.* v. *Walker*, 115 Fed. R. 822.

IV. 10. 113. *Vitascope Co.* v. *U. S. Phonograph Co.*, 83 Fed. R. 30.

Inventor held not to have such an interest in his name as to prevent its use on a sign in connection with his invention. *Edison* v. *Hawthorne*, 108 Fed. R. 839.

The word "Singer," having become descriptive of sewing-machines, its use cannot be enjoined where it is clearly specified that the manufacture is not that of the complainant, but where the name is used on machines which are not "Singer" it is a deceptive use and can be enjoined. *Singer Mnfg. Co.* v. *Hipple*, 109 Fed. R. 152.

Plaintiff cannot enjoin the defendant from using the word "Singer" on its sewing-machines rightfully made under the Singer system, if it does so in such a way as not to lead the public otherwise to be deceived. *Singer Mnfg. Co.* v. *Loog*, 8 App. Cas. 15.

D. A form or shape.

See VIII. 1 F. 173, & G. 181.

Where complainant employed a bottle of peculiar shape to put up its root beer and under its use acquired a reputation, it is entitled to preliminary injunction against party who adopts same style of bottle for its root beer with fraudulent intention. *Charles E. Hires Co.* v. *Consumers Co.*, 100 Fed. R. 809.

Complainant had acquired reputation in sale of its whiskey in use of square-shaped, bulging-necked bottle, as a package for Mount Vernon Whiskey.

"Complainant, of course, has no exclusive right to the name 'Mount Vernon,' and the labels of the defendant are in no sense an imitation of the labels of the complainant. Complainant's case rests solely on the form of package, which it claims has been so imitated as to make out a case of unfair competition." *Cook & Bernheimer Co.* v. *Ross*, 73 Fed. R. 203.

E. A color.

"While it is true that no one has a monoply of form, of color, or of the shape of letters, it has repeatedly been held that one

may not use the color that another has selected as a distinguishing mark of his goods, or use the same arrangement of letters and of marks, when such use is with the design to market his goods as the goods of another." *Enoch Morgan's Sons Co.* v. *Whittier-Coburn Co.*, 118 Fed. R. 657, 661.

Party not allowed to use blue wrappers on washing compound called Saphia, in imitation of blue wrappers on Sapolio. *Enoch Morgan's Sons Co.* v. *Schwachofer*, 5 Abb. Pr. n. cas. 265.

"There are decisions to the effect that color alone cannot become a valid trade-mark, and that a red label on a yellow wrapper, or a white label on a red box, cannot be registered. But where, for the purpose of presenting his goods to the public, a manufacturer has adopted a particular combination of features, in part old and in part new, he may be entitled to protection against a palpable imitation." *Hildreth* v. *D. S. McDonald Co.*, 164 Mass. 16.

"Color, undoubtedly, is a most important element in all package combinations; but there are other elements as well, which go to make up the entire combination. Because a total change of color would so change the general appearance as to destroy resemblance to another package, it by no means follows that color alone would be sufficient to produce a general appearance resembling another package. It would not be giving the complainant a monopoly of yellow to restrain the sale of a particular yellow package, where, in addition to the color, a number of other elements, each differing more or less from its analogue in complainant's package, had been so collocated together as to produce a general appearance calculated to delude the unwary purchaser." *N. K. Fairbank Co.* v. *R. W. Bell Mnfg. Co.*, 77 Fed. R. 869.

"They must also, upon the same grounds, be prohibited from surrounding the neck and cork of a bottle of the form generally used to contain champagne wine, which contains their product as herein described, a rose-colored capsule of metal, whether stamped with the words 'Extra Dry,' and an imitation of the complainant's trade-marks, as in the exhibit before the court, or otherwise." *Von Mumm* v. *Frash*, 56 Fed. R. 830.

But see: Complainant not entitled to a decree enjoining the sale merely of a rose-colored capsule, unembossed, or even with the words "Extra Dry" impressed thereon, as such capsules may well be used in such a manner as not to deceive. *Von Mumm* v. *Witteman*, 91 Fed. R. 126; affirming 85 Fed. R. 966.

F. A style of dressing or marking goods.

See XI. 14. 270. *Proctor & Gamble Co.* v. *Globe Refining Co.*, 92 Fed. R. 357.

See XI. 1, 239, 2, 242, 4, 245.

Respondent held to have infringed rights of complainant in use of bottles of precisely same size and form for Morse's "Yellow Dock Compound," and in blowing in the glass in precisely the same manner the words "Dr. Morse's Celebrated Syrup." *Alexander* v. *Morse*, 14 R. I. 153.

Imitation of boxes for fireworks with labels enjoined. *Barnett* v. *Leuchars*, 13 L. T. N. S. 495.

Similarity of phrases on boxes of gall cure, and of size and color held to justify an injunction on ground of unfair trade. *Bickmore Gall Cure Co.* v. *Karns*, 134 Fed. R. 833; reversing 126 Fed. R. 573.

Inventor and manufacturer of metallic hones for sharpening razors wrapped them in special envelopes to distinguish them; defendant procured envelopes, and wrapped them on his own hones; plaintiff entitled to recover, although defendant's hones were as good as plaintiff's. *Blofeld* v. *Payne*, 4 Barn. & Adol. 410.

"The imitative devices used upon the stoves and ranges manufactured by the defendants are alleged to be employed by them for the purpose and with the result of deceiving the public, and thereby diverting the trade of the complainant to the defendants. This they have neither the moral nor the legal right to do." *Buck's Stove & Range Co.* v. *Kiechle*, 76 Fed. R. 758.

"Complainants ought in equity and good conscience to be protected from the imitation of their packages, so far as they are peculiarly designed and shaped, for the purpose of distinguishing complainant's goods, and from the imitation in color, design, style, and lettering combined of the labels used to make said packages, when put on the market; and complainants ought to be protected, as against the present defendants, from the introduction and sale of all such goods as are put up in such imitated packages and marked with such deceptive labels." *Carbolic Soap Co.* v. *Thompson*, 25 Fed. R. 625.

Imitation of bottles and labels of "Castoria" so as to deceive enjoined. *Centaur Co.* v. *Hughes Bros. Mnfg. Co.*, 91 Fed. R. 901.

While the word "Castoria" has become public property at expiration of patent, respondent is obliged to plainly distinguish

his goods and not use similar bottles and labels to those used by complainant during twenty years previously. *Centaur Co.* v. *Neuthery*, 91 Fed. R. 891.

Complainants had long made thread and sold it under a special label of their own design. Respondents fraudulently imitated it. Injunction. *Coats* v. *Holbrook*, 2 Sandf. Ch. 586.

Where preparation was put up as "Ohio Liniment," in bottles with labels and directions in similar language so as to imitate "Chinese Liniment," injunction issued. *Coffeen* v. *Brunton*, 4 McLean, 516.

A barrel with red rim and glazed surface, bearing letters "AAA" and a Maltese cross, protected against a similar barrel with letters XXX and a crown. *Cook* v. *Starkweather*, 13 Abb. Pr. n. s. 392.

Preparations put up in glass bottles of a certain size, with labels, and bearing name "Mrs. Winslow's Soothing Syrup" imitated as to bottles, labels, and name; held infringement, and injunction. *Curtis* v. *Bryan*, 36 How. Pr. 33.

Cards used by the respondent for hooks and eyes were substantially like those of complainants as to size, color, and form, and made to simulate mode of fastening eyes to cards. Injunction. *De Long Hook & Eye Co.* v. *Francis Hook & Eye Fastener Co.*, 139 Fed. R. 146.

"The defendant had an equal right with the complainant to manufacture and sell the same sizes and style of labels, but not intentionally and fraudulently to dress them by such a mode of packing and numbering as to cause, or be likely to cause, purchasers to mistake them for those produced by the complainant." *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651.

System of numbering to designate style and size of stationers' supplies, and style of dressing goods with labels, etc., imitated by defendant; relief on ground of unfair trade. *Dennison Mnfg Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651.

Although "Toothache Gum" on medicinal preparation is descriptive, yet respondent is enjoined from using the name on labels of same or similar color as that used by complainant and in connection with style of similar type. *Devlin* v. *McLeod*, 135 Fed. R. 164.

Respondent enjoined from using name "Toothache Gum" on medicinal preparation on labels of similar type and color to those of complainant. *Devlin* v. *Peck*, 135 Fed. R. 167.

An emollient paper dressing for corns put up under name

"French Tissue" by complainant was sold by respondent under same name, in such shape, and in envelopes and advertising circulars so closely resembling those under which complainant had achieved reputation, that there was likelihood of deception. Held injunction should issue. *Draper* v. *Skerrett*, 116 Fed. R. 206.

Complainants had acquired reputation in putting up a beverage of a certain color, in certain kind of bottles, with certain capsules and a label bearing among other words "Linetta" and address of proprietors; the respondent infringed by putting up beverage of similar color, in similar bottles, with similar capsules, with a label of different shape and without address, but with word "Linetta" in similar lettering of gold and red on the label. Held infringement. *Drewry* v. *Wood*, 127 Fed. R. 887.

An imitation of packages, labels, and manner of dressing goods will be restrained where party has combined these things so as to invade plaintiff's prior right by adoption and in a way calculated to deceive. *Electro Silicon Co.* v. *Levy*, 59 How. Pr. 469.

Complainant entitled to injunction on ground of unfair trade against respondent who put up its soap in form, color, and imitation of package so like those of complainant as to be easily mistaken; where it is further shown that complainant, under its style of dressing goods had acquired great reputation, and that respondent was not acting in good faith. *Enoch Morgan's Sons Co.* v. *Whittier-Coburn Co.*, 118 Fed. R. 657.

Defendant restrained from dressing up a soap called "saphia," and selling it in blue packages resembling those enclosing "sapolio."

"I do intend that he shall abstain from dressing his goods in wrappers so closely resembling the plaintiff's as to enable him to deceive the public and perpetrate a fraud." *Enoch Morgan's Sons Co.* v. *Schwachofer*, 55 How. Pr. 37.

"Probably no mere form of a package would ever alone amount to a representation capable of indicating that the wares contained in it were those of any particular make. But when the form of the packages, the color of the wrappers, and the papers done up with them and the form and color of the labels are considered all together, it is quite apparent that when they have been so long used by the orator's firm for holding this particular compound when offered for sale, the mere appearance of the package would amount to a representation that they contained that article of manufacture." Cylindrical packages with pink wrappers (yellow and crimson papers inside) with white label embossed with

words "Hamburg Hoppensack Co." on tea, protected. *Frese* v. *Bachof*, 14 Blatchf. 432; 13 O. G. 635.

Injunction granted to restrain a party from making and sending to Turkey watches having the plaintiff's name and customary marks which had become known in Turkey, and word "Jessendede" in Turkish characters, in imitation of plaintiff's watches. *Gout* v. *Aleploglu*, 6 Beav. 69.

Respondent enjoined from imitating labels, capsules, and bands on bottles of whiskey resembling those of complainant sold as "Canadian Club Whiskey." *Hiram Walker & Sons*, Ltd., v. *Hockstaeder*, 85 Fed. R. 776.

Respondent enjoined from imitating labels, bands, capsules, of complainant and using "Canadian Rye Whiskey," in imitation of "Canadian Club Whiskey." Respondent's whiskey not made in Canada. *Hiram Walker & Sons, Ltd.*, v. *Mikolas*, 79 Fed. R. 955.

A bottle of dark glass, four equal rectangular sides with an engraved label on one side with certain printing and design, infringed by similar bottles and labels and printing. Many of the respondent's bottles were those of complainant with name Hostetter blown in them, "Hostetter's Celebrated Stomach Bitters" not trade-mark, but protection extended to bottles and labels. *Hostetter* v. *Adams*, 20 Blatchf. 326; 10 Fed. R. 838.

"But the size of the labels and the devices, the appearance, the directions for the use, the size and shape of the bottles, mode of packing, etc., were in exact imitation of the plaintiff's, and the boxes or cases intended for sale were marked 'Dr. Hostetter's Bitters,' the same as the genuine." *Hostetter* v. *Vowinkle*, 1 Dill. 329.

"Johnson's Anodyne Liniment," put up by defendant in bottles bearing same name, and in imitation of bottles and wrappers, held infringement. Name alone not passed on. *Jennings* v. *Johnson*, 37 Fed. R. 364.

Wrappers of stove polish, of blue paper with black ink used for a number of years, and under which party has built up a business, protected. *Dixon Crucible Co.* v. *Benham*, 4 Fed. R. 527.

Edouard Pinaud had long been in the perfumery business in Paris, France, and achieved a great reputation. His business and trade-marks had passed to complainant, who carried it on and manufactured two preparations, known as "Extract Végétal" and "Eau de Quinine." Respondent was formerly in his employ, but on leaving began to put up similar goods, similarly labelled,

and with French words so designed as to lead one to believe that they were the product of the French firm, although they were made in New York. Unfair trade, and injunction. *Klotz* v. *Hecht*, 73 Fed. R. 822.

Complainant and predecessors had for many years bottled and sold mineral waters from Germany, which it had put up in green botties with blue labels of distinctive characteristics, and the water became known as "Blue Label Mineral Water." Defendant adopted and used for its mineral water bottles and labels of same shape, size, and color, but bearing thereon different words. Held, that while there were differences, yet the general effect was such as to deceive, and injunction should issue. *Kronthal Waters* v. *Becker*, 137 Fed. R. 649.

A firm put pills into wooden boxes of uniform size, shape, and appearance, each box containing twenty-two pills, with the name of the original invention stamped in red wax on the cover of each box, around which they placed the red label or wrapper. That label, with its devices and the red seal on the box, constituted a trade-mark.

A party is entitled to all advantages of celebrity which he has gained in manufacture.

When, therefore, a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of the goods having that mark or brand know it by them to be of his manufacture, no other manufacturer has a right to adopt the same stamp, because, by so doing, he would be substantially representing the goods to be the manufacture of the person who first adopted the stamp, and so would, or might, be depriving him of the profit he might make by the sale of the goods which the purchaser intended to buy.

It is not necessary that a specific trade-mark be infringed, but that the court is satisfied that there is an intent to deceitfully palm off goods as those of another. *McLean* v. *Fleming*, 96 U. S. 245.

Plaintiff prepared smoking tobacco as "Mrs. G. B. Miller & Co.'s Best Smoking Tobacco"; defendant prepared tobacco as "The Mrs. C. B. Müller & Co.'s Best Smoking Tobacco, 437½ Grove Street, Jersey City," in packages of same size, shape, and color, stamped as aforesaid. It was a fraud; demurrer to declaration overruled. *Miller Tobacco Manufactory* v. *Commerce*, 16 N. J. L. 18.

"A champagne bottle, for instance, is a thing long and well

known by the public, and any person, under ordinary circumstances, may lawfully use the same in putting up any preparation therein. But when a manufacturer of a hitherto unknown fluid or beverage, as an article of commerce, has a trade-mark therefor, and introduces such article of commerce to the public in a champagne bottle, with a particular kind of label or trade-mark affixed thereto, and the public becomes acquainted with it and recognizes it in that form and style, and thereafter another party or manufacturer, finding such article to be in great demand, introduces an article of like taste, color, and appearance, claiming to be for similar use or purpose, and with a label sufficiently like the former, and of a character calculated to mislead the public, why, then in such case I think that he might be and ought to be enjoined from embarrassing his neighbor and misleading the public by using a champagne bottle in putting up his preparation similar *in taste, flavor and appearance and with similar designation of* use or quality of article." *Moxie Nerve Food Co.* v. *Baumbach*, 32 Fed. R. 205, 213.

Preliminary injunction against use of labels, bottles, and wrappers resembling those of complainant, and marked "Nerve Food" in imitation of "Moxie Nerve Food." The exclusive right to "Nerve Food" alone not passed upon. *Moxie Nerve Food Co.* v. *Beach*, 33 Fed. R. 248.

"The shape and color of the bottle, the shield, and the general appearance of the label, are well and designedly adapted to deceive the ordinary purchaser, in the ordinary course of purchasing the article in a small quantity for immediate use." *Myers* v. *Theller*, 38 Fed. R. 607, 610.

A., a manufacturer, put up awls in a distinctive package consisting of a bronze-colored box having a brown label on the top, and on one side printed inscriptions, and tied with an orange string. Ten years after A. began the use of this package, which use, though small at first, increased largely the last two years, B., a manufacturer of awls, began to use a box indistinguishable in every particular, even to the words of the inscription, and the size and shape of type; except that at the bottom, in letters and arrangement as nearly like A.'s as possible, instead of "Manufactured & Warranted by New England Awl & Needle Co., West Medway, Mass.," the label read, "Manufactured for United States Awl & Needle Co., New York." Held, A. could maintain bill to restrain B. And this, although the judge below found that defendant did not intend to deceive, for an inspection of

the boxes makes it plain that the public would not distinguish them. *N. E. Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154.

Respondent on appeal enjoined from using a red label with clipped corners, bearing on the face in white two circles with intersecting lines, and words "Factory Seal," substantially like label of complainant, of same shade of red, clipped corners, bearing an ellipse with intersecting lines and words "In- er Seal" in white, used on cracker boxes of same size. *Ohio Baking Co.* v. *Natl. Biscuit Co.*, 127 Fed. R. 116; affirming 127 Fed. R. 160.

Style of putting up bluing in a cylindrical box with a cover to be perforated, with labels of a certain arrangement of words and style of printing, so copied by respondent as to deceive the public; injunction issued, although there was no trade-mark, on ground of unfair trade. *Sawyer* v. *Horn*, 1 Fed. R. 24.

Plaintiff had acquired reputation for his bluing sold in bottles with a bright metallic cap of tin, extending down over about one-half of the rim at the mouth of the bottle, the cap having six perforations; held, that the defendant should be enjoined by preliminary injunction from using a bright metallic top on a bottle of the same shape and appearance as that used by complainant. *Sawyer Crystal Blue Co.* v. *Hubbard*, 32 Fed. R. 388.

Complainants had for many years manufactured drawers with elastic seams, stamped "Scriven's Elastic Seam" and number "50," and they had become so known. Respondents manufactured similar drawers, designated "Standard Stretchy Seam," and marked "50," and advertised as "Elastic Seam Drawers." Held, that such facts showed deliberate intention to deceive, and justified injunction. *Scriven* v. *North*, 134 Fed. R. 366; modifying 124 Fed. R. 894.

Bottles of ink with label in white capital letters of large type, "Stephen's Blue Black," infringed by similar bottles bearing labels in similar type of "Steelpens Blue Black." *Stephens* v. *Veel*, 16 L. T. N. S. 145.

Injunction against use by defendant of form and color of tablets and shape of box, style of label, and use of words "Candy Cathartic," so nearly like dress of complainant's goods that it was a fraud. Defendant under decree would have to judge for itself how near he could go to the line. *Sterling Remedy Co.* v. *Spermine Medical Co.*, 112 Fed. Rep. 1000.

Complainants in England manufactured thread and sold it in United States as "Taylor's Persian Thread." Defendants sold

thread prepared in exact imitation, put on similar spools and so colored, stamped, and labelled as to resemble them exactly, or as nearly as could be done. Injunction. *Taylor* v. *Carpenter*, 2 Sandf. 603.

(1) A combination of well-known elements of color, size, shape, lettering, words, etc., each one of which may be old, adopted and used by a party and under which he has gained a reputation may be protected as a combination in cases of fraud.

See VIII. 1 E. 172. *Hildreth* and *Fairbank* cases.
See VIII. 1 F. 173.

"True, some of the elements may have beeu old, but it is not required that the separate details must have been original with the complainant seeking relief from infringement. The question is whether the adoption of the collocated features of the complainant's card and style of dress disclosed a differentiation from that previously adopted, and by which the public has come to recognize the product of the complainant." *De Long Hook & Eye Co.* v. *Francis Hook & Eye Fastener Co.*, 139 Fed. R. 146, 149.

Others before the plaintiff had made molasses candy of the same size and shape, and wrapped the pieces in the same kind and size of paper, with twisted ends. But the plaintiff to this old combination added printed words "Velvet," in red script in middle and on ends of wrappers. The defendant company adopted the old combination and added in Roman type in red ink on middle of wrapper, but not on ends, the word "McDonald." As a fact the public was deceived. An injunction was properly issued restraining the defendant from printing in red letters upon yellow wrappers for candy of substantially the same size and shape the name "McDonald" or any other word likely to deceive. *Hildreth* v. *D. S. McDonald Co.*, 164 Mass. 16.

Complainant had for two or three years put up yellow washing powder in yellow packages marked "Gold Dust," and "Washing Powder" with certain indicia, and at great expense built up considerable business. Defendant then changed its style of goods and put up a yellow washing powder in packages of same size, shape, and color with similar indicia, marked "Buffalo Soap Powder," with address of manufacturer. Held that the combination was such that injunction should issue against putting up and selling or offering for sale "the particular form of package which has been referred to in the bill and put in evidence as 'Defendant's Second Package,' or any other form of package

which shall, by reason of the collocation of size, shape, colors, lettering, spacing, and ornamentation, present a general appearance as closely resembling the 'Complainant's Package' referred to in the bill and marked in evidence, as does the said 'Defendant's Second Package.'" To which should be added, "This injunction shall not be construed as restraining defendant from selling packages of the size, weight, and shape of complainant's package, nor from using the designation 'Buffalo Soap Powder,' nor from making a powder having the appearance of complainant's 'Gold Dust,' nor from using paper of a yellow color as wrappers for its packages, provided such packages are so differentiated in general appearance from said 'Complainant's Package' that they are not calculated to deceive the ordinary purchaser." *N. K. Fairbank Co.* v. *K. W. Bell Mnfg. Co.* 77 Fed. R. 869.

G. A label or advertisement.

See XI. 1, 239, 2, 242, 4 A. 245.

Injunction granted against infringement of label in distinguishing features on ground that it was a trade-mark; but not against letters "A C A" on ground that they were descriptive, although for many years of a known and recognized reputation. *Amoskeag Mnfg. Co.* v. *Spear*, 2 Sandf. S. C. 599.

NOTE — This case might have been decided on the principles of unfair trade.

A distinctive label for beer used for two years and during that time having acquired a reputation, consisting of a diagonal red band with the name of beer in white letters on band, protected by preliminary injunction. *Anheuser-Busch Brewing Ass'n* v. *Clarke*, 26 Fed. R. 410.

A court of equity will enjoin unlawful competition in trade by means of labels of peculiar design or colors, or packages of distinctive shapes, intended to enable the defendant to pass his goods off as those of the plaintiff. *Brown Chemical Co.* v. *Stearns*, 37 Fed R. 360.

Labels of "Wolfe Aromatic Schiedam Schnapps," although not trade-marks imitated as to size, color, and words protected. *Burke* v. *Cassin*, 45 Calif. 467.

"A label is not a trade-mark, as recognized at common law, though it may, in fact, contain no words, figures, etc., except those which constitute the trade-mark. On principle, a person

is as fully entitled to be protected in the use of his label as his trade-mark, and the authorities fully sustain this position." *Burke* v. *Cassin*, 45 Cal. 467.

Labels with letters "C B" and words "A Broder à la Croix," on cross cotton protected against similar labels. *Cartier* v. *Carlile*, 8 Jur. N. S. 183.

Label on "Cauffman's Ginger Brandy," imitated in size, shape, color, and printed matter by that of respondent, although there were some differences and the word "Imperial" was substituted for "Cauffman," protected by injunction. *Cauffman* v. *Schuler*, 123 Fed. R. 205.

"It is truly said, that if any one takes upon himself to study these two labels, he will find several marks of distinction. On the other hand, the colors are of the same nature, the labels are exactly of the same size, the letters are arranged precisely in the same mode, and the very same name appears on the face of the jars or bottles in which the blacking is put. It appears therefore to me that there is quite sufficient to mislead the ordinary run of persons." *Croft* v. *Day*, 7 Beav. 84.

Respondent enjoined the second time from simulation of label for cigars. *Cuervo* v. *Owl Cigar Co.*, 68 Fed. R. 541.

Where a person has no exclusive right in a trade-mark he may be entitled to protection in a label where another label is so like his as to mislead the public. *Davis* v. *Kendall*, 2 R. I. 566.

"The wrappers and label, and the arrangement of the printed characters, and the language of the wrappers and labels, have become a well-known trade-mark." *Dixon Crucible Co.* v. *Benham*, 4 Fed. R. 527.

The defendant was restrained from using a label for washing powder similar to that of the plaintiff, embodying plaintiff's trade-mark and other features. *Falkinburg* v. *Lucy*, 35 Calif. 52.

A label for medicine with name and address of proprietor, name of medicine, and the letter B nine times repeated in three vertical columns may be protected, where its imitation would be likely to deceive the public. *Foster* v. *Blood Balm Co.*, 77 Ga. 216.

Plaintiff made pens on whose boxes he affixed labels showing that he was the manufacturer, and on first quality label he had "303"; on second quality "753"; defendant removed from boxes "753" label and put on one closely resembling "303" label with that number. Held fraud; injunction issued. *Gillott* v. *Kettle*, 3 Duer, 624.

Labels on an article used for making "Julienne" soup, fancy in style, protected as trade-marks; device consisted of words "conserves alimentaires" under which was coat of arms of city of Paris, upon either side monogram "A. G." in a circle, aud underneath words "Paris," "Julienne." *Godillot* v. *Hazard*, 81 N. Y. 263.

Labels bearing name of Hennessy on French brandy protected. *Hennessy* v. *Wilmerding-Loewe Co.* 103 Fed. R. 90.

Real estate auctioneer using an advertising flag with stars on upper and lower border entitled to injunction against another auctioneer using a similar flag in the same locality. *Johnson* v. *Hitchcock*, 3 N. Y. Supp. 680.

Complainant entitled to temporary injunction where it appeared that it had at great expense acquired a reputation for drawing-paper and materials which sold in labels, which labels the respondent had simulated by labels almost identical in size, shape, coloring, and lettering, so that mind of purchaser would be readily deceived. *Keuffel & Esser Co.* v. *H. S. Crocker Co.*, 118 Fed. R. 187.

Injunction against use of label on beer almost identical in general appearance with that of complainant, with same colors and same arrangement of letters, scrolls, and landscape. While there are differences the resemblances are such that the consumer is likely to be misled. *Kostering* v. *Seattle Brewing & Malting Co.*, 116 Fed. R. 620.

"An injunction, *pendente lite*, will issue, restraining the defendant from placing on the bags used by him in putting his peas on the market a label or inscription resembling in design, form, and arrangement, or collocation of identical words, the label or inscription of the complainants, as does the label now used by the defendant."

Defendant's label was a palpable imitation of complainant's, in color of ink, arrangement of words, and in general style. *Landreth* v. *Landreth*, 22 Fed. R. 41.

Although names "Disque," and "Pile-Leclanche," on patented electric batteries were descriptive and not protected as trade-marks, complainant was protected from simulation of labels. *Leclanche Battery Co.* v. *Western Electric Co.*, 23 Fed. R. 276.

Complainant sold Liebig's Extract of Meat in two-ounce jars, with wrapper, neck label, and metallic capsule. Label had printed "Liebig's Extract of Meat" and facsimile signature of

"J. V. Liebig." Defendant enjoined from using a label like complainant's in color and general appearance and bearing words "Liebig's Fluid Beef Co.," which were fictitious. But "Liebig" had become generic and its use would not be enjoined. *Liebig's Extract of Meat Co.* v. *Walker*, 115 Fed. R. 822.

Infringement of label, imitating the plaintiff's and using same type, with word "Bovina" instead of "Boviline." Injunction. *Lockwood* v. *Bostwick*, 2 Daly, 521.

A blue wrapper pasted around a small bottle of bluing containing in separate compartments various inscriptions in letters of silver and bronze, infringed by label of same size, color, type, and same general appearance; injunction on ground of unfair trade. *Sawyer* v. *Kellogg*, 7 Fed. R. 720.

A statement on a label of prepared chicory root that it is from the factory of "E. B. Muller & Co., in Roulens (Belgium)" when only the raw chicory root is from Belgium, and it is prepared in New York, is false, and on that ground, as well as on account of similarity of labels, an injunction will issue. *Scheuer* v. *Muller*, 74 Fed. R. 225.

Defendants enjoined from using numerals "830" to designate mottled drab hose not made by complainant, and from using on their labels the word "Seamless" printed in script, with the flourish underneath in imitation of the word "Seamless" as used by complainant. *Shaw Stocking Co.* v. *Mack*, 21 Blatchf. 1; 12 Fed. R. 707.

Preliminary injunction granted against use of labels on needles so like those of complainant as to be likely to deceive. *Walton* v. *Crowley*, 3 Blatchf. 440.

"Without deciding whether the defendant may or may not use either of the words 'Genuine' or 'Yankee,' in any possible combination, we think it sufficient to say that he may not use the labels, or devices, or handbills which he is using, nor any other like labels, devices, or handbills calculated to deceive the public, or create the belief that the soap he sells is the soap made or sold by the plaintiffs under the name of Genuine Yankee Soap." *Williams* v. *Johnson*, 2 Bosw. 1.

"They are of exactly the same size, their colors throughout are the same, the words descriptive of the goods are the same, and they are arranged in precisely the same manner, printed with letters of the same form and size, and in ink of the same colors." *Wirtz* v. *Eagle Bottling Co.*, 50 N. J. Eq. 164.

2. A sign, to be protected on the ground of unfair trade, must have first acquired a reputation, and have been imitated with fraudulent intent.

See XV. 3 B. 306. *N. K. Fairbank Co.* v. *Windsor*, 124 Fed. R. 200.

"But, while the idea of fraud or imposition lies at the foundation of the law of technical trade-marks as well as the law of unfair competition, it must be borne in mind that fraud may rest in actual intent shown by the evidence, or may be inferred from the circumstances, or may be conclusively presumed from the act itself. In the case of unfair competition, the fraudulent intent must be shown by the evidence, or be inferable from the circumstances, while, in the case of the use by one trader of the trade-mark or trade-symbol of a rival trader, fraud will be presumed from its wrongful use. It is commonly said that there is a right of property in a technical trade-mark, and an infringement of it is spoken of as a violation of a property right. Whether this view be correct or not is quite immaterial, because it is universally agreed that some of the rights which are incident to property do inhere in a technical trade-mark. The cases all agree that no one has a right to use another's trade-mark in connection with similar goods; and if he does so use it, and persists therein after being requested to desist, the fraud and imposition which constitute the essence of the injury will be presumed to exist, and relief will be granted without further proof." *Church & Dwight Co.* v. *Russ*, 99 Fed. R. 276, 279.

"If the plaintiffs had been the first and only ones to make use of this label, another person seizing upon and appropriating a black and gold label of the same size, and for the same purpose, might be held guilty of infringement, when, if the plaintiffs had no exclusive right thereto, and defendants had done only what others had done before, they would not be considered." *Coats* v. *Merrick Thread Co.*, 149 U. S. 562–569; affirming 36 Fed. R. 324.

Where party did not have trade-mark he is not entitled to claim protection for the manner of dressing his goods till he has shown that he has first acquired a reputation under that dressing. *Colgan* v. *Danheiser*, 35 Fed. R. 150.

Where words "standard" and "computing," descriptive marks, have not acquired a secondary meaning designating scales of

complainant, court will not enjoin their use by another. *Computing Scale Co.* v. *Standard Computing Scale Co.*, 118 Fed. R. 965.

"It has long been settled that in cases of unfair competition the action is based upon deception, unfairness, and fraud, and that this fraud should be generally proved, and not left to inferential evidence alone. This rule is far more strictly followed in cases of unfair competition than in cases involving a technical trade-mark, where fraud will be presumed from the wrongful use of the trade-mark, without regard to the intent. The United States courts have repeatedly held the intent to deceive the public an indispensable element in the fraud charged in unfair competition, and that 'this intent and the fraud in which it inheres may be, and generally must be, proved, by circumstances, by facts, by sales, by a course of action.'" *Daviess County Distilling Co.* v. *Martinoni*, 117 Fed. R. 186, 188.

"Undoubtedly courts of equity have granted injunctions to restrain the fraudulent use of words of this character; but the grounds of such decisions have been invariably, I think, the fraud of the defendants, and not any exclusive right of the plaintiffs." *Farnum, ex parte*, 18 O. G. 412.

"Where the ground for relief by injunction is fraud, it is necessary that the fraud should be made to appear by positive averments, founded on complainant's own knowledge, or that of some person cognizant of the facts. It is a general rule that whatever is essential to the rights of the complainant, and is necessarily within his knowledge, ought to be alleged positively and with precision." *Gaines & Co.* v. *Sprouse*, 117 Fed. R. 965, 967.

"Relief in such cases is granted only where the defendant by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacturer, to the injury of the plaintiff." *Goodyear's India Rubber Glove Mnfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598, 604.

"To justify a court of equity in interfering in an alleged case of unfair competition, there must be something more than the mere duplication by the one party of the other's trade-name, and that this was to be found in the deceptive use of imitative methods of display, or other device by which the public are led into buying the infringer's goods when they intended to buy those of the original producer; the fraud so perpetrated being a

legitimate ground for equitable interference and the practical basis of it." Diamond-shaped label of "Liquorice Pastilles" marked "H. H." not infringed. *Heide* v. *Wallace*, 129 Fed. R. 649, 650.

"The action is based upon deception, unfairness, and fraud, and when these are established the court should not hesitate to act. Fraud should be clearly proved; it should not be inferred from remote and trivial similarities. Judicial paternalism should be avoided; there should be no officious meddling by the court with the petty details of trade; but, on the other hand, its process should be promptly used to prevent an honest business from being destroyed or invaded by dishonest means." *Hilson Co.* v. *Foster*, 80 Fed. R. 896, 897.

"It seems, however, to be contended that plaintiff was entitled at least to an injunction, upon the principles applicable to cases analogous to trade-mark, that is to say, on the ground of fraud on the public, and on the plaintiff, perpetrated by defendant by intentionally and fraudulently selling its goods as those of the plaintiff. Undoubtedly an unfair and fraudulent competition against the business of the plaintiff — conduct with intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's — would, in a proper case, constitute ground for relief." *Lawrence Mnfg. Co.* v. *Tennessee Mnfg. Co.*, 138 U. S. 537, 549.

"Not until a feature had been used long enough to be known as a mark of the orator's machines, could the employment of it by others be a representation that their machines were the orator's." *Wilcox & Gibbs Sewing Mach. Co.* v. *The Gibbens Frame*, 17 Fed. R. 623, 624.

A. But imitation of distinguishing features beyond the probability of chance, or with full knowledge of the imitation, will be good evidence of fraud.

"Nothing is shown by the affidavits to repel the suspicion which naturally arises that the subsequent adoption of such a very similar label by one of the two rivals in the same city could not be accidental, but must have been for the purpose of confusion." *Anheuser-Busch Brewing Ass'n* v. *Clarke*, 26 Fed. R. 410.

Where respondent must have known of the high reputation and standing of the ploughs marked "Bissell" and the value of

the name, its assumption by it, to the loss and detriment of the complainant, will be enjoined on the ground of unfair trade. *Bissell Chilled Plow Works* v. *T. M. Bissell Plow Co.*, 121 Fed. R. 357.

"The presumption of a designed imitation, arising from the similarity of the spoons, the resemblance of the labels, and the identity of the numbers, would be very strong if all these circumstances were found to exist in reference to only one kind; but when the case finds, as it does, that they do exist in respect to several different kinds, the presumption is vastly strengthened." *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402, 417.

"It will readily be seen upon a comparison of the labels of the plaintiff with those of the defendants, that they are in many respects different, but in other respects there is a marked resemblance. The similarity could not have been accidental. The design on the part of the defendants to imitate the plaintiff's labels is unmistakable. The labels are nearly of the same dimensions, the paper and ink are respectively of the same colors." *Burke* v. *Cassin*, 45 Calif. 467, 480.

"Nor do these courts require specific proof of purchases by individuals actually deceived, when the labels themselves show an attempt at deception which appears to be well calculated to deceive. . . . Inspection of the labels must carry conviction to any unbiased and intelligent mind that the later label was prepared by someone who had seen the earlier one, and that it was designed, not to differentiate the goods to which it was affixed, but to simulate a resemblance to complainant's goods sufficiently strong to mislead the consumer, although containing variations sufficient to argue about should the designer be brought into court. This is the usual artifice of the unfair trader." *Collinsplatt* v. *Finlayson*, 88 Fed. R. 693.

Imitation evidence of fraud.

In the present case it appeared that the respondent had deliberately adopted in a number of instances the same style of boxes, manner of marking and lettering, even to the arbitrary numbers in use by the complainant, in fact had even gone so far as to imitate the system of the complainant.

"It is in the highest degree unreasonable to assume that after the complainant had adopted the numbers '223,' '2004,' '209,' and '201,' in connection with certain trade-dress for certain sizes and styles of labels to which they were applied, the defend-

ant's use of the same numbers and in connection with the same sizes and styles of labels, was an accidental coincidence." *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651, 664.

"Accidental coincidence is out of the question so far as the numbers, the names, and the sizes on these samples, in their sequence are concerned. In these particulars the defendant's samples are manifestly a studied imitation of those of the complainant." *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651, 666.

"In the present case the evidence shows that the goods of the defendant have been mistaken by purchasers for those of the complainant, probably by the design of the dealer. And, though there is no evidence connecting such dishonest dealing with the defendant in any way, the fact that it so dresses its goods as to give an easy opportunity to the unscrupulous dealer to delude the consuming purchaser is very persuasive evidence that an intention existed to enter into competition with the manufacturer whose goods were already well established, and to carry on such competition in a manner which courts of equity hold to be unfair." *Enoch Morgan's Sons Co.* v. *Whittier-Coburn Co.*, 118 Fed. R. 657, 661.

"It is elementary law that, when the simulation of well-known and distinctive features is so close, the court will assume that the defendant intended the result they have accomplished, and will find an intent to appropriate the trade of their competitor, even though in their instructions to their own selling agents they may caution against oral misrepresentations as to the manufacture of the goods." *Enterprise Mnfg. Co.* v. *Landers*, 131 Fed. R. 240, 241.

"Without rejecting the evidence of my senses, I cannot doubt that the label or trade-mark which the defendants admit that they propose to use, from its general resemblance to that of the plaintiff and his firm, is well calculated to mislead the public, by inducing the belief that the articles to which it is affixed are in reality prepared or manufactured by the plaintiff's firm. Nor can I doubt that the label was framed with this design, since the imitation is so close, minute, and exact, as in my opinion to exclude the supposition of any other motive." *Fetridge* v. *Wells*, 4 Abb. Pr. 144, 145.

"The intention of the defendant to imitate the plaintiff's label and the success of his effort is apparent. . . . In purchasing articles of so common use as bread, labels are not expected to be

critically examined, and persons who cannot read, as well as those who do, are obliged to buy." *Fleischman* v. *Schuckmann*, 62 How. Pr. 92.

"It was not necessary for the complainant to attempt to discover whether a purchaser had been actually deceived, for a manifest liability to deception exists. Although the intent of the defendant's principal when it commenced to use the name 'Health Food' may have been innocent, the continuance, after it had learned of the complainant's prior use, indicates its deliberate intention to use the name without reference to the complainant's possible prior rights." *Fuller* v. *Huff*, 104 Fed. R. 141, 145.

Where packages are so similar that the court cannot escape the conviction that infringement was intended, and it is highly improbable that there was no design, an affidavit that no imitation was intended will not avail on motion for preliminary injunction. *Hansen* v. *Siegel-Cooper*, 106 Fed. R. 691.

"It is plain that it is a copy from the plaintiff's by design. Variations are made of such a character as to be capable of discernment and description. But the general effect to the eye of an ordinary person, acquainted with the plaintiff's bottle and label, and never having seen the defendant's label and not expecting to see it, must be, on seeing the defendant's, to be misled into thinking it what he has known as the plaintiff's. The size, color, and shape of the bottle . . . the general effect of the horse and his rider . . . give an affirmative resemblance calculated to deceive an ordinary observer and purchaser, having no cause to use more than ordinary caution, and make him believe he has before him the same thing which he has before seen on the plaintiff's bottle and expects to find on the bottle he is looking at. The differences which he would see, on having his attention called to them, are not of such a character as to overcome the resemblances to the eye of a person expecting to see only the plaintiff's bottle and label, and having no knowledge of another." *Hostetter* v. *Adams*, 10 Fed. R. 838, 842.

"It is difficult to believe that there was no intention to deceive in this case, although the defendant swears that adopting the same numbers which Humphrey has used was purely accidental. . . . The defendant has printed his list with the same diseases or complaints designated by precisely the same numbers. If this was accidental and not intentional, it is one of the most remarkable coincidences that has occurred, and is a serious tax upon

human credulity." *Humphrey's Homeopathic Med. Co.* v. *Wenz*, 14 Fed. R. 250, 254.

Complainant had for several years used on granite, iron, and steel ware a rectangular label of a certain size printed in dark blue on light blue paper. Respondent after having for many years used a different label, suddenly changed to use of one like that of the complainant; held to justify inference of fraud and preliminary injunction issued. *Lalance & Grosjean Mnfg. Co.* v. *Natl. Enameling & Stamping Co.*, 109 Fed. R. 317.

"It is difficult to understand how any intelligent and unprejudiced mind can contemplate these contrasted exhibits, and reach any other conclusion than that the change was made with the intention of suggesting complainant's label to the retail purchaser. No amount of affidavits made by interested parties would be persuasive to the contrary. No necessity for any change at all is suggested, and, change being once decided on, it was so easy to make a change which would preserve the old lozenge, and still tend to differentiate between complainant's and defendant's goods, that a contrary course must be assumed to be designed to accomplish its natural result." *Lalance & Grosjean Mnfg. Co.* v. *Natl. Enameling & Stamping Co.*, 109 Fed. R. 317, 318.

Although letters "L. L." on cotton goods were descriptive, yet they would be protected in case of fraudulent imitation. "But the deceitful representation or perfidious dealing must be made out or be clearly inferable from the circumstances." In this case there was not considered to be a fraudulent imitation. *Lawrence Mnfg. Co* v. *Tennessee Mnfg. Co.*, 31 Fed. R. 776.

"The color of the paper, the words used, and the general appearance of the labels when used, show an evident design to give a representation of those used by the plaintiff, and the directions for using are an exact copy of those used by the plaintiff." *Lea* v. *Wolf*, 13 Abb. Pr. N. S. 389; 15 Abb. Pr. N. S. 1; 46 How. Pr. 157.

"The plaintiff in error submits that, in order to maintain this suit, it is necessary to show that it knew of the existence of a trade-mark, that it intended to palm off its goods as those of the Russia Cement Company, and that the public was deceived thereby. This might be true if the only case shown by the proofs was that of an actual purpose to mislead the public to the injury of the Russia Cement Company; but, as we place the case on the proposition that, under the circumstances, the use of the words 'Manufactured by The Le Page Company,' in connec-

tion with the word 'glue,' is necessarily a wrongful injury to the Russia Cement Company, which ought to have been foreseen by Le Page and the Le Page Company, we have not deemed it necessary to go into the controverted question of actual fraudulent intent or artifice, or to weigh the evidence on that point. Positive proof of fraudulent intent is not required where the proof of infringement is clear, as the liability of the infringer arises from the fact that he is enabled to sell a simulated article as and for the one which is genuine." *Le Page Co.* v. *Russia Cement Co.*, 51 Fed. R. 941.

"Nor is it necessary, in order to give a right to an injunction that a specific trade-mark should be infringed; but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant, and that he persists in so doing after being requested to desist." *Mc Lean* v. *Fleming*, 96 U. S. 245, 254.

"Positive proof of fraudulent intent is not required where the infringement is clear, as the liability of the infringer arises from the fact that he is enabled, through the unwarranted use of the trade-mark to sell a simulated article as and for that which is genuine." (Although word "trade-mark" is used it is a case of unfair trade.) *Mc Lean* v. *Fleming*, 96 U. S. 245, 253.

"There are also, as is usual, a number of minor differences between the form and the dress of the two packages, which are expatiated upon in the affidavits and the brief; but no one can look at both packages without perceiving that there are strong resemblances, which could easily have been avoided had there been an honest effort to give defendant's goods a distinctive dress." *National Biscuit Co.* v. *Baker*, 95 Fed. R. 135.

"They had the right to use the background used by the complainant; they had the right to use clipped corners and the word 'Seal'; they had the right to use any color that the complainant used for cartons; and they had the right to use packages of the size used by the complainant. But when they used all these things in combination, the object is too apparent to admit of argument." *National Biscuit Co.* v. *Ohio Baking Co.*, 127 Fed. R. 160, 161.

Where an inspection of boxes and styles of wrapping make it plain that the public would not be likely to distinguish between them, court will not be bound by a decision of lower court that defendant did not intend to deceive. *N. E. Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154.

"The law is well settled that in suits of this character the intention of the respondent in adopting the style of package or choosing a name for a similar product is to a certain extent immaterial. It is not essential to right of complainant to injunction to show absolute fraud or wilful intent on the part of the respondent. Upon familiar principles, it will be presumed that the respondent contemplates the natural consequences of its own acts." *N. K. Fairbank Co.* v. *Luckel, King, & Cake Soap Co.*, 102 Fed. R. 327, 330.

"When there are found strong resemblances, the natural inquiry for the court is, why do they exist? If no sufficient answer appears, the inference is that they exist for the purpose of misleading." *Paris Medicine Co.* v. *W. H. Hill Co.*, 102 Fed. R. 148, 151.

"That the defendant's label is a designed imitation of the complainant's scarcely admits of a doubt. Such perfect similarity could hardly have been the result of chance. We do not mean to say that it would be a justification if it were accidental. But it is apparent that it was designed." *Sawyer* v. *Kellogg*, 7 Fed. R. 720, 721.

"The respondent, in his answer and in his testimony, avers that he had no intention of infringing on the rights of the complainant. He has taken the testimony of a number of witnesses to prove his high character as a citizen and business man. In the argument great stress is laid upon this testimony by respondent's counsel, as negativing the idea of a fraudulent purpose on the part of the respondent in dressing up his goods in imitation of the complainant's. The court cannot give to this evidence the weight to which counsel insist it is entitled. It must in this case, as in every case where intent is the subject of investigation, deduce the intent from the acts of the respondent. These constitute the proof as to the purpose of the respondent, and by them the court must be guided." *Walter Baker & Co.* v. *Baker*, 77 Fed. R. 181, 184.

"The methodical imitation of the wrappers and style of labels appear to be intentional, and not accidental." *Wellman & Divire Tobacco Co.* v. *Ware Tobacco Works*, 46 Fed. R. 289.

"The law, in civil cases, does not attempt to penetrate the secret motive which induced the act brought in judgment, but judges of its legal quality solely by the consequences which have naturally and necessarily proceeded from it. It is no less a dictate of justice than of sound reason that every person must be

understood to have intended to do just what is the natural consequence of his act deliberately done. The aggrieved person, in cases of this class, is not required to show intentional fraud, but he makes a sufficient case to give him a right to protection when he shows that the defendant is using his label, or one so nearly like it as to render deception of the public and injury to himself probable." *Wirtz* v. *Eagle Bottling Co.*, 50 N. J. Eq. 164, 167.

3. The substitution on goods of different grades of the same origin, of signs, labels, or styles of dressing goods adopted by a proprietor, is a fraud enjoined on the ground of unfair trade.

See VIII. 1 G. 182. *Gillott* v. *Kettle*, 3 Duer, 624.

"If a brandy different from that which the manufacturer bottled is put into bottles and sold as the manufacturer's bottled brandy, the fact that it is the manufacturer's bulk brandy does not make the sale less an imposition." *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216, 221.

"It is manifest that the sale of merchandise in bulk by a manufacturer does not justify the vendee in using on his retail packages the label which the manufacturer uses upon the same merchandise only when prepared by himself on smaller packages for the retail trade." *Krauss* v. *Jos. R. Peebles' Sons Co.*, 58 Fed. R. 585, 592.

Complainant entitled to exclusive use of word "Le Page" on glue, put up two grades, the first called "Le Page's Liquid Glue," the second grade called "Le Page's Fish Head Glue." Respondent purchased a lot of second grade and put it up and labelled it "Le Page's Liquid Glue." Held, a deception which should be enjoined. *Russia Cement Co.* v. *Katzenstein*, 109 Fed. R. 314.

4. A party re-filling boxes, barrels, or receptacles which have already acquired by familiar use a reputation in the public mind as containing the goods of another, with the intention thereby of diverting trade and deceiving the public, is guilty of unfair trade, and will be enjoined on the ground of fraud.

Defendant had no right to take lime-juice bottles with name of complainant blown in them, fill them with lime juice and resell them. *Evans* v. *Von Luer*, 32 Fed. R. 153.

Respondent sold bitters closely resembling those of complainant, put up in jugs marked "H. Bitters," and in some instances sold them in Hostetter's bottles. Complainant alone possessed secret of making the bitters. Held to constitute a case of unfair trade. *Hostetter* v. *Martinoni*, 110 Fed. R. 524.

Complainant has right to injunction against respondent, who refilled his empty whiskey barrels bearing his trade-mark "Golden Wedding." *Pontefecat* v. *Isenberger*, 106 Fed. R. 499.

"I lay it down as a general rule, that it is not justifiable for a trader to fill bottles, or casks, or anything else bearing a known name, so as to induce the public to believe that the thing contained in those vessels is the production of the man whose name they bear; because by doing that he puts it in the power of the person selling these goods to impose on the public." *Rose* v. *Loftus*, 47 L. J. Ch. 576; 38 L. T. n. s. 409.

Respondent enjoined from refilling bottles of complainant for gins, of dark glass of distinctive size and shape, having firm's name, address, and monogram blown into the glass. *Van Hoboken* v. *Mohns*, 112 Fed. R. 528.

5. A fraudulent course of conduct by oral or written misrepresentations tending to injure another in his established business constitutes unfair trade.

Complainant had trade-mark in word "Sapolio," to designate particular kind of soap. Defendant's salesmen, when asked for "Sapolio," would hand out a soap in a different wrapper marked "Pride of the Kitchen." Held to constitute infringement.

"Any act or thing done to induce the belief that the one article is in fact the other is unfair, and indeed unlawful; and this is the true meaning and intent of the acts of the defendant's salesmen complained of. The case falls clearly within the principle that equity should prevent a party from fraudulently availing himself of the trade-mark of another, which has already obtained currency and value in the market, by whatever means he may devise for that purpose. The defendant had no right to represent, by word of mouth or by act, directly or indirectly, that 'Pride of the Kitchen' was 'Sapolio,' and yet this is what the acts of their agents amount to. Such acts should be restrained." *Enoch Morgan's Sons Co.* v. *Wendover*, 42 Fed. R. 420, 422.

The writing of a single letter threatening suit for infringement of patent is not such an interference with customers as would

of itself constitute unfair trade. *George Frost Co.* v. *Kora Co.*, 136 Fed. R. 487.

A publication of a garbled letter written to the public by complainant, in which he denied having any business connection with a certain "Life of McKinley," but that he was engaged in writing a new life, in which publication the reference to the new life was omitted, and the public confused according to the plan of the respondent, is unfair trade which the court will enjoin. *Halstead* v. *Houston*, 111 Fed. R. 376.

Defendant did not counterfeit labels on bottles, but manufactured an article similar to "Hostetter Bitters," and sold it to customers, advising them to buy "Hostetter Bitters" bottles, refill them, and resell the article as genuine "Hostetter Bitters." "The fact that it has advised its customers to perpetrate a fraud of that description, and that it has furnished them the spurious article, and that some of its customers have probably acted on the suggestion, is sufficient to render them liable to an injunction. *Hostetter Co.* v. *Brueggeman-Reinert Distilling Co.*, 46 Fed. R. 188.

Respondent manufactured bitters as nearly like Hostetter's as possible in taste and color, the complainants by a secret process having sole right to make these bitters, and did it for the purpose of palming off their bitters as Hostetter's, and it was in evidence that he advised his customers to put them into empty Hostetter bottles. Held, to justify a decree on ground of unfair competition. *Hostetter* v. *Conron*, 111 Fed. R. 737.

Respondent, by its secretary and treasurer, sold to representative of complainant bitters billed as "Aromatic Bitters," but represented to be "Hostetter Bitters," and at request of representative furnished him with an empty Hostetter bottle. Injunction. *Hostetter Co.* v. *William Schneider Wholesale Wine and Liquor Co.*, 107 Fed. R. 705.

Respondent reprinted edition of Webster's Dictionary of 1847, on which copyright had expired, advertised that it was the "Famous Reprint Edition," the same as sold previously for $12 to $15, then offered for $1.45, using same form, size, and shape of book as complainant, publishing under copyrighted edition of 1864, with symbol of book and "Webster's Dictionary." Held, that form, size, symbol, "Webster's Dictionary" were not trademarks, but that the advertisement was such as to deceive people into believing that it was edition of 1864, and should be enjoined. *Merriam* v. *Famous Shoe & Clothing Co.*, 47 Fed. R. 411.

Respondent reprinted obsolete edition of 1847 Webster's Dictionary, worth about $2, and stated in advertisements that it was "Latest Edition," hitherto sold for $10, and offered now for $8. There was evidence of persons' being deceived. Held, that there was no trade-mark in "Webster's Dictionary," or in form or size of volume, but that the advertisements were calculated to deceive, and that the respondent should be enjoined from such advertisements at the suit of complainant, owner of later copyrighted editions, and that it should insert in the book a statement that it was old edition of 1847. *Merriam* v. *Texas Siftings Publ. Co.*, 49 Fed. R. 944.

It is unfair trade for a grocer to put up a soap powder called "Buffalo" as and for a superior article well known and recognized as "Gold Dust," which is a valid trade-mark. *N. K. Fairbank Co.* v. *Dunn*, 126 Fed. R. 227.

Testimony that two parties employed by complainant went to respondent's store, asked for Hostetter Bitters, that he sold them bitters resembling Hostetter's, sold from barrels marked "H. Bitters," and furnished empty Hostetter bottle with the labels, would warrant inference that he was in the business of selling a preparation like Hostetter's for the purpose of its being used with Hostetter bottles and labels, and of palming it off as Hostetter's. The fact that witnesses were not real customers no defence. Injunction. *Samuel Bros. & Co.* v. *Hostetter Co.*, 118 Fed. R. 257.

After a prior adjudication allowing party right to use of name "F. G. Weber & Co." on packages of tea, the court would enjoin oral representation that the tea is "Weber's Tea," on the ground that it would lead to confusion and be unfair trade. *Weber Medical Tea Co.* v. *Kirschtein*, 101 Fed. R. 580.

A. But there is no unfair trade unless there is a violation of some contractural right or some course of conduct likely to deceive the public to the injury of another party.

It is not unfair competition for one employed by another in work under a patent to subsequently obtain a patent in an improvement in manufacture of a similar article and engage in manufacture and sale of such article under his own patent. *American Coat Pad Co. of Baltimore City* v. *Phoenix Pad Co.*, 113 Fed. R. 629.

It is not fraud for a cigar dealer to register as a trade-mark

the word "She" used on labels for cigars sold by printers in New York to cigar dealers throughout the country who are not supposed to be conflicting in trade; but such word cannot become by registration a trade-mark for the registrant, because being on stock labels it lacks originality of application; it may be protected on the ground of unfair trade. *Sartor* v. *Schaden*, 125 Iowa, 696.

6. A fraudulent imitation of the distinguishing outlines and features of goods which are not structural but ornamental, may constitute unfair trade.

But see: VIII. 1 F. 179. *Scriven* v. *North*, 124 Fed. R. 894.

Complainant had for many years manufactured stoves and ranges with white enamel on the inside of doors, and these stoves had achieved considerable reputation as "White Enamel." Held, whether the method of using enamel was a trade-mark or not, the respondent should not be allowed fraudulently to use the same means of dressing his stoves. *Buck's Stove & Range Co.* v. *Kiechle*, 76 Fed. R. 758.

Complaint was that respondent had infringed by use of words "standard" and "computing," and by copying outlines of complainant's scales. Held, that the words were descriptive and not secondary in meaning, and that there were marked mechanical differences in the scales which could not but be noted by one familiar with scales even in slightest degree. Injunction refused. *Computing Scale Co.* v. *Standard Computing Scale Co.*, 118 Fed. R. 965.

Complainant had for many years made coffee-mills of certain shape, design, and color, and achieved great reputation. Respondent undertook the manufacture of exactly same style of coffee-mills, except in numbers, which were, however, simulated. Held, that the imitation was such as to show fraud, and that the respondent should be enjoined. *Enterprise Mnfg. Co.* v. *Landers, Frary & Clark*, 124 Fed. R. 923. Aff'd 131 Fed. R. 240.

"The injunction should be broad enough so that, while not interfering with the inherent right of the defendant to make coffee-mills of such design, shape, and dress as it may please to employ, it will prevent said defendant from marketing a mill, not only such as it now markets and threatens to market, but any mill which, by reason of its shape, design, and arrangement of color and number, shall so resemble the coffee-mills of the plaintiff as

to be likely to create a misapprehension in the minds of the purchasing public of average intelligence, and to tend to lead the ordinary consumer to mistake the mills of the defendant for the mills of the plaintiff." *Enterprise Mnfg. Co.* v. *Landers, Frary, & Clark,* 124 Fed. R. 923, 928. Aff'd 131 Fed. R. 240.

For many years complainant had made box letter files under the names "Eureka" and "Leader," and an emblem of a globe. The court did not pass on the question as to whether these were trade-marks, but as the respondent had so imitated the style, color, marking, and names of the complainant's boxes as to cause unfair competition, injunction was granted.

"This particular file (one of many made by appellant) came to be known to the trade, not by the word or emblem merely, but by its appearance as a whole, which had been uniformly maintained, of which the word and emblem were but two of very many features. The decree to be directed will protect appellant fully in its 'Leader' file as made, and we will not undertake to say in advance that appellee is likely to use the word or the emblem upon files which in other respects bear no resemblance to appellant's." *Globe-Wernicke Co.* v. *Brown*, 121 Fed. R. 90, 92.

But see: Complaint that the appellee is making and selling sectional bookcases in imitation, not only of the "system" which the appellant employs, but also of the sizes, styles, material, and finish of those of appellant, with intent to deceive the public. It was not claimed that appellee was representing by any sign its bookcases to be those of the appellant. Held, that since complainant did not have any monopoly in that style of bookcases, and had not by that form and style obtained a reputation rather than skill of workmanship and elegance of materials, there was no unfair trade. *Globe-Wernicke Co.* v. *Fred Macey Co.*, 119 Fed. R. 696.

"It is impossible to admit the claim of the appellant to the extent of its pretensions, which would amount to a monopoly of such proportions as would practically engross the business. Without doubt, a party may adopt distinguishing marks to denote the origin of production as being his own, or he may adopt some other peculiar method of distinguishing his own goods, and thus retain the benefit of the good reputation which he has acquired for them. But the very idea of distinguishing them implies that it cannot be done by such universal characteristics as belong to other goods of the kind, and which the general public have the undoubted right to use. . . Nor is it competent for one person

to appropriate to his own purposes any common and general characteristics of the goods he manufactures to such an extent that another shall be impeded or embarrassed in his free right to use such characteristics in his own business." *Globe-Wernicke Co.* v. *Fred Macey Co.*, 119 Fed. R. 696, 704.

Same principles of law involved as in *Singer Mnfg. Co.* v. *June Mnfg. Co.*, 163 U. S. 169; and many imitations the same; similar decree and accounting. *Singer Mnfg. Co.* v. *Bent*, 163 U. S. 205; reversing 41 Fed. R. 214.

"But it does not follow, as a consequence of a dedication, that the general power, vested in the public, to make the machine and use the name, imports that there is no duty imposed on the one using it, to adopt such precautions as will protect the property of others and prevent injury to the public interest, if by doing so no substantial restriction is imposed on the right of freedom of use. . . It is obvious that if the name dedicated to the public, either as a consequence of the monopoly or by the voluntary act of the party, has a twofold significance, one generic, and the other pointing to the origin of manufacture, and the name is availed of by another without clearly indicating that the machine, upon which the name is marked, is made by him, then the right to use the name, because of its generic signification, would imply a power to destroy any good-will which belonged to the original maker. It would import not only this, but also the unrestrained right to deceive and defraud the public by so using the name as to delude them into believing that the machine made by one person was made by another." *Singer Mnfg. Co.* v. *June Mnfg. Co.*, 163 U. S. 169, 186, 187.

Complainant had for many years built up an extensive business with great reputation in sewing-machines under patents, some fundamental, some accessory, and applied name "Singer," in a descriptive sense. At expiration of some patents the respondent began to construct machines of a similar pattern, using the name "Singer," and adopting certain forms in the machine which were employed by the complainant for distinguishing purposes and not for structural, such as a distinctive oval plate with certain marks; a screw protected by patent in complainant's machines serving a mechanical purpose was imitated by a dummy screw in respondent's. The numbers, running up into millions on complainant's machines, were copied on respondent's as if they came from an old established concern. Held, that while the complainant, after expiration of patent, had no right to the

name "Singer" or to form of machines, yet the respondents were in their copies of unessential details, etc., guilty of fraud. Injunction. "First, from using the word 'Singer' or any equivalent thereto in advertisements in relation to sewing-machines, without clearly and unmistakably stating in all said advertisements that the machines are made by the defendant, as distinguished by the sewing-machines made by the Singer Manufacturing Company: second, also perpetually enjoining the defendant from marking upon sewing-machines, or upon any plate or device connected therewith and attached thereto the word 'Singer,' or words or letters equivalent thereto, without clearly and unmistakably specifying in connection therewith that such machines are the product of the defendant or other manufacturer, and therefore not the product of the Singer Manufacturing Company. And the decree so to be entered must also contain a direction for an accounting by the defendant as to any profits which may have been realized by it, because of the wrongful acts by it committed." *Singer Mnfg. Co.* v. *June Mnfg. Co.*, 163 U. S. 169; reversing 41 Fed. R. 208.

Complainant entitled to injunction against party who imitated its disk records in color, lettering, and grooves, and used same numbers thereon as it used for designation to the public. *Victor Talking Machine Co.* v. *Armstrong*, 132 Fed. R. 711.

A. But similar features or designs which are structurally essential or are in common use do not constitute a case for unfair trade.

It is not unfair competition for respondent to use a tin tag of similar size and color to that of complainant on its plug tobacco where such use is common to the trade, especially where the different lettering is easily distinguishable. *Continental Tobacco Co.* v. *Larus & Bro. Co.*, 133 Fed. R. 727.

Unfair competition is not established by proof of similarity in form, dimensions, or general appearance alone. Where such similarity consists in constructions common to or characteristic of the articles in question, and especially where it appears to result from an effort to comply with the physical requirements essential to commercial success, and not to be designed to misrepresent its origin of such articles, the doctrine of unfair competition cannot be successfully invoked to abridge the freedom of trade competition. *Marvel Co.* v. *Pearl*, 133 Fed. R. 160.

7. A party who has acquired, in good faith, a reputation under a mark by use during the same period in which it is used by another party, may be protected in its use, although the other party may have the rights of a trade-mark therein.

See VIII. 1 B (2). 157. *City of Carlsbad* v. *Schultz*, 78 Fed. R. 469.
See IV. 9 B. 112. *Corwin* v. *Daly*, 7 Bosw. 222.
See IV. 8 A. 111.
See XVI. 2. 334. *Leprince* v. *Iler & Morris*, 92 O. G. 189.

A. A name registered and claimed as a trade-mark, which may not be a valid trade-mark, may be protected within geographical limits on the ground of unfair trade.

See VIII. 5 A. 197. *Sartor* v. *Schaden*, 125 Iowa, 696.
The name "Keystone," for cigars, registered and claimed as a trade-mark, while it might not be a valid trade-mark on account of prior use and geographical meaning, might be protected in New England on the ground of unfair trade. *Cohen* v. *Nagel*, Mass. Feb. 1906.

IX. TRADE-NAMES.

1. A trade-name used by a proprietor to designate (A) the personality and the character, (B) or the locality of his business, not affixed to the goods, is protected by the courts from infringement as against all others not having an equal right to use it.

A. *(1) Business enterprises.*

"Colton Dental Rooms," sign protected. Where infringer formerly working for plaintiff hung out sign similar in form to that of plaintiff's, with small letters (after his own name) "late operator at the," and "Colton Dental Rooms" prominently displayed. Held, infringement. *Colton* v. *Thomas*, 2 Brewst., 308.

"Established 1780," or "Established A. D. 1780," as part of trade-name protected. *Hazard* v. *Caswell*, 57 How. Pr. 1.

Plaintiffs operated line of omnibuses known as "London Conveyance Company"; defendant used on his line such words as "Conveyance Company." Injunction. *Knott* v. *Morgan*, 2 Keen, 213.

A party who has built up at Taunton a large business at considerable expense under the name "Manufacturers' Outlet Company," which name was registered as a trade-mark, is entitled to relief against a party who fraudulently for the purpose of diverting business, establishes himself under the name of the "Taunton Outlet Company." *Samuels* v. *Spitzer*, 177 Mass. 226.

The plaintiff carried on business in the city of L., having for his sign a figure of a gilt lion, and designating his place of business "The Golden Lion." The defendant had for some years had the conduct of the business, and beginning on his own account opened a shop, in front of which he placed a figure somewhat similar to that of plaintiff; the court restrained the defendant from using as a sign this or any similar figure. *Walker* v. *Alley*, 13 Grant Ch. 366.

(2) Hotel.

"We think that the principle of the rule is the same to whatever subject it may be applied, and that a party will be protected in the use of a name which he has appropriated and by his skill

rendered valuable, whether the same is upon articles of personal property which he may manufacture, or applied to a hotel where he has built up a prosperous business." *Howard* v. *Henriques*, 3 Sandf. S. C. 725.

"Irving House," protected as trade-name for hotel. *Howard* v. *Henriques*, 3 Sandf. S. C. 725.

Plaintiffs by agreement with proprietors of "Revere House," used name on busses (and on caps of drivers) to convey passengers to and from hotel and a railroad station. Defendant used same name likewise. Held, in a court on the case plaintiffs had right to recover "such damages as the jury, upon the whole evidence, should be satisfied they had sustained; that the damages would not be confined to the loss of such passengers as the plaintiffs could prove had actually been diverted from their coaches to those of the defendants, but that the jury would be justified in making such inferences as to the loss of passengers and injury sustained by the plaintiffs as they might think were warranted by the whole evidence in the case." *Marsh* v. *Billings*, 7 Cush. 322.

McCardel allowed party to use his name on hotel in which he, McCardel, was employed. McCardel left hotel and got no benefit from it; party sold hotel to defendant. McCardel's wife who succeeded him in restaurant business under name of "McCardel House," had right to restrain defendant from using name "McCardel House" on his hotel. No express agreement or license existed for use of McCardel's name. *McCardel* v. *Peck*, 28 How. Pr. 120.

Plaintiffs agreed with A, proprietor of certain hotel, "Irving House," to have exclusive use of his name on busses (and badges) to and from his hotel. Held entitled to injunction v. third parties using name likewise. *Stone* v. *Carlan*, 13 Mo. L. R. 360; Cox Manual, 104.

"Columbia," as applied to hotel, good trade-mark. (See *idem.* III 2 E. 73.) *Whitefield* v. *Loveless*, 64 O. G. 442.

Name of hotel "What Cheer House," protected. A. built hotel "What Cheer," on leased land, then bought adjoining lot and built there a hotel called "What Cheer House." At expiration of lease the lessor had no right to designate the hotel "What Cheer House." *Woodward* v. *Lazar*, 21 Calif. 448.

(3) Orchestra, etc.

Party has right to trade-name on minstrels. Christy had in 1842 at some labor and expense established "Christy's Minstrels," and given shows till fall of 1854. He suspended, went to California and after several months returned. Performers in old troupe without license started "Christy's Minstrels." He had not resumed, but announced intention to do so. Injunction. *Christy* v. *Murphy*, 12 How. Pr. 77

(4) Newspaper, periodical, or publication.

See XI. 11. 265.

(a) But there is no exclusive right to a trade-name on a publication which has been dedicated to the public without copyright or on which a copyright has expired.

"The bill rests, then, upon the single proposition: Is the complainant entitled to invoke the aid of this court to prevent the defendant from using the complainant's assumed name of 'Mark Twain,' in connection with the publication of sketches and writings which complainant has heretofore published under that name, and which have not been copyrighted by him? . . . The invention of a *nom de plume* gives the writer no increase of right over another who uses his own name; . . . but an author cannot, by the adoption of a *nom de plume* be allowed to defeat the well-settled rules of the common law in force in this country, that the publication of a literary work without copyright is a dedication to the public, after which any one may republish it."

But the complainant would have had the right to enjoin use of his *nom de plume* on matter which he did not write. *Clemens* v. *Belford*, 14 Fed. R. 728, 731.

"The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it, as certainly as the principal carries with it the incident." *Jollie* v. *Jaques*, 1 Blatchf. 618, 627.

"I have no doubt that defendant is entitled to use the words 'Webster's Dictionary,' to describe the work that it is engaged in publishing and selling. Those words were used to describe Webster's Dictionary of the edition of 1847, and, as the copyright on that edition has expired, it has now become public property. Any one may reprint that edition of the work, and entitle the re-

print 'Webster's Dictionary.' The latter words, which appeared on the title-page and on the outer cover of books of the edition of 1847, have become public property, as well as other parts of the work. . . . In my judgment, no person engaged in publishing and selling a book or books can acquire an exclusive right to use the device of a book on letter-heads and bill-heads, or on wrappers or boxes containing books. The device in question, when used in that connection or relation, is not sufficiently arbitrary to constitute a valid trade-mark." *Merriam* v. *Famous Shoe and Clothing Co.*, 47 Fed. R. 411, 413.

The copyright on Webster's Dictionary having expired, no one has any special property in the title. *Merriam* v. *Holloway Pub. Co.*, 43 Fed. R. 450.

"The plaintiffs are not entitled to an exclusive use of the name 'Webster's Dictionary' upon copies of editions, the copyrights of which have expired, for the name is not a trade-mark. Mere copies of the edition 1847 and 1859 can be reproduced by a publisher, over his own name, provided he makes no misrepresentations to induce the public to believe that it is another book, the right to publish which is the exclusive property of the plaintiff. The mere form or size of the volume in which Webster's Dictionary has ordinarily appeared, does not, in the mind of the public, connect the plaintiffs with the manufacture of the dictionary, and there is no characteristic of a trade-mark in such ordinary form or size." *Merriam* v. *Texas Siftings Pub. Co.*, 49 Fed. R. 944, 947.

B. The locality of his business.

See X. 4. 231; X. 7. 237.

A party with consent of owner of building erected sign over his store "Tower Palace," owner paying half expense; after he moved the new lessee continued name. Held, that he could not be enjoined by former proprietor, as name went with the building.

"Here the name 'Tower Palace' was intended to describe and designate the place, and not the particular business, nor the person carrying it on. It never was used as a trade-mark by appellant, but simply to indicate the particular place on Market Street where he did business, and consequently he never acquired the exclusive right to use that name, except as applicable to and while he occupied that building." *Armstrong* v. *Kleinhans*, 82 Ky. 303.

Party and his predecessor had for many years been doing busi-

ness at No. 10 South Water St., and had used trade-name "The Old Joseph Hall Agricultural Works, No. 10 South Water St., Rochester, N. Y.," so that the place had come to be known as "No 10 South Water St." Held, entitled to relief against party who established himself on same street and used, "No. 10 South Water St." *Glen & Hall Mnfg. Co.* v. *Hall*, 61 N. Y. 226.

"It would follow from these principles that if a person had established a business at a particular place, from which he has derived or may derive, profit, and has attached to that business a name indicating to the public where and in what manner it is carried on, he has acquired a property in the name, which will be protected from invasion by a court of equity, on principles analogous to those which are applied in case of the invasion of a trade-mark." *Glen & Hall Mnfg. Co.* v. *Hall*, 61 N. Y. 226, 231.

2. Under the same rules as apply to trade-marks courts will not, in the absence of fraud, protect a party in the exclusive use of (A) a descriptive, (B) a geographical, (C) an appellative, (D) or a deceptive trade-name.

A. Descriptive.

"Svenska Snesmagasinet," meaning, "Swedish Snuff Store,' descriptive trade-name, not protected.

"If a phrase or words in common use are selected, which are indicative of the character, nature, kind, quality, virtue or composition of the thing to which they relate, the law will not protect their use as a trade-mark, and the same is true in respect of trade-name or designation." *Bolander* v. *Peterson*, 136 Ill. 215.

"Antiquarian Book Store," not good exclusive trade-name. *Chaynski* v. *Cohen*, 39 Calif. 501.

"Civil Service," in a trade-name cannot be granted exclusive protection. *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512.

Plaintiff could not enjoin defendant from use of its name, "Colonial" being descriptive of kind of business carried on. *Colonial Life Assurance Co.* v. *Howe Colonial Assurance Co.*, 33 Beav. 548.

The complainant not entitled to enjoin respondent in use of its name, as the words "employers' liability," as applied to insurance

had become descriptive and no one had exclusive right to use of name. *Employers' Liability Assurance Corporation* v. *Employers' Liability Insurance Co. of the United States*, 24 Abb. N. Cas. 368. Aff'd 61 Hun, 552.

"But the name of 'Goodyear Rubber Company,' is not one capable of exclusive appropriation. 'Goodyear Rubber' are terms descriptive of well-known classes of goods produced by the process known as Goodyear's invention. Names which are thus descriptive of a class of goods cannot be exclusively appropriated by any one." *Goodyear's India Rubber Glove Mnfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598.

"International Banking Company" tried to restrain defendants from using name "International Bank," both having same business of foreign bonds; name not protected. *Koehler* v. *Sanders*, 122 N. Y. 65; 48 Hun, 48.

Letters "IXL," not protected as part of a trade-name over a store.

"It is claimed that the letters 'IXL' could not be used by the respondent after being appropriated by the appellant. The letters have been used by many manufacturers to denote their wares, as on cutlery and on bitters, and were not the invention of the plaintiffs, but taken by them from former proprietors and inventors thereof and do not by themselves make a trade-mark, any more than the word 'excelsior,' which is often used with other words to make a trade-mark or sign." *Lichtenstein* v. *Mellis*, 8 Oregon, 464.

No exclusive right to use word "Pictorial," as applied to almanac; action to be tried first at law. *Spottiswoode* v. *Clark*, 10 Jurist, 1043.

B. Geographical.

"Swedish Snuff Store," descriptive, and party not entitled to its exclusive use. *Bolander* v. *Peterson*, 136 Ill. 215.

"Further than this, we think that the word 'Continental,' a geographical adjective, meaning pertaining to or relating to a continent, is a word in common use, more or less descriptive of extent, region, and character, and like the words 'Columbian,' 'International,' 'East Indian,' and some other geographical adjectives, it cannot be exclusively appropriated as a trade-mark or trade-name." *Continental Ins. Co.* v. *Continental Fire Ass'n*, 101 Fed. R. 255, 257; affirming 96 Fed. R. 846.

Defendant could not be enjoined from using its trade-name, it not appearing that it had not creameries in the town, and was not rightfully carrying on the creamery or butter business there. *Elgin Butter Co.* v. *Elgin Creamery Co.*, 51 Ill. App. 231; 155 Ill. 127.

C. Appellative.

See III. 3. 73. *Brown Chemical Co.* v. *Myer*, 31 Fed. R. 453; 139 U. S. 540.

D. Deceptive.

The same general principles apply as in the case of deceptive trade-marks, etc.

3. A. A party may be entitled to the use of a certain distinguishing feature in a trade-name, but may not have equal rights to the same feature in a mark on the goods.

Defendant could use the designation "Brooklyn White Lead" on his product, it being descriptive; but could not use the trade-name "Brooklyn White Lead Co." *Brooklyn White Lead Co.* v *Masury*, 25 Barb. 416.

The defendant company had manufactured corsets and shoes in a limited way, according to certain hygienic principles, to which it had applied the name "Delsarte" in a descriptive way; the plaintiff had built up a large trade in good faith under that name as a fancy name on shoes; held that defendant could use its corporate name, but could not use name "Delsarte" as a trade-mark. *Mellor & Holmes Shoe Co.* v. *Delsarte Mnfg. Co.*, 46 Atl 1089.

B. A party may be entitled to use certain distinguishing features on his goods, but not to embody the same in his trade-name so as to deceive the public.

Complainant assigned rights to sell under a patent "taper sleeve pulleys" west of the Mississippi River, but did not assign his trade-name "Taper-Sleeve Pulley Works." Held that respondent could use the name of "taper-sleeve pulleys" to designate his goods, but could not use the trade-name. *Gray* v. *Taper-Sleeve Pulley Works*, 16 Fed. R. 436.

4. Where a party has in good faith built up a business under a descriptive or personal trade-name courts will compel a new rival, who originally would have been entitled to use the same name, to plainly distinguish his business.

See VIII. 1 C. (2). 165.

A party by the name of Bissell manufactured at South Bend, Ind., ploughs called "Bissell Plows." Afterwards he formed a corporation, "Bissell Chilled Plow Works." He subsequently retired and formed a corporation under name "T. M. Bissell Plow Co." using name "Bissell" on ploughs. After his death business was discontinued and then certain parties of another name at Eaton Rapids, Mich., purchased stock, patterns, corporate name, etc., of the company and began to manufacture ploughs there, marking them by name of "T. M. Bissell," showing by circulars his picture, and claiming him as original inventor, formerly of South Bend. The original process and patent was owned by the complainant company. Held, that it was a case for injunction against use of name "Bissell" as trade-mark or trade-name. *Bissell Chilled Plow Works* v. *T. M. Bissell Plow Co.*, 121 Fed. R. 357.

"It is not to be said that the plaintiffs have any exclusive right to the words 'Conveyance Company,' or 'London Conveyance Company,' or any other words; but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business, by attracting custom on the false representation that carriages, really the defendant's, belong to, and are under the management of the plaintiffs." *Knott* v. *Morgan*, 2 Keen, 213.

Where defendant had been manager for plaintiff, who for years had carried on business in Pall Mall under name of "Pall Mall Guinea Coal Co.," he had no right on leaving, to use same name, although he did business on Pall Mall, and although there were other guinea coal companies in London. *Lee* v. *Haley*, L. R. 5 Ch. App. 155.

5. It is a fraud for a company to use the name of a person, not on account of his skill or ability, but for the purpose of obtaining advantage of the reputation of another of the same name in a similar business.

A blacking manufactory had long been carried on under name of "Day & Martin," and executors of survivors continued the business under same name. A person by name of Day, having obtained the authority of one Martin to use his name, set up the same trade under name "Day & Martin," in bottles and labels having a general resemblance to those of plaintiffs. Injunction. *Croft* v. *Day*, 7 Beav. 84.

Complainant had acquired great reputation in the snuff business and his snuff had become known as "Garrett's Snuff." The respondent corporation was formed with three hundred and fifty shares, of which T. H. Garrett subscribed for only two and one-half, and was an employé in a subordinate position. The corporation put out inferior snuff, and by using the name "Garrett" created great confusion. Held, that on appeal for preliminary injunction, although the court in its discretion did not grant injunction against use of proper name, the case was so clear that as to that part the decree should be reversed and that injunction should issue against use of "T. H. Garrett," or of name "Garrett" as part of corporate name. *Garrett* v. *T. H. Garrett & Co.*, 78 Fed. R. 472.

Complainant's predecessors as "Rogers Bros." had acquired great reputation in cutlery. Respondent corporation, formed by two incorporators named "Rodgers," without especial skill in cutlery, undertook to manufacture table ware, and stamped it "Rodgers Bros. Cutlery Co." Held unfair trade. *International Silver Co.* v. *Rodgers Bros. Cutlery Co.*, 136 Fed. R. 1019.

About forty years ago three Rogers brothers in Hartford had started business of plating silver ware, and acquired great reputation, using marks "Rogers," and "1847, Rogers Bros." Complainant was their successor. In 1890 Simeon L. and George H. Rogers, sons of one of the original Rogers, but who had not previously been engaged in the silver-ware business, were instrumental in forming a new corporation of nominal capital stock of $200,000, but they owned only one-eighth of stock, and the prominent stockholders' names were not used. This corporation soon changed its name to "S. L. & G. H. Rogers Co.," and marked its

silver ware "Rogers" and "Rogers Bros." in various forms, also representing that they were "only real Rogers Bros." Preliminary injunction against such use of "Rogers" and "Rogers Bros." *International Silver Co.* v. *Simeon L. & George H. Rogers Co.*, 110 Fed. R. 955.

Complainant as successor of "Wm. Rogers Mnfg. Co.," was engaged in manufacturing silver-plated ware, with a right to the use of the trade-mark "Wm. Rogers Mnfg. Co." Defendants organized a corporation under the name of "Wm. G. Rogers Company," using trade-mark "Wm. G. Rogers." W. G. R., its president, was a bank clerk, had never engaged in that or similar business of manufacturing, his only efforts having been to sell some silver ware of a concern supplied by complainant. He had only five of one hundred shares of stock, two other stockholders holding eighty-five shares, they having formerly manufactured silver ware for genuine "Wm. Rogers Mnfg. Co.," and had organized this company to continue in business. Held to conclusively show want of good faith on part of defendant, and preliminary injunction allowed against use of name "Wm. G. Rogers," or any other mark of which the words "Wm. Rogers" are a characteristic part on the goods, but not from use of its corporate name. *International Silver Co.* v. *Wm. G. Rogers Co.*, 113 Fed. R. 526. Aff'd 118 Fed. R. 133.

William H. Rogers, a bicycle machinist, without knowledge of silver-plating, used his name first individually, then in forming a partnership, and later a corporation to get the benefit of his name on silverware made for him by others. Complainant was entitled to trade-name "Wm. Rogers & Sons," "Wm. Rogers," and "Wm. Rogers Manufacturing Company" on silverware, and entitled to injunction. *International Silver Co.* v. *William H. Rogers Corp.*, 66 N. J. Eq. R. 119.

Complainant and predecessors had been engaged in thread business in England and in United States since 1840, and built up a reputation under its name so that its thread was called for as "Coats'" thread. Respondent was incorporated to make thread and deliberately to deceive the public, took the name of an incorporator, Coates, not because he knew of thread business, but because of similarity to complainant's name. Although the packages of thread were otherwise not calculated to deceive, yet there was ground for injunction. *J. & P. Coats, Ltd.*, v. *John Coates Thread Co.*, 135 Fed. R. 177.

Respondent Rogers had been selling silver ware in New York

for a number of years manufactured for him and labelled "Brunswick" or "Belmont" with his own name "Wm. A. Rogers." Evidence showed that he was trading on the name of the well-known complainant manufacturing company. Injunction against use of the name on silver-plated ware "Wm. A. Rogers." *Rogers* v. *Wm. Rogers Mnfg. Co.*, 70 Fed. R. 1019.

Complainant was successor of partner, who for many years had used the name "Rogers" on its table ware, and under it had built up a great reputation. The respondent corporation was formed for the purpose of enabling a man by the name of Strickland to use the name "Rogers," and a salesman by that name was given a quarter interest in the concern. Respondent enjoined from using mark "R. W. Rogers Co." *R. W. Rogers Co.* v. *Wm. Rogers Mnfg. Co.*, 70 Fed. R. 1017; affirming 66 Fed. R. 56.

"I place my concurrence in the judgment in this cause upon the broad ground that a body of associates who organize a corporation for manufacturing and selling a particular product, are not lawfully entitled to employ as their corporate name in that business the name of one of their number, when it appears that such name has been intentionally selected in order to compete with an established concern of the same name, engaged in similar business, and divert the latter's trade to themselves by confusing the identity of the products of both, and leading purchasers to buy those of one for those of another." *R. W. Rogers* v. *Wm. Rogers Mnfg. Co.*, 70 Fed. R. 1017, 1019.

J. W. Thorley took eighteen shares in a company called after him, "J. W. Thorley's Cattle Food Co.," and was employed as manager in making food for cattle, which was intended to divert trade from a celebrated preparation known as "Thorley's Food for Cattle." Held a fraud; injunction issued. *Thorley's Cattle Food Co.* v. *Massam*, 42 L. T. R. N. S. 851.

"Rogers & Son" used continuously by father and son and their successors in plating silver ware, protected as trade-name although there were not as formerly a Rogers & Son.

Spurr, in Greenfield, formed the corporation and paid a small royalty to D. C. and Geo. E. Rogers, father and son, who never learned or practised the silver-ware business, but lent their name for the purpose of deceiving the public. *William Rogers Mnfg. Co.* v. *Rogers & Spurr Mnfg. Co.*, 11 Fed. R. 495.

"This royalty is paid for a falsehood. The names of these Rogerses is not of the slightest value in the silver-plating business, which they never learned or practised; nor were they ever

partners, as I read the evidence, except in hiring out this trade-mark. It is impossible that this royalty can be paid for anything but the chance of purchasers supposing it to represent some other Rogers. A court of equity cannot be expected to look with much favor upon a trade-mark thus acquired and thus used." *William Rogers Mnfg. Co.* v. *Rogers & Spurr Mnfg. Co.*, 11 Fed. R. 498.

6. A. The use of a corporate name by a corporation infringing on the trade-mark of a party, or trade-name of another to his injury in unfair trade, may be enjoined by the courts.

See VIII. 1 B (2). 158. *Nesne* v. *Sundett*, 93 Minn. 299.
See X. 1 A. (2). 222. *Le Page Company* v. *Russia Cement Co.*

"The fact that both are corporate names is of no consequence in this connection. They are the business names by which the parties are known, and are to be dealt with precisely as if they were the names of private firms or partnerships. The defendant's name was of its own choosing, and if an unlawful imitation of the complainant's is subject to the same rules of law as if it were the name of an unincorporated firm or company."

Use of corporate name "Cellonite Manufacturing Company," or any name infringing "Celluloid" enjoined. *Celluloid Mnfg. Co.* v. *Cellonite Mnfg. Co.*, 32 Fed. R. 94, 97.

Corporate name "Landlords' Protective Department" will be enjoined as conflicting with prior corporate name "Chicago Landlords' Protective Bureau." *Chicago Landlords' Protective Bureau* v. *Koebel*, 112 Ill. App. 21.

A corporation cannot use, so as to deceive, the name of a private individual who has already given his name to a former corporation which he has assisted in forming. *Dodge Stationery Co.* v. *Dodge*, 145 Calif. 380.

"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. The name of an eminent philanthropist was taken without his consent and against his protest. This assumption of name was a wrong which we cannot doubt a court of equity would, upon his application, have restrained, even if the purpose of the corporation had been wholly innocent and

praiseworthy; but here, it is clear, the name, the portrait, and the fac-simile signature of Rev. Sebastian Kneipp were employed, not only without his consent and against his will, but were so assumed with a view to deceive the public, and to induce the belief that the product marketed and sold was prepared under his supervision, and offered to the public with his sanction." *Kathreiner's Malz Kaffee Fab.* v. *Pastor Kneipp Med. Co.*, 82 Fed. R. 321, 324.

"The act of sovereignty allowing incorporation is permissive, not mandatory. It sanctions the act of incorporation under the name and for the business proposed, if that name and that business be otherwise lawful. The sovereign by the act of incorporation adjudges neither the legality of the business proposed, nor of the name assumed. That is matter for judicial determination by a court having jurisdiction of the subject when the legality of the business or of the name is called in question. If one may not use the name imposed upon him *in invitum* so that it shall work wrong to another, by what token may he become incorporated under a name selected by himself to effect like wrong? And how is the sovereignty of a great state impugned by the denial to incorporators of a right to perpetrate such a wrong? Is it possible that a sovereignty of a state can be thus invoked to perpetrate a fraud? If it may be, then indeed will that sovereignty stand for oppression, and not for justice." *Peck Brothers & Company* v. *Peck Bros. Co.*, 113 Fed. R. 291, 300.

See *idem*, VIII. 1 C. (1). 163.

The complainant was a Pennsylvania corporation, known familiarly as "The Philadelphia Trust Co.," and generally so called. Held, that a preliminary injunction should issue against the respondent, a Delaware corporation, chartered to do a trust business in any part of the world. *Philadelphia Trust Safe Deposit & Ins. Co.* v. *Philadelphia Trust Co.*, 123 Fed. R. 534.

But see: The complainant, a New York corporation, doing business in the State of Texas by virtue of a license, cannot enjoin a Texas corporation from use of the word "Continental," as complainant "is without standing to question the right of the defendant to use in its business the name granted and authorized by the State of Texas." *Continental Ins. Co.* v. *Continental Fire Ass'n*, 101 Fed. R. 255; affirming 96 Fed. R. 846.

But see: A United States circuit court cannot interfere by injunction at the instance of a corporation organized under the laws of another State, and prevent individuals, acting under a license

of the Secretary of that State, from taking necessary legal steps to form a corporation bearing the same name as the foreign corporation.

But after the formation of the corporation it is not said what the court might do to prevent interference with complainant's business. *Lehigh Valley Coal Co.* v. *Hamblen*, 23 Fed. R. 225.

B. But a descriptive corporate name will not give one an exclusive right to a name which others might properly use in their business.

See IX. 2 A. 207.

"Names which are thus descriptive of a class of goods cannot be exclusively appropriated by any one. The addition of the word 'Company' only indicates that parties have formed an association or partnership to deal in such goods, either to produce or sell them. . . . Names of such articles cannot be adopted as trade-marks, and be thereby appropriated to the exclusive right of any one; nor will the incorporation of a company in the name of an article of commerce, without other specification, create any exclusive right to the use of the name." The word "Goodyear" was descriptive of rubber made by a certain process, and the name "Goodyear Rubber Company," or "Goodyear Rubber Manufacturing Company" was not capable of exclusive appropriation. *Goodyear's India Rubber Glove Mnfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598, 602; reversing 22 Blatch. 421; 21 Fed. R. 276.

7. A trade-name, by affixation, may also become a trade-mark.

"Is not a man's name as strong an instance of trade-mark as can be suggested? — subject only to this inconvenience, that if a Mr. Jones or a Mr. Brown relies on his name, he may find it a very inadequate security, because there may be several other manufacturers of the same name." *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; 35 L. J. Ch. 352; 12 Jur. N. S. 205; 14 L. T. N. S. 220; 14 W. R. 363.

"A name, though originally the name of the first maker, may in time become a mere trade-mark or sign of quality and cease to denote or be current as indicating that any particular person is the maker. In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the

individual who first affixed it. *Hall* v. *Barrows*, 4 De G. J. & S. 150 etc.

"It is true that a name or the style of a firm may by long usage become a mere trade-mark." *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137, 144.

"The Courts of Equity having taken that step, trade-marks began to be considered as property, and no doubt there is in a certain sense a property in a trade-mark, and equally in a trade-name, because a trade-name may be used and is very commonly used, as a trade-mark properly so called — that is, a mark put upon the goods themselves. Then both a trade-mark and a trade-name were allowed to be sold as part of the good-will of a business." *Singer Mnfg. Co.* v. *Wilson*, 2 Ch. D. 434, 454.

X. ASSIGNMENT.

1. A. (1) **A trade-mark** (2) **or a trade-name representing the good-will of a business may pass by assignment or conveyance of the business.**

(1) A trade-mark.

"And inasmuch as the court protects the owner of the mark, he is entitled to authorize another, when he hands over his business to him, to place that mark on his goods. That is a right which, being protected by this court, may be disposed of for value, may be bought and sold, and is, therefore, in that sense of the word, property." *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518, 525.

Trade-mark "Celluloid" passed by assignment together with rights, business and good-will. *Celluloid Mnfg. Co.* v. *Cellonite Mnfg. Co.*, 32 Fed. R. 94.

M. A. Thedford was engaged with others in manufacturing "Simmons' Liver Medicine;" he sold out his interest, agreeing not to enter into the sale of the medicine. He afterward began business with others and put out what was called "M. A. Thedford & Co's Original and Only Genuine Liver Medicine, or Black Draught," in packages and labels calculated to deceive. Held, that, although he had dropped the word "Simmons," the agreement was sufficiently broad to call for injunction. *Chattanooga Medicine Co.* v. *Thedford*, 66 Fed. R. 544; reversing 58 Fed. R. 347; 49 Fed. R. 949.

The name "Congress," as a valid trade-mark on water of a particular spring, passed with the purchase of the spring without special mention of good-will or trade-mark. *Congress & Empire Spring Co.* v. *The High Rock Congress Spring Co.*, 45 N. Y. 291; reversing 57 Barb. 526.

Where a manager of a business subsequently becomes a partner and then sole owner, the fact that he was not the original designer or owner of a trade-mark is no ground for refusing injunction for infringement. *Cuervo* v. *Landauer*, 63 Fed. R. 1003.

"The mere fact that each and all of the 'Fishes' withdrew from that business, did not prevent the words mentioned from continuing to point to the old place of business and the old firm of 'Fish

Bros.' and 'Fish Bros. & Co.,' at Racine, as the true source and origin of their particular make and style of wagon and vehicle to which the plaintiff company succeeded, and continued to manufacture at Racine. It is true that one of the functions of a trade-mark is to point out the true ownership of the goods or articles to which it is applied, and that the words 'Fish Bros.' and 'Fish Bros. & Co.,' partially ceased to perform that office when Mr. Case became the ostensible owner or mortgagee, and still more so when the legal title passed to the receivers respectively, and finally became extinct when the property and assets became vested in the plaintiff; but such extinction did not prevent those words from performing the two other functions of a trade-mark mentioned." *Fish Bros. Wagon Co.* v. *La Belle Wagon Works*, 82 Wis. 546, 560.

Trade-mark in "N. S." used on label to indicate cigars made for a certain dealer exclusively can be assigned with the business and thereafter can be continued by the assignee using them as his predecessors, and he can enjoin one using "N. & S." on cigar labels. *Frank* v. *Sleeper*, 150 Mass. 583.

Business of threshing-machines at establishment known as "Number 10 South Water Street" passed by purchase from executors of former proprietor to party who was entitled on continuing business to restrain one using same trade-name "Number 10 South Water Street." *Glen & Hall Mnfg. Co.* v. *Hall*, 61 N. Y. 226.

An instrument which grants, licenses, assigns and sets over to a party the absolute and exclusive use of certain trade-marks and all benefits and advantages to be derived therefrom held to constitute an assignment. *Griggs, Cooper & Co.* v. *Erie Preserving Co.*, 131 Fed. R. 359.

Trade-marks "A. N. Hoxie's Mineral Soap" and "A. N. Hoxie's Pumice Soap" passed with assignment of good-will and assets of the firm. Bill of sale: "The following goods and chattels, namely, all my right, title, and interest in and to all and singular the partnership property belonging to the firm, meaning hereby to sell and convey all my interests in the entire assets of the firm." *Hoxie* v. *Chaney*, 143 Mass. 592.

"As to the right of Pike to dispose of his trade-mark in connection with the establishment where the liquor was manufactured, we do not think there can be any reasonable doubt. It is true, the primary object of a trade-mark is to indicate by its meaning or association the origin of the article to which it is

affixed. As a distinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale. But when the trade-mark is affixed to articles manufactured at a particular establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of a trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by its original designer." *Kidd* v. *Johnson*, 100 U. S. 617, 620.

"S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio," enclosed in a circle, good trade-mark. The right to use the trade-mark was assigned, with sale of the manufacturing establishment. *Kidd* v. *Johnson*, 100 U. S. 617. *Contra: Kidd* v. *Mills*, 5 O. G. 337, *infra*.

"There is no reason why a trade-mark cannot be conveyed with the property with which it is associated. As an abstract right, apart from the article manufactured, a trade-mark cannot be sold, the reason being that such transfer would be productive of fraud upon the public. In this respect it differs from a patent or a copyright; but in connection with the article produced, it may be bought and sold like other property. It constitutes a part of partnership assets, and is property sold with the firm property." *Morgan* v. *Rogers*, 19 Fed. Rep. 596.

Assignment of a trade-mark and the business of making soap by originator and owner to a corporation is valid; and the assignee who places on the product his own name is not acting in bad faith. *Petrolia Mnfg. Co.* v. *Bell & Bogart Soap Co.*, 97 Fed. R. 781.

The portrait of the original proprietor of a medicinal preparation used as a trade-mark may be assigned, although it bears also his own name. *Richmond Nervine Co.* v. *Richmond*, 159 U. S. 293.

"It is hence settled law that the right to use a trade-mark is not a mere personal privilege, but that, within certain limits it is capable of being bought and sold as other property." *Skinner* v. *Oakes*, 10 Mo. App. 45, 56.

A trade-mark does not necessarily attach to a manufacture at a certain place. A party might sell factory and go elsewhere. *Sohier* v. *Johnson*, 111 Mass. 238.

"Whatever may be the law as to a trade-mark which is strictly personal, it is the settled law that the right to use a trade-mark in connection with the business in which it has been used is property which will be protected by the courts, and which may be sold and transferred." *Warren* v. *Warren Thread Co.*, 134 Mass. 247.

Contra: On substantially the same facts as 100 U. S. 617 the Commissioner of Patents found that the trade-mark did not pass on transfer of factory in Cincinnati.

S. N. Pike had trade-mark on whiskey. He took in two clerks and used trade-mark. Afterward he sold factory in Cincinnati which belonged to him individually to respondents in this Patent Office interference case, but which had been used for the partnership business. The U. S. case says that transfer in terms extends use of trade-mark to said respondent. The O. G. case says that there is nothing to indicate transfer of good-will or trade-mark, but in fact there was a paper giving to the said respondents the use of all brands; but the commissioner said it was a license, and given after the sale. He holds that Pike individually did not have the right to the trade-mark but that it belonged to the firm. The U. S. case says that paper was contemporaneous with assignment; by using the trade-mark the firm did not acquire any title to it; it remained in Pike as much as real estate, and firm acknowledged right of said respondents to it. *Kidd* v. *Mills*, 5 O. G. 337. *Contra: Kidd* v. *Johnson*, 100 U. S. 617.

(2) A trade-name.

See X. 4. 231. *Booth* v. *Jarrett*, 52 How. Pr. 169.

See X. 4. 231. *Churton* v. *Douglas*, 28 L. J. Ch. 841.

See X. 4. 231. *Hudson* v. *Osborne*, 39 L. J. Ch. 79.

See VIII. 1 C (2). 168. *Natl. Starch Mnfg. Co.* v. *Duryea*, 101 Fed. R. 117; affirming 79 Feb. R. 651.

See VIII. 1 C (1). 165. *Kathreiner's Malz Kaffee Fab.* v. *Pastor Kneipp Med. Co.*, 82 Fed. R. 321.

Brown could legally assign the use of his name with his business of medicinal preparations where the business was not of a personal nature. *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

"But the cases are numerous in which it has been held that a party may lawfully assign and sell, not only a trade-mark indicative of origin in himself, but even the right to use his own name in connection with a particular business."

Stratton sold out his interest in the yeast business and good

will, which had been acquired under name "Twin Brothers," to complainant. *Burton* v. *Stratton*, 12 Fed. R. 696, 704.

Lessee of a mill has the right to use the proper name attached to the mill, and old firm having by inheritance same proper name with no one in it of same name cannot enjoin its use. *Carmichel* v. *Latimer*, 11 R. I. 395.

"The defence that the distillers' brand was not a subject of sale and transfer, and therefore formed no consideration for the alleged agreement, because the use thereof by another than F. M. Head & Co. was deceptive, is not valid; for it is well settled that a trade-mark affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment." *Dant* v. *Head*, 90 Ky. 255, 261.

Johnston party in England could assign right to Estes in United States to name "Chatterbox" on juvenile publications sufficient to enable him in case of infringement to bring bill in equity. *Estes* v. *Williams*, 22 Blatch. 364.

"The principle seems to be well settled, that where a party sells out an established business, and with it his own name, to be used in connection with such business, he cannot afterwards resume it in carrying on the same business." *Frazer* v. *Frazer Lubricator Co.*, 121 Ill. 147, 157.

"On February 28th, 1890, the plaintiff purchased the stock in trade and goodwill of Francis Draper & Co., including the possession of their factory, of which they were tenants at will, and took a covenant from the members of the firm not to engage in the manufacture of oil cans for ten years. . . . We infer that Draper & Co. acquired a right to be protected to the usual extent in the use of the word 'Draper,' and we see no sufficient reason to doubt that, in view of the continuity of the business, the name was capable of assignment by Draper & Co. to the plaintiff." *H. A. Williams Mnfg. Co.* v. *Nocra*, 158 Mass. 110, 111.

A party named Pancoast took out a patent on ventilators and assigned to complainant the said patent with exclusive use of his name thereon. Held, that the complainant could enjoin respondent from use of the name "Pancoast" on a similar article, and it was not necessary to allege in bill actual use and manufacture by the complainant of the patented article. *Janney* v. *Pan-Coast Ventilator & Mnfg. Co.*, 128 Fed. R. 121.

Le Page established and carried on business of making glues known as "Le Page's Glue." He organized and was treasurer of Russia Cement Co., a corporation to which was transferred all his

rights, assets, good-will, and trade-marks. Held, that neither he nor a corporation with which he was associated could sell glue under the designation, "Manufactured by the Le Page Company." *Le Page Co.* v. *Russia Cement Co.*, 51 Fed. R. 941.

Peter Oakes formed partnership with Probasco, and made and sold candies called "Oakes' Candies." Later Oakes sold out all interest and trade-mark to Probasco, who, after continuing some time and employing Oakes, who subsequently quit him, then conveyed his interest to respondent. Held, that although as between Oakes and Probasco the latter had no right to convey the trade-mark "Oakes," yet the assignee, being a bona fide purchaser, had right to use the name, but could not use "Peter Oakes," and although the infringement of that name was unintentional, yet the case should go to a master for account of profits. *Oakes* v. *Tonsmierre*, 49 Fed. R. 447.

"The case falls within another principle, which is, that a name may be used as a mere adjective of description or quality, which the public do not understand as any warranty that the person whose name is used is the maker of the article; and in these cases the right to use the name may be sold with the right to manufacture and vend the goods without reference to the question as to what person or persons actually manufacture them." *Oakes* v. *Tonsmierre*, 49 Fed. R. 447, 451.

The trade-name "Old Oscar Pepper Distillery" passed under sale of the Distillery so that its owner could use it, and the original Pepper could not enjoin its use. *Pepper* v. *Labrot*, 8 Fed. R. 29.

Rochus Heinisch acquired great reputation in manufacture of shears, and sold his business to his three sons, who stamped the goods "R. Heinisch," and they became known as "Heinisch shears." One of the partners, H. C. Heinisch, retired from the firm, became its sole agent, and assigned his rights in the agency to defendants. He had assigned to the firm on retirement all his right, title, and interest to it. At termination of agency the complainant, assignee of the firm, entered into a contract with defendants for an exclusive agency, in which they recognized sole right of complainant in trade-mark. At termination of contract H. C. Heinisch conveyed his interest in trade-name to defendants, and they began to make shears marked "H. C. Heinisch," so as to deceive customers. H. C. Heinisch had never done more than convey abstractly his trade-name. Held, that defendants should be enjoined from marking their shears "Heinisch," or "H. C. Heinisch." *R. Heinisch's Sons Co.* v. *Boker*, 86 Fed. R. 765.

F., J., R., & T., copartners, began business of manufacturing machinery at Worcester in 1852, under the name of "F. & Co."; and F., J., R., & C., copartners, began a like business in Cincinnati in 1853, under the same name, using it as the style of the firm and as a trade-mark. F. died in 1854. Ever since his death J., R., & C., copartners, continued the business at Cincinnati, with all the rights as to the use of the name of "T. & Co." which the Cincinnati firm had originally; and J., R., and T., copartners, continued the business at Worcester under the name of "F. & Co." with the assent of F.'s representatives, until 1861, when their firm was dissolved and its orders, correspondence, and good-will were sold to T., who thereafter pursued the business of buying and selling, but not of manufacturing, machinery. Held, that J., R., & C. could not maintain a bill in equity to enjoin T. from using the name of "F. & Co." in his business and attaching it to machinery which he sells made by others than themselves. *Rogers* v. *Taintor*, 97 Mass. 291.

"While the plaintiff has not sought to prevent the defendant from manufacturing glue, we add, in order to avoid misunderstanding, that while the defendant cannot use the words adopted as a trade name for the article manufactured by him, we do not decide that he may not use the words 'Liquid Glue,' or other appropriate words, to describe his product, or to state in that connection that he is himself the manufacturer of it." *Russia Cement Co.* v. *Le Page*, 147 Fed. R. 206, 211.

NOTE. — The decision in *Le Page Co.* v. *Russia Cement Co.* went further than this.

A manufacturing firm calling its product "Le Page's Liquid Glue," after the name of a partner with his consent, sold the right to use "the trade-marks belonging to or in use by said copartnership" to a corporation of which that partner became an officer, and which continued to make the glue under the same name. Afterwards he left the corporation and began to do business as "Le Page Liquid Glue Company," and make and sell "Le Page's Improved Liquid Glue." Held, "We are of opinion, therefore, that the defendant should be enjoined from using the words 'Le Page's Improved Liquid Glue,' or 'Le Page's Liquid Glue,' to describe the article manufactured by him, and from describing the company under whose name he conducts his business as 'Le Page's Liquid Glue Company,' whether with or without any addition thereto." *Russia Cement Co.* v. *Le Page*, 147 Mass. 206.

Plaintiff A. Thynne sold his bakery business and good-will thereof to defendant, who also bought his stock in trade, including cards bearing name "A. Thynne, Baker." The assignment called for "all the beneficial interest and good will of the said *Arthur* Thynne" in the said trade or business, but contained no express assignment of right to use plaintiff's name.

Held, defendant could use name of plaintiff to show business was formerly carried on by him, but not so as to expose him to any liability. *Thynne* v. *Shove*, 45 Ch. D. 577.

B. Or it may descend to successors or legatees.

Charles Emerson, a maker of razor strops, which bore a label stating that they were made by "Charles Emerson, Emerson Place," taught his business to his five nephews (he having no children, and they being among his heirs-at-law). After his death, intestate, they continued the business in different places, and one of them, of the same name as the uncle, carried it on at Emerson Place, and used a label precisely similar to that formerly used by the uncle. Held, no infringement of this nephew's rights for the son of another nephew to use a label on similar strops which he manufactured, stating that he was the son of a successor of the original "Charles Emerson, Emerson Place." In this case court found that business and trade-mark were not disposed of by will or otherwise, or by administrator. *Emerson* v. *Badger*, 101 Mass. 82.

"B. B. H.," surmounted by a crown, began to be used by a firm in 1836 in the iron business as a trade-mark; there were several changes in partners, but the same mark was continued, and in 1863, on death of one of the partners, the trade-mark constituted an asset of the partnership. *Hall* v. *Barrows*, 4 De G. J. & S. 150.

"The plaintiff in this case is the owner of a remedy known as 'Johnson's Anodyne Liniment,' and this suit is brought to enjoin the defendant from putting up and offering for sale a liniment of his own manufacture, in a form so closely resembling that of the plaintiff's article that the public are liable to be deceived thereby, and a portion of the plaintiff's business unlawfully taken away. The liniment was first prepared by Abner Johnson, about the year 1810. In 1846 he took his son, Thomas Johnson, into partnership. In 1848 the business was conducted by Thomas Johnson and his brother, I. S. Johnson, the father having died that year. In 1849, Thomas Johnson died, and the business was then carried

on by I. S. Johnson until 1866, when he sold a part of his interest to the complainant. This continued until 1876, when the complainant bought out the entire interest of I. S. Johnson, and became the sole proprietor of the business. Upon the evidence, I think the complainant has shown such a proprietary right to this business, and to the use of the bottles, labels, and wrappers with which this medicine has been associated and identified, as entitles him to maintain this action against this defendant, and therefore the first defence of want of title in the complainant falls to the ground." *Jennings* v. *Johnson*, 37 Fed. R. 364.

Business of Thorley, in "Thorley's Cattle Food," descended to his executors, who carried on business and were protected in use of his name. *Thorley's Cattle Food Co.* v. *Massam*, 42 L. T. N. s. 851.

"It is equally clear that any of the Marshall children, or any other person by the name of Marshall, having acquired a knowledge of the compound, had a perfect right to manufacture and sell it, by himself or others, in his own name, even against the protest of old Samuel Marshall, provided he did not do it in any such way as to be likely to mislead ordinary purchasers, proceeding with ordinary caution, into the belief that they were purchasing the liniment manufactured and sold by old Samuel Marshall himself." *Marshall* v. *Pinkham*, 52 Wis. 572, 587; 38 Am. R. 756.

Trade-marks "Crowley," used on steel since early in the eighteenth century, and "Crowley Millington" since 1782, descended to plaintiff with a steel business, and he was entitled to injunction against their use in 1838. *Millington* v. *Fox*, 3 My. & Cr. 338.

Grandfather and father of plaintiffs, who were sons of latter, carried on dairy farm and sold butter with trade-mark of symbol of cornucopia, under which name it became known. Sons succeeded to business without letters of administration, and afterwards separated. Held, that they had right to mark as against stranger. *Pratt's Appeal*, 117 Penn. St. 401.

2. A. A trade-mark or trade-name may pass under an assignment in bankruptcy or for benefit of creditors to the trustees.

See VIII. 1 C (1). 165. *Peck Brothers & Company* v. *Peck Bros. Co.*, 113 Fed. R. 291.

See X. 1 A (1). 219. *Fish Bros. Wagon Co.* v. *La Belle Wagon Works*, 82 Wis. 546.

The trade-mark passed to trustees under creditor's deed. *Bury* v. *Bedford*, 33 L. J. N. S. Ch. 465.

Trade-marks passed under assignment in bankruptcy, and a subsequent assignee had clearly established his right after eleven years' user. *Edelston* v. *Vick*, 23 Eng. L. & Eq. 51.

"A trade-mark, or a designation of one's trade, may thus be sold by order of the court, whether it be attached to a new business or to one long existing. In such case, 'good-will' and trade-marks are governed by similar rules." *Glen & Hall Mnfg. Co.* v. *Hall*, 61 N. Y. 226; 19 Am. R. 278.

"I take it that in substance there is no distinction between a sale by a man himself of his business and the good-will of it, and the sale by the assignees in bankruptcy of all a bankrupt's assets of every kind." *Hudson* v. *Osborne*, 39 L. J. Ch. 79.

A trade-mark is such property that can be reached and disposed of by creditors, and therefore it can pass under assignment for their benefit. *Milliken* v. *Dart*, 26 Hun, 24.

"The complainant having, upon his own petition, been declared a bankrupt, filed the required schedule of his assets and liabilities, in which he described the tract of land inherited from his brother as including the 'Old Oscar Pepper Distillery;' and as such it was known at the time the title became vested in the defendants (who purchased from the assignee in bankruptcy). . . . Neither by its own meaning, nor by association, does it indicate the personal origin or ownership of the article to which it is affixed." "Old Oscar Pepper," a trade-mark for whiskey, which passed to defendant through assignee in bankruptcy. *Pepper* v. *Labrot*, 8 Fed. R. 29.

Trade-mark on a medicinal preparation owned by a company was reached by creditors, who avoided through the courts a fraudulent sale and assignment for benefit of creditors. *Richmond Nervine Co.* v. *Richmond*, 159 U. S. 293.

A trade-mark may be assigned with business, and under insolvency or bankruptcy it passes to assignee or trustee. This is unless it is something personal. "King Bee," on tobacco does not show a trade-mark requiring skill of particular individual in manufacture or selection. *Sarrazin* v. *W. R. Irby Cigar & Tobacco Co.*, 93 Fed. R. 624.

A trade-mark not of a personal nature, and not in[illegible] any peculiar personal skill, but designating place or e[illegible]ent where thread is manufactured, passes under assign[illegible] in-solvency. *Warren* v. *Warren Thread Co.*, 134 Mass. 241.

B. (1) But if it be of a personal nature or the bankrupt's own name, (2) or if it be not availed of by creditors, it may be resumed by bankrupt.

(1) Personal trade-mark.

See X. 3. 229. *Cotton* v. *Gillard*, 44 L. J. Ch. 90.

Fish brothers formed partnership for manufacture of wagons and obtained a trade-mark; later the partnership became financially embarrassed and receiver was appointed. The partnership assets were subsequently turned over to the corporation complainant, in the formation of which Fish Brothers joined. Later they left and began manufacturing wagons as "Fish Wagons," and using name "Fish Bros. & Co." The Federal court followed a Wisconsin decision that the right to the trade-mark in the corporation was not exclusive, and that the respondent assignee of Fish Brothers had the right to so use the name "Fish." *Fish Bros. Wagon Co.* v. *Fish Bros. Mnfg. Co.*, 87 Fed. R. 203. But see *Russia Cement Co.* v. *Le Page*, 147 Mass. 206; X. 1, A. 2. 224.

"It is not denied that Henry T. Helmbold could, by voluntary sale and assignment, transfer the right to use his knowledge and name, but it is not seen how the right to use his own knowledge and name can be taken from him by any judicial proceeding whatever. If they can be, then the merchant who has become unfortunate, but who has still a knowledge and a name with which to begin business anew, must, if he has been adjudged a bankrupt, be content to leave with his assets his brains and his character." *Helmbold* v. *Henry T. Helmbold Mnfg. Co.*, 53 How. Pr. 453.

"Between the time of the sale of the distillery by Stone to Mattingly & Lancaster and the making of the contract of March 10th, 1882, Stone became a bankrupt. It is therefore urged that, if the right to use his name, as a part of the whiskey brand, did not pass with the sale of the distillery, then it passed to his assignee in bankruptcy, and there was, therefore, no consideration for the contract of March 10th, 1882. It will be noticed that the words composing the brand, save the name of the appellee, are those of common use; and the right of using his name merely was a personal one to the appellee, and did not, therefore, pass to his assignee, any more than would the skill acquired by a merchant from experience in his business." *Mattingly* v. *Stone*, 12 S. W. Rep. 467.

Bemis, with partner Downer, under firm name of Downer, Bemis & Co., had a partner's interest in brand "Downer, Bemis & Co." for ales. Held, that the interest was too intangible for creditors of Bemis to reach it through the courts. *Taylor* v. *Bemis*, 4 Biss. 406.

(2) Not availed of by creditors.

Assignment in insolvency for benefit of creditors without mentioning trade-mark, and it not being mentioned by trustees or claimed by creditors did not pass trade-mark. *Bradley* v. *Norton*, 33 Conn. 157.

3. A trade-mark cannot be assigned apart from the business or good-will to which it is attached.

See XI. A (1). 220. *Morgan* v. *Rogers*, 19 Fed. R. 596.
See IV. 2. 88.

The name with the representation of a white swan upon water formerly used as a trade-mark in the flour business cannot be transferred as a trade-mark apart from the business.

"A trade-mark is analogous to the good-will of a business. Whoever heard of a good-will being sold to one while the original owner continues the business as before; the good-will is inseparable from the business itself." *Bulte* v. *Igleheart Bros.*, 137 Fed. R. 492, 498, 499.

Trustee in bankruptcy purported to sell the trade-mark "Licensed Victuallers' Relish," used on a sauce the composition of which was a secret. Held, that apart from the business of making the sauce there could be no valid assignment. *Cotton* v. *Gillard*, 44 L. J. Ch. 90.

"As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment, or descend to a man's legal representatives." *Dixon Crucible Co.* v. *Guggenheim*, 2 Brew. 321, 339.

Lichtenstein Bros. & Co., a corporation, was a manufacturer of cigars using "El Falcon" as a trade-mark on a brand. On 31st Oct., 1898, it went out of business and assigned to plaintiffs the right to the trade-mark in question, but no business or good-will. The plaintiffs subsequently used the mark in their own business. Held, that in the absence of fraud the assignee could not enjoin

another party from using "El Falco" on a brand of cigars. *Falk* v. *American West Indies Trading Co.*, 180 N. Y. 445.

Where registration of a trade-mark is claimed under an assignment which does not purport to assign the business in which said mark was employed, it will be refused. *Frazee* v. *Merchants' Coffee Co.*, 106 O. G. 2292.

It is not necessary to have a separate instrument in writing transferring a trade-mark, for the right to use it goes with the business. *J. R. Newberry Co.* v. *Joseph J. O'Donohue's Sons*, 111 O. G. 299.

"There is no case that can be found, none cited by counsel at all, which in any manner supports the proposition that a bare trade-mark, aside from the property, can be assigned, sold, or a good title given to it." The name "Buck" for cigars could not pass without the business. *McVeagh* v. *Valencia Cigar Factory*, 32 O. G. 1124, 1126.

"A trade-mark cannot be assigned or its use licensed, except as incidental to a transfer of the business as property in connection with which it has been used. An assignment or license without such a transfer is totally irreconcilable with the theory upon which the value of a trade-mark depends, and its appropriation by an individual is permitted." *Macmahan Pharmacal Co.* v. *Denver Chemical Mnfg. Co.*, 113 Fed. R. 468, 474.

Where Mrs. Pepper did not succeed to any business of her husband to which the alleged trade-mark "Pepper's Signal Oil" belonged, she had no right to assign that trade-mark. "Her husband left no such business, and there is no such thing as a trade-mark in 'gross,' to use that term by analogy. It must be appendant of some particular business in which it is actually used upon or in regard to specific articles." *Weston* v. *Ketchum* 51 How. Pr. 455.

"The mere sale of a trade-mark apart from the article to which it has been affixed confers no right of ownership, because no one can claim the right to sell his goods as goods manufactured by another. To permit this to be done would be a fraud upon the public." *Witthaus* v. *Braun*, 44 Md. 303, 306.

4. No special form or words are required for an assignment of a trade-mark, but it will pass by the assignment of a business indicated by the mark, unless it is of a personal nature.

See cases under X. 1 A. (1), 218 and X. 3, 229.

"Such a trade-mark would seem to be an incident to the business of the place or establishment to which it owes its origin, and without which it can have no independent existence. It should be deemed to pass with a transfer of the business because such an implication is consistent with the character of the transaction and the presumable intention of the parties." *Atlantic Milling Co.* v. *Robinson*, 20 Fed. R. 217, 218.

Booth had built a theatre and called it "Booth's Theatre." A lease of the building conveyed the right to use that name. *Booth* v. *Jarrett*, 52 How. Pr. 169.

Sale of business in yeast under trade-mark "Twin Brothers," although not in writing, held to include trade-mark and good-will. Fact that consideration was far in excess of material assets and admission of respondent that he had sold interest in trade-mark, good evidence. *Burton* v. *Stratton*, 12 Fed. R. 696.

The name "John Douglas & Co." passed with assignment of good-will of the business. *Churton* v. *Douglas*, 28 L. J. Ch. 841; 33 L. T. 57.

An agreement acquiring right to manufacture and sell a medicinal compound known as "J. M. Lindsay's Blood Searcher," held to include by implication also the right to use the name. *Fulton* v. *Sellers*, 4 Brew. 42.

"My conclusion in this case is, . . . that those who have acquired through the sale under the assignee, and by subsequent conveyances, all that remained of the assets, interests, rights or property of the insolvent firm of Hegeman & Co., have the right to use that business and the trade-mark with it, if they so use it as to express the fact that they are successors to, and not the original firm." *Hegeman* v. *Hegeman*, 8 Daly, 1, 22.

"If one has made of his own name a trade-mark, and then transfers to another his business, in which his name has been so used, the right to continue such use of the name will doubtless follow the business as often as it may be transferred." *Horton Mnfg. Co.* v. *Horton Mnfg. Co.*, 18 Fed. R. 816, 819.

A party who has sold the "Osborne House" and the business

which went with it has no right to resume it again, for such resumption must be for the purpose of deceiving the public. *Hudson* v. *Osborne*, 39 L. J. Ch. 79.

The exclusive right to use certain brands on galvanized iron passed to plaintiff by virtue of written papers signed at the time of the dissolution of partnership. *Merry* v. *Hoopes*, 111 N. Y. 415.

J. Miller & Sons executed to complainant a chattel mortgage of business as follows: "The entire property, stock, furniture and fixtures, and other articles, now in and upon said premises, together with all debts and book accounts, assets and effects of every kind and nature, belonging to said firm of J. Miller & Sons." Mortgagee took possession of business under the mortgage. Subsequently Miller & Sons conveyed trade-mark and right to sell medicinal compounds in business. Held, that mortgagee had title to trade-mark as against the subsequent assignees. *Morgan* v. *Rogers*, 19 Fed. R. 596.

"The name of the particular hotel would therefore be of value as connected with the good-will of the business carried on therein, and that passed to the respondents to the extent of the appellant's right to possession as tenant, which was only for two years." *Mossop* v. *Mason*, 18 Grant Ch. 453, 463.

"Draper," passed under assignment of good-will, business etc., of manufacturing of oilers, and protected in equity. *Noera* v. *H. A. Williams Mnfg. Co.*, 158 Mass. 110.

"It is a fair inference from these authorities that when, as in the present case, the trade-mark consists merely in the name of the establishment itself, where the manufacture is carried on, and becomes attached to the manufactured article only as the product of that particular establishment, a sale of the establishment will carry with it to the purchaser the exclusive right to use the name it had previously acquired, in connection with his own manufacture at the same place of a similar article, by operation of law." *Pepper* v. *Labrot*, 8 Fed. R. 29, 43.

"Labels, trade-marks, particular words and phrases devised or used to distinguish or identify the product of the plant, and associated with such products in the public mind, are in like manner usually transferred with the plant, and are regarded as valuable acquisitions for the purchasers." *Symonds* v. *Jones*, 82 Me. 302, 313.

5. There can be no valid assignment of a trade-mark or trade-name which is of such a personal nature that its use by another in the business would be likely to deceive the public.

"When, however, the whole pecuniary value of the name, in its connection with an article of merchandise, or a manufacture, or a business, is derived solely from the personal qualities of the one to whom the name belongs, such as his skill, special knowledge and experience, or from the fact that the article is produced under his personal supervision, which imparts to it an especial value, — then the right to the name is not transmissible." *Hegeman* v. *Hegeman*, 8 Daly, 1, 6.

"There may no doubt be cases where the personal skill of an artist or artisan may so far enter into the value of the product that a trade-mark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and in such cases, it would be a fraud upon the public if the trade-mark should be used by other persons, and for this reason such a trade-mark would be held to be unassignable. It is in any case a question whether the use of the trade-mark would give to the public or to purchasers a false idea as to who made the article; and a court of equity would not lend any active aid to sustain a claim to a trade-mark which should contain a misrepresentation to the public. . . . But, on the other hand, the usages of trade may be such that no such inference would naturally be drawn from the use of a trade-mark, which contains a person's name, and that all that purchasers would reasonably understand is that goods bearing the trade-mark are of a certain standard kind or quality, or are made in a certain manner, or after a certain formula, by persons who are carrying on the same business that formerly was carried on by the person whose name is in the trade-mark." *Hoxie* v. *Chaney*, 143 Mass. 592, 593; 58 Am. R. 149.

"If an artist or an artisan has acquired, by his personal skill and ability, a reputation which gives to his works in the market a higher value than those of other artists or artisans, he cannot give any other persons the right to affix his name or mark to their goods, because he cannot give to them the right to practise a fraud upon the public." *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. Cas. 523, 545.

"It seems to me that the question whether 'good-will' does ordinarily include the right to use the name of a living person should receive one general answer, viz., that it does not." *Levy* v. *Walker*, 10 Ch. D. 436, 443.

"Now the question here is, whether or not the trade-mark in question owes its value to the personal skill of Mr Darst as a manufacturer. If it does, it does not pass by assignment, for the public must not be deceived into buying goods which, though bearing his trade-mark, are not the product of his peculiar skill." *Sweezey, in re*, 62 How. Pr. 215, 219.

A. organized an orchestra, giving it name of Fadettes and hired and paid members. He afterward sold to B. all his right, title, and interest in and to organization "together with all rights acquired in and to the establishment, name, and trade-mark in the words," composing the name, and then ceased to have any connection with it. The other members of the orchestra were not parties to the contract and did not agree and were not bound to continue to play under the new management of B. but subsequently withdrew from the organization and formed a corporation under name of "Fadettes." Held that name was not assignable; opinion by Knowlton and dissent by Lathrop. *Messer* v. *The Fadettes*, 168 Mass. 140.

"But where the trade-mark consists of a name, how far it is capable of assignment is a more difficult question. We think that the answer to this question depends upon the effect which the use of the name in each particular instance is shown to have upon the minds of the public. If it leads the public to believe that the particular goods are, in fact, made by the person whose name is thus stamped upon them, or in whose name they are advertised, whereas they are, in fact, made by another person, then such a use of the name will not be protected by the courts; for to do so would be to protect the perpetuation of a fraud upon the public." *Skinner* v. *Oakes*, 10 Mo. App. 45, 56.

6. A. An assignee or successor of a trade-mark might be obliged to so indicate to the public the fact that he is assignee that they may not be misled.

See. V 1. 116.

Complainant was assignee of "Aleutian Islands Fishing & Mining Co." and used on a label the following statement: "Packed at Karluk, Kodiak Island, Alaska, by the Aleutian

Islands Fishing & Mining Company, San Francisco, California"; such statement being false, the complainant was not entitled to relief, although the statement was corrected by additional label on top of can after suit was brought. *Alaska Packers' Ass'n* v. *Alaska Imp. Co.*, 60 Fed. R. 103.

"To correct the misstatement of the label, complainant, since the commencement of the action, has attached a circular label to the top of the can, stating that the salmon is packed by it as assignee of the Aleutian Islands Fishing & Mining Company. I do not think this cures the defect of the original label. It is the facts which existed before the suit was brought which make the cause of action and entitle to relief." *Alaska Packers' Ass'n* v. *Alaska Imp. Co.*, 60 Fed. R. 103.

"The complainant, Stachelberg, obtained, by assignment from one Asher Bijur, of New York, the exclusive right to use this trade-mark ('La Normandi,' for cigars), and he subsequently conveyed the right to the firm of Stachelberg & Co., the complainants. . . . Whatever may be thought of the remaining defences, there is one point which we think is well taken, and therefore fatal to any relief prayed for in the bill. In the use of the trade-mark the complainants do not state that it was obtained by assignment or purchase from A. Bijur. Bijur originated the trade-mark, and it thus became a sign of the quality of the article he sold, and an assurance to the public that it was the genuine product of his manufacture. . . . Now, in order that the public may not be deceived, it is essential that an assignee or purchaser of the original proprietor should indicate in the use of the trade-mark that he is assignee or purchaser — otherwise the public are misled into purchasing the goods of another manufacturer or vendor as those of the original proprietor. . . . And so these complainants, in failing to give notice that they are the purchasers and assignees of the trade-mark from A. Bijur are practising the same deception toward the public which they charge against the defendant. The fact that the name, 'M. Stachelberg,' is attached to the trade-mark, can no more relieve the complainants of the charge of misrepresentation as to the public than the use of the name 'E. Ponce,' or 'E. P.' can relieve the defendant of such a charge. It is the use of the fanciful words, 'La Normandi,' or words of substantial similarity, that is calculated to mislead." *Stachelberg* v. *Ponce*, 23 Fed. R. 430.

"We think, however, it is the duty of the complainants to the

respondent, as well as to the public, to refrain from using the labels in such manner and form as might lead the public to suppose that the goods packed by them were packed by the respondent. They should strike from their letter heads, circulars, and labels any words indicating that the goods were prepared by John Winslow Jones, and, if they use his name, should add such words as clearly indicate that the goods are not prepared by him, but by them as his successors." *Symonds* v. *Jones*, 82 Me. 302.

B. But this is necessary only when its use otherwise would be deceptive.

See IV. 7. 107. *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137.

See X. 1 A (1). 219. *Kidd* v. *Johnson*, 100 U. S. 617.

See X. 1 A (2). 222. *Carmichel* v. *Latimer*, 11 R. I. 395.

See X. 5. 233. *Hoxie* v. *Chaney*, 143 Mass. 592.

"Benedictine," name for cordial passed by assignment to complainant. It was not necessary to designate fact of assignment as the product had been manufactured for 400 years. *Bauer & Co.* v. *La. Soc. Anon. de la Distillerie de la Liqueur Benedictine de l'Abbaye de Fecamp*, 120 Fed. R. 74.

"The difference between 'Joseph Dixon & Co.,' as printed on the labels, and 'The Joseph Dixon Crucible Co.' is not of such a character as to destroy the plaintiff's right to equitable relief. Joseph Dixon & Co. is the name of the firm that has been for many years lawfully engaged in the manufacture of Dixon's stove polish. Since the formation of the new company and the death of Mr. Dixon in 1868, the name on the wrapper has not been changed. There is nothing here to indicate any attempt at deception or imposition. The trade-mark designates the place truly where the goods are put up and sold, and with sufficient certainty the ownership thereof." *Dixon Crucible Co.* v. *Guggenheim*, 2 Brew. 321, 341.

"But then it is said that the use of this label by the plaintiff is a fraud . . . because it holds out that the article is manufactured by Taylor, when it is, in point of fact, manufactured by the plaintiff, Taylor having ceased to have anything to do with the business. But to take the last point first, the firm of Taylor & Co. having originally made this article, and it being now made by the persons who have *bona fide* acquired the business, they

are quite justified in using the name of the old firm. It would be going too far to say that this is a misrepresentation by the plaintiff, when he only uses the name which he has bought the right to use." *Edelston* v. *Vick*, 23 Eng. L. & Eq. 51, 56.

"Nor do we think the position tenable that the complainants are not entitled to relief because they are only assignees of the trade-mark, and use it without designating themselves assignees. We do not perceive how their using the mark after they bought it without giving notice that they are not the original owners of it, can be a fraud upon the public, of which the defendant can avail himself." *Fulton* v. *Sellers*, 4 Brew. 42, 48.

"The plaintiff, Jennings, was one of the firm I. S. Johnson & Co. In stating on the label that the liniment is prepared by I. S. Johnson & Co., he merely retains the name of the firm of which he was a member. I cannot see how the public are deceived or injuriously affected by such a course. It is not uncommon, under such circumstances, to retain the old firm name." *Jennings* v. *Johnson*, 37 Fed. R. 364.

"All that the public or the trade cared to know was that the goods were the production of their (Rogers Bros.), skill and experience. That fact, as it seems to us, clearly appears. The further fact that the petitioners furnished capital and machinery, employed and paid laborers, and sold the goods, is entitled to but little weight so far as this question is concerned; although it shows that, in another sense, the petitioners were the manufacturers of the goods." *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450, 458; 12 Am. R. 401.

"On the contrary, it is but common experience that articles bearing a particular name are not regarded by the public as being the actual manufacture of the person whose name they bear." *Oakes* v. *Tonsmierre*, 49 Fed. R. 447, 451.

7. A trade-mark or trade-name may have come to designate a particular locality, and a transfer of that locality, by lease or otherwise, may carry with it right to use the mark or name.

See IX. 1 B. 206; X. 4. 231.

"It may become identified with the place or establishment where the article is manufactured or sold, to which it has been applied, so as to designate and characterize the article as the production of that place or establishment, rather than of the

proprietor. A trade-mark of this description is of no value to the original proprietor because he could not use it without deception, and therefore would not be protected in its exclusive enjoyment." *Atlantic Milling Co.* v. *Robinson*, 20 Fed. R. 217, 218.

XI. INFRINGEMENT.

1. An infringement of a trade-mark is an imitation such as would be likely to deceive the ordinary customer in the usual course of trade in the purchase of goods of one person as those of another.

See VIII. 1. 151; cases cited.
See VIII. 2 A. 187.
See XI. 4 A. 245.

"Two trade-marks are substantially the same in legal contemplation, if the resemblance is such as to deceive an ordinary purchaser, giving such attention to the same as such purchaser usually gives and to cause him to purchase the one supposing it to be the other. . . . For the purpose of establishing a case of infringement, it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the articles sold by the party to whom the right to use the trade-mark belongs." *Amoskeag Mnfg. Co.* v. *Trainer*, 101 U. S. 51, 63, 66.

"We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer, is obnoxious to the law. Judged by this standard, it seems to me that, considering the nature and circumstances of this case, the name 'Cellonite Manufacturing Company' is sufficiently similar to that of 'Celluloid Manufacturing Company' to amount to an infringement of the complainants' trade-name." *Celluloid Mnfg. Co.* v. *Cellonite Mnfg. Co.*, 32 Fed R. 94, 97.

"Now, an intending purchaser is not bound to be careful. Even if he has the opportunity of comparing the labels and wrappings, he is not bound to do so. And, indeed, where an article that costs but a few cents is offered upon the market, it is a matter of common knowledge, of which the court will take notice, that an intending purchaser pays little or no attention to it." *Centaur Co.* v. *Robinson*, 91 Fed. R. 889, 891.

"Even in the case of a valid trade-mark the similarity of brands must be such as to mislead the ordinary observer." *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460, 467.

"The infringement of trade-marks is the violation by one person of an exclusive right of another person in the use of a word, mark, or symbol." *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651, 659.

"The rule is well settled that to enable the proprietor of a trade-mark to relief against an illegal appropriation, it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side; it is sufficient if there is such a degree of resemblance that ordinary purchasers, using ordinary caution, are likely to be deceived." *Glen Cove Mnfg. Co.* v. *Ludeling*, 22 Fed. R. 823, 826; 23 Blatchf. 46.

"Taking this as the true rule, and applying it in this case, I am forced to the conclusion that the ordinary mass of purchasers would be deceived, after paying ordinary attention when purchasing, into the belief that they were buying the tobacco of complainant, when in fact they were getting the tobacco of the defendant. Ordinary care in this connection, means the care that men ordinarily exercise when buying chewing tobacco."

The marks were stars of different size and color. *Liggett & Myer Tobacco Co.* v. *Hynes*, 20 Fed. R. 883, 886.

"The ease with which thoughtless purchasers are misled by the nomenclature of trade, adopted to convey false and misleading impressions to eye and ear, induces the courts to be diligent and zealous in protecting such purchasers from deception, and honest traders from dishonest competition." *Little* v. *Kellam*, 100 Fed. R. 353, 354.

"What degree of resemblance is necessary to constitute an infringement is incapable of exact definition as applicable to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resembling that of another trader as that ordinary purchasers buying with ordinary caution are likely to be misled." *McLean* v. *Fleming*, 96 U. S. 245, 251.

Court does not consider whether dealer will be confused, but whether consumer will be. *National Biscuit Co.* v. *Baker*, 95 Fed. R. 135.

"The trade-name differs from the trade-mark in this: that one appeals to the ear more than to the eye. The advertisements of the name were for the purpose of having the intended purchaser

ask for 'Gold Dust,' without his having any knowledge of the character of the label on the package he was to receive, and in this sense the fact that the infringer of the name used different devices and symbols would have no great force. *N. K. Fairbank Co.* v. *Luckel, King & Cake Soap Co.*, 102 Fed. R. 327, 331.

"A specific article of approved excellence comes to be known by certain catchwords easily retained in memory, or by a certain picture which the eye readily recognizes. The purchaser is required only to use that care which persons ordinarily exercise under like circumstances. He is not bound to study or reflect; he acts upon the moment. He is without the opportunity of comparison. It is only when the difference is so gross that no sensible man acting on the instant would be deceived, that it can be said that the purchaser ought not to be protected from imposition. Indeed, some cases have gone to the length of declaring that the purchaser has a right to be careless, and that his want of caution in inspecting brands of goods with which he supposes himself to be familiar ought not to be allowed to uphold a simulation of a brand that is designed to work fraud upon the public." *Pillsbury* v. *Flour-Mills Co.*, 64 Fed. R. 841, 847.

"The imitation of a man's trade-mark, in a manner liable to mislead the unwary, cannot be justified by showing, either that the device or inscription upon the imitated mark is ambiguous and capable of being understood by different persons in different ways, or that a person who carefully and intelligently examined and studied it might be misled." *Singer Mnfg. Co.* v. *Loog*, 8 App. Cas. 15, 18.

"The complainant is entitled to relief if the brand used by the defendants sufficiently resembles the complainant's brand to be mistaken for it, and the defendants adopted their brand for the purpose of selling their kegs as the kegs of the complainant, or for the purpose of enabling retail dealers to do so, and the complainant has been injured by this fraud or is likely to be injured by it." *Southern White Lead Co.* v. *Cary*, 25 Fed. R. 125, 126.

"The proper question should be, not differences, but points of resemblance; not the utmost vigilance of purchasers, but ordinary observation." *Swift* v. *Dey*, 4 Robertson, 611, 612.

"A tradesman, to bring his privilege of using a particular mark under the protection of Equity, is not bound to prove that it has been copied in every particular by another. It is enough for him to show that the representations employed bear such a resemblance to his as to be calculated to mislead the public gener-

ally who are purchasers of the article, and to make it pass with them for the one sold by him. *Walton* v. *Crowley*, 3 Blatchf. 440, 447.

The similarity in sound as well as of appearance of trade-marks may constitute infringement. "Yusea," on incandescent lights infringed by "U-C-A." *Welsbach Light Co.* v. *Adam*, 107 Fed. R. 463.

2. Although there may be some difference in the two marks, yet if the general characteristics are such as are likely to deceive the ordinary purchaser there is an infringement.

See XI. 1. 239.

"When the entire trade-mark is copied, the case is free of difficulty, as the rule is universal that the infringer is liable; but the question is, when may it be said that a trade-mark has been taken by another? Answers to that question are found in several cases, of which no one is more satisfactory than that given by the Master of the Rolls in a recent case. He says that a trade-mark to be taken need not be exactly copied, nor need it be copied with slight variations, but it must be a substantial portion of the trade-mark; to which he adds that it has sometimes been called the material portion, but that, as he states, means the same thing, and he then remarks that it means the essential portion of the trade-mark, and finally concludes the subject by saying that 'what the court has to satisfy itself of is that there has been an essential portion of the trade-mark used to designate goods of a similar description.'" *Amoskeag Mnfg. Co.* v. *Trainer*, 101 U. S. 51, 65. (From dissenting opinion of Clifford, J.).

"No one who has counterfeited a legitimate trade-mark and applied the spurious symbol in competition with the genuine can avoid the charge of infringement by showing that the false mark has in practice been so accompanied, on labels, capsules, or otherwise, by trade-names, designations, descriptions, or other accessories, not forming part of it, as to render it unlikely that the public has been deceived. Such a showing, while it may affect the nature or measure of the relief to be granted, cannot defeat a suit for infringement." *Bass, Ratcliffe & Gretton, Ltd.*, v. *Feigenspan*, 96 Fed. R. 206, 212.

"While there is a difference between the two, there is still such similarity as we think would lead many purchasers — the

consumer, though not likely the general trade-dealer — to purchase one for the other. It is against the probability of such impositions upon the consuming class of the public that courts will extend their protection." *Improved Fig Syrup Co.* v. *California Fig Syrup Co.*, 54 Fed. R. 175, 178.

Use of name of proprietor on trade-mark does not avoid infringement. *Leonard* v. *White's Golden Lubricator Co.*, 38 Fed. R. 922.

"To constitute an infringement exact similarity is not required; there may be an infringement without it. . . . Nor need the resemblance be such as would deceive persons seeing the two trade-marks placed side by side. . . . The plaintiff is entitled to protection if the trade-mark of defendant would deceive the ordinary purchaser, purchasing as such persons ordinarily do." *Liggett & Myer Tobacco Co.* v. *Hynes*, 20 Fed. R. 883, 884.

"I am well satisfied that a technical trade-mark, although not a fac-simile of another, may, nevertheless, be so used by a rival manufacturer as to imitate another's trade-mark, and when such use actually deceives the public a court of equity will afford relief." *National Biscuit Co.* v. *Swick*, 121 Fed. R. 1007, 1011.

"It has been said that it is the resemblances that should be looked at, rather than the differences. But the existence of the latter negatives the former, and it is necessary to take both into view, in order to get a correct picture of the whole." *Proctor & Gamble Co.* v. *Globe Refining Co.*, 92 Fed. R. 357, 364.

There is an infringement although one uses his own name in connection with trade-mark.

"Roberts Parabola Needles," infringed by "William Clark & Sons Parabola Needles." *Roberts* v. *Sheldon*, 8 Biss. 398.

Singer made a sewing-machine to which he gave his own name; it became known by that name. He afterwards took other persons into partnership with him for the sale of the machines known as the "Singer" sewing-machines, and which were made in great variety with many modifications, but though not protected by patents were established in public favor under that name. Wilson sold sewing-machines and advertised among others "Singer" sewing machines, but used his own trade-mark on the machines and expressly stated in his advertisements that the machines sold by him were manufactured by himself. Held, that this nevertheless constituted a wrongful invasion of rights of Singer, and Wilson could be restrained by injunction. *Singer Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376; reversing 2 Ch. D. 434.

Although defendant used his own name after word "Glenfield" on starch which he had no right to use, injunction on ground of unfair trade. *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508.

In line with the last three cases see XI. 15, 273, *Battle* v. *Finlay*, 50 Fed. R. 106; *Menendez* v. *Holt*, 128 U. S. 514, 277.

3. There is no infringement of a trade-mark where there is only a general resemblance not calculated to deceive the ordinary purchaser.

See XI. 4 A. 250. *Royal Baking Powder Co.* v. *Davis*, 26 Fed. R. 293

"The law is not made for the protection of degenerates and paranoiacs, but for the general public composed of men with ordinary common sense and with faculties unimpaired. The task of the court, therefore, will be accomplished if it confines its attention to those similarities which are likely to deceive the ordinary purchaser." *Hilson Co.* v. *Foster*, 80 Fed. R. 896, 898.

"I do not regard the words 'tempest' and 'hurricane' as so similar as to warrant the conclusion that the public is liable to be misled into believing the lamps are of the same manufacture." *Hurricane Patent Lantern Co.* v. *Miller*, 56 How. Pr. 234, 235.

"It does not suffice to show that persons incapable of reading the labels might be deceived by the resemblance. It must appear that the ordinary mass of purchasers, paying that attention which such persons generally do in buying the article in question, would probably be deceived." *Partridge* v. *Menck*, 2 Sandf. Ch. 622, 625; 2 Barb. Ch. 101.

The complainant by virtue of a trade-mark of a conventional shaped diamond figure on abradant of crushed steel is not entitled to the exclusive right to the word "diamond"; and such trade-mark is not infringed by figure of a radiant diamond gem. *Pittsbury Crushed Steel Co.* v. *Diamond Steel Co.*, 85 Fed. R. 637.

"The question is this, as in every other case, whether there is such a resemblance between the two as to deceive a purchaser using ordinary caution. The difference is so palpable here that no one can be deceived. . . . The court is not bound to interfere where ordinary attention will enable purchasers to discriminate between the trade-marks used by different parties." *Popham* v. *Cole*, 66 N. Y. 69, 75; reversing 14 Abb. Pr. N. S. 206.

Where complainant has right to use "Hygeia" on its mineral water, and respondent had right to use it in the combination "Waukesha Hygeia Mineral Springs," it was no infringement for

the respondent to make the word "Hygeia" more conspicuous than the other words. *Waukesha Hygeia Mineral Springs Co.* v. *Hygeia Sparkling Distilled Water Co.*, 63 Fed. R. 443.

4. A. In order to obtain protection on the ground of unfair trade the imitation should be such as would be likely to deceive the ordinary purchaser in the ordinary course of business, although there may not be exact similitude.

See XI. 1, 239, 2, 242, and 3, 244.
See VIII. 1 F. 173, and G. 181.

"Benedictine," a cordial, was made for three hundred years at monastery at Fecamp, Normandy. After Revolution complainant's predecessor, who had rightfully acquired receipts, manufactured the liqueur and formed the present corporation. The liqueur was put up in peculiar bottles, with distinctive labelling and wording. Respondent in Chicago put up a similar preparation, calling it "Liqueur de St. Benedict," in similar bottles and labels. Injunction on ground of unfair trade. *Bauer & Co.* v. *La Soc. Anon. de la Distillerie de la Liqueur Benedictine de l'Abbaye de Fécamp*, 120 Fed. R. 74.

Respondent appellant in Chicago enjoined from imitating labels, bottles, and printing of complainant from their liqueur "Chartreuse," making minor changes and substituting word "Chasseuse" for "Chartreuse." Case of unfair trade. *Bauer & Co.* v. *Order of Carthusian Monks*, 120 Fed. R. 78.

Respondent appellant enjoined from imitating bottles, labels and printing of complainant for its bitters called "Angostura," and from using the word "Angostura." *Bauer & Co.* v. *Siegert*, 120 Fed. R. 81.

"It is alleged that the word 'Angostura' is not the subject of a trade-mark or a trade-name. We cannot sustain the contention. For upwards of half a century no town has existed by that name; and even if the old town of Angostura were still known by that name, the appellant would not be permitted by fraudulent imitation to deceive the public and wrong the appellees by palming off its goods as their goods." *Bauer & Co.* v. *Siegert*, 120 Fed. R. 81, 84.

"Conformity of one label to another sufficiently to attract and deceive is not excused by ability to analyze the offending label and point out differences which, if known and recognized, would avoid confusion. The ensemble does the mischief; the usual

purchaser neither abstracts nor analyzes for the purpose of differentiation and judgment." *Cantreli & Cochrane, Ltd.*, v. *Butler*, 124 Fed. R. 290, 291.

"It is not necessary that the resemblance should be such as would deceive first or intelligent purchasers. It is sufficient if it be calculated to deceive the unwary, the incautious, or the ignorant purchaser. Neither need the resemblance be so great that one would be deceived who should see the labels placed side by side. If an ordinary purchaser, looking at the article offered to him, would naturally be led, from the label attached to it, to suppose it to be the product of a rival manufacturer, and would purchase it in that belief, the court will enjoin the use of such article as fraudulent." *Cauffman* v. *Schuler*, 123 Fed. R. 205, 206.

Where complainant's packages and labels for Castoria are not exactly imitated, but the resemblance is so great as to be likely to deceive, an injunction will issue. "While it is true that, upon an actual comparison of the wrappers side by side, substantial differences will be found, and that no one with knowledge would, after such examination, be deceived, still it will be perceived at once by a mere inspection of the packages of the complainant and defendant that they are so much alike in general appearance that the one is apt to be mistaken for the other, and that a close inspection is necessary to distinguish them. If we look at the two wrappers we find that the color of the paper is the same; that there is a similarity in the type used and their general arrangement, and that their size and peculiar characteristics are changed at similar intervals of space; that upon each wrapper there is affixed 'a signature in script; and that at the bottom of each there is a dark band, upon which words are printed in white letters." *Centaur Co.* v. *Killenberger*, 87 Fed. R. 725, 726.

Where party adopts a label with name "Castoria," it having by expiration of patent become public property, he will be enjoined from use of words "New Label," as it might lead the public to believe that the old proprietor had adopted a new label. *Centaur Co.* v. *Marshall*, 92 Fed. R. 605.

"The embellishments of the label are of the same character, and they are arranged in the same form and printed in the same Gothic type as the labels of the Plaintiffs. The same colors are, moreover, used, and there is a similar scroll or border. To the general eye, therefore, they resemble the plaintiffs' labels, al-

though upon a minute examination differences may be detected." *Edelston* v. *Vick*, 11 Hare 78, 84.

"The true test, we think, is whether the resemblance is such as that it is calculated to deceive, and does, in fact, deceive the ordinary buyer, making his purchases under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates. No inflexible rule can be laid down. Each case must in a measure be a law unto itself." *Fischer* v. *Blank*, 138 N. Y. 244, 252.

Complainant had put up for years a chicory substitute for coffee in cylindrical packages of red paper labelled "Frank Chicory"; respondent entered market with same class of goods, similarly packed, and using name "Frank"; held infringement. *Franck* v. *Frank Chicory Co.*, 95 Fed. R. 818.

"Where the trade-mark consists of a picture or symbol, or in any peculiarity in the appearance of the label, the imitation must be such as to amount to a false representation, liable to deceive the public and enable the imitator to pass off his goods as those of the person whose trade-mark is imitated. And when there is such an absence of resemblance that ordinary attention would enable customers to discriminate between the trade-marks of different parties, the court will not interfere." *Hier* v. *Abrahams*, 82 N. Y. 519, 523; 37 Am. Rep. 589.

Complainant purchased distillery conducted under name of "West End Distillery Co.," also certain valuable brands as "Ky.'s Criterion" and "Honeymoon." Respondents, sons of vendor, began business, labelling their brands "East End Distillery Co.," and using brands "Ky.'s Criterion," and "Honeycomb." Preliminary injunction issued against use of brands "Ky.'s Criterion," and "Honeycomb." *Kentucky Distilleries & Warehouse Co.* v. *Wathen*, 110 Fed. R. 641.

"A casual or inattentive observer, as most purchasers are, would be very likely to accept one in place of the other. . . . It is by this peculiar form, combination, and location of the words, rendering one label a close resemblance of the other, that deception and injury would be caused. And when that is the nature of the device resorted to, although the defendant may employ the words he has a legal right to select and use, yet he violates the right of the plaintiff by so printing, placing, and arranging them as to produce the conclusion that the manufacture is that of the other party." *Kinney Tobacco Co.* v. *Maller*, 53 Hun (N. Y.), 340, 343.

"Elaborate descriptions of the points of resemblance or those of difference are, taken by themselves alone, always unsatisfactory. The eye, at a glance, takes in the whole of one exhibit and the whole of another, and the comparison thus made of the two is the surest and the only satisfactory way of satisfying the judgment as to the existence of the alleged deceptive imitation. *Lorillard Co.* v. *Piper*, 86 Fed. 956. With an exhibit of a bottle both of the complainant and defendant before me, dressed up in the style used by both, ready for sale, I can, of course, easily distinguish one from the other; but the resemblance between the two is so close that the consumer, without close attention, could easily be deceived into accepting the mineral water of the defendant when he intended to purchase that of the complainant." *Kronthal Waters* v. *Becker*, 137 Fed. R. 649, 653.

"It is true that the defendants have substituted their name as the manufacturers, but that alone will not relieve the defendants from the charge of an attempted imitation of the labels and wrappers of the plaintiff for the purpose of misleading purchasers." *Lea* v. *Wolf*, 13 Abb. Pr. N. S. 389, 391.

"What is called the general 'get-up,' which is an expression used by some of the witnesses, is so similar that obviously the one might easily be mistaken for the other. Of course in all these cases, there are differences as well as resemblances, and the question, so far as the packages are concerned, must always be decided by contrasting the striking resemblances with the striking differences. Now the only difference which strikes me is this: That Goodwin has substituted the word 'Goodwin' in large letters for 'Sunlight.' That is the whole difference which catches the eye. Then look at the resemblances; look at the paper; look at the printing; look at the blank space and the catch words; look at the whole thing, and it is impossible not to arrive at the conclusion, not only that one was intended to pass for the other, but that that intention has been realized." *Lever* v. *Goodwin*, 36 Ch. D. 1, 8.

"Argument to show that the name of the pills, as given in the trade-mark of the respondent, was of a character to mislead and deceive, is scarcely necessary as they are *idem sonans* in the usual pronunciation; nor can it be doubted that the form of the box containing the pills, and the general appearance of the wrapper which surrouuded it, were calculated to have that effect." *McLean* v. *Fleming*, 96 U. S 245.

"Much must depend, in every case, upon the appearance and

special characteristics of the entire device; but it is safe to declare, as a general rule, that exact similitude is not required to constitute an infringement, or to entitle the complaining party to protection. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as would be likely to mislead one in the ordinary course of purchasing the goods, and induce him to suppose he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection, if he takes reasonable measures to assert his rights and prevent their continued invasion." *McLean* v. *Fleming*, 96 U. S. 245, 253.

"Difficulty frequently arises in determining the question of infringement, but it is clear that exact similarity is not required, as that requirement would always enable the wrong-doer to evade responsibility for his wrongful acts. Colorable imitation, which requires careful inspection to distinguish the spurious trade-mark from the genuine, is sufficient to maintain the issue; but a court of equity will not interfere, when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress, if he has been guilty of no laches. *Amoskeag Mnfg. Co.* v. *Spear*, 2 Sandf. S. C. 599; *Coddington Dig.*, 109; *McAndrew* v. *Bassett*, 4 De G. J. & S. 380." *McLean* v. *Fleming*, 7 L. T. R. N. S. 768; 96 U. S. 245, 255.

"Two trade-marks are substantially the same in legal contemplation if its resemblance is such as to deceive an ordinary purchaser, giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one supposing it to be the other. *Gorham Company* v. *White*, 14 Wall. 511." *McLean* v. *Fleming*, 7 L. T. R. N. S. 768; 96 U. S. 245, 256.

"Defendant is a manufacturer, and sells only to the trade. By its salesmen it offers its soap powder in competition with complainant's, as an article equal or superior thereto, and at a less price. Undoubtedly, no one who bought from defendant was ever deceived. No effort was ever made to delude the trade into the belief that defendant's salesmen were selling complainant's goods. But equity regards the consumer as well as the middleman. It is to him, more than to the jobber or wholesale pur-

chaser, that the various indicia of origin with which merchants dress up their goods appeal; and courts will not tolerate a deception devised to delude the consuming purchaser by simulating some well-known and popular style of package." *N. K. Fairbank Co. v. R. W. Bell Mnfg. Co.*, 77 Fed. R. 869, 875.

"In regard to the last point made, that by reason of the defendants using their own name on the wrapper or envelope, the public are not deceived, it would, perhaps, be enough to say, that when goods acquire a specific name, the purchaser rarely looks to see who has manufactured goods by that name." *Roberts* v. *Sheldon*, 8 Biss. 398, 401.

"I do not think the use of the words 'Coral Baking Powder' is in itself an infringement of plaintiff's trade-mark, 'The Royal Baking Powder.' The difficulty is with the similarity of the labels upon which the words are used. The general arrangement of the words being the same, the devices upon the cans being very much alike, and the labels of the same color and general appearance, I think purchasers might be very easily deceived into buying the one for the other." *Royal Baking Powder Co.* v. *Davis*, 26 Fed. R. 293.

"A competing business firm is bound to deal fairly in placing its rival article upon the market, and if it clearly appears that the defendants have closely imitated the plaintiff's labels and style, and have done obvious damage to the latter's business through the unlawful business methods employed, the plaintiffs are entitled to relief upon the ground of fraud. . . . The only material difference between the two labels in design and appearance exists in the colors, and this is no defence." *Schmidt* v. *Brieg*, 100 Calif. 672, 680.

Complainants in Angostura, Venezuela, making bitters, cannot enjoin defendants using "Augostura" on bitters for two reasons:

1st, the complainants fraudulently represent on advertising circulars, by alleged statements of chemists, that their bitters are free from intoxicating ingredients, — when, in fact, they contain forty per cent of alcohol.

2d, the bitters sold by defendants are made of a bark common in Venezuela, called Angostura bark; Angostura is name of a city in that country. It was registered as a trade-mark in 1877, by the firm of C. W. Abbott & Co., who made these bitters, and had carried on the business in Baltimore for fifty years. Moreover, on their labels and circulars the firm called especial attention to the fact that these bitters were sold by them, so that the

public would not be likely to be deceived into thinking that they were made by Siegert. *Siegert* v. *Gandolfi*, 139 Fed. R. 917.

Respondent enjoined from putting up laxative tablets in size, shape, and style, and manner of lettering and labelling with words "Candy Cathartic," and "Cascara," instead of "Cascarets," so nearly like those of complainant as to lead to deception. There were differences, but the resemblances were too marked. Held, also, "Candy Cathartics" a fancy name. *Sterling Remedy Co.* v. *Gorey*, 110 Fed. R. 372.

Packages of soap marked "Old Mill Soap," "Made by Swift & Co., Chicago," with picture of old mill, infringed by package marked "Old Stone Mill Soap," and "Made by Crown Mnfg. Co.," with picture of old mill, there being similarity in type, letters and appearance of package. *Swift* v. *Brenner*, 125 Fed. R. 826.

"The proper question should be, not differences, but points of resemblance; not the utmost vigilance of purchasers, but ordinary observation. The value of the goods to be sold, and the intelligence of the persons dealing in and consuming them, besides other circumstances, are also to be taken into account in determining the adaptability of a simulated trade-mark to deceive purchasers. . . . The great principle laid down and applied in all the cases of trade-marks is, that if persons of ordinary understanding purchasing the article would be placed on their guard, and would be led to inquire whether they were being deceived by the article they were purchasing, that fact is sufficient for the court to refuse its interference." *Swift* v. *Dey*, 4 Robt. 611, 612, 615.

Complainant had on his packages a shield with words "Smoke and Chew" in alternate red and yellow lettering, and name "Sweet Lotus." Defendant had on his packages a shield of the same curvature, words "Smoke and Chew," with same style of colors in lettering, and name "Peach Blossom"; a preliminary injunction granted. *Wellman & Dwire Tobacco Co.* v. *Ware Tobacco Works*, 46 Fed. R. 289.

"The entire wrappers and labels so closely resemble each other that dealers and purchasers would be readily misled and deceived. The differences, on critical examination, are capable of discernment and description, but to the eye of an ordinary person who knew the complainant's packages of tobacco, and never had seen the defendant's, labelled as they are, and not knowing of any such kind of tobacco in the market, would be misled." *Wellman & Dwire Tobacco Co.* v. *Ware Tobacco Works*, 46 Fed. R. 289.

B. There is no infringement on ground of unfair trade where there is only a general resemblance not calculated to deceive, or where there is some sign or name distinguishing the origin of the goods.

See XI. 4 A. 245.

"Notwithstanding plaintiff has no real or legal trade-mark, if the defendants had intentionally simulated the particular device or symbol employed by plaintiff on his labels, and such simulation was calculated to deceive ordinarily prudent persons, and did deceive such persons, the plaintiff would be entitled to protection against the consequences of such deception, not because of his device or symbol being a trade-mark, in the legal sense of that term, but because of the fraud and deception practised by the defendants upon the plaintiff and the public. In this case, however, the labels used by the plaintiff and defendants respectively are so entirely dissimilar that we do not think it possible for any person of ordinary prudence and caution to have been deceived by the defendants' label, and thereby induced to buy their remedy, when the purchaser desired and intended to buy the plaintiff's remedy." *Alff* v. *Radam*, 77 Tex. 530, 541.

"The plaintiff had established a large and lucrative trade in a superior brand of soap which it called and marked 'Old Country Soap.' The defendant made and sold a soap which it called and branded 'Our Country's Soap.' The packages of the two manufacturers were of the same size and shape, but the dress of the defendant's product bore the defendant's name and its place of manufacture, and was so unlike that of the plaintiff that it was not likely to deceive a common purchaser who exercised ordinary care. Held, the use of the term 'Our Country' as a brand or name for the soap under these circumstances did not constitute unfair competition." Syllabus by court. *Allen B. Wrisley Co.* v. *Iowa Soap Co.*, 122 Fed. R. 796.

A plain red triangle on an elliptical figure, with black border and red lace-work design, bearing the words "Bass & Co." and "Pale Ale," not infringed by circular label bearing figure of strap and buckle stamped with red triangle having large white "Z" thereon. *Bass, Ratcliffe & Gretton, Ltd.*, v. *Henry Jettner Brewing Co.*, 87 Fed. R. 468.

The label of respondent on "Castoria" was so unlike that of complainant that court did not issue injunction.

"The conclusion is irresistibly forced upon the mind that such

a buyer cannot be deceived by it into the purchase of the product of the appellees for that made by the appellant, and that there was no error in the refusal of the court to enjoin its use before the final hearing of the case." *Centaur Co.* v. *Marshall*, 97 Fed. R. 785; affirming 92 Fed. R. 605.

Circular paper label, with black letters on gilt ground, words "J. & P. Coats, Best Six Cord" in gilt band around border and in centre symbol "200 YDS," and number of thread, on spool of thread, not infringed by label similar in shape with words "Merrick Thread Co.," number of thread in gilt band upon the border, and in centre words "Best Six Cord" enclosing a star. *Coats* v. *Merrick Thread Co.*, 147 U. S. 562; affirming 36 Fed. R. 324.

Where a party plainly and conspicuously places his name on a label although there may be a general resemblance to that of a complainant such as to deceive a careless purchaser, the court is not likely to grant injunction. *Coats* v. *Merrick Thread Co.*, 149 U. S. 562.

"The differences are less conspicuous than the general resemblance between the two. At the same time, they are such as could not fail to impress themselves upon a person who examined them with a view to ascertain who was the real manufacturer of the thread." *Coats* v. *Merrick Thread Co.*, 149 U. S. 562, 567.

"Defendant's affidavits tend to show that an ordinary buyer purchasing in the usual manner is not deceived by any simulation in defendant's manner of dressing its goods into believing that he is buying the goods of complainant. The similarities pointed out by the complainant in view of the employment of the trade-mark itself as a distinctive identification is no deception upon the public, if proper consideration be given upon this motion to the opposing affidavits. It does not appear that any ordinary purchaser has been misled. It is not clear, from the large number of exhibited cards with hooks and eyes attached, many of them apparently like complainant's cards, but without its trade-mark, or any simulation thereof, that defendant's article is a fraud upon the complainant." Temporary injunction denied. *De Long Hook & Eye Co.* v. *Francis Hook & Eye Fastener Co.*, 118 Fed. R. 938, 940. Injunction on final hearing. 139 Fed. R. 146.

A cigar band had some similarities to claimant's claimed as trade-mark, but held not to be unfair trade.

"It is likely enough that a near-sighted man, or a man with impaired vision, unaided by glasses, or a man in so much of a hurry as to be unwilling to stop for a careful look, might mistake one band for the other, but these classes may be disregarded in applying the test of similarity. Certainly an ordinarily intelligent man, able to see and to read, and willing to take a few seconds' time to examine the two bands, would inevitably discover that one of the banded cigars was made by the complainant and the other by the defendant." *E. Regensburg & Sons* v. *Juan F. Portuando Cigar Mnfg. Co.*, 136 Fed. R. 866, 869.

Where packages of tobacco were so dissimilar that it did not appear to court that there was improper imitation, preliminary injunction refused. *Gail* v. *Wacherbath*, 28 Fed. R. 286.

The label on a lubricating oil, printed in black, bearing letters "Three in One" above a large red figure 1 enclosing in white the figure 3 and word "on," is not infringed by a label of different size on similar oil, printed with words differently arranged, partly in red and partly in black, headed "Big Four," with figure 4 prominently displayed in black on red background, and words "lubricator," "big," and "rust preventive," running across it. *G. W. Cole Co.* v. *American Cement & Oil Co.*, 130 Fed. R. 703.

Respondent not enjoined from selling confectionery, called "liquorice pastilles," in diamond shape, similar in size and shape to that of complainants, and put up in boxes of similar size but differently marked, and the candy stamped "W" instead of "H. H." The general similarity was not such as to deceive, and the shapes were common in the trade. *Heide* v. *Wallace*, 135 Fed. R. 346; affirming 129 Fed. R. 649.

"It is not enough that there may be a possibility of deception. The offending label must be such that it is likely to deceive persons of ordinary intelligence. . . . In trade-marks, in order to entitle the plaintiff to relief by injunction, the resemblance must be such that ordinary purchasers dealing with ordinary caution are likely to be misled. . . . The court is not bound to interfere where ordinary attention will enable the purchaser to discriminate. . . . In that part of plaintiff's trade-mark, which he is entitled to claim as such, there is no resemblance whatever. They differ in style, color, and device." *Heinz* v. *Lutz*, 146 Pa. St. 592, 608.

A label of red and black letters on white background of "Elastic Starch," with large and prominent cut of flatiron, and name and address of proprietor, not infringed by label of white, yel-

low, and black letters on red background of "E's New Process Starch," with picture of colored woman holding up freshly ironed shirt, and flatiron on table, and address of proprietor. *J. C. Hubinger Bros. Co.* v. *Eddy*, 74 Fed. R. 551.

Bars of soap of respondent like those of complainant, and on both were words "a base de Glycerine," but on other side of bars of complainant were words "La Parisienne," and on respondent's "Rose de France." Held no infringement. *Kropf* v. *Furst*, 94 Fed. R. 150.

Where complainant had trade-mark "Welcome" for soap on which it had expended large sums of money, court would not enjoin respondent from using his name, "Welcome A. Smith," on soap of different size and shape, and different style of wrappers; but would only enjoin such prominent use of it as would be likely to mislead people in thinking it was "Welcome Soap." *Lever Bros., Ltd.*, v. *Smith*, 112 Fed. R. 998.

There is no unfair competition in representing on a package or boxes the picture of a patented article (a syringe) substantially like that on boxes sold by complainant, where both parties have right to sell under patent. *Marvel Co.* v. *Trellar Co.*, 125 Fed. R. 829.

Use of a rose-colored capsule on bottles of champagne is not an infringement of complainant's right to use same colored capsule where the respondent's labels are so different that no mistake is likely to arise.

"A man of average intelligence, exercising ordinary care, could readily ascertain the difference." *Mumm* v. *Kirk* 40 Fed. R. 589.

Preliminary injunction not granted where the complainant has not shown that his method of putting up coffee essences in tin boxes, with certain labels, had been imitated by respondent so as to deceive the public, and that the public has been in fact deceived. The right of complainant should be clear. *Pfeiffer* v. *Wilde*, 107 Fed. R. 456; affirming 102 Fed. R. 658.

Complainant put up hair-crimpers in red boxes, white label, with black border and bust of woman, with words "Madame Louie, Common Sense Hair Crimper"; defendant put up hair crimpers of different size and weight in similar boxes, with white label and bust of woman with words "The Langtry Elegantes. One gross, No. 1 Black, Hair Crimpers." Defendant had prior use of white label with central vignette. Otherwise labels, boxes, wrappers, and lettering were so different that no one

could reasonably be expected to be deceived. No injunction. *Philadelphia Novelty Mnfg. Co.* v. *Rouss*, 40 Fed. R. 585.

A bright red box with white label and black border, for hair crimpers, on label "Madame Louie Common Sense Hair Crimpers," with bust of woman with curled hair, not imitated by bright red box with white label bearing words "The Langtry Elegantes," with different lettering and head of woman, curled hair, insufficient for injunction. Bill dismissed. *Philadelphia Novelty Co.* v. *Blakesley Novelty Co.*, 40 Fed. R. 588; affirming 37 Fed. R. 365.

The letters and words on respondent's label were arranged in the same manner as on complainant's; but the words were different, and the size, form, and color of letters, as well as size of label. Held, that there was not sufficient resemblance to justify injunction. *P. Lorillard Co.* v. *Peper*, 86 Fed. R. 956.

A label for cereal food bearing name "Grape-Nuts," not infringed by one dissimilar in color, arrangement of printed matter, and having certain marked differences, although there is a certain resemblance in size and color of background.

"But there are certain distinctive marks which are peculiarly suggestive to the eye, which, in our judgment, so stamp these labels and indicate such marked dissimilarity that we think that the purchaser who, relying upon his knowledge of the character of the brand he wished, should mistake the one for the other, would be stupid indeed." *Postum-Cereal Co., Ltd.*, v. *American Health Food Co.*, 119 Fed. R. 848; affirming 109 Fed. R. 898.

Although both parties used the words "Healing Springs" on their mineral waters, yet other wording was so different that there was no infringement; the words "Rubino" and "Lithia Water" differentiated the labels. *Virginia Hot Springs Co.* v. *Heyeman*, 138 Fed. R. 855.

5. An infringement of a trade-name is an imitation such as would deceive a purchaser in the ordinary course of business.

See XI. 1, 239, 2, 242, 3, 244.

"He has no such company, and that part of his new title seems to have been adopted to imitate the plaintiffs', and to make his paint pass as theirs. Such would be its effect with any but the most cautious. . . . Any false name that is assumed in imitation of a prior true name is in violation of this right, and the

use of it should be restrained by injunction." *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416, 418.

"This case we think is clearly within the rule of prohibition. It is difficult to believe that the words 'late operator,' and 'formerly operator,' being in letters and type so much smaller than the other letters upon the cards and sign of the defendant, have not been thus placed with a purpose to mislead and to create an impression that his rooms are the Colton Dental Rooms, or rooms of the Colton Dental Association. But whether intended to produce this result or not, no one can doubt that they are calculated to mislead the majority of unwary persons, and even of the most wary and cautious, when suffering from acute pains and seeking for immediate relief." *Colton* v. *Thomas*, 2 Brews. 308. 313.

In a bill brought by plaintiffs doing business under firm name of "Devlin & Co." to restrain defendant from using firm name of plaintiffs', an injunction was granted restraining said defendant from displaying upon signs, etc., said firm name and confining him to the use of his own proper Christian and surname without devices which might tend to mislead and induce the public to believe or suppose that he is the plaintiffs. Defendant then put out sign upon which was "Devlin's Clothing"; over the word "Devlin" were defendant's initials "J. S.," with number of his store, "826," on each side of the initials. Held, facts justified finding of deception, and that the words and letters were so arranged as to deceive, and were so intended; order of contempt proper. *Devlin (Jeremiah D.)* v. *Devlin (John S.)* 69 N. Y. 212.

"In my opinion there is not sufficient similarity in the two names, as above, necessarily to lead to the inference that there was an intention to deceive." *Merchant Banking Co.* v. *Merchants' Joint Stock Bank*, 47 L. J. Ch. 828, 830.

"To justify an injunction in such a case, it should appear that the resemblance between the two trade-marks or trade-names is sufficiently close to raise a probability of mistake on the part of the public or to show a design to mislead and deceive on the part of the defendant. . . . The evidence further shows that such mistakes actually occurred. It further satisfies us that the defendant intended that they should occur." *Sanders* v. *Jacobs*, 20 Mo. App. 96, 98.

6. The act of the infringement may consist in using the mark so as to deceive, although it may be used differently from the manner of the original proprietor.

The plaintiff had a trade-mark for furs consisting of a figure of a lady and a bear; the defendant used a similar figure not as a trade-mark, but on a circular sent to customers; held an infringement. *Jay* v. *Ladler*, 40 Ch. D. 649.

A trade-mark used by a distiller on bottled goods is infringed if used by a retailer on his goods bottled from barrels sold by the distiller. *Krauss* v. *Jos. R. Peebles' Sons Co.*, 58 Fed. R. 585.

"But it surely cannot be said, that a person having a valid trade-mark, which he uses upon one form of package, another person can adopt the same mark upon the same form of package, and is justified in its use because he also puts it upon another form of package. Nor is it very material whether the barrels have one or two stamps upon them, or whether one kind of whiskey is straight and the other blended, or the price of one is a little greater or less than the other." *G. G. White Co.* v. *Miller*, 50 Fed. R. 277, 278.

7. A. In order to claim relief or damages for the infringement of a trade-mark, it is not necessary to show fraudulent intent,

See IV. 3. 92.
See X. 1 A 2. 223. *Oakes* v. *Tonsmierre*, 49 Fed. R. 447.
See VIII. 2. 185. *Church & Dwight Co.* v. *Russ*, 99 Fed. R. 276.
See VIII. 2. 186. *Daviess County Distilling Co.* v. *Martinoni*, 117 Fed. R. 186.

"But the practice in equity has long been settled otherwise, the rule now being that the injury the owner of the trade-mark suffers by the offering for sale in the market of other goods, side by side with his, bearing the same trade-mark, entitles the real owner of the trade-mark to protection in equity, irrespective of the intent of the wrongdoer, it being held that the injury done to the complainant in his trade by loss of custom is sufficient to support his title to relief. Neither will the complainant be deprived of remedy in equity, even if it be shown by the respondent that all the persons who bought goods from him bearing the trade-mark of the real owner were well aware that

they were not of the complainant's manufacture." *Amoskeag Mnfg. Co.* v. *Trainer*, 101 U. S. 51, 63.

"Even where no fraud can be justly imputed, where the use of the name or style originated in mistake and not in design, although the party may be exempted from damages and costs, the continuance of the use may be justly restrained, since it involves a violation of the right of property, that if persisted in with a knowledge of the fact would be fraudulent." *Amoskeag Mnfg. Co.* v. *Spear*, 2 Sandf. S. C. 599.

"From the above it would seem that an intentional fraud is not necessary to entitle the plaintiff to protection, but that where the same mark or label is used, which recommends the article to the public by the established reputation of another, who sells a similar article, and the spurious article cannot be distinguished from the genuine one, an injunction will be granted although there was no intentional fraud." *Coffeen* v. *Brunton*, 4 McLean, 516, 519.

"And it is not an answer to an application for an injunction to restrain the user thereof by another person, for such other person to say and prove that he adopted the trade-mark without knowing that it already belonged to the plaintiff." *Cope* v. *Evans*, L. R. 18 Eq. 138, 143.

Imitation of cigar labels with trade-mark thereon was so close as to be fairly assumed to be intentional. "That the defendants did not know that the labels, which they bought, as they aver, from a cigar-box maker, were infringements, is no reason for refusing the relief prayed for. The owner of a trade-mark is entitled to protection against ignorant as well as against malicious infringers. Nor is the fact that no actual sale is shown material. It is manifest on the papers that defendants bought the boxes thus labelled to sell with their cigars, and that, but for the complainant's appeal to the courts, they would have offered them for sale." *Cuervo* v. *Landauer*, 63 Fed. R. 1003.

"If the defendant, without fraud, use the trade-mark of the plaintiff, he is still liable. If the right be violated it matters not whether it be by fraud or by mistake." *Davis* v. *Kendall*, 2 R. I. 566, 570.

"The jurisdiction to restrain the use of a trade-mark rests upon the ground of the plaintiff's property in it and of the defendant's unlawful use thereof. *Boston Diatite Co.* v. *Florence Mnfg. Co.*, 114 Mass. 69. If the absolute right belonged to the plaintiff, then, if an infringement were clearly shown, the fraudulent intent

would be inferred and . . . the further violation of the right of property would nevertheless be restrained." *Lawrence Mnfg. Co.* v. *Tennessee Mnfg. Co.*, 138 U. S. 537.

"If the effect of the simulated trade-mark is to deceive the public into the belief that the article upon which it is placed is the article of some other manufacturer, then it is deception, whether it was the actual intention of the person using the simulated trade-mark to deceive or not, as the principle of law applies that persons are held to have intended the necessary, natural and probable consequences of their acts." *Liggett Tobacco Co.* v. *Hynes*, 20 Fed. R. 883.

An imitation close enough to deceive, whether intended or not, is an infringement to be restrained. *Lorillard* v. *Wight*, 15 Fed. R. 383.

"Positive proof of fraudulent intent is not required where the proof of infringement is clear." *McLean* v. *Fleming*, 96 U. S. 245, 253.

"In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names." *Millington* v. *Fox*, 3 My. & C. 338, 352.

"I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark. . . . A man may take the trade-mark of another ignorantly, not knowing it was the trade-mark of the other; or he may take it in the belief, mistaken but sincerely entertained, that in the manner in which he is taking it he is within the law, and doing nothing which the law forbids; or he may take it knowing it is the trade-mark of his neighbor, and intending and desiring to injure his neighbor by so doing. But in all these cases it is the same act that is done, and in all these cases the injury to the Plaintiff is just the same." *Singer Mnfg. Co.* v. *Wilson*, 3 App. Cas. 376, 391.

"Now one man may adopt or imitate the label or trade-mark of another with the most innocent intention possible, but the law is settled that if his imitation is such as is calculated to mislead purchasers into the belief that he is selling an article manufactured by that other, this court will interfere." *Wotherspoon* v. *Currie*, 22 L. T. N. s. 260.

Intent not an element in the question of infringement when there is interference with legal rights causing loss and injury. *Van Hoboken* v. *Mohns*, 112 Fed. R. 528.

B. nor that persons have actually been deceived,

"Nor is it necessary, in order to entitle the party to relief, that proof should be given of persons having been actually deceived, or that they bought goods in the belief that they were of the manufacture of the complainant, provided that the court is satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other." *Amoskeag Mnfg. Co.* v. *Trainer*, 101 U. S. 51, 63.

"It is of no moment that the proof fails to show deception, confusion or injury to any marked extent. Such proof is unnecessary where infringement of a valid trade-mark is clearly established. The defendant is using the complainant's property and, as he is acting without color of right, the complainant is entitled to have that use discontinued. If the defendant's contention be correct that actual damage must be proved before an injunction can issue, it follows that if to-morrow a new infringer should commence the publication of a paper with a Chinese copy of the complainant's trade-name on its title-page, the court would be powerless to grant relief until the infringement had been carried on long enough to cause actual, provable damage. Equity is not so helpless and impotent. It is the policy of the law to arrest the pirate before he actually makes off with the plunder." *Gannert* v. *Rupert*, 127 Fed. R. 962, 964.

"Wrongs which are the probable result of given means should be prevented, not awaited. The infringement of a trade-mark implies injury." *Lanahan* v. *John Kissel & Son*, 135 Fed. R. 899, 903.

"As has been often pointed out before, it makes no difference that dealers in the article are not deceived. No one expects that they will be. It is the probable experience of the consumer that the court considers." *National Biscuit Co.* v. *Baker*, 95 Fed. R. 135.

"It was not necessary for the complainant to attempt to discover whether a purchaser had been actually deceived, for a manifest liability to deception exists." *Fuller* v. *Huff*, 104 Fed R. 141.

"In a case like the present it would be too much to require the complainants to prove instances of such deception. It is not likely that the knave who perpetrates the fraud upon the ultimate consumer will disclose himself to the complainants; and the ultimate consumer, if cognizant of the fraud practised upon him,

could not, unless by mere accident, be known to the defendants. Such testimony is unnecessary when, as here, the proofs warrant the conclusion that the only reason for the dress adopted by the defendants for their product is that it can be successfully used to defraud the ultimate consumer." *Von Mumm* v. *Frash*, 56 Fed. R. 830, 837.

"Neither is he required to prove that persons have actually been deceived, and that his adversary's goods have been purchased under the belief that they were his. If it appears that the resemblance between the two labels is such that it is probable, in the sale of the goods of the parties, the one will be mistaken for the other, enough is shown to make it the duty of the court to interfere." *Wirtz* v. *Eagle Bottling Co.*, 50 N. J. Eq. 164, 168.

C. nor that the other goods are inferior.

See VIII. 1 F. 173. *Blofield* v. *Payne*, 4 Barn. & Adol. 410.

"In this view the excellence of the counterfeit intensifies the wrong done to the plaintiff, and is a cogent argument for his right to reparation, although the public have suffered no actual injury." *Cleveland Stone Co.* v. *Wallace*, 52 Fed. R. 431, 437.

"To entitle a complainant to protection against a false representation it is not essential that the article should be inferior in quality, and that the individual should fraudulently represent it so as to impose upon the public; but if, by representation, it be so assimulated as to be taken in the market for an established manufacture or compound of another, the injured person is entitled to an injunction." *Coffeen* v. *Brunton*, 5 McLean, 256, 260.

The question is not whether the article made and sold by the defendant under complainant's trade-mark is an article of the same quality or value, but whether the defendant is attempting to pirate on the complainant's good-will. *Partridge* v. *Menck*, 2 Sandf. Ch. 622.

Fact that article sold under pirated trade-mark is not inferior, no defence for suit for damages for loss of sales; might be for injury to character of the thread. *Taylor* v. *Carpenter*, 2 Wood. & M. 1.

3. In order to claim relief or damages for the infringement on the ground of unfair trade where no legal trademark is involved, it is necessary to prove fraud.

A. But imitation of distinguishing features beyond the probability of chance will be good evidence of fraud.

See VIII. 2. 185; VIII. 2 A. 187.

B. And unnecessary marks which would result in deception of the public and injury to an established business will be enjoined as unfair trade.

Complainants had since 1828 in Holland and since 1889 in United States manufactured and sold a fine grade of cocoa known as "Van Houten's Cocoa." The defendant company with Hooton as president and large stockholder, skilled in the business began the preparation in 1897 of a similar article but not in packages likely to deceive. Later Hooton left the concern. Confusion was shown in the public mind, and as he was no longer in the business the court decreed that the name Hooton should not be used so as to deceive. *Van Houten* v. *Hooton Cocoa & Chocolate Co.*, 130 Fed. R. 600.

9. The appropriation of a word in one combination of words may not be infringed by its use in other combinations which are not likely to mislead.

"Samaritan's Gift," and "Samaritan's Root and Herb Juices," on medicines, not infringed by "Samaritan's Nervine." "Samaritan" in one combination of words does not prevent its being used in all other combinations." *Desmond's Appeal*, 103 Penn. St. 126.

"Pratt's Astral Oil" not infringed by "Standard White Astral Oil."

"Then, in the second place, the appropriation in the word 'Astral' in one combination of words, does not preclude its use in all other combinations." *Pratt Mnfg. Co.* v. *Astral Refining Co.*, 27 Fed. R. 492, 494.

10. Courts of equity have two objects in granting injunctions: first, to protect the individual in the profits of his skill; second, to protect the public from imposition.

But see: V. 3 A. 125.

See VIII. 1 A (3) (a). 154. *American Washboard Co.* v. *Saginaw Mnfg. Co.*, 103 Fed. R. 281.

See VIII. 3 A. 194.

"At present it is sufficient to say that in all cases where a trade-mark is imitated, the essence of the wrong consists in the sale of goods of one manufacturer or vender as those of another; and it is only when this false representation is directly or indirectly made, and only *to the extent in which it is made*, that the party who appeals to the justice of the court can have a title to relief." *Amoskeag Mnfg. Co.* v. *Spear*, 2 Sandf. 599, 607.

"Where a trade-mark is infringed the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and it is on this ground that a court of equity protects trade-marks." *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651, 656.

"No man has a right to use names, symbols, signs, or marks which are intended, or calculated, to represent that his business is that of another. No man should in this way be permitted to appropriate the fruits of another's industry, or impose his goods upon the public by inducing it to believe that they are the goods of some one else." *Hilson Co.* v. *Foster*, 80 Fed. R. 896, 897.

"Courts of equity have two objects in view in granting injunctions against their imitation: 1. To secure to the individual adopting one the profits of his skill, industry, and enterprise. 2. To protect the public against fraud." *Humphrey's Specific Homeopathic Med. Co.* v. *Wenz*, 14 Fed. R. 250, 252.

Probability of damage to complainant true ground of relief in equity, not that public may be deceived. *Kentucky Distilleries & Warehouse Co.* v. *Wathen*, 110 Fed. R. 641.

"Its object is twofold: First, to protect the party using it from competition with inferior articles; and second, to protect the public from imposition." *Shaw Stocking Co.* v. *Shaw*, 12 Fed. R. 707, 710.

"It imports that the article is made by the original proprietor, and therefore genuine, and the law protects the original proprie-

tor, not only as a matter of justice, but to prevent imposition on the public." *Stachelberg* v. *Ponce*, 23 Fed. R. 430, 431.

11. Infringement of the trade-mark or trade name of a newspaper or periodical may be restrained, and in such cases the courts frequently consider the size and shape of the paper, and the general appearance of the type.

See IV. 6 B. 103. *Estes* v. *Worthington*, 31 Fed. R. 154.

See II. 3 A. 23. *Kipling* v. *G. P. Putnam's Sons*, 120 Fed. R. 631.

Held, name "New Era," on newspaper, not so like "Democratic Republican New Era," type and other incidents being dissimilar, as to entitle plaintiff to injunction. *Bell* v. *Locke*, 8 Paige, 75.

"But in such case (*i. e.*, absence of fraud), the title of the defendant's paper must so closely simulate that of the plaintiff's that an infringement may be declared by the court as a matter of law, or else the simulation must be proven as a fact." *Duniway Pub. Co.* v. *Northwest Printing, etc., Co.*, 11 Oregon, 322.

Name "Chatterbox" on juvenile publication enjoined on same principles as in *Estes* v. *Williams*, name and binding being imitated. *Estes* v. *Leslie*, 23 Blatch. 476; 27 Fed. R. 22.

"The name 'Chatter-book,' as printed upon the cover of the defendant's books, is, in my opinion, an imitation of the name 'Chatter-box,' which, by association, when used upon books of a juvenile character, points 'distinctively to the origin or ownership' of the books to which it is applied; and the use by the defendants of the name 'Chatter-book' upon the books which are represented by the exhibits in the case, the same being books of a juvenile character, of the general appearance, style, and manner of cover of complainant's books, should be enjoined *pendente lite*." *Estes* v. *Leslie*, 29 Fed. R. 91.

Name "Chatterbox" on juvenile publications enjoined; same principles involved as in *Estes* v. *Williams* and *Estes* v. *Leslie*. *Estes* v. *Worthington*, 24 Blatchf. 371.

"Chatterbox" on series of juvenile publications of uniform appearance and in a style of peculiar attractiveness, there being no copyright, protected against books of same name and so similar in appearance as to lead purchasers to think that they are the same. *Estes* v. *Williams*, 22 Blatchf. 364; 21 Fed. R. 189.

Complainant for fifteen years acquired a reputation for a magazine published under name "Comfort." The respondent started

a magazine called "Home Comfort," of a different size, price, style, arrangement and printed matter, with no proof of fraud or injury. Held, that "Comfort" was an arbitrary word, and that it was infringed by use of "Home Comfort." The respondent's paper circulated in part at least of territory of complainant's. Injunction should issue. *Garnert* v. *Rupert*, 127 Fed. R. 962; reversing 119 Fed. R. 221.

The complainant published in Massachusetts, New York, and Pennsylvania, a financial paper called "United States Investor," which became well known in the East and in some foreign countries. The respondent later published in California a paper called "The Investor," but having thereon in conspicuous place the words, "A Financial Guide to Southern California," and other distinguishing differences. Held, that the difference in the localities, and the difference in the appearance of the papers was such as not likely to cause confusion, and injunction denied. *Investor Publishing Co. of Mass.* v. *Dobinson*, 82 Fed. R. 56; 72 Fed. R. 603.

"Now it appears to us that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person adopting the same name for any other similar publication; and that this right is a chattel interest capable of assignment was held in *Longman* v. *Tripp*, 2 Bos. & P. W. R. 67 and Foss, *ex parte*, 2 De G. & J. 230." *Kelly* v *Hutton*, L. R. 3 Ch. 703, 708.

"National Police Gazette" entitled to preliminary injunction against "United States Police Gazette," printed in a way actually to deceive purchasers and readers. *Matsell* v. *Flanagan*, 2 Abb. Pr. n. s. 459.

Title of a copyrighted publication separate from the publication which it is used to designate, is not within the protection of copyright, but may be protected on ground of infringement of trade-mark or trade-name.

Case sent to master to determine whether name "Our Young Folks" on publication in Boston was infringed by "Our Young Folks' Illustrated Paper" in Augusta, type and contents being different. Each issue of complainant's magazine duly copyrighted. *Osgood* v. *Allen*, 1 Holmes, 185.

"By publishing, in accordance with the requirements of the copyright law, a book under the title of the life of any distinguished statesman, jurist, or author, the publisher could not prevent any other author from publishing an entirely different and

original biography under the same title. When the title itself is original and the product of the author's own mind, and is appropriated by the infringement, as well as the whole, or a part of the literary composition itself, in protecting the other portions of the literary composition, courts would also probably protect the title. But no case can be found, either in England or this country, in which, under the law of copyright, courts have protected the title alone, separate from the book which it is used to designate." *Idem*, 192–193.

"The Good Things of Life" not infringed by the "Spice of Life," there being marked dissimilarities. "It is not sufficient to maintain the action that purchasers inattentively might accept the defendant's publication in place of the plaintiff's. But it is necessary to maintain their action that the defendants should have employed this word 'life' with the same significance, in whole or in part, as it has been employed by the plaintiffs." *Stokes* v. *Allen*, 56 Hun, 526.

12. Infringement of a distinguishing feature of a publication which would be liable to deceive may be enjoined.

See VIII. 5. 197. *Merriam* v. *Texas Siftings Pub. Co.*, 49 Fed. R. 944.

See IX. 1 A (4) (a). 206, ditto.

Plaintiff, author of law books, sold copyright and edited second edition, but refused to edit third edition. Publisher put out a third edition bearing name of author, as if he had edited third edition. Third edition contained errors which were prejudicial to author. Injunction granted to restrain publisher from issuing third edition with any statement which would lead public to suppose that it was edited by author. *Archbold* v. *Sweet*, 1 M. & Rob. 162.

"The principle is clear that you cannot adopt a trade-mark or use a name calculated to mislead or deceive persons as to an article, already appropriated, into the belief that they are purchasing one thing when they are purchasing another. On the whole, I come to the conclusion that this publication is not calculated to mislead the ordinary run of mankind, who are alone to be considered. The court does not legislate for the careless class, who know not what they are purchasing. The word 'Punch' is well known, and it is impossible that an ordinary person can be misled." *Bradbury* v. *Beeton*, 21 L. T. n. s. 323, 325.

Complainant had for many years published Bibles, using thereon the name "Oxford," by which name the Bibles had become known. Respondent, having no connection with the place, enjoined from using that name on its Bibles, and defence that it was a geographical name did not avail. *Chancellor, etc., of Oxford University* v. *Wilmore-Andrews Pub. Co.*, 101 Fed. R. 443.

"The principle is that there must be an adaptation of plaintiff's title, either exact or to an extent sufficient to show an appropriation of words producing similtude in the titles themselves, or from well-established popular designation." *Forney* v. *Engineering News Pub. Co.*, 10 N. Y. Supp. 814.

Complainant published book, "Farthest North, Nansen." Respondent published book, "The 'Fram' Expedition. Nansen in the Frozen World. Including Earlier Arctic Explorations." There was substantially the same literary matter, and many of the same illustrations, but there was such dissimilarity in titles, title-page, and cover that one of ordinary intelligence would not be deceived. In absence of fraud, injunction denied. *Harper & Bros.* v. *Lare*, 103 Fed. R. 203; affirming 93 Fed. R. 989.

An author does not succeed in making out a case of unfair trade where a later edition is so unlike an earlier one that a purchaser is not likely to be deceived, where there is no proof that one was deceived, where no fraud is shown, and where the two editions are unlike in size, shape, binding, color, arrangement, and typography. *Kipling* v. *G. P. Putnam's Sons*, 120 Fed. R. 631.

Where complainant alleged that defendant, in advertisements, circulars, letter-heads, etc., made a similar use of symbol of open book, used in same relation to publication of "Webster's Dictionary," and used date of publication 1890 on title-page when it was a reprint of edition of 1847, held, that there might be such evidence of fraudulent intent that court would overrule defendant's demurrer. *Merriam* v. *Holloway Pub. Co.*, 43 Fed. R. 450.

"Social Register," as applied to a book compiled with care, of residents of New York City and Orange, N. J., is a valid trademark, and preliminary injunction should issue against respondent, who published "Howard's Social Register" in Orange. *Social Register Ass'n* v. *Howard*, 60 Fed. R. 270.

13. Infringement is not shown where a party conducting a legitimate business without intent to defraud is entrapped, or forced, through lack of good faith of another, into a technical imitation of complainant's marks or labels where no fraud is shown and the public is not likely to suffer by deceit.

Parties as agents for a corporation dealing in Edison phonographs had a sign "Edison Phonograph Agency." After termination of agency they still maintained the sign dealing in Edison phonographs. Held, that the sign was not deceitful, and that Edison, a stockholder of a corporation which manufactured and sold phonographs, could not enjoin them, he having no pecuniary interest. *Edison* v. *Hawthorne*, 108 Fed. R. 839, affirming 106 Fed. R. 172.

Defendant was engaged in the legitimate business of renewing burned-out electric lamps, making a saving by a new process of about five or eight cents on each lamp. Prior to 1890 it always removed the label of the complainant. After that time the complainants so affixed their trade-mark "G. E." on the inside of the leading-in tube that it could not be removed without great expense. The defendant, however, apparently acted in good faith and pasted on the outside their labels "Malden" and "Perfection" known to the trade. On a motion by complainant for preliminary injunction the court said that there was no apparent fraud on the part of the defendant, that it was not a case similar to the re-use of bottles with the mark of original proprietor blown therein as there were many kinds of bottles in public use, while there was not the same opportunity for choice in the case of electric lamps, and it was a question how far the complainant was acting in good faith in so affixing its trade-mark that it could not be removed without disproportionate expense in the legitimate business of renewal. The defendant was held to the best of good faith in affixing its own labels so as to distinguish its product. Motion for preliminary injunction denied." *General Electric Co.* v. *Re-New Lamp Co.*, 121 Fed. R. 164. *But see:* 128 Fed. R. 154 *infra.*

On final hearing the court decided that there was not such difficulty and expense in removing the initials "G. E." from the complainant's burned-out lamps as to allow respondent to renew them with the initials remaining. *General Electric Co.* v. *Re-New Lamp Co.*, 128 Fed. R. 154.

Infringement by the respondents is not shown by proof that agents without knowledge of principal twice sold bitters falsely represented to be Hostetter Bitters and advised use of Hostetter bottles, if the acts were disavowed by the principal and there is no course of wrong-doing shown. *Hostetter Co.* v. *Brunn*, 107 Fed. R. 707.

Selling imitation "Hostetter" bitters as such imitation, without encouragement that they be sold as and for original, is no infringement. *Hostetter* v. *Van Vorst*, 62 Fed. R. 600.

Simulation of signature on complainant's label under a special order given by the complainant's agents or detectives is not so far an infringement as to warrant issuing an injunction. *Liebig's Extract of Meat Co., Ltd.*, v. *Libby*, 103 Fed. R. 87.

14. Examples of non-infringement.

"Adams Sappota Tolu Chewing Gum," on chewing gum, by "Heisel's Elastic Tolu." *Adams* v. *Heisel*, 31 Fed. R. 279.

"Old Country," soap, by "Our Country." *Allen B. Wrisley Co.* v. *George E. Rouse Soap Co.*, 87 Fed. R. 589.

"Old Country," soap, by "Our Country." *Allen B. Wrisley Co.* v. *Iowa Soap Co.*, 104 Fed. R. 548.

"Magic," cleaning compound, by "Magico." *American Chemical Co., ex parte*, 62 O. G. 588.

"Brown's Iron Bitters," drugs, by "Brown's Iron Tonic," Brown acting in good faith and bottles, labels, etc., being different. *Brown Chemical Co.* v. *Myer*, 31 Fed. R. 453.

"S. B." cough drops, by "B. & S." *Burt* v. *Smith*, 71 Fed. R. 161.

"Henderson," on whiskey, not anticipated by "Anderson." *Buchanan-Anderson-Nelson* v. *Breen & Kennedy*, 120 O. G. 2125.

Figure of a star, soap, by figure of star and a crescent. *Cornwall's Appeal*, 12 O. G. 138.

"Samsoncalf," shoes, by picture and words "Our Little Samson." *F. M. Hoyt Shoe Company, ex parte*, 113 O. G. 1970.

"Weber, New York," pianos, by "Webster, New York." *Foster* v. *Webster Piano Co.*, 13 N. Y. Supp. 338.

"Old Crow," with picture of a crow, not infringed by "Old Jay," with figure of a jay, on whiskey. *Gaines & Co.* v. *Carlton Importation Co.*, 120 O. G. 902.

"Old Crow," with figure of crow not infringed by "Raven

Valley, with picture of three ravens, on whiskey." *Gaines & Co.* v. *Knecht & Son*, 120 O. G. 1163.

"Electrene," by "Griserin," for medical preparations. *Griserin-Werke Paul Camphausen, ex parte*, 120 O. G. 327.

"Remington," typewriters, by "Remington-Sholes." *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118; reversing 110 Fed. R. 520 and 122 Fed. R. 348.

"Royal Irish Linen," writing paper and envelopes, by "Royal Vellum." *Hurd & Co., ex parte*, 59 O. G. 1763.

"Golden Charm," over large fanciful monogram of letters, "F. G. S. & Co." on flour not infringed by "Charm" and a shield containing capital letter I.

"The whole question in cases of this kind is not whether persons are entitled to combine in one device independent devices that have been separately used as trade-marks; but whether after such combination has been made, there is a probability of the public being misled or deceived thereby. If not, and the distinctiveness of the new combination is quite apparent to ordinary intelligence, no objection should be made to its registration, if the other requisites of the law are complied with." *Imbs, in re*, 10 O. G. 463.

Symbol of sun representing a human face, surrounded by rays with words sometimes used "[illegible]rmth of Life," on underwear, not infringed by indistinct outline of sun's rays with monogram of respondents in circle, and "Beach Mnfg. Co., Hartford, Conn." prominently displayed. *Juros Hygienic Underwear Co.* v. *Simons*, 49 Fed. R. 276.

"Blue Jay," on whiskey, not infringed by "Old J" or "Old Jay Rye" with representation of a blue jay. *Jones* v. *Carlton Importation Co.*, 120 O. G. 2444.

Complainant had used a conventional figure of a diamond shape or lozenge on an abradant composed of particles of steel used for polishing, under name of "Crushed Steel." The word "diamond" had never been associated with it. Subsequently respondents sold a similar article under name of "Diamond Steel," with figure of radiant diamond. Held no infringement. *Kann* v. *Diamond Steel Co.*, 89 Fed. R. 706.

"West End Distillery Co.," Whiskey, by "East End Distillery Co." *Kentucky Distilleries & Warehouse Co.* v. *Wathen*, 110 Fed. R. 641.

"Electric," flour, by "Electric Light." *Kirby* v. *McLaughlin & Co.* v. *Johnston*, 72 O. G. 1785.

"Dermacura," skin ointment, by "Dermakola." *Laxakola Co.*, *ex parte*, 100 O. G. 451.

"Uneeda," biscuits, by "Otaka." *Lorenz*, *ex parte*, 89 O. G. 2067.

"Walkeasy," and "Walk-a-way," shoes, by "Waulkwell." *Parker, Holmes & Co.*, *ex parte*, 100 O. G. 1111.

"Grape-Nuts," cereal food, by "Grain-Hearts." *Postum Cereal Co.* v. *American Health Food Co.*, 119 Fed. R. 848.

"Cuticura," not infringed by "Cuticle" for toilet soap where the boxes, wrappers, and lettering of package were different; although there was little doubt that defendants had selected name the first five letters of which were the same as plaintiff's to get the benefit of its advertising. No proof of actual deception. *Potter Drug & Chemical Co.* v. *Parsfield Soap Co.*, 106 Fed. R. 914; affirming 102 Fed. R. 490.

A yellow wrapper bearing "Every Day Soap," in black letters with name and location of maker and small circular figure of moon and stars, not infringed in package of similar size and shape of yellow wrapper with words in yellow on black ground "Everybody's Soap," the print and figures in the two bearing no resemblance and name and location of respondent plainly appearing. *Proctor & Gamble Co.* v. *Globe Refining Co.*, 92 Fed. R. 357.

"Royal," baking powder, by "Coral." *Royal Baking Powder Co.* v. *Davis*, 26 Fed. R. 293.

"Social Register, Newport," directory, by "Newport Social Index." *Social Register Ass'n* v. *Murphy*, 128 Fed. R. 116.

"No-To-Bac," medicine to cure Tobacco habit, by "Baco-Curo." *Sterling Remedy Co.* v. *Eureka Chemical Mfg. Co.*, 80 Fed. R. 105, affirming 70 Fed. R. 704.

"Rough on Rats," medicinal preparations, etc., by "Rough on Skeeters." *Wells* v. *Ceylon Perfume Co.*, 105 Fed. R. 621.

"Ma-Le-Na," by "Man-a-Lin," on medicines." *York* v. *Hartman*, 119 O. G. 1921.

15. Examples of infringement.

See VIII. 1 A. 152. *Fuller* v. *Huff*, 104 Fed. R. 141.
See X. 1 A. (1). 219. *Frank* v. *Sleeper*, 150 Mass. 583.
See VIII. 1 F. 173.
See VIII. 1 F. (1). 180.
See VIII. 1 G. 181.
See XI. 4 A. 245.

"Chartreuse," liqueur, by "Chasseurs." *Bauer & Co.* v. *Order of Carthusian Monks*, 120 Fed. R. 78.

"Sap Maple Syrup," with representation of a maple leaf, for syrup, by a cluster of maple leaves. *A. R. Gregoire & Co., ex parte*, 102 O. G. 1293.

"Willoughby Lake," on scythe-stones, by "Willoughby Ridge."

"Black Diamond," ditto, "Diamond Gem." *A. F. Pike Mnfg. Co.* v. *Cleveland Stone Co.*, 35 Fed. R. 896.

"Colonial Dame," perfumery, by "Colonial." *Allen B. Wrisley Co.* v. *Buck*, 95 O. G. 2483.

"Mormaja," coffee, by "Mojava." *American Grocery Co.* v. *Sloan*, 68 Fed. R. 539.

Figure of a star, lubricating oil, by word "star." *American Lubricating Oil Co.*, 9 O. G. 687.

Label of bow and arrow with word "Apollinis," on mineral water bottles, by label with anchor and word "Apollinaris." *Apollinaris Brunnen* v. *Somborn*, 14 Blatchf. 380.

Figure of owl, and words "We Never Sleep," on ladies' and children's shoes, by figure of head and upper part of owl and words, "Owl Shoe" on men's and boys' shoes. *B. A. Corbin & Son Co.* v. *Miller, Kohlhepp, Giese & Co.*, 98 O. G. 1485.

Complainants' trade-mark for pale ale consisting of an equilateral triangular figure red in color, infringed by a nearly equilateral triangle of red on pale ale and half and half with a narrow gold border and a monogram of the letters "C." and "F." in the middle, with some fine scroll ornamentation in the corner. *Bass, Ratcliff & Gretton (Ltd.)* v. *Feigenspan*, 96 Fed. R. 206.

The unauthorized use by respondent of the name "Bromidia" is not the less an infringement although accompanied by the name of respondent. *Menendez* v. *Holt*, 128 U. S. 521, says, "That is an aggravation and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor." *Battle* v. *Finlay*, 50 Fed. R. 106.

"Nitro," on firearms, by "nitro-hunter." *Belknap & Co., ex parte*, 105 O. G. 745.

"Cyco," on carpet sweepers, by "Cyco Prize." *Bissell Carpet Sweeper Co., ex parte*, 104 O. G. 2148.

Trade-name "Standard Distilling Co." by "Standard Distilling & Distributing Co." and the fact that the complainants were as individuals using the former name, not a fraud. *Block* v. *Standard Distilling & Distributing Co.*, 95 Fed. R. 978.

"Cocaine," hair oil, by "Cocoïne." *Burnett* v. *Phalon*, 9 Bosw. 192. Aff'd 5 Abb. Pr. N. S. 212.

"Swan," gin, by "Black Swan." *Cuire, ex parte*, 15 O. G. 248.

"Ribbons," plug tobacco, by red ribbon. *Calvert & Brother, ex parte*, 85 O. G. 288.

"National," sewing machines, by "New National." *Carey* v. *New Home Sewing Machine Co.*, 96 O. G. 1429.

Where party has acquired reputation for tobacco under name "Lone Jack" with a device, it is an infringement to take that name although with a different device. *Carroll* v. *Ertheiler*, 1 Fed. R. 688.

Cross with letters "C. B." infringed by a similar mark with distinguishing difference of letters "C. S." instead of "C. B." *Cartier* v. *Carlile*, 8 Jur. N. S. 183.

"Celluloid," chemical compound, by "Cellonite." *Celluloid Mnfg. Co.* v. *Cellonite Mnfg. Co.*, 32 Fed. R. 94.

Trade-name "Chicago Landlords' Protective Bureau" infringed by "Landlords' Protective Department." *Chicago Landlords' Protective Bureau* v. *Koebel*, 112 Ill. App. 21.

Shield with eagle thereon, and an eagle bearing a shield, cuffs, collars, and shirts, by a shield and "Shield Brand." *Coon, ex parte*, 58 O. G. 946.

"Monarch Distilling Co.," whiskey, by "M. V. Monarch."

(The merchandise in either case would probably be known as Monarch whiskey). *Corning & Co., ex parte*, 65 O. G. 751.

Picture of greyhound enclosed in circle with word "Run-Lite," for lubricants, refused registration in view of prior registered mark of picture, of greyhound with words "Greyhound Brand. Amber A. A. Machinery Oil." *Crescent Oil Co, ex parte*, 115 O. G. 2137.

"Perry Davis Vegetable Painkiller," on medicine, by "The Great Home Remedy, Kennedy's Painkiller." *Davis* v. *Kennedy*, 13 Grant Ch. U. C. 523.

Representation of diamond- or lozenge-shaped figure with word "Diamond," inks, by diamond-shaped figure and words "Black Diamond." *Diamond Ink Co., ex parte*, 98 O. G. 1483.

"Liveraid," or "Liverine," on medical compound, by "Liveroid." *Dr. Parker Medicine Co., ex parte*, 106 O. G. 1779.

Emblem of anchor on wire, infringed by emblem of anchor surmounted by crown. *Edelsten* v. *Edelsten*, 7 L. T. R. N. S. 768.

"Sapolio," soap, by "Sapho." *Enoch Morgan's Sons Co. v. Whittier Coburn Co.*, 118 Fed. R. 657.

"Chatter-box," on juvenile books of same general appearance, style, and manner of cover, by "Chatter-book." *Estes* v. *Leslie*, 29 Fed. R. 91.

"U. S. Star," with figure of star, on windmills and tanks, by figure of a star with windmill in the centre. *Flint & Walling Mnfg. Co., ex parte*, 85 O. G. 148.

"Dyspepticure," medicinal preparation, by "dyspepticide." *Foley & Co., ex parte*, 87 O. G. 1957.

A five-pointed star, on oil, by a six-pointed or similarly pointed, star. *Galena Oil Co.* v. *W. P. Fuller & Co.*, 101 O. G. 1611.

A picture of a chicken cock standing upright within a circle, with names "Old Bourbon Whiskey, Bourbon County, Ky." and "From J. A. Miller, Paris," known as "Chicken Cock Whiskey," infringed by a like picture with "Miller's Game Cock Rye," the complainant having used its mark on barrels, and respondents on both barrels and bottles. *G. G. White Co.* v. *Miller*, 50 Fed. R. 277.

Initials "G. F.", on velvet ribbons, by "G. & F." *Giron* v. *Gartner*, 47 Fed. R. 467.

"Maizena," with allegorical picture of Indian preparing corn and corn flour, by "Maizharina," with picture of man carrying maize. *Glen Cove Mnfg. Co.* v. *Ludeling*, 22 Fed. R. 823.

"Home Brand," canned goods, by "Home Comfort." *Griggs, Cooper & Co.* v. *Erie Preserving Co.*, 131 Fed. R. 359.

"Floridena," perfumes, by "Floradora." *Grossmith, ex parte*, 100 O. G. 2175.

A representation of a sea monster enthroned about a vertical anchor as trade-mark for flour, anticipated by symbol and word "Anchor" across it. *Gwin Bros. & Co., ex parte*, 120 O. G. 2755.

"Optine," for medicine, anticipated by "Optal." *Holbert, ex parte*, 115 O. G. 2136.

Figure of an ox, on mustard, infringed by figure of ox and word "ox." *Harrison* v. *Taylor*, 12 L. T. N. S. 339.

"Lightning Hay Knives," hay knives (lightning being trade-mark), by "Lightning Pattern Hay Knives." *Hiram Holt Co.* v. *Wadsworth*, 41 Fed. R. 34.

"Canadian Club Whiskey," whiskey, by "Canadian Rye Whiskey." *Hiram Walker & Sons* v. *Mikolas*, 79 Fed. R. 955.

"Hostetter Bitters," bitters, by Host-Style Bitters." *Hostetter Co.* v. *Becker*, 73 Fed. R. 297.

Word "star" with symbol of star, underwear, infringed by

word "star" with symbol of star and crescent. *Hutchinson* v. *Blumberg*, 51 Fed. R. 829.

"Star" and symbol of a star, shirts, by "Lone Star" and symbol of star. *Hutchinson* v. *Covert*, 51 Fed. R. 832.

"Syrup of Figs," medical preparation, by "Improved Syrup of Figs" similar bottles, wrappers and devices. *Improved Fig Syrup Co.* v. *California Fig Syrup Co.*, 54 Fed. R. 175.

"Uno," medical compounds, by "Ino." *Ino Medicine Co., ex parte*, 101 O. G. 887.

Ostermoor's mark No. 34,063, 23 Jan. 1900, infringed by a mark representing a felt mattress with lining and cover removed so as to expose the layers spread apart. *J. C. Hirschman Co., ex parte*, 120 O. G. 690.

A plain red Greek cross long used and well known on surgical plasters, by use of a Greek cross of a slightly different pattern and having in a red circle in the centre the letters "B. & B." *Johnson & Johnson* v. *Bauer & Black*, 82 Fed. R. 662; reversing 79 Fed. R. 954.

Crouching cat with words "Old Tom," on gin, by cat in standing position with words "Old Tom." *Kaufmann* v. *Blache, ex parte*, 84 O. G. 145.

"Honeymoon," whiskey, by "Honey-comb." *Kentucky Distilleries & Warehouse Co.* v. *Wathen*, 110 Fed. R. 641.

"Syrup of Red Spruce Gum," with picture of Indian with background of waterfall and spruce trees, on medicinal preparation, protected from infringement with imitation of bottles and labels so close as to lead to belief that it was intentional. *Kerry* v. *Toupin*, 60, Fed. R. 272.

"Autogirdle," interfered with, by "Auto-Garter" for corsets. *Kops Bros.* v. *Royal Worcester Corset Co.*, 119 O. G. 1584.

"Hunter," on whiskey, is a valid trade-mark, and the use by defendants of the words "White Label Hunter Whiskey, Bottled by ——" is an infringement which will be enjoined. *Lanahan* v. *Kissel*, 135 Fed. R. 899.

"Sunlight," soap, by "American Sunlight." *Lever Bros.* v. *Pasfield*, 88 Fed. R. 484.

"Sorosis," shoes, by "Sartoris." *Little* v. *Kellam*, 100 Fed. R. 353.

"Capital," coffee, by "Capitol." *Lown* v. *Ohio Coffee & Spice Co.*, 73 O. G. 1136.

"Chewso," chewing candy, by "Chewies." *McInnerney, ex parte*, 85 O. G. 148.

"Holt & Co. having then acquired the exclusive right to the words 'La Favorita' as applied to this particular vendible commodity, it is no answer to their action to say that there was no invasion of that right because the name of 'S. O. Ryder' accompanied the brand upon flour sold by appellants, instead of the name of 'Holt & Co.' That is an aggravation and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor." *Menendez* v. *Holt*, 128 U. S. 514, 521.

"Peach," plug tobacco, by "Peach Greenville." *Meriwether & Co., ex parte*, 83 O. G. 1513.

"Tiger," with picture of two tigers pulling wearing apparel in opposite directions, by "Teareabout" with same illustration. *Morris* v. *Robinson*, 101 O. G. 2570.

"Hostetter's Stomach Bitters," medicine, by "Thellers' celebrated Stomach Bitters" with similarity of details on label, and same peculiar form and color of round-shouldered, short-necked bottles. *Myers* v. *Theller*, 38 Fed. R. 607.

"Uneeda," biscuits, by "Iwanta." *National Biscuit Co.* v. *Baker*, 95 Fed. R. 135.

Geometrical design with word "In-er-seal," on bakery products, by similar geometrical design on a label of similar size, shape, and color with words "Factory Seal." *National Biscuit Co.* v. *Swick*, 121 Fed. R. 1007.

"Satinola," for cosmetics, refused registration in view of prior registered marks "Satin," "Satin Skin," and "Satin Scent," for substantially same class of goods. *National Toilet Co., ex parte*, 116 O. G. 593.

"Home," on sewing machines, by "Home Delight." *New Home Sewing Machine Co.* v. *Bloomingdale*, 59 Fed. R. 284.

"Cottolene," substitute for lard composed of cotton-seed oil, by "Cottoleo." *N. K. Fairbank Co.* v. *Central Lard Co.*, 64 Fed. R. 133.

"Gold Dust," washing powder, by "Gold Drop." *N. K. Fairbank Co.* v. *Luckel, King, etc., Soap Co.*, 102 Fed. R. 327; reversing, 88 Fed. R. 694.

"Vitae-Ore" and "V. O." medicinal preparation by "Vitalizing Ore." *Noel* v. *Ellis*, 89 Fed. R. 978.

"In the first place I must look at the tickets and inquire whether a large part of that which impresses the eye has been taken, and I must answer that it has. I find that the two elephants in the two top corners of the Plaintiff's ticket are repeated

in the two top corners of the Defendant's ticket. It is quite true that the elephants are in a different position, the Defendant's elephants have howdahs upon them, and the Plaintiff's have not, and the trunks are turned in different directions, but still in each corner there is an elephant; that impresses the eye with a considerable amount of similarity." *Orr Ewing* v. *Johnston*, L. R. 13 Ch. D. 434, 445.

"German Sweet Chocolate," by "Sweet German Chocolate," wrappers and labels similar. *Pierce* v. *Guittard*, 68 Calif. 68.

"Cuticura," toilet soap, by "Curative." *Potter Drug & Chemical Corp.* v. *Miller*, 75 Fed. 656.

"Rex," on dyspepsia tablets, by "Rexall." *Regis* v. *Jaynes*, 185 Mass. 458.

"Grenadine," "Grenade," syrup, by "Grenade." *Rillet* v. *Carlier*, 61 Barb. 435.

"Le Page Liquid Glue," glue, by "Le Page Improved Liquid Glue." *Russia Cement Co.* v. *Le Page*, 147 Mass. 206.

"California," soap, by "A. S. California Family Soap." *Smith, ex parte*, 16 O. G. 679.

A Maltese cross with monogram and other inscriptions infringed by a Maltese cross without inscription and monogram for boots and shoes. *Smith-Briscoe Shoe Co., ex parte*, 117 O. G. 1491.

"Seafoam," on baking powder, by "Sodafoam." *Sodafoam Baking Powder Co.*, 96 O. G. 1239.

Figure of a boat surrounded by a diamond-shaped border and an exterior diamond-shaped outline, not interfered with by representation of a flag, a diamond-shaped figure thereon, a rhomboid within the diamond-shaped figure, for varnishes. *Standard Varnish Works* v. *David B. Crockett Co.*, 119 O. G. 961.

"Pep-Kola," on tonics and stimulating beverages by "Pepko." *Sutton, ex parte*, 108 O. G. 291.

Star enclosing letter "G" (which latter may be omitted), engine oil, by red star (word or symbol). *Swan & Finch Co., ex parte*, 100 O. G. 682.

"Diamond dust," refused registration for cereals in view of prior registration of "diamond" and "diamond mills." *Snyder, ex parte*, 115 O. G. 1849.

"Silver Leaf," with group of three maple leaves, lard, by "Maple Leaf," with two maple leaves. *Vogel & Son, ex parte*, 99 O. G. 2321.

Complainants' trade-mark of full-length figure of waitress, called "La Belle Chocolatiere" registered 16 October, 1883, and

advertised in United States and Canada at enormous expense, infringed by full-length picture of woman in Puritan costume, differently colored and differently faced, with rock to the left and with the name of the defendant. *Walter Baker & Co. Ltd.* v. *Puritan Pure Food Co.*, 139 Fed. R. 680.

"Yusea," incandescent lights, by "U-C-A." *Welsbach Light Co.* v. *Adam*, 107 Fed. R. 463.

"Shooting Star," on wines, by shooting star with figure 1 above and figure 2 below. *Werner & Co., ex parte*, 85 O. G. 775.

"Velvet-Skin," and "Velveo-Silvo," on soap, by "Velva." *Willard Chemical Co., ex parte*, 107 O. G. 1972.

"Satin Skin," or "Satin," on toilet preparations, by "Satinette." *Wood* v. *Hinchman*, 110 O. G. 600.

"Donkey," soaps, by figure of bridled and saddled donkey. *Woolwine, ex parte*, 97 O. G. 1373.

"Charter Oak," "Old Charter," and "Royal Charter," all properly in conflict and involved in interference proceedings. *Wright & Bluthenthal* v. *Mayer & Cushman*, 119 O. G. 2234.

XII. LICENSE.

1. A. A proprietor may grant to another the right to use his trade-mark or trade-name in a business which is not merely personal, provided that the use by the licensee is not upon goods of a different origin or likely to deceive the public.

See X. 5. 233; X. 6 A. 234.

See VI. 2 A. 136. *Batcheller* v. *Thomson*, 93 Fed. R. 660.

See XV. 7. 319. *Moxie Nerve Food Co.* v. *Baumbach*, 32 Fed. R. 205; *Wallach* v. *Wigmore*, 87 Fed. R. 469.

Proprietor of whiskey distillery allowed a dealer to use his trade-mark on bottled whiskey made from the distillery, but the license being in the nature of a contract should be strictly limited to goods in that form specified. *Krauss* v. *Jos. R. Peeble's Sons Co.*, 58 Fed. R. 585.

B. It may be granted in connection with the hotel business.

Plaintiff by agreement with proprietor of "Revere House," used name on busses to convey passengers to and from hotel, having exclusive right to name. Held, that he could recover damages against a third party without right using said name on busses for similar purpose. *Marsh* v. *Billings*, 7 Cush. 322.

"The ground of action against the defendants is not that they carried passengers to the Revere House or that they had the words 'Revere House' on the coaches, and on the caps of the drivers, merely; but that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence of the lessee of the Revere House, in violation of the rights of the plaintiffs." *Marsh* v. *Billings*, 7 Cush. 332.

"It has never been held that a mere consent or acquiescence in the use of a name or trade-mark conferred an absolute and an irrevocable right which could not be annulled. While it may temporarily transfer or impart a right, it by no means follows that such a right is so fixed and determined that the original owner is forever afterwards debarred from revoking a permission already given." *McCardel* v. *Peck*, 28 How. Pr. 120.

Plaintiffs under agreement with a proprietor of a hotel, "Irving House," acquired exclusive use of name for busses to and from hotel. Held, entitled to injunction against third parties using name likewise. *Stone* v. *Carlan*, Cox's Manual 104.

C. Or under a patent.

A. B. Howe, as licensee of patent of his brother to make sewing-machines, acquired right to use "Howe" on the machines so that his brother could not use his surname in such a way as to deceive the public as to the sewing-machines. *Howe* v. *Howe Machine Co.*, 50 Barb. 236.

While a license to manufacture under a patented machine may carry with it the right to use a trade-mark on the goods manufactured, yet where it appears that a former license has been revoked, decree will be for complainant. *Martha Washington Creamery Buttered Flour Co.* v. *Martien*, 37 Fed. R. 797; 44 Fed. R. 473.

D. But license to use a trade-mark apart from the proprietor's business and on goods of a different origin is a fraud, and courts will recognize no contractual rights under it.

Plaintiff had previously acquired considerable reputation in manufacture and sale of sewing-machines under the trade-mark "National." He licensed the defendant to use that name on machines of its own make for a stipulated fee. Held, that such an agreement was invalid and fraudulent, so that the plaintiff could not recover under it.

"It was a license to use a stamp, dissociated and stripped of truth and of its former significance, for the purpose of falsely inducing purchasers to believe that what it meant when used by the plaintiff it meant when used by the defendant." *Lea* v. *New Home Sewing-Machine Co.*, 139 Fed. R. 732, 733.

2. Acquiescence in unauthorized or authorized use of a trade-mark or trade-name has been termed to amount to a revocable license.

See XIII. 1 A. 282. *Amoskeag Mnfg. Co.* v. *Spear*, 2 Sandf. S. C. 599.

XIII. LACHES.

1. A. Mere delay in bringing suit for infringement of trade-mark will not defeat the right of a party legally entitled to the mark to an injunction.

See XIV. 1 A (2). 299.

A delay of from 9 to 3 years according to vague evidence, while sufficient to debar claim for profit, did not disentitle proprietor to right to injunction against "Amoskeag" on prints and calicoes. *Amoskeag Mnfg. Co.* v. *Garner*, 54 How. Pr. 297; 55 Barb. 151.

"The consent of a manufacturer to the use or imitation of his trade-mark by another may, perhaps, be justly inferred from his knowledge and silence; but such a consent whether expressed or implied, when purely gratuitous may certainly be withdrawn; and when implied it lasts no longer than the silence from which it springs. It is, in reality, no more than a revocable license. The existence of the fact may be a proper subject of inquiry in taking an account of profits if such an account shall hereafter be decreed; but even the admission of the fact would furnish no reason for refusing an injunction." Five years' delay. *Amoskeag Mnfg. Co.* v. *Spear*, 2 Sandf. S. C. 599.

Mere delay for 6 years in bringing bill to enjoin improper use of name "Bissell" on ploughs, not laches, but it might preclude recovery of profits. *Bissell Chilled Plow Works* v. *T. M. Bissell Plow Co.*, 121 Fed. R. 357.

It is no defence on ground of laches that defendant has for 23 years used words "Old Crow" and symbol of a crow on its whiskey, infringing trade-mark of the complainant, unless knowledge was brought home to the complainant. *Gaines* v. *Whyte Grocery Co.*, 107 Mo. App. 507.

Plaintiff had for many years manufactured a pen stamped and known as "303." Defendant infringed on the number as applied to his pens. The fact that there had been infringements by others in New York and in England for 15 or 20 years, which may have been generally known to the plaintiff, although he may not have known of any particular individual infringing, not laches on

his part to prevent an injunction. *Gillott* v. *Esterbrook*, 47 Barb. 455; 48 N. Y. 374.

"Unreasonable delay in bringing a suit is always a serious objection to relief in equity; but cases arise in litigations of the kind before the court where the complainant may be entitled to an injunction to restrain the future use of a trade-mark, even when it becomes the duty of the court to deny the prayer of the bill of complainant for an account of past gains and profits. . . . Equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits." *McLean* v. *Fleming*, 96 U. S. 245, 251, 253.

"The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. . . . Mere delay or acquiescence cannot defeat the remedy by injunction in support of a legal right, unless it has been continued so long and under such circumstances as to defeat the right itself." *Menendez* v. *Holt*, 128 U. S. 514, 523.

Plaintiff's acquiescence in defendant's use of name "Nolan Bros." for 10 years in a wholesale shoe business does not preclude it from objecting to its use in a retail shoe business, since mere use of trade-name in one business does not give the right to use it in another business. *Nolan Bros. Shoe Co.* v. *Nolan*, 63 Pacif. 480; 131 Calif. 271.

Mere delay of 7 years where respondent's sales were not many, not laches in bringing bill for infringement. *Rahtjen's American Comp. Co.* v. *Holzappel's Comp. Co.*, 101 Fed. R. 257.

"The complainant's label, which he alleges that the defendant has wrongfully imitated, had been in use substantially in the same form for a dozen or more years prior to the bringing of the suit. . . . It is further suggested that the complainant has lain by for several years, whilst the defendant has been publicly using his own label, and has thus acquiesced in its use. To this suggestion it may be proper to reply that the complainant had a patent for the article of bluing, which he was prosecuting and endeavoring to substantiate, but in which he finally failed. His failure to establish his patent (which would have covered all rights), ought not to preclude him from falling back on his right to the trade-mark. No essential delay has occurred since the termination of the proceedings on the patent. But, at any rate,

an acquiescence in Kellogg's use of his own label was no acquiescence in his use of the new and altered label having Sawin's name in the caption." *Sawyer* v. *Kellogg*, 7 Fed. R. 720, 721.

"In England the rule is stringent in trade-mark cases that lack of diligence in suing deprives the complainant in equity of the right either to an injunction or an account. Our courts are more liberal in this respect. A long lapse of time will not deprive the owner of a trade-mark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights, if he would hold a wrongdoer to an account for profits and damages. This rule, however, applies only to those where there has been an acquiescence after a knowledge of the infringement is brought home to the complainant. Such is not the present case. Although the defendant began the packing of bluing in the packages complained of early in the year 1878, there is no evidence that the complainant knew it until a short time before the suit was brought." Bill brought in 1881. *Sawyer* v. *Kellogg*, 9 Fed. R. 601, 602.

"But I do not understand the rule to be, that if a party infringes upon another's trade-mark there is any fixed time in which he must bring suit in order to save his rights." *Williams* v. *Adams*, 8 Biss. 452.

B. But unreasonable delay with knowledge of facts may defeat the right to recover profits or damages.

"Upon the question of laches, however, I am constrained to say that the complainant's conduct has been such that the relief granted must be limited to an injunction. Ryder commenced using the brand in 1869, and has used it continuously since. That the complainants knew of this, certainly as early as 1871, is not disputed. That they protested at all is denied. Certainly there was no vigor or courage shown by them until just prior to the commencement of this suit in 1882. That they did not consent is true, but it is equally true that for men who believed their rights invaded, their course was inconsistent and misleading. Ryder might well have imagined that they did not intend to call him to an account. The circumstances were such as to justify the belief on his part that he was licensed, by silence, to use the trade-mark. It would be inequitable to compel him to pay for its use during the long years that the complainants slept upon their rights." *Holt* v. *Menendez*, 23 Fed. R. 869, 871.

When complainant delayed suit for infringement of trade-name on silverware from summer of 1898 to 7 June, 1902, it was laches not entitling it to account for profits. *International Silver Co.* v. *William H. Rogers Corp.*, 66 N. J. Eq. R. 119, 140.

"The complainants are not entitled to an account. For nearly four years prior to the date of suit they had notice that their trade-mark was in common use by dealers in soaps in this country, and did nothing to prevent it until about the time of filing this bill. . . . There is no evidence of fraud on the respondent's part. He did not even know of the complainants' existence, or of the existence of the rights they set up. To hold him liable to account for his past sales, and damages to the complainants, in view of such laches, would be unjust." *Low* v. *Fels*, 35 Fed. R. 361, 362.

"Equity will not decree for an account of past gains and profits where there has been laches in bringing the suit, and long acquiescence in the use of the trade-mark by others, and especially not where the acquiescence covers a period of fourteen years." *Manhattan Medicine Co.* v. *Wood*, 4 Cliff. 461, 488.

Acquiescence of long standing is proved in this case, and inexcusable laches in seeking redress, which show beyond all doubt that the complainant was not entitled to an account nor to a decree for gains or profits. *McLean* v. *Fleming*, 96 U. S. 245.

"It is idle to talk of acquiescence, in view of these facts. Delay in bringing suit there was, and such delay as to preclude recovery of damages for prior infringement; but there was neither conduct nor negligence which could be held to destroy the right to prevention of further injury." *Menendez* v. *Holt*, 128 U. S. 514, 525.

Laches in bringing bill while it might entitle party to injunction will not allow him to recover for profits. *N. K. Fairbank Co.* v. *Luckel King & Cake Soap Co.*, 116 Fed. R. 332; affirming 106 Fed. R. 498, and 88 Fed. R. 694.

"The rightful owner of the trade-mark, by giving to the other person notice of his right, could place the latter in the wrong in respect to anything *thereafter* done in violation of the owner's rights. But as to all previous acts, it could not be said that there was any 'imitation,' or 'adoption,' or 'colorable resemblance.' There would have been, previous to such notice, none of that intent to palm off the manufactures of one man for those of another which appears in all cases on this subject. The case is still stronger where the defendants not only are ignorant of the plain-

tiff's claim, but have been induced, by a previous litigation, to acknowledge a similar claim made to the same trade-mark by a third party. I think, therefore, that the plaintiffs should have a permanent injunction, as prayed for, and that they should recover costs; but I do not think that they are entitled to any damages, and in that respect the prayer of the complaint is denied." *Weed* v. *Peterson*, 12 Abb. Pr. N. S. 178, 180.

But see: Although a party has used a name in infringement of a trade-mark for many years, yet if it is not known to complainant, and use has not been with knowledge and acquiescence of complainant, he is not debarred from recovery of profits by any laches. *Gilka* v. *Mihalovitch*, 50 Fed. R. 427.

C. And may be ground for refusing preliminary injunction.

See XIII. 2. 287.

"Laches in prosecuting infringers has always been recognized as a sufficient reason for denying a preliminary injunction; sometimes, apparently, by way of discipline to a complainant who has manifested reluctance to burden himself with the expense and vexation of a law-suit, and delayed legal proceedings until his patience was exhausted. When delay of the owner of a patent or trade-mark to prosecute infringers has been of a tendency to mislead the public or the defendant sought to be enjoined into a false security, and a sudden injunction would result injuriously, it ought not to be granted summarily, but the complainant should be left to his relief at final hearing." *Estes* v. *Worthington*, 22 Fed. R. 822, 823.

Where alleged infringement of the word "Fairbanks" on scales has continued for 18 years with the knowledge of complainant, preliminary injunction will not be granted, but the case left to a final hearing on the merits. *E. T. Fairbanks & Co.* v. *Des Moines Scale & Mnfg. Co.*, 96 Fed. R. 972.

D. In England the rule is that lack of diligence in suing deprives the complainant in equity of the right to an injunction or an account. English cases cited.

"I know of no instance in which the court has given relief with reference to a trade-mark except on a prompt application." Delay of two years. *Beard* v. *Turner*, 13 L. T. N. S. 746, 750.

"The principles laid down are well known; first if you induce

another to lay out money by keeping back a right, which you intend at some future time to assert, you may induce him to incur serious expenditure." *Beard* v. *Turner*, 13 L. T. N. s. 746, 749.

"Where persons come and object, in whatever form, to the use of a trade-mark which has been used for a great number of years, it does not follow as a matter of course that the use for a great number of years is an absolute bar to obtaining an injunction; but most certainly it throws on those who object to the use the *onus* of proving that it was originally a fraudulent use, and that it is calculated to deceive; and very much stronger evidence is required in such a case where there has been a long user than would be required in another case." *Heaton's Trade-Mark, in re*, 27 Ch. D. 570, 576.

Delay in filing bill from end of August to 25 November not laches, for plaintiff should wait until he collected evidence that persons had been actually deceived. *Lee* v. *Haley*, L. R. 5 Ch. App. 155.

"I do not think as a matter of law the mere fact that it (the mark) has been used for a great number of years, necessarily affords a defence. If it was clearly made out that it was originally used for the purpose of fraud, that it was continued for the purpose of fraud, and that it has the practical effect of deceiving the public, I do not think that the lapse of years would prevent the plaintiffs having a remedy." *Rodgers* v. *Rodgers*, 31 L. T. N. S. 285, 287.

"We have before shown that there is no legal principle to bar such a suit, unless the delay to prosecute is equal to the time fixed in the Statute of Limitations, or as in patents the inventor permits a public use so long as by express statutory provision to be estopped." *Taylor* v. *Carpenter*, 2 Wood. & M. 1, 19.

2. When there has been delay in prosecuting open and notorious infringement of a trade-mark, or when there has been a long-standing acquiescence, so that another party has been allowed in good faith to build up under it a valuable business, the original proprietor may not be allowed to enjoin the continued use by that party.

See IV. 8 A. 111.
See VIII. 7. 202.
See XIV. 1 B. 293.
See XIII. 1 D. 286. *Beard* v. *Turner*, 13 L. T. N. S. 746.

See XIII. 1 C. 286. *Estes* v. *Worthington*, 22 Fed. R. 822.

Where party has for 21 years and during the life of a patent known of and acquiesced in use by defendant of name "Charter Oak" on stoves who has under it built up a large business, he can not after expiration of patent complain of infringement. *Filley* v. *Child*, 16 Batch. 376.

"So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay in respect to which the elements of an estoppel could rarely arise. At the same time as it is in the exercise of discretionary jurisdiction that the doctrine of reasonable diligence is applied, and those who seek equity must do it, a court might hesitate as to the measure of relief, where the use by others, for a long period, under assumed permission of the owner, had largely enhanced the reputation of a particular brand." *Menendez* v. *Holt*, 128 U. S. 514, 524.

Acquiescence in an open and extensive use for eight years, with full knowledge thereof, by a party of a trade-mark "Prince's Metallic Paint" on paint, under a claim of right, estops a party from maintaining suit for injunction. *Prince's Metallic Paint Co.* v. *Prince Mnfg. Co.*, 57 Fed. R. 938; affirming 53 Fed. R. 493.

The name "Hunyadi" applied to mineral waters became generic in Hungary 1873–1895 by action of the government although S. had first adopted it. In 1895 he succeeded in making good his title in Hungary but meanwhile the name had become generic in United States. From 1873–1897 S. did nothing in United States to maintain his exclusive right to the word, although he made active efforts in Hungary both by petitions to government, by registration, and by suits. He must have known of infringements in United States. Held, that although he had not abandoned name "Hunyadi" by laches he had lost exclusive right to word as trade-mark in United States. This principle of laches did not, however, apply to bottles with short necks, labels with 3 rectangular panels of red and white, and a metal capsule for which protection was granted. *Saxlehner* v. *Eisner & Mendelson Co.* 179 U. S. 19; reversing 91 Fed. R. 536; 88 Fed. R. 61.

But see: Where a party in United States begins to make an artificial water by secret process and uses the word "Hunyadi"

thereon, which word is a valid trade-mark in Hungary on waters exported to this country and which is being actively protected in our courts, it is no defence that as against others the owner has been guilty of laches so as to be precluded from enjoining them. *Thackery* v. *Saxlehner*, 125 Fed. R. 911.

The respondent for 30 years was openly and notoriously bottling and selling its waters under the name "Vichy," and that name was being used not only by respondent but by others so that the complainant must have known of it. Moreover, the respondent was, under that name, with implied knowledge of complainant, building up a valuable business.

"With all these facts before them, and with the yearly increasing sales and competition of the defendant company, no move was made against them for 25 years and until 1898 when this bill was filed. A clearer case of laches could hardly exist. *Saxlehner* v. *Eisner*, 179 U. S. 19, 36."

As the respondent was not guilty of fraud, and as the waters differed, it was held that, while not allowing to the complainant the exclusive use of the name "Vichy," the respondent should not use the name "Vichy" on its labels so as to deceive. (La) *République Française* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427.

When complainant saw the respondent busy in spending money and developing its springs in 1895, 1896, and 1897, while it remained comparatively idle, it is too late in 1903 to object to use of distinguishing marks, as "Healing Springs," which the respondent has been using on his labels. *Virginia Hot Springs* v. *Hegeman*, 138 Fed. R. 855.

XIV. ABANDONMENT.

1. A trade-mark is abandoned (A) when the proprietor, by some act or by laches, is held to have intended to permanently discontinue its use; (B) when the sign, after discontinuance, has lost its signification of any business reputation or good-will.

A. When the proprietor, by some act or by laches, is held to have intended to permanently discontinue its use.

See VI. 3. 138.
See IV. 6 B. 103.

"The right to the exclusive use of a word or symbol as a trade-mark is inseparable from the right to make and sell the commodity which it has been appropriated to designate as the production or article of the proprietor. It may be abandoned if the business of the proprietor is abandoned. It may become identified with the place or establishment where the article is manufactured or sold, to which it has been applied, so as to designate and characterize the article as the production of that place or establishment, rather than of the proprietor." *Atlantic Milling Co.* v. *Robinson*, 20 Fed. R. 217, 218.

"Besides, the defendant's paper upon its face purports to be a revival of an old publication, in which he was formerly interested with complainant, which publication had been voluntarily discontinued by both for more than eighteen months.

"The particular name, therefore, which he had assumed had been so long derelict, except in its subsequent democratic connection, that even an opposition editor might lawfully have seized upon it and appropriated it to the use of his political friends, without any danger of deceiving the public, or drawing off the patronage of those who really wished to read the complainant's paper." *Bell* v. *Locke*, 8 Paige, 75, 77.

"It cannot be denied that it is abundantly proven in this cause that the manufacture of Morris & Wright, and of those who suc-

ceeded them at Durham, was known, called, and distinguished in the market as 'Durham' smoking tobacco. It is on this notorious fact in the cause that the able and ingenious argument has been raised that the public, by its voice, may appropriate and consecrate to an individual property in a designation by which he may choose to denote any product of his industry. But I can find no warrant for such proposition in the law on this subject. On the contrary, it is distinctly laid down by the authorities that it is only *the actual use* of the mark, device, or symbol by the dealer which entitles him to it, and gives him the right to be protected in the enjoyment of it." *Blackwell* v. *Armistead*, 3 Hughes, C. Ct. 163, 167.

Complainants had under word "Durham" built up extensive business of tobacco at Durham, N. C., since 1865. Respondents, under claim of having used word on tobacco at Durham in 1861, after a non-user of eight years, used word on tobacco at Richmond, Va. It meanwhile had acquired a new and valuable reputation under complainants, who had assumed it innocently in 1865–66. Held, to have been abandoned by respondents, if they had ever had rights in it.

"The label and trade-mark of complainants was established in 1865 by J. R. Green. His business and that of his successors built up the insignificant and obscure place, Durham's Station, into the flourishing town 'Durham.' The town grew up during the first four or five years of the use of the label, and owed its growth in chief part to the business indicated by the label. . . . The use of the principal characteristics of this trade-mark by manufacturers not conducting their business at Durham is a deception put upon the public, and may be enjoined on that ground alone, irrespectively of the trade-mark right." *Blackwell* v. *Dibrell*, 3 Hughes, 151, 162.

"The use of these words by the plaintiff's predecessor in 1873 does not seem to have been sufficient in extent and time to make them indicate with definiteness that flour on which they might be placed came from him, and whatever rights in that respect had begun to accrue to him by that use were lost in the abandonment of the use long before the defendants began using them in 1884." *Brower* v. *Boulton*, 53 Fed. R. 389, 390. Aff'd 58 Fed. R. 888.

A brought bill against B to restrain him from using word "Chlorodyne," as applied to a medicine. He dismissed bill with costs and then used words "original Chlorodyne." B used those

words and on bill to restrain him, held, that, although he had lost right to exclusive use of word "Chlorodyne" by abandonment in dismissing former bill, yet he might prevail on "original Chlorodyne" by showing persons had been deceived into purchasing B's medicines for his. *Browne* v. *Freeman*, 12. W. R. 305.

"What is the test by which a decision is to be arrived at whether a word which was originally a trade-mark has become *publici juris?* I think the test must be, whether the use of it by other persons is still calculated to deceive the public; whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade-mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, or can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade-mark is simply a right to prevent a trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade-mark, the right to the trade-mark must be gone." *Ford* v. *Foster*, L. R. 7 Ch. App. 611, 628.

"Emollio" was used as trade-mark on perfumery previous to, but not after, 1867, and in 1870 labels were destroyed. Held, abandonment, not only by cessation of user, but also by destruction of labels, showing intention to abandon. *Grossmith's Trade-Mark, in re*, 60 L. T. N. S. 612.

Sale of right to use a certain trade-mark in connection with certain articles in the same class as another class may indicate intention to abandon its use as to those articles, although the sale may be invalid. *Macmahan Pharmacal Co.* v. *Denver Chemical Mnfy. Co.*, 113 Fed. R. 468.

"Evidence was given to the effect that from 1857 to 1860 the words 'La Favorita' were occasionally used in St. Louis by Sears & Co., then manufacturing in that city, as designating a particular flour; but the witnesses were not able to testify that any had been on sale there under that brand (unless it were that of Holt & Co.) for upwards of twenty years. The use thus proven was so casual and such little importance apparently attached to it, that it is doubtful whether Sears & Co. could at any time have successfully claimed the words as a trade-mark, and, at all events, such use was discontinued before Holt & Co. appropriated the words to

identify their own flour, and there was no attempt to resume it." *Menendez* v. *Holt*, 128 U. S. 514, 521.

"If the trade-mark be abandoned, or the use of it intentionally discontinued by the original proprietor, it may be readopted and appropriated by another, provided it has not become a mere description of quality or kind of product." *O'Rourke* v. *Central City Soap Co.*, 26 Fed. R. 576, 578.

Failure to register a feature in an alleged trade-mark amounts to an abandonment of it. *Pittsburgh Crushed Steel Co.* v. *Diamond Steel Co.*, 85 Fed. R. 637.

"Eureka" on steam packing of a certain kind used by complainant from 1875 to 1886; respondents had used it in a limited way on another kind of packing from 1872 to 1874. Injunction against respondent to protect complainant's use. *Symonds* v. *Greene*, 28 Fed. R. 834.

"This is a motion for a preliminary injunction to restrain the use of the word 'Eureka' in trade, in connection with steam and hydraulic packing. There is no question but that the orator commenced using that name for packing made by him in 1875, and has continued that use since that time, nor but that the defendants use that name in connection with that kind of packing, not of the orator's make, in trade; nor but that a firm known as Sellers Bros. gave that name to a kind of steam packing patented by William Beschke in 1872, . . . and used it in connection with that packing until early in 1874. . . . The use of that name by Sellers Bros. was so long ago, and so limited, that it cannot fairly be considered to now have any effect upon the indication by it of the source of goods to which it has for so many years been applied [1886]. When the orator first began to use it, it might have indicated that the goods were Sellers Bros., and might not, but now it would not indicate to any one in the trade that the goods were Sellers Bros., nor would the fact of their former use of it now confuse its signification." *Symonds* v. *Greene*, 28 Fed. R. 834.

B. When the sign, after discontinuance, has lost its signification of any business reputation or good-will.

In 1881 plaintiffs began to use trade-mark "Brazilian Silver" on spoons and forks, and continued its use under a constantly increasing business till 1897. Defendant had used same name on similar goods in 1886, but his sales fell off and practically ceased

in 1887, and between 1887 and 1894 there were very few sales by him. After that defendant asserted his right to use it. Held, that he had abandoned name and could not afterwards resume it to another man's detriment. *Daniel* v. *Whitehouse*, L. R. 1 Ch. (1898) 685.

"Although I do not find any case precisely like this case, because there was a time at which both these people were making goods in the same way (though it does not seem to have been proved that they were made of precisely the same alloy), yet still it seems to me that if a trade drops out of the use of a party, as it has done in this case out of the defendant's use, and while that state of things prevails another gains the reputation in the trade for goods made under the particular name, and his name is associated with the mark, and the mark associated with his name, so that everybody who deals in the goods considers that when they see the mark they see goods made by that particular maker, then the original position of the competitor using the same mark has practically disappeared." *Daniel* v. *Whitehouse*, L. R. 1 Ch. 689, 690.

Ralph, the respondent, was dangerously ill and out of business for the space of one year and nine months, but the Court decided that this was a sufficient length of time for his interest in the trade-mark to have ceased, and even stated that one year would be a sufficient length of time. *Ralph* v. *Taylor*, L. R. 25 Ch. D. 194.

"It is said that Mr. Ralph does not come within it [33d rule] for this reason, that since February, 1882, he has been prevented by illness and other causes, but principally by illness, from doing that which he is minded to do, if he can carry into effect certain treaties that he is engaged in at the present moment either to manufacture by himself or other persons this machine; and really the only question I have to determine is whether one year and nine months is sufficient cesser on the part of Mr. Ralph to show that he comes within the 33d rule, and is not a person engaged in any business concerning the goods, within the same class as the goods, with respect to which this trade-mark is registered. I am of opinion that one year and nine months is quite sufficient. If I had any doubt about it, I am able by analogy to say that I should not be wrong in concluding that one year and nine months is sufficient, from the fact that under the *Companies Act*, you may wind up a company if it has ceased to carry on business for a year. The Legislature in that has shown by its enactment when

a business is supposed to be carried on, and what amount of cesser shows that the business is not being carried on." *Ralph* v. *Taylor*, L. R. 25 Ch. D. 194, 198.

"In Allan's Law of Good Will (p. 26) it is said that 'a trade-mark cannot exist apart from the good-will of a business, since what is known as the good-will may persist for a time after such business has in fact ceased. A manufacturing establishment, for instance, may, with all its machinery, and appliances and its store of products, be destroyed by fire, and a year or two may pass before such manufactory is rebuilt, and the business started again; but, when started, the old customers, in part at least, will resume trade connections. Here the business stops for a time, but the good-will involving the trade-marks remains a property more or less valuable during the interval of cessation. I can conceive such a stoppage of business by accident or design, even for a series of years, where the good-will, including the trade-marks, may still be found extant: that is to say, valuable upon resumption. But when it is not shown in some satisfactory way that the trade reputation of a suspended business continues to have value, — can be exchanged or sold, for instance, for a price, — a court cannot say that a good-will remains; in other words, that there still attaches to the old proprietor any dominion over, or property right in, a mark which may once have had, but which no longer has, significance for him in the world of trade.'" *Royal Baking Powder Co.* v. *Raymond*, 70 Fed. R. 376, 380. Aff'd 85 Fed. R. 231.

Defendant was proprietor of a business which ceased in 1871. As a minor feature thereof he compounded and sold baking-powder, and marked the word "Royal" on his cans. It was not shown that the good-will of his business remained extant or of value for any time after the cessation of said business in 1871, or that the word "Royal" retained for any time in the trade any significance as a mark for the article once compounded by the defendant. In 1894 defendant recommenced the baking-powder business and the use of the said word as a mark. Held, that the earlier use by defendant does not strengthen the later, as against a competitor whose use of said word as a mark for baking powder has been continuous and exclusive since 1873; and this regardless of what the intent of defendant with respect to said word may have been during the twenty-three years from 1871 to 1894. *Royal Baking Powder Co.* v. *Raymond*, 70 Fed. R. 376. Aff'd 85 Fed. R. 231.

"The appellant, after abandoning for nearly a quarter of a century the manufacture and sale in the city of New York of baking powder, and the use of the fraudulent label, recommenced business in the city of Chicago in the year 1894, using labels which were clearly adapted and intended to, and which clearly would, impose upon the public the article he made and sold as the article manufactured and sold by the appellee. This fraud was more bald and more injurious than that he had previously indulged, for here there was not only imposition upon the public, but invasion of the right of the appellee to the business which it had established." *Raymond* v. *Royal Baking Powder Co.*, 85 Fed. R. 231, 235.

But see: Word "anti-washboard," applied to soap used as trade-mark by defendant's predecessors 1872–1875, when business ceased and firm dissolved. In 1884, after suit had begun, a member of original firm assigned right to defendant, and that was his only right claimed to trade-mark. It did not appear in the case that at time of assignment assignor had any business in which word was used. Plaintiff's predecessor had used mark since 1875, supposing that the original firm had gone out of business, which they did soon after. In 1883 he registered the mark at Washington, and assigned right to plaintiff. Held, plaintiff could not enjoin defendant, as when his predecessor started to use it, although innocently, he was in fact a trespasser on rights of others. *O'Rourke* v. *Central City Soap Co.*, 26 Fed. R. 576.

A. ***(1) But where, sufficient time has not elapsed to amount to abandonment at law, the fact of intention should be shown, and a mere discontinuance does not show intention.***

See XV. 3 B. 304.

See XIII. 1 A. 282.

"It is no answer to his complaint against any particular person who has so used it to say that such person is not the only one who has done so, for a trespasser cannot justify upon the ground that others have committed like trespasses. Therefore the appropriation by the appellee of the appellant's box and labels is not excused by showing merely that others had similarly appropriated them. It is essential that it should also appear that the appellant had, by its acquiescence, abandoned its exclusive right, and, 'to establish a defence of abandonment, it is

necessary to show, not only acts indicating a practical abandonment, but an actual intent to abandon.'" *Actiengesellschaft Vereinigte Ultramarine-Fabriken* v. *Amberg*, 109 Fed. R. 151; reversing 102 Fed. R. 551.

Party has right to trade-name for a minstrel troupe. Christy had in 1842 at some labor and expense established "Christy's Minstrels," and gave shows till fall of 1854. He suspended, went to California, and after several months returned. Performers in old troupe without license started "Christy's Minstrels." He had not resumed, but announced intention of doing so. Injunction. *Christy* v. *Murphy*, 12 How. Pr. 77.

"A trade-mark, whether it consists of a symbol or a descriptive name, may be abandoned; and, if it is, it may then be appropriated by any one, who, by doing so, adopts it as his own; or after it is abandoned it may be resumed by the original proprietor and readopted by him, if in the meantime it has not been taken possession of by another, or by the community in general, or become, as a name or device, by general user, a mere designation of the kind of article or product, when its quality as an exclusive trade-mark is gone; the criterion or test being, was there an *intention* to abandon, which will depend upon the special circumstances of the particular case." *Hegeman* v. *Hegeman*, 8 Daly, 1, 7.

Joseph Ingels had from 1857 to 20 March, 1876 manufactured grain drills under letters patent, using trade-mark "Hoosier." He then discontinued business and 27 February, 1877, assigned the letters patent and trade-mark to complainant. Respondent took up trade-mark "Hoosier," and it was held that the suspension from business was not of sufficient length to show an intention to abandon, which must be proved. *Julian* v. *Hoosier Drill Co.*, 78 Ind. 408, 412.

"The question of abandonment is one of intention, and the burden of establishing it lies upon the party who affirms it. . . . In view of these facts, it cannot be inferred, from less than a year's suspension of the business by Ingels, that he intended to abandon either the business or his right to said trade-mark. The suspension must be, presumptively at least, attributed to indisposition or inability, rather than to an intention to abandon valuable rights. . . . We think the delay, under the circumstances, will not preclude her from this relief. She did not intend to abandon, and therefore has not abandoned, her right, as to the future, to the exclusive use of her property in the trade-mark.

Inability may prevent the use of the mark, but it will not confer upon others the right to use it, or constitute an abandonment." *Julian* v. *Hoosier Drill Co.*, 78 Ind. 408, 412.

Action for damages. Verdict six cents. Trade-mark on leather.

"The fact that the plaintiff had discontinued the use of this trade-mark for three years, would not deprive him of a right of action against the defendant for selling leather which was not manufactured by the plaintiff, but stamped in the same manner in which the plaintiff had formerly designated the leather manufactured by him, thus purporting to be of his manufacture and declared by the defendant at the time of the sale to be the genuine Lemoine calfskins. That credit and reputation which a man acquires by his care or skill in the manufacture of a particular article, is a species of property which the law recognizes and protects, and where, as a means of extending his reputation and finding purchasers, he affixes some mark or symbol to designate that the article is of his manufacture, he is injured by the sale of an article manufactured by another, with his peculiar symbol or trade-mark affixed to it. If the article is inferior to his own, he is injured in reputation, and even if it be of a similar quality and kind, its sale goes so far to diminish the sale of his own article, and thus works a pecuniary damage." *Lemoine* v. *Ganton*, 2 E. D. Smith, 343, 347.

"But it appears to me that Mr. Boehm has established, first, that he did acquire a trade-mark, which became his property in connection with toilet soap, and then the question arises on whether he ever abandoned it. . . . Now, on the question of abandonment, it appears to me that intention to abandon must be shown. There are some analogous cases in law, such as the case of an easement. Mere non-user of an easement, like a right to foul a stream, for a considerable period of years, would not be sufficient to prove an intention to abandon it. . . . In substance, therefore, the question of abandonment is one of intention to be inferred from the facts of this particular case." *Mouson* v. *Boehm*, 26 Ch. D. 398, 404.

"A man who has a trade-mark may properly have regard to the state of the market and the demand for the goods; it would be absurd to suppose he lost his trade-mark by not putting more goods on the market when it was glutted." *Mouson* v. *Boehm*, L. R. 26 Ch. D. 398, 406.

To constitute abandonment, an intention to abandon must be

shown. Mere non-user of a trade-mark could no more be said to constitute abandonment than the mere non-user of the right to foul a stream belonging to a mill as an easement, could be said to constitute an abandonment of the easement. Boehm, however, had neither broken up his moulds nor erased this trade-mark from his books and lists. On the contrary, he had continued to issue the mark in the trade-list of his firm. *Idem.*

Defendant's predecessor had prior right to use of white label with head of woman with hair curled over the words "Hair Crimpers." Business misfortunes necessitated the discontinuance of this label for two or three years, but, in a legal sense, it was never abandoned. *Philadelphia Novelty Mnfg. Co.* v. *Rouss*, 40 Fed. R. 585.

"To establish the defence of abandonment it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon. Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed. And in a recent English case this doctrine has been applied to a case of trade-marks." *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19, 31.

See idem XIII. 2. 288.

(2) But abandonment is not shown by numerous infringements not known or acquiesced in by the owner.

See XIII. 1 A. 282.

Defence of abandonment of particular style of dressing goods is not shown where it appears that complainant was first to adopt such style, that it has been used continuously for forty years but others meanwhile have used it, unless it is shown that the use has been with consent of complainant, or there has been an intention to abandon. In this case there was an active assertion of rights. *Actiengesellschaft Vereinigte Ultramarine-Fabriken* v. *Ambery*, 109 Fed. R. 151; reversing 102 Fed. R. 551.

The fact that a certain label for use on cigar boxes has been sold by numerous lithographers and frequently used, is no defence to bill for injunction if such use was not with knowledge of complainant. *Cuervo* v. *Jacob Henkell Co.*, 50 Fed. R. 471.

Abandonment of trade-mark is not made out by showing numerous infringements not acquiesced in by owner. *Williams* v. *Adams*, 8 Biss. 452.

"I do not understand the rule to be, that if a party infringes

upon another's trade-mark, there is any fixed time in which he must bring suit in order to save his rights. Certainly there is no such neglect on the part of the complainants proved here, as would show an intention to abandon their trade-mark." *Williams* v. *Adams*, 8 Biss. 452, 454.

XV. PRACTICE AND PLEADING.

1. United States Courts.

The jurisdiction of the United States Courts in cases involving infringement of trade-marks registered in the Patent Office at Washington depends on the Act of February 20, 1905, given herewith.

In cases of unfair trade and of trade-marks not registered at Washington, the jurisdiction depends on the diversity of citizenship and damages claimed to the amount of $2000 under the Revised Statutes.

Federal courts have no jurisdiction in cases of unfair competition between citizens of the same state; and this case depending on a trade-mark, the trade-mark being invalid, bill is dismissed for want of jurisdiction. *A. Leschen & Sons Rope Co.* v. *Broderick & Bascom Rope Co.*, 134 Fed. R. 571; affirming 123 Fed. R. 149.

Federal court does not have jurisdiction of cases of unfair trade between citizens of the same State. *Burt* v. *Smith*, 71 Fed. R. 161.

If owing to non-compliance with the provisions of an act the registration of a trade-mark is void, yet the trade-mark may be good at common law and protected in United States courts where there is diversity of citizenship and requisite jurisdictional amount in controversy. *Edison* v. *Thomas A. Edison, Jr. Chemical Co.*, 128 Fed. R. 1013.

Where there is an allegation in bill to restrain infringement of trade-mark in suit between citizens of different States that the amount in controversy exceeds the sum of $2,000, although the amount of damage is not stated, the United States court has jurisdiction. *Griggs, Cooper & Co.* v. *Erie Preserving Co.*, 131 Fed. R. 359.

A suit cannot be maintained in the United States to enforce a Missouri State statute on trade-marks outside of that State, although there is diversity of citizenship, and the amount involved is in excess of $2,000. *Rehbein* v. *Weaver*, 133 Fed. R. 607.

Under Act of 1881 jurisdiction of the United States Court

arose only in cases where the alleged infringement of a trade-mark was in Indian or foreign commerce. *Warner* v. *Searle & Hereth Co.*, 101 U. S. 195.

It is not sufficient allegation of jurisdictional amount to state that trade name is worth in excess of $5,000; and that defendant's acts are calculated to mislead intending purchasers to "its great loss, injury, and damage," as the damage may still be less than $2,000. *Winchester Repeating Arms Co.* v. *Butler Bros.*, 128 Fed. R. 976.

2. State Courts.

Suits for infringement of trade-marks and unfair trade may be brought in the State Courts, subject to removal on Federal questions, to the United States Courts.

3. Relief in Equity.

"Chancery protects trade-marks upon the ground that a party shall not be permitted to sell his own goods as the goods of another, and, therefore, he will not be allowed to use the names, marks, letters, and other *indicia* of another, by which he may pass off his own goods to purchasers as the manufacture of another. *Croft* v. *Day*, 7 Beav. 84; *Perry* v. *Truefit*, 6 Beav. 66; *Newman* v. *Alvord*, 51 N. Y. 192." *McLean* v. *Fleming*, 69 U. S. 245, 255.

A. Principles.

See IX. 6 A. 214.

See IV. 6 B. 105. *Lery* v. *Waitt*, 61 Fed. R. 1008.

See IV. 6 B. 105. *Macmahan Pharmacal Co.* v. *Denver Chemical Mnfg. Co.*, 113 Fed. R. 468, 471.

Plaintiff ordered to give bond to defendant to pay damages if plaintiff was not entitled to injunction. *Apollinaris Brunnen* v. *Somborn*, 14 Blatchf. 380.

"Courts of equity proceed 'on the principle of protecting property alone and the promotion of honesty and fair dealing. The protection of the public alone' is not a sufficient ground for the jurisdiction. However, it is an element which enters, and ought to enter, into every case." *Avery* v. *Meikle*, 81 Ky. 73, 90.

Not necessary but advisable to demand discontinuance of alleged

infringement, as the court would look with much more favor on an honest attempt to adjust matters outside of court before bringing bill. *Brennan* v. *Emery-Bird-Thayer Dry-Goods Co.*, 99 Fed. R. 971.

"'A court of equity does not sit as an arbiter to determine in advance upon other and changed labels which the infringer may adopt to avoid the condemnation of the court,' and that 'the court ought not to say how near the infringement may lawfully approximate the label of the complainant, but should cast the burden upon the guilty party of deciding for himself how near he may with safety drive to the edge of the precipice, and whether it be not better for him to keep as far from it as possible.'" *Charles E. Hires Co.* v. *Consumers' Co.*, 100 Fed. R. 809, 813.

The court appended the label which respondent might use on his mineral water, designating it "Artificial Carlsbad," he having with propriety acquired an equitable right in the word "Carlsbad." *City of Carlsbad* v. *Schultz*, 78 Fed. R. 469.

Where respondent inadvertently and through mistake of agents used the word "patent" on an unpatented device in violation of rights of complainant, but when attention was called to it discontinued it, and there was no ground to believe it would be used in the future, there is no ground for a bill in equity; as it was a single trespass, no apprehension of future injury and damages could be recovered at law. *Globe-Wernicke Co.* v. *Brown*, 121 Fed. R. 185.

Plaintiffs having right to use name "Dr. J. Hostetter's Stomach Bitters," cannot enjoin defendants, who simply make and prepare an extract, without any false representation, showing how it can be made into "Hostetter's Bitters," although their customers compound it and sell it in complainants' bottles marked with their (complainants') labels, purchased second-hand. The name "Hostetter" had become descriptive of the contents. *Hostetter* v. *Fries*, 21 Blatchf. 339; 17 Fed. R. 620.

"The law is well settled that a party who has appropriated a particular trade-mark to distinguish his goods from other similar goods, has a right or property in it which entitles him to its exclusive use. This right is of such a nature that equity will protect it by injunction from invasion, and if it has been invaded, the wrongdoer is liable for the damage he has thereby caused the party whose trade-mark he has adopted or illegally imitated; which damage will ordinarily be the loss of profits caused by the

illegal or fraudulent infringement." *Hostetter* v. *Vowinkle*, 1 Dill. 329, 331.

"Suits for violations of trade-marks or for unfair competition, when an intent accompanies the act, involve a fraud upon the public and on him whose property right is directly impaired." *N. K. Fairbank Co.* v. *Windsor*, 118 Fed. R. 96.

A foreigner who registers in this country a trade-mark consisting of 'a red anchor, in a white oval space or field,' in connection with particular words, cannot afterwards enlarge his rights, as against persons having in good faith an established business under the symbol of an anchor, by a new registration, claiming broadly the use of the picture of an anchor. *Richter* v. *Anchor Remedy Co.*, 52 Fed. R. 455.

Court will not issue an injunction against use of a label already approved by complainant's counsel. *Weber Medical Tea Co.* v. *Weber*, 102 Fed. R. 156.

B. Damages and profits.

Respondents found by master to have made profit of twenty-five cents each on 900 barrels of flour by infringement of trade-mark "Champion." Evidence did not show that orator would have made this profit if respondent had not. This might have been true. "If the defendants made profits by their invasion of the orator's rights, the orator is entitled to them whether the same profits would have been made by the orator or not, and not to any more if they would, for the same profits could not be made by both." Report confirmed. *Atlantic Milling Co.* v. *Rowland*, 27 Fed. R. 24.

Court sustained a master's report that complainant was entitled only to nominal damages for use of name by respondent of W. H. Baker (William H. Baker), complainant's initials being "W. H.", and he having acquired reputation as "W. H. Baker." Evidence failed to disclose that complainant was entitled to any recovery except for nominal damages, or that any person had been deceived in the purchase. *Baker* v. *Baker*, 115 Fed. R. 297.

"The owner is entitled to recover of the infringer of a trade-mark the profits arising from the sale of the spurious goods with the trade-mark impressed upon them. He is not limited to the difference between the price for which the spurious goods would sell without, and the price of the same goods with, the trade-mark impressed upon them."

Syllabus by the court. *Benkert* v. *Feder*, 34 Fed. R. 534.

There being an infringement, profits allowed for six years past, although defendant did not know of infringement.

"If the principle established by these cases was not followed, a man might imitate the mark of another person, of great value, taking care not to know anything about it himself or to whom it belonged, and he would not be liable to any injunction or to account for the profits arising from the use of the mark." *Cartier* v. *Carlile*, 8 Jur. N. S. 183.

No account as to profits allowed except as to user after knowledge of plaintiff's right to trade-mark. *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.

"A party whose trade-mark has been violated is entitled to recover all profits realized by the wrongdoer from sales of the spurious article, and also damages resulting from such violation. . . . The owner of a trade-mark is entitled to nominal damages for the violation of his trade-mark, although it is not shown that he has sustained actual damages, and although the defendant's articles are not inferior in quality to his own." *El Modelo Cigar Mnfg. Co.* v. *Gato*, 25 Fla. 886, 915.

"It is evident that the profit realized by the wrongdoer is not the *only* measure of damages. The spurious article may have injured the credit of the genuine one, and the profits of the owner of the trade-mark may have been greatly reduced, whilst the wrongdoer has made little or no profit." *Graham* v. *Plate*, 40 Cal. 593.

"The functions of a master on an accounting do not include the imposing of exemplary damages by way of punishment. They are confined to the estimation of the profits realized by the infringer on the one hand, and of such damage as has been suffered by the complainants on the other, for the purpose of giving him compensation therefor. Complainants are not entitled to an award of punitive damages." *Hennessy* v. *Wilmerding-Loewe Co.*, 103 Fed. R. 90, 96.

"If a man manufactures goods himself and puts upon them the trade-mark of another, though he may not know to whom that trade-mark belongs, he must at least know that he has himself no right to the mark. That knowledge makes him liable to account for the profits he may have realized by his conduct. But if a man buys goods from a third party, believing them to be genuine, while in fact they are spurious, it is not until he has been told that they are so, that he can be considered to be guilty of any fraud, or

to be liable to render any account. In the present case the plaintiffs have failed to establish any such knowledge on the part of the defendants, and if, on the filing of the bill, the defendants had offered the plaintiffs their costs, and the plaintiffs had persevered with their suit." *Moet* v. *Couston*, 10 L. T. N. S. 395, 396.

Where a party using cartons so like those of complainant as to deceive, discontinued their use on learning of the wrong, there might be an injunction against use; but since no intentional fraud is shown under unfair trade, there should be no decree for damages. (Reversing on question of damages 118 Fed. R. 96.) *N. K. Fairbank Co.* v. *Windsor*, 124 Fed. R. 200.

"If he [defendant] did not sell, the profits on the sales are not chargeable to him; but if any profits came to him for preparing the article for those who did sell, they belong to the complainant, and the object of the accounting is to ascertain that fact. And if the defendant has damaged the complainant by the unlawful use of his trade-mark, the nature and extent of the damage is a proper subject of inquiry." *Sawyer* v. *Kellogg*, 9 Fed. R. 601, 602.

In a suit for accounting on ground of unfair trade in use of red and blue label on Hunyadi mineral water which was an infringement, the complainant is not obliged to show the proportion of profits attributable to the label alone as distinguished from the name "Hunyadi," the capsule and size of the bottle; nor should the respondent be allowed to charge out of the profits the travelling expenses and salaries of salesmen engaged in selling such water where there is no separate account, and where such expenses are paid out of a general account of which the water is only a part. *Saxlehner* v. *Eisner & Mendelson Co.*, 138 Fed. R. 22.

"The chief contention in this case arises over the refusal of the master to make allowance for certain expenses, in his computation of the profits realized by the defendant by imitating complainant's labels, brands, trade-marks, etc. . . . While it is customary in the computation of profits in this class of cases to make allowance for expenses, yet the expenses so allowed must be expenses necessarily incurred in the unlawful venture, which would not have been incurred but for engaging in such venture. When an unlawful business is carried on in connection with the defendant's regular business, and the same agencies are employed in doing that which is lawful and that which is unlawful, no rule of law of which I am aware requires any deduction for expenses in estimating the profits of the unlawful business. In this case the

defendant was a distilling company. It has a place of business, a license for doing business, travelling salesmen, etc. The proof does not convince me that any additional expenses were incurred by the defendant in the manufacture and sale of Benedictine, other than such as the master has allowed. The manufacture of Benedictine was carried on in connection with its ordinary business by the usual number of employés. The unlawful venture increased the gross profits without swelling the gross expenses." *Société Anonyme* v. *Western Distilling Co.*, 46 Fed. R. 921.

In suit to recover profits made by the defendant in sales of unfair trade the net profits should be ascertained by a deduction from gross profits of expenses of sale. *Walter Baker & Co., Ltd.*, v. *Sluck*, 130 Fed. R. 514.

Where there has been an invasion of party's right by unfair trade, he is entitled on proper proofs to compensation to the extent of the invasion. A case of simulation of advertisements. *Williams* v. *Mitchell*, 106 Fed. R. 168.

C. Injunction.

(1) Preliminary injunction.

See IX. 5, 211. *Garrett* v. *T. H. Garrett & Co.*, 78 Fed. R. 472.

"An interlocutory injunction operates somewhat in the nature of judgment and execution before trial. Without question it is at times an appropriate remedy in the prevention of great wrong but to authorize its issuance there must exist a pressing necessity. The right to it must be clear, and the apprehended injury must be grievous, and generally, where the injury may be measured in money, the alleged wrongdoer should be shown to be unable pecuniarily to respond." Exclusive right to name "Pettijohn" affixed to cereal foods being doubtful, preliminary injunction denied. *American Cereal Co.* v. *Eli Pettijohn Cereal Co.*, 76 Fed. R. 372; affirming 72 Fed. R. 903.

Where date of origination of combination of color and form is not clear, preliminary injunction will not be granted. *Cantrell & Cochrane, Ltd.*, v. *Witteman*, 109 Fed. R. 82.

"He knew it to be the recognized designation of the plaintiff's tobacco, which had become popular with consumers and the trade. Did he not expect the public to be influenced thereby and his business increased? An affirmative answer cannot well be avoided. If he did not, however, the injunction will do him no

harm, for he has not yet had time to establish a reputation of his own under this name. . . . A preliminary injunction as prayed for will be granted." *Carroll* v. *Ertheiler*, 1 Fed. R. 688, 691.

Preliminary injunction will not be granted where complainant has long delayed bringing bill, so that if it had acted at once a final hearing on the merits might have been had, and where no pecuniary damages have resulted. *C. O. Burns Co.* v. *W. F. Burns Co.*, 118 Fed. R. 944.

Complainant entitled to continuing of preliminary injunction in view of the frequency of respondents' acts of infringements. *Cravenette Co.* v. *Benjamin*, 105 Fed. R. 621.

Where title to trade-mark "Crescent" is doubtful, no preliminary injunction should issue. *Diamond Match Co.* v. *Safe Harbor Match Co.*, 109 Fed. R. 154.

Where it clearly appears by proof and comparison that there is such a simulation of packages by the respondent as to show fraud, complainant will be entitled to preliminary injunction. *Draper* v. *Skerrett*, 94 Fed. R. 912.

When delay of the owner of a patent or trade-mark to prosecute infringers has been of a tendency to mislead the public, or the defendant sought to be enjoined into a false security, and a sudden injunction would result injuriously, it ought not to be granted summarily, but the complainant should be left to his relief at final hearing. Various publishers had used word "Chatterbox" on publications from 1876 to 1885. *Estes* v. *Worthington*, 22 Fed. R. 822.

"In trade-mark cases, it is by no means of course to grant preliminary injunctions, even where the plaintiff's case seems to be made out; and I shall, therefore, leave the further consideration of the case to the final hearing, when the question as to the defendant's claim of right to the use of the words 'Fairbanks' patent' and the other questions of fact just referred to, and the unexplained circumstances and terms of the writing claimed to have extinguished the right of Chamberlain, can, if necessary, be further considered. The motion for an injunction must be denied, and the order heretofore made, granting an injunction till the decision of the motion, must be vacated." *Fairbanks* v. *Jacobus*, 14 Blatchf. 337, 341.

"We are, however, satisfied that in this case, the injunction, if to be granted at all, ought to await the result of a trial upon the merits. It is a grave matter to petrify in an instant a living

business by a mere interlocutory order." *Foster* v. *Blood Balm Co.*, 77 Ga. 216, 226.

Where respondent's affidavits on motion for preliminary injunction indicate a prior use by another, injunction will not issue. *French* v. *Alter & Julian Co.*, 74 Fed. R. 788.

"To a preliminary injunction the plaintiffs are not, on this branch of the case entitled. Neither party has any exclusive right in the article known as Hamburg tea, which appears to be a compound known in the German books of medicine; nor do the plaintiffs at present appear to have any special right in respect to the form, size, and color of the packages, the labels upon which are sufficient to distinguish, even to a careless observer, the one from the other. A preliminary injunction must issue against the defendant, restraining him from the use of the name of 'J. C. Frese & Co.,' and from that of the trade-mark, or label, 'J. C. Frese & Co., Hopfensack, 6 Hamburg,' on packages of Hamburg tea, and the residue of an injunction asked for is denied." *Frese* v. *Bachof*, 13 Blatchf. 234, 236.

"A glance at the two marks shows that the defendants have taken bodily the picture or representation which forms the complainants' trade-mark, and appropriated it to their own use. To my mind the infringement is so clear that it requires no further discussion; and, if there is any defence to this motion, it must rest upon some other ground. . . . In a case of this character, if the court has no doubt on the question of infringement, an injunction should be granted at this stage of proceedings, unless there are special circumstances which take the case out of the general rule. I do not find any such special circumstances in this case. The defendants contend that it would work irretrievable injury to them to grant this motion, but this position is not supported by the proofs." *G. G. White Co.* v. *Miller*, 50 Fed. R. 277, 278.

On application for preliminary injunction for infringement of registered trade-mark "Napoleon" on cigars it appeared that the mark had been anticipated, but there was evidence of unfair trade; held, that injunction would not issue till it clearly appeared that a Federal question was involved." *Goldstein* v. *Whelan*, 62 Fed. R. 124.

"The learned counsel for the defendant invokes the rule that 'it is only when the legal title is clear that a court of equity will interfere by injunction to restrain the use or colorable infringement of a trade-mark.' We are of the opinion that the allegations of the complaint show a clear legal right in the plain-

tiff to the exclusive use of the trade name 'Clysmic,' and hence that the injunction was properly allowed in the first instance." *Hill* v. *Lockwood*, 32 Fed. R. 389.

Where priority of right and evidence of fraudulent intent are doubtful, and question of laches is raised, complainant is not entitled to preliminary injunction against responsible respondent in case of alleged infringement of trade-mark. *H. Mueller Mnfg. Co.* v. *A. Y. McDonaly & Morrison Mnfg. Co.*, 132 Fed. R. 585.

Court obliged complainant to give bond of $10,000 to respondent on application for preliminary injunction in case of unfair trade. *Kentucky Distilleries & Warehouse Co.* v. *Wathen*, 110 Fed. R. 641.

"The orator seeks by motion for a preliminary injunction to have the defendant restrained from using the words 'Pile Leclanche' and 'Disque,' and the orator's style of label, upon batteries of the defendant's manufacture. . . . As the medals were awarded to the patented batteries, the representation of them upon the labels would be indicative of the reputation of these batteries rather than of their origin. Under these circumstances and authorities, the question whether these things all together amount to an unlawful representation of the source of the batteries is so doubtful that the granting of a preliminary injunction does not appear to be warranted." *Leclanche Battery Co.* v. *Western Electric Co.*, 21 Fed. R. 538.

Complainant may be compelled to give a bond with sureties on granting of preliminary injunction. *Leonard* v. *White's Golden Lubricator Co.*, 38 Fed. R. 922.

The question of fact, whether the cigar boxes held for sale and being sold by the defendant, with the marks, devices, and designs thereon, are such colorable imitation of the complainant's goods as to be likely to deceive or mislead purchasers to the injury of complainants, being for the jury on final hearing of the bill, and irreparable damage not being probable, there being no charge that the defendant is insolvent, there was no error in denying an interlocutory injunction. Injunctions in restraint of trade should be sparingly granted before final decree. *Lies* v. *Daniel*, 82 Ga. 272.

"The granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it, and the decision of a court of first instance, refusing such an injunction, will not, except for very strong

reasons, be reversed by this court." *New York Asbestos Mnfg. Co.* v. *Ambler Asbestos Air-Cell Covering Co.*, 102 Fed. R. 890, 891.

A mere similarity in packing merchandise does not justify preliminary injunction. "To justify a preliminary injunction, the plaintiff's case must be clear in all respects." *Pfeiffer* v. *Wilde*, 102 Fed. R. 658.

"The plaintiff shows that he has used the symbols mentioned in his bill of complaint to designate cigars made by him; and that the defendants make use of the same. But the affidavits of defendants show that the same symbols were used by others upon cigar boxes before, or about the time the plaintiff began to use them. These affidavits make it doubtful whether the plaintiff has so had the exclusive use of the symbols that the use of them by the defendant serves to pass their cigars as those of the plaintiff. This question cannot safely be determined upon the affidavits, but should be established by evidence regularly taken in due course. The plaintiff does not appear to be entitled to a preliminary injunction. Motion denied." *Portuondo* v. *Monne*, 28 Fed. R. 16.

To justify preliminary injunction plaintiff's case must be clear in all respects. *Postal Tel. Cable Co.* v. *Netter*, 102 Fed. R. 691.

"A motion is made for a preliminary injunction to restrain the use of the word 'Cream' in connection with the words 'Baking Powder,' which is manufactured and put upon the market by the defendant, and, as is alleged, in packages having labels and wrappers similar in design to those upon the goods of complainant, and exact enough to deceive. . . . The complainant is certainly entitled to protection in the use of this word, in connection with the baking-powder it manufactures, unless it is adopted and used as descriptive of the article, its ingredients or characteristics. . . . It is unnecessary to consider the other ground urged, that the form in which the article manufactured by the defendant is put upon the market, its wrappers and labels and other devices, are of a similitude exact enough to warrant the relief asked. Motion granted, with leave to defendant to move to dissolve the injunction at the next June term of this court after the answer is filed." *Price Baking Powder Co.* v. *Fyfe*, 45 Fed. R. 799.

"This is a motion for a preliminary injunction to restrain the use of the word 'Eureka' in trade in connection with steam and hydraulic packing. There is no question but that the orator com-

menced using that name for packing made by him in 1875, and has continued that use since that time; nor but that the defendants use that name in connection with that kind of packing, not of the orator's make, in trade; nor but that a firm known as Sellers Bros. gave that name to a kind of steam-packing patented by William Beschke in 1872, at Philadelphia, and used it in connection with that packing until early in 1874; nor but that the profits on the sales of defendants are much less than $500. . . . On the whole case as it now stands, the orator appears to be entitled to the injunction asked. Motion granted." *Symonds* v. *Greene*, 28 Fed. R. 834.

Where purchasers might be readily deceived in the style and get up of cham pagne bottles, yet if he defendant has publicly adopted the same style for many years, a preliminary injunction will not be granted. *Von Mumm* v. *Steinmetz*, 137 Fed. R. 168.

Where imitation of boxes and stamps is not such as likely to deceive, and there is no evidence that one has been deceived, preliminary injunction will not issue. *Van Camp Packing Co.* v. *Cruikshanks Bros. Co.*, 90 Fed. R. 814.

(e) Perpetual injunction.

"An injunction is granted accordingly, restraining the defendants, their servants or agents, from selling, etc., any mineral or other waters not being the genuine 'Apollinaris Water,' under the name of 'Apollinaris Water' or 'London Apollinaris Water,' or under any other name of which the word 'Apollinaris' so forms part as to be calculated to deceive the public." *Apollinaris Co.* v. *Norrish*, 33 L. T. N. s. 242, 244.

Although a party on notice discontinues infringement of a trade-mark, yet if he persists in fighting every step in proceedings for injunction, an injunction should issue against him. *Hutchinson* v. *Blumberg*, 51 Fed. R. 829.

4. Relief in Law.

At law the proper remedy is by an action on the case, and proof of fraudulent user is the essence of the action, but to sustain a bill in this court, it is not necessary to prove fraud, or that the credit of the plaintiff was injured by sale of inferior article; the injury done to plaintiff by loss of custom is sufficient to support his title to relief. *Edelsten* v. *Edelsten*, 7 L. T. R. N. S. 768.

A. Damages.

"It is a well-established principle of the common law that in actions of trespass and all actions on the case for torts a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary, or vindictive rather than compensatory.

"In actions of trespass where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been been entitled to recover had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called 'smart money.' This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Day* v. *Woodworth*, 13 How. Pr. 363, 371.

Now, in trespass with the allegation of a continuando, or "diversis diebus," if the plaintiff insists upon proving repeated acts of trespass, he will not be allowed to give evidence thereof, unless committed within the time specified. In truth, the usual mode of declaring in actions for infringement of a patent is, to allege that the defendant on such a day (naming it) "and on divers other days and times between that day and the day of the commencement of the suit (or exhibiting the bill), did unlawfully, etc., make and sell, and use, etc." *Eastman* v. *Bodfish*, 1 Story, 528.

Where party alleges: "Since the 1st day of November, 1888,

knowingly, wilfully, and fraudulently, offered for sale, and is now selling, glue in packages," etc., there is no continuando with reference to matter of selling, and at common law the plaintiff could prove only one sale. Verdict for damages of $8,000 reversed. *Le Page Co.* v. *Russia Cement Co.*, 51 Fed. R. 941.

"In a case like this (an action of trespass on the case for trade-mark infringement), if in any, no reason exists for giving greater damages than have actually been sustained, or what have been called compensatory. There is nothing peculiarly atrocious in the conduct of the defendant, to be punished by damages, and in no other way, as a public example, considering the blamable usages which exist on this subject." *Taylor* v. *Carpenter*, 2 Wood & M. 122; Fed. Case No. 13785.

"In cases of this character, where you are satisfied from the proof and from the admissions in the case that the fraud — the intention to defraud — is at the bottom of the matter, . . . the jury are not confined to the exact monetary damages, but may give what are known as vindictive or exemplary damages, for the purpose of deterring others from embarking in the same schemes of fraud and deception." *Warner* v. *Roehr*, Fed. Case No. 17189 a.

5. Costs.

See XIII. 1 B. 286. *Weed* v. *Peterson*, 12 Abb. Pr. n. s. 178.

"If a man should imitate another person's label or trade-mark, and sail so near the wind as just to avoid an injunction, and do so intentionally, though the court does not grant the injunction, it would not willingly give him any costs of the proceedings." *Bass* v. *Dunbar*, 19 L. T. n. s. 626.

Where offer to disclose manufacturer and surrender profits, and sell no more thread and pay costs to that time was not made till time of filing answer, subsequent costs allowed, the infringers not being ignorant of spuriousness of thread. *Coats* v. *Holbrook*, 2 Sandf. Ch. R. 586.

Where complainant succeeded only in part on bill for unfair trade it was not allowed costs. *Clark Thread Co.* v. *Armitage*, 67 Fed. R. 896.

A decree for complainant in contested suit for infringement of trade-mark carries costs except under exceptional circumstances. *Hennessy* v. *Wilmerding-Lowe Co.*, 103 Fed. R. 90.

Where respondent before suit has discontinued objectionable

labels, no costs will be allowed complainant. *Lever Bros.* v. *Smith*, 112 Fed. R. 998.

Where there has been unnecessary delay on part of the respondents in presenting objections to master's report to the court, while the court would not sustain the master's finding on damages in unfair trade, yet would allow costs of court and master's fees. *N. K. Fairbank Co.* v. *Windsor*, 124 Fed. R. 200.

"As to the matter of costs, we find nothing in this case to take it out of the ordinary rule that a decree for an infringement and an injunction carries costs. The only reason suggested by the counsel for the defendant was, that no demand was made before suit that the defendant should cease to use the label. We have never understood that in such cases a demand was necessary, nor that an infringer, who stoutly contests the suit to the end, should be relieved from the payment of the costs, which have been incurred in consequence of his wrong-doing and his litigation." *Sawyer* v. *Kellogg*, 9 Fed. R. 601, 602.

"It is his (the defendant's) duty at once to give all the information required, and to undertake that the goods shall not be removed or dealt with until the spurious brand has been removed, and to offer to give all facilities to the person injured for that purpose. If, after that, the person injured files a bill, though he will be entitled to all that he asks in the shape of relief, as he might have got it all without suit, he will not get from such defendant the costs of the suit, and he may have to pay them." *Upmann* v. *Elkan*, L. R. 12 Eq. 140, 145.

6. Criminal Remedy.

There are criminal statutes against the illegal use of registered trade-marks under the laws of various States.

7. Parties.

See XV. 3 B. 305. *Moet* v. *Couston*, 10 L. T. N. S. 395.

"I think that this is not the kind of action which ought to be encouraged. If the owner of a trade-mark finds that it is being pirated, surely it is not the small retailer who ought to be punished, but an endeavor ought to be made to prosecute those who placed the spurious goods on the market; and although I agree that the plaintiffs are entitled to an injunction, yet I cannot think it is the duty of the court in every case in which a small retail

dealer who has innocently (and I think that the defendants in this case have acted innocently) happened to purchase a small quantity of the spurious goods, to say that he ought to be fixed with the costs of the action." *American Tobacco Co.* v. *Guest*, L. R. (1892) 1 Ch. D. 630, 632.

Complainant had from owner of mineral spring in Hungary sole right to export mineral water under his trade-mark "Hunyadi Janos," to United States, but that gave him no right to protection against one who under same name exported to United States bottles of the water bought in the general market and not sold by the owner of the spring for the purpose of export. *Apollinaris Co.* v. *Scherer*, 27 Fed. R. 18.

"The plaintiffs have brought their bill against the defendants named, and are met by a demurrer. . . . A ground of demurrer is that the directors of the defendant corporation are joined as parties defendant, which, it is insisted, is a misjoinder. . . . The current of authority in this country seems clearly to justify the plaintiff's action in joining the directors. In the case of *Poppenhausen* v. *Falke*, it was held that, where persons were acting in concert in infringing a patent, although they act merely as employés of a corporation, they are liable to be sued therefor jointly in one suit. It is true that there is a class of agents — such as mere workmen in the employ of a manufacturer — against whom there can be no recovery, although they may have participated in the acts of infringement. But ordinarily the infringer cannot escape the responsibility by showing that he was acting for another." *Armstrong* v. *Savannah Soap Works*, 53 Fed. R. 124, 125.

Where labels are so alike that attempt at deceit is evident, the court will issue an injunction against a party who is only a dealer, having purchased the goods from the original imitator with the intent to resell them, and the fact that since suit has begun he has voluntarily ceased to deal in goods is no bar to injunction. *Burnett* v. *Hahn*, 88 Fed. R. 694.

"Respondent urges that there is a misjoinder of parties defendant. I do not think so. The bill alleges that the respondents, Bishop et al., are using the corporation but as a means of infringement; that they are substantially the corporation. In the case of *Nerve Food Co.* v. *Baumback*, the Star Bottling Works, a corporation, was joined with the respondent Baumback, under the same circumstances, the corporation, namely, belonging to him." *California Fig Syrup Co.* v. *Improved Fig Syrup Co.*, 51 Fed. R. 296, 298.

"It is true that the bill does not show that the defendants have affixed any of the spurious labels to cigars of their own manufacture, or that they have sold any cigars bearing the counterfeit certificates or labels. But this is not important. From the fact that they have made and sold spurious labels and advertised them for sale, the court must presume that defendants intend that they shall be used on cigar boxes by the persons who buy them, and that they manufacture and sell them for that purpose. The conduct of the defendants is equally as culpable as that of the manufacturers of cigars who buy and use the spurious labels, and the loss which complainant sustains by the use of the same on cigar boxes is directly attributable to the persons who make and sell the counterfeit labels as to the dealers in cigars who buy and use them." *Carson* v. *Ury*, 39 Fed. R. 777, 780.

Not only the user but the engraver of a trade-mark may be held liable for infringement. *C. A. Vale Cigar Mnfg. Co.* v. *C. A. Vale*, 30 O. G. 1183.

Alien protected in our courts in trade-mark cases. *Coats* v. *Holbrook*, 2 Sandf. Ch. 586.

"Nor is there anything to the suggestion that injunction will not lie against defendants, because they do not themselves make, pack, or sell the fraudulent cigars. No doubt they may make the boxes without objection. There is no trade-mark, so far as appears, in the style, size, or shape of a cigar box. But they do much more. They procure labels counterfeiting the complainant's, and assemble these labels with their boxes, with the obvious purpose of enabling others by the use of the labels to palm off their goods upon the public as the goods of the complainant. Complainant is clearly entitled to an injunction against all who knowingly combine together to accomplish that purpose." *Cuervo* v. *Jacob Henkell Co.*, 50 Fed. R. 471, 472.

An injunction against principals binds them subsequently so that they cannot as agents of others do the acts enjoined; but an injunction against principals, their servants and agents does not bind the servants and agents when they cease to become so and act as principals. *Dadirrian* v. *Gullian*, 79 Fed. R. 784.

"Upon the allegations of the bill, the defendants are actively engaged in assisting third persons to use the complainants' trade-mark in violation of their rights. The mere act of printing and selling labels in imitation of the complainants' might be innocent, and without evidence of an illicit purpose, would not be a violation of the complainants' rights. It is otherwise, however, when

this is done with the obvious purpose of enabling others by the use of the labels to palm off their goods upon the public as the goods of the complainants." *De Kuyper* v. *Witteman*, 23 Fed. R. 871.

In a suit to enjoin certain individuals from unfair competition, the corporation of which they are officers is not an indispensable party. *Elgin Natl. Watch Co.* v. *Loveland*, 132 Fed. R. 41.

"The infringement of a trade-mark is a trespass upon the rights of the owner by using it as a false representation that the wares of the infringer are those of the owner, for which an action of trespass on the case would lie at common law, in which all participating would be principals and proper defendants." *Estes* v. *Belford*, 30 O. G. 99.

"No person should be made a party who has no interest in the suit, and against whom no decree can be had at the hearing; and for this reason a person who is a mere agent for another in the transactions in controversy ought not generally to be made a party defendant, unless his presence is necessary for the purposes of discovery. And it has been held in suits for infringements of patents that there is a class of agents, such as mere workmen in the employ of a manufacturer, against whom there can be no recovery, although they may have participated somewhat in the acts of infringement. But ordinarily the infringer cannot escape responsibility by showing that he was acting for another. In torts of misfeasance, like the violation of a trade-mark, agents and servants are personally liable to the injured party. All persons procuring or assisting in the commission of a trespass are principals in the transaction, and both the master who commands and the servant who does the act of trespass may be made responsible as principals, and may be sued jointly or severally for damages, as the injured party may elect. A joint action will lie against the principal and agent. . . . It follows that the defendants, although they were only the agents or servants of Richard Worthington, in doing the wrongful acts sought to be restrained and for which damages are claimed, are responsible to the complainant and the complainant has the right to pursue them." *Estes* v. *Worthington*, 30 Fed. R. 465.

If a party has caused to be sold to dealers counterfeit labels with the intent that they be used in fraud it is an infringement, and it is not necessary to further allege that the party has manufactured the labels. *Hennessy* v. *Herrman*, 89 Fed. R. 669.

"Under these circumstances, I think the complainant is entitled to an injunction restraining the defendant from selling a spurious article of bitters as and for Hostetter's Bitters. Customers of defendant, who have thus been advised and induced to use genuine bottles and labels in the manner above mentioned, are clearly guilty of a wrongful act which a court of equity will enjoin; and a person who counsels and advises another to perpetrate a fraud, and who also furnishes him the means of consummating the same, is himself a wrongdoer, and, as such, is liable for the injury inflicted. The defendant cannot shield itself from an injunction by the plea that it has not itself sold a spurious article in a false dress. *Hostetter Co.* v. *Brueggeman-Reinert Distilling Co.*, 46 Fed. 188, 189.

Parties who have an actual, though not an equal interest, in trade-marks and labels may be joined as plaintiffs in one suit. *Jewish Colonization Ass'n* v. *Solomon*, 125 Fed. R. 994.

A distiller granted for five years sole and exclusive control of his bottled product of whiskey and agreed not to allow any other party to use his trade-mark. Held, that where a third party infringed the trade-mark on bottled goods, the distiller should be made a party complainant as he had a valuable interest in the trade-mark, unless it is shown that he was requested and refused to join. *Krauss* v. *Jos. R. Peebles' Sons Co.*, 58 Fed. R. 585.

Fact that complainant is an alien does not affect his right of property in a trade-mark at common law, independent of statute of registration. *La Croix* v. *May*, 15 Fed. R. 236.

Owner of a trade-mark is not estopped from bringing suit to enjoin an infringement of it by the fact that he has made a third party his licensee for the territory in which the defendant carries on his business as to which infringement is charged. *Moxie Nerve Food Co.* v. *Baumbach*, 32 Fed. R. 205.

"All who are concerned in the commission of a tort are alike amenable to the party injured." *Sawyer* v. *Kellogg*, 7 Fed. R. 720, 722.

"But in the courts of the United States, under the Constitution and Laws, they are entitled, being alien friends, to the same protection of their rights as citizens. There is no pretence to say, that if a similar false imitation and use of the labels of a citizen, put upon his own manufactured articles, had been designedly and fraudulently perpetrated and acted upon, it would not have been an invasion of his rights, for which our law would have granted ample redress. There is no difference between the

case of a citizen and that of an alien friend, where his rights are openly violated." *Taylor* v. *Carpenter*, 3 Story, 458, 463.

Where there is an exclusive licensee of a trade-name and a patent the licensor cannot maintain suit for infringement in his own name without joining the licensee. *Wallach* v. *Wigmore*, 87 Fed. R. 469.

8. Pleadings.

"The declaration further alleges, in substance, that the defendant, well knowing the plaintiff's said mark, and for the purpose and with the effect of such deception, did stamp the words 'Roger Williams' upon cotton cloth not manufactured by the plaintiff, and to his serious injury. Certainly, under the rule, so well settled, that a partial imitation of a trade-mark, if calculated to deceive, will support an action, this is a sufficient allegation of an invasion of the plaintiff's rights. The court cannot, as a matter of law, decide that such partial use of the designation of his goods appropriated by the plaintiff was not designed, calculated, and effectual to carry out the fraud charged, and must leave that, as well as the prior allegation, to be settled upon the evidence by the jury. The demurrer is therefore overruled; but under the agreement of the parties, suggested at the argument, the defendant has leave to withdraw his demurrer without costs, and to plead over to the merits." *Barrows* v. *Knight*, 6 R. I. 434, 439.

Allegation of following facts held on demurrer to constitute a cause of suit.

"The complainants and the defendant are competitors in the same line of business. The defendant has assumed a trade-name similar to, and in imitation of, complainants' trade-name, and the public has been deceived thereby, and great confusion and injury has resulted to complainants' business therefrom. The incorporators of the defendant corporation, before its organization, knew of the existence and character of the complainants' business, and the trade-name under which it was being carried on; and, notwithstanding its attention has since been called to the injury which it has done to the complainants' business, it refuses to desist from the use of the name so wrongfully used." *Block* v. *Standard Distilling & Distributing Co.*, 95 Fed. R. 978, 980.

Where in suit for infringement of a trade-mark exhibits of the devices are used by both complainant and defendant accompany-

ing the bill, the court will sustain a demurrer to the bill where the exhibits show that there is no infringement. *Collins Chemical & Mnfg. Co.* v. *Capitol City Mnfg. Co.*, 42 Fed. R. 64.

"The pendency of a similar action in the State court seems to present no bar to the relief asked for." Motion for preliminary injunction on fraudulent imitation of labels. *Collinsplatt* v. *Finlayson*, 88 Fed. R. 693.

A bill alleging different acts aud kinds of infringement of style of dressing of goods, and manner of lettering and wording not multifarious as it is not necessary to bring separate bills. *Dennison Mnfg. Co.* v. *Thomas Mnfg. Co.*, 94 Fed. R. 651.

"The defendant insists that there are such differences in his mode of using and combining the colors on the wrapper that no careful purchaser need be deceived, if he exercise ordinary care and prudence. This may be true and in the absence of fraud, and upon the merits the court may not be willing to hold that an infringement has been shown. But the fraud has been confessed by the demurrer, and such confession entitles the complainant to an injunction. The demurrer is overruled and twenty days' time is given to the defendant to answer the complainant's bill on its merits." *Enoch Morgan's Sons' Co.* v. *Hunkele*, 16 O. G. 1092, 1093.

A plea in abatement averring that there is another suit pending in which the co-defendants are merely the servants or agents of W. is not good, as servants and agents are liable jointly and severally with the masters. *Estes* v. *Worthington*, 30 Fed. R. 465. See idem, XV. 7, 318.

"The allegations of the bill upon information and belief are insufficient. Whatever is essential to the rights of the complainant, and is necessarily within its knowledge, ought to be alleged." *Gaines & Co.* v. *Sprouse*, 117 Fed. R. 965, 966.

A bill in equity should contain a specific allegation of fraud, and when it does not the word "fraudulent" adds nothing to the averments of fact, and is demurrable. *Garst* v. *Hall & Lyon Co.*, 179 Mass. 588.

Bill for unfair competition in use of word "Webster's" on dictionaries. "Because the denials in the plea do not fully meet the averments in the bill of evidential facts which s' uld be either traversed or admitted, the objections to the ple· vell taken." *G. & C. Merriam Co.* v. *Struus*, 136 Fed. R. 4'

Equity is without jurisdiction of a suit for infrin f patent where it appears by plea set down for argum· as

admitting truth) that on learning of infringement, and before commencement of suit, respondent finally and in good faith abandoned making and selling of patented articles and does not intend to further infringe. *General Electric Co.* v. *N. E. Electric Mnfg. Co.*, 123 Fed. R. 310.

A bill alleging that respondent wrongfully prints and furnishes wrappers to business competitors similar to those used by complainant and by unlawful imitation directly contributes to wrongful and unlawful diversion of trade, whereby goods of competitors are sold as and for goods of complainant, is not demurrable for failure to allege that there was unlawful use in sale of goods of specific kind as those of complainant. *Hildreth* v. *Sparks Mnfg. Co.*, 99 Fed. R. 484.

Two separate and distinct defences cannot be raised by plea, and a defect on the face of the bill, viz., that there is no allegation of exclusive right in complainant, must be raised by demurrer. *Hostetter Co.* v. *E. G. Lyons Co.*, 99 Fed. R. 734.

Complaints for infringement of trade-marks and of labels may be made in one bill.

Defence that a trade-mark is invalid because geographical should not be raised by demurrer. *Jewish Colonization Ass'n* v. *Solomon*, 125 Fed. R. 994.

"The theory of the demurrer is that the complainant's statutory title upon allegations of the bill is invalid. It is not necessary to decide the questions raised, because, as the demurrer is to the whole bill, the bill is sufficient if all the allegations concerning a registration of the trade-mark were eliminated." *La Croix* v. *May*, 15 Fed. R. 236, 237.

A bill for infringement of a trade-mark cannot, on failure to prove a valid trade-mark, be sustained on the ground of unfair trade where it is not charged that respondent has injured or intended to injure complainant by deceitfully misrepresenting and marketing his product as the product sold by the complainant under a certain name. *Lamont* v. *Leedy*, 88 Fed. R. 72.

A bill alleging that defendants have imitated complainant's peculiar style of bronzing horse-shoe nails, with fraudulent intention of deceiving the public, is not bad on demurrer, as the court will not decide on the pleadings whether or not there may be fraud entitling the complainant to relief. *Putnam Nail Co.* v. *Bennett*, 43 Fed. R. 800.

An answer under oath called for by bill that respondent had a prior use of a certain alleged trade-mark "Parker," on whiskey,

is, although in nature avoidance, so far responsive to allegations of bill that it is evidence for respondent, to be overcome by complainant. *Uri* v. *Hirsch*, 123 Fed. R. 568.

"The proper practice, when objection is made to the form of a plea, is to file exceptions thereto. When a plea is set down for argument no exception can be taken to its regularity or form. The objection to the form of the plea must be overruled, and the plea in that respect taken to be good." *Vacuum Oil Co.* v. *Eagle Oil Co.*, 122 Fed. R. 105, 106.

A bill alleging that a mail order company advertises "Winchester Model Single Shot Take Down Rifles," and fills order for said rifles with rifles of an inferior grade not made by the complainant, thus deceiving the purchasers and injuring complainant's business, is demurrable where it does not allege that it sells other rifles as and for complainants' rifles and that parties have been deceived thereby. No cause of complaint alleged. *Winchester Repeating Arms Co.* v. *Butler Bros.*, 128 Fed. R. 976.

9. Appeal.

When it clearly appears that the court below erred in not granting to the complainant a preliminary injunction against use of peculiar shaped bottles for root beer employed by the respondent with fraudulent intent, on appeal the court will correct the error and issue preliminary injunction. *Charles E. Hires Co.* v. *Consumers' Co.*, 100 Fed. R. 809.

"When the trial court has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct, unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence." *Gorham Mnfy. Co.* v. *Emery-Bird-Thayer Dry-Goods Co.*, 104 Fed. R. 243, 244; affirming 92 Fed. R. 774.

"An examination of the decree rendered by the court below shows that, while it adjudges the validity of the patent sued on and directs an injunction termed 'perpetual' against the defendants as infringers, it refers the matter to a master for taking an account. It is well settled that such a decree is not a final decree from which an appeal could be taken, or of which this court would have jurisdiction, under the sixth section of the judiciary act of 1891. . . . We are, however, of the opinion that it is an interlocutory decree granting an injunction, from which an appeal

would lie under the seventh section of the said judiciary act. . . . An allowance of an appeal from an interlocutory order or decree, granting or continuing an injunction in au equity cause under the seventh section of the judiciary act of 1891, is a new feature of the practice in the United States courts. Being of a highly remedial nature, it ought to be construed so as to give full force to the intention of the lawmaker. The mischief to be remedied by the act was that injunctions which deprived parties of the possession and control of property, or compelled enforced action in the use of property, were, under the practice of the courts, frequently rendered long before the final hearing in the case, and operated, to a great extent, in the nature of execution before judgment. This mischief was as great in patent cases, where parties on hearings, preliminary to the final decree, were enjoined, pending long and tedious examinations in the matter solely of accounting, as in any other cases of preliminary injunction. The case of *Richmond* v. *Atwood,* decided in the first circuit, and reported in 48 Fed. Rep. 910, was a case on all fours with the present one, and therein the court took and exercised jurisdiction, apparently without question. The suit was one for an infringement of letters patent wherein an appeal was taken from a decree sustaining the patent, holding the defendant to be an infringer, awarding an injunction, and ordering an account. . . . The order of the court is that the motion to vacate the proceedings in this cause, and to dismiss the appeal for want of jurisdiction, be denied; that our former decree, remanding the cause, with directions to dismiss the bill, with costs, be, and the same is, modified so as to direct the cause to be remanded to the circuit court, with instructions to dissolve and dismiss the injunction granted in said court; and that appellee pay the costs, and that the rehearing applied for be denied." *Jones* v. *Munger Improved Cotton Mach. Mnfy. Co.*, 50 Fed. R. 785.

An appeal on an order *denying* a preliminary injunction is not like an appeal on the merits, and the order will not be reviewed unless clearly wrong. *Paris Medicine Co.* v. *W. H. Hill Co.*, 102 Fed. R. 148.

"It will be observed, from an examination of the cases in the Supreme Court of the United States, that a decree in patent cases, declaring the patent in question valid, and that it has been infringed, and for an injunction and an accounting, has uniformly been referred to as an interlocutory decree, and the cases are numerous, like *Barnard* v. *Conrad*, 7 How. 650; *Forgay* v.

Conrad, 6 How. 201; *Humiston* v. *Stainthorp*, 2 Wall. 106; *Milwaukee, etc., R. Co.* v. *Soutter*, 2 Wall. 510, 521; *Beebe* v. *Russell*, 71 How. 283; *Keystone Manganese and Iron Co.* v. *Martin*, 132 U. S. 91, where, upon an appeal from a decree determining the general property right granting an injunction, and an order for an accounting before a master, it has been held that the decree was not final or appealable. It is true, that the cases in the supreme court are based upon a different statute, and in unmistakable language deny the right of appeal from interlocutory decrees. But they are for that reason none the less significant, as showing what has been understood as the line between interlocutory and final decrees. We must assume that Congress used the term 'interlocutory order or decree,' in this connection in its common and well-understood sense, and as intending the line of distinction accepted and interpreted by the federal courts; and it follows that all injunction orders and decrees which were interlocutory, and not final, within the meaning of the old statute, and for that reason not appealable, are interlocutory under the new statute, and therefore, by the same logic and upon the same reasoning, are appealable. . . . It is quite probable — indeed, quite clear — that a distinction would be made between injunctions granted preliminarily as a matter of discretion, and a decree for an injunction granted upon the final determination of a particular right; and the general rule that an appellate court interferes reluctantly with injunctions granted *in limine* as a matter of discretion should not, in our view, apply to an appeal under the statute from an interlocutory decree for a perpetual injunction based upon a final determination of the substantial property right in a patent cause." *Richmond* v. *Atwood*, 52 Fed. R. 10, 21.

10. Evidence.

See XV. 8, 320. *Collins Chem. & Mnfg. Co.* v. *Capitol City Mnfg. Co.*, 42 Fed. R. 64.

"This court has held that one of the plaintiffs offering himself as a witness, and testifying on behalf of the plaintiffs, and having been asked and answered on his direct examination the question, 'What profits have been realized by your firm on each dozen of the article sold?' was bound upon the cross-examination to have answered the question, 'In making up your estimate of profits as you have given, what materials do you calculate the cost upon?'" *Burnett* v. *Phalon*, 21 How. Pr. 100.

A party defendant may be excused under a statute from answering questions which would tend to incriminate him of the criminal offence of counterfeiting trade-marks and labels. *Byass* v. *Sullivan*, 21 How. Pr. 50.

Preparation of affidavits similar in language and printed without seeing the witnesses, and sent out over the country, is not a method of obtaining testimony to be encouraged. *Carroll* v. *Ertheiler*, 1 Fed. R. 688.

"Nor do these courts require specific proof of purchases by individuals actually deceived, when the labels themselves show an attempt at deception which appears to be well calculated to deceive." *Collinsplatt* v. *Finlayson*, 88 Fed. R. 693.

Where a former decree has established the right to certain parties to use the words "Fish Bros," and "Fish Bros. & Co." with the picture of a fish on wagons such parties might assign their right, and in a suit brought against assignee to restrain such use the prior decision serves as *res judicata*. *Fish Bros. Wagon Co.* v. *Fish Bros. Mnfg. Co.*, 95 Fed. R. 457.

Where the only act of infringement is shown to be a marking of bill of sale of silver ware as "Gorham," after a clear statement that it was not "Gorham," and at the especial request of complainant's agent, where no one appears ever to have been deceived, there is not sufficient ground for injunction. *Gorham Mnfg. Co.* v. *Emery-Bird-Thayer Dry-Goods Co.*, 92 Fed. R. 774. Aff'd 104 Fed. R. 243.

Evidence of witnesses procured by the complainant for the purposes of a case of unfair trade against a party is not disinterested and should be carefully weighed and scrutinized. *Hostetter Co.* v. *Bower*, 74 Fed. R. 235.

Where bill charges that respondents refilled with bogus bitters Hostetter bottles, the burden is on the complainant to show that the bitters are bogus, and where there is no chemical analysis and the case rests on parties who not knowing the formula have only had experience in sampling, injunction will not issue branding respondents as frauds and cheats. *Hostetter Co.* v. *Comerford*, 97 Fed. R. 585.

A misrepresentation of a saleswoman that two kinds of soap were made by the same firm, calling attention to different marks, one "La Parisienne," the other "Rose de France," to an agent of complainant who was not deceived, not sufficient to justify preliminary injunction. *Kroppf* v. *Furst*, 94 Fed. R. 150.

Proof of single sale to complainant's agent together with other

proof may justify an injunction. *Lever* v. *Pasfield*, 88 Fed. R. 484.

Evidence as to title of complainant's trade-mark and how the title is derived from predecessors, where such facts are in issue, should be clear and not merely inferential. *P. Lorillard Co.* v. *Peper*, 65 Fed. R. 597.

Certified copy of complainant's charter supplemented by parol evidence sufficient to show incorporation under answer on information and belief. *Samuel Bros. & Co.* v. *Hostetter Co.*, 118 Fed. R. 257.

Under allegation in complaint that the proprietor of a trade-mark has built up a large and profitable business by his skill, quality of goods, and extensive advertising, evidence is open without a special plea of the facts by the respondent that the goods are not as represented and that the trade-mark is deceitful. *Uri* v. *Hirsch*, 123 Fed. R. 568.

XVI. REGISTRATION.

1. Property right in a trade-mark exists at common law, and is independent of the statutes regulating registration. Under United States Statutes certificate of registration is *prima facie* evidence of ownership; but this evidence may be contradicted in court, and the mark held to be invalid.

See XVI. 3, 339. *Goldsmith v. United Shirt Vest Co.*, 119 O. G. 1261.

See II. 5 A. 29.

"A trade-mark registration is not a grant, neither is it a contract. It is a mere record permitted to an owner of a trade-mark, that has been used in commerce with foreign nations or Indian tribes, who is domiciled in the United States, or located in some foreign country which affords similar privilege to our own citizens, of which record a certificate is given by the commissioner of patents. It is true that the registration is *prima facie* evidence of ownership, but in this it is only like any other record." *C. A. Yale Cigar Mnfg. Co. Ltd.*, v. *C. A. Yale*, 30 O. G. 1183.

"The inquiry is therefore always open as to the validity of the title to a trade-mark evidenced by the registration. The registration could not confer a title to the trade-mark upon the complainant if some other corporation or individual had acquired a prior right by adoption and use; nor could it vest defendant with a title as against the complainant's common-law title. In this view the only office of a registration is to confer jurisdiction upon the court to protect a trade-mark when the proprietor has obtained the statutory evidence of title, and the only function of the commissioner of patents is to determine whether an applicant has a presumptive right to the trade-mark." *Glen Cove Mnfg. Co.* v. *Ludeling*, 22 Fed. R. 823, 826.

A party who invented a game of cards, calling it "Flinch" and selling it under that name, has acquired a common-law trade-mark, although it was never registered or copyrighted, and the game was never patented. *H. B. Chaffee Mnfg. Co.* v. *Selchow*, 131 Fed. R. 543.

"Registration under the act of 1881 is of but little, if any, value, except for the purpose of creating a permanent record of the date of adoption and use of the trade-mark, or in cases where it is necessary to give jurisdiction to the United States courts." *Hennessy* v. *Braunschweiger & Co.*, 89 Fed. R. 664, 668.

"Remington," registered as a trade mark for typewriters held to be invalid as being an ordinary surname. *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118.

Property in trade-marks does not derive its existence from an act of congress. *La Croix* v. *May*, 15 Fed. R. 236.

While the act of 1881 does not include in the list of limitations of right to register trade-marks descriptive words, it does not by implication allow descriptive trade-marks, as rights and remedies exist independent of statutes. *L. H. Harris Drug Co.* v. *Stucky*, 46 Fed. R. 624.

"The right to be protected in the exclusive use of a trade-mark is not dependent on the federal statute authorizing the registration of certain trade-marks. It has been long recognized by the common law and enforced by the chancery courts of England and this country." *Ohio Baking Co.* v. *Natl. Biscuit Co.*, 127 Fed. R. 116, 120.

"It is a property right, for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity, with compensation for part infringement. The exclusive right was not created by Act of Congress and does not now depend upon it for its enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage." *Trade-Mark Cases*, 100 U. S. 82, 92.

A certificate of registration of trade-mark is merely *prima facie* evidence of ownership, and indictments to punish counterfeiting of registered trade-marks should aver facts showing alleged owners had acquired exclusive property therein. *United States* v. *Braun*, 39 Fed. R. 775.

Registration of trade-mark under invalid act of 1870 is not *prima facie* evidence of ownership as that act did not require use as condition precedent to registration. *Vanden Bergh & Co.* v. *Belmont Distillery Co.*, 99 O. G. 1624.

The registered trade-mark "U-C-A," on incandescent lights, temporarily enjoined, as registration is only *prima facie* proof. *Welsbach Light Co.* v. *Adam*, 107 Fed. R. 463.

2. Decisions of Patent Office on Practice.

Word "squirrel" and figure of squirrel, used conjointly or separately, cannot be covered under one application where the picture is "capable of such a variety of modifications that two of the modifications might appear to be substantially different things to an ordinary purchaser." *Adam Roth Grocery Co., ex parte*, 62 O. G. 315.

Refusal to allow amendment of application under act of 1881 so as to bring it under act of 1905 is a final decision and appealable. *American Separator Co., ex parte*, 119 O. G. 339.

A label stated in application to be for wire cloth but bearing words "all goods bearing this label are guaranteed Union Made," and not signifying the purpose of its application, although having some artistic merit, not registrable. *American Wire Weaver's Protective Ass'n, ex parte*, 94 O. G. 586.

"Porto Rico," considered to be a Territory of the United States entitling citizens to register trade-marks in United States. Cuba, under laws in February, 1902, a foreign country but her citizens entitled to register trade-marks in United States. The Philippine Islands considered to be a foreign country. *Attorney General's Opinion*, 98 O. G. 2175.

A label entitled "Ayres Medicinal Wonder," with descriptive matter and directions for use, containing nothing original, and not the result of intellectual labor, not registrable. *Baldwin, ex parte*, 98 O. G. 1706.

An artistic print entitled "White Eagle Reformation," consisting of simulations of United States flag, seal, and currency, claimed to be used for advertising purposes for books, not registrable for two reasons:

1st. It does not identify the article upon which it is to be used.

2d. It is against public policy to use United States flag and seal for advertising purposes. *Ball, ex parte*, 98 O. G. 2366.

Certificate of registration will not be issued to assignee of applicant though assignment may have have been previously recorded. The Patent Office cannot determine whether business has passed; and under the statute the owner should apply. *Bassett, ex parte*, 55 O. G. 997.

But see overruling case, *infra*, *Frank* v. *Macwilliam*, 114 O. G. 542, 338.

A foreigner seeking registration here on ground of foreign reg-

istration should produce the certificate. *Beckett, ex parte*, 119 O. G. 340

Where a registraut is decided not to be the true owner of a mark in interference proceedings, he may be allowed to caucel the mark. *Bloomington Canning Co., ex parte*, 119 O. G. 2235.

Where signature to statement is "Boston Fountain Pen Co.," and to drawing is "Boston Fountain Pen Company," there is a variance which should be corrected. *Boston Fountain Pen Co., ex parte*, 116 O. G. 2531.

There is no appeal from examiner's decision allowing registration of trade-mark except in clear case. *Broderick & Bascom Rope Co.* v. *Leschen & Sons Rope Co.*, 96 O. G. 1647.

The words "Satin Polish" are so far a genuine if imperfect attempt to describe merchandise that they may be retained as part of a label for registration. *Brigham, ex parte*, 20 O. G. 891.

"Junior" and "Jr.," not necessarily following a name, are not true alternatives and cannot be registered as one trade-mark. *Bryant Electric Co., ex parte*, 119 O. G. 2522.

Application for registration of the words "Centennial Isidor Bush & Co., St. Louis, Mo., in combination with registered trade-mark and obverse and reverse of the centennial medal. On Appeal.

"I do not, however, think it a safe practice to permit the registration of a compound trade-mark, one of whose distinguishing features has already been appropriated and registered by another as applied to the same class of merchandise." One feature resembles another trade-mark. *Bush & Co., in re*, 10 O. G. 164.

An application should include a description as accurate as possible and a drawing. *Carborundum Co., ex parte*, 118 O. G. 2250.

It is not a matter for interference proceedings that some third party has used the mark at issue. *Carey* v. *New Home Sewing Machine*, 101 O. G. 448.

Application for trade-mark described as the word "circle" or representation of a circle, not sustained by a facsimile disclosing two concentric circles with words "Circle Polish" in space between them, and in the field within the inner circle the letters "C. P." arranged as a monogram. It does not show alternative marks by use of word "circle" or representation of circle alone. *Circle Manufacturing Company, ex parte*, 98 O. G. 2365.

A label with words "Cast Steel Cement for Perfecting Iron & Steel Castings," and monogram "C. S.," without artistic merit

and merely calling for skill in type-setting, not registrable. *Clark Cast Steel Cement Co., ex parte,* 99 O. G. 2968.

Registration for good grounds may be refused even after publication, although there is no notice of opposition. *Cluett, Peabody & Co., ex parte,* 120 O. G. 902.

Applicant cannot register a symbol of a cross as a trade-mark for boots and shoes without describing it more particularly as a cross of certain style, as the designation of the figure by word "cross" is too generic. It should be noticed also that applicant's name is Cross. *Cross, ex parte,* 107 O. G. 2236.

A mark should be registered only as used.

Where application showed word "Tunnel," with pictorial representation of miner's cap, lamp, tools, the statement that word "Tunnel" alone might be used showed a variation. *Crowley, ex parte,* 99 O. G. 228.

Where applicant for registration of trade-mark has incorrectly stated its place of incorporation, the error is of no consequence, and does not affect validity of registration. *Crucible Steel Co. of America, ex parte,* 107 O. G. 270.

The description of a trade-mark should include all the features material thereto shown in the drawing. *Dr. Peter Fahrney & Sons Co., ex parte,* 119 O. G. 1924.

A drawing and description should agree so that a mark said to be Moss Back should not appear drawn as Moss-Back. *E. C. Atkins & Co., ex parte,* 119 O. G. 2236.

The background of a word in drawing consisting of vertical lines is not part of the trade-mark, and the word alone is registrable. *Eli Lilly Co., ex parte,* 119 O. G. 2234.

Single shipment of goods to Mexico with mark concealed and instructions to keep it secret, even if a *bona fide* sale, not such a public use of the mark in this country as to indicate intention to use it, and does not justify registration. *Farmers Mnfg. Co.* v. *Harrison,* 96 O. G. 2062.

On all doubtful cases as to infringement the benefit of the doubt should be given to the prior registrant. *Flint & Walling Mnfg. Co.,* 85 O. G. 148.

Affidavits, being *ex parte,* in an interference proceeding do not constitute proper evidence upon which to found a judgment contrary to the allegation of an application for a trade-mark. *Frank* v. *Macwilliam,* 108 O. G. 291.

A mark consisting of a horizontal row of billiard balls between billiard cues (which alone is registrable) conjoined with the de-

scriptive word "rubber back" as applied to billiard cloth, is not registrable, as the word is descriptive. *Goodman-Leavitt-Yatter Co., ex parte,* 107 O. G. 834.

Failure to prosecute application for trade-mark for a year is such laches as would amount to an abandonment, so that the application would be considered as no longer pending. *Griserin-Werke Paul Camphausen, ex parte,* 120 O. G. 327.

Where a foreign citizen is located in a foreign country other than that in which he is a citizen, application will be governed by existing treaty with the country of location rather than citizenship. *Haggenmacher, ex parte,* 60 O. G. 438.

A fac-simile showing a lozenge-shaped figure and word "Indurine" does not conform to application claiming a trade-mark the essential feature of which was lozenge-shaped figure. There is a variation between fac-simile and application. *Hall, ex parte,* 98 O. G., 2174.

Requirement for division of application is final judgment and appealable. *Hamilton, ex parte,* 118 O. G. 269; *Harris, ex parte,* 117 O. G. 903.

A drawing of single ivy leaf held to justify registration under application of arbitrary word "Ivy" or the representation as trade-mark on cutlery. *Hecht, ex parte,* 96 O. G. 1648.

A label entitled "Dr. Houghton's Rheumalgine" with arrangement of printed matter naming and describing medicine and giving directions for use, with no artistic merit, is not entitled to registration. *Houghton, ex parte,* 99 O. G. 1623.

A party who has used words "American Volunteer" on boots and shoes, entitled to registration, as against one who has since used the word "Volunteer" for overshoes. *Joseph Banigan Rubber Co.* v. *Bloomingdale,* 89 O. G. 1670.

"Meats," is not a sufficiently definite description of a particular class of goods to justify registration of a mark. *Kingan Packing Association, ex parte,* 119 O. G. 2234.

"Meats," is not sufficiently definite in designation of "particular goods" required under the statute, as it is a class. *Kingan Packing Ass'n,* 120 O. G. 1165.

The essential feature of a mark is not necessarily what it is stated to be in the application, but what the fac-simile shows it to be. *Kingan & Co., Ltd., ex parte,* 97 O. G. 2085.

The word "Rosebud" and the representation of one, are true alternatives and can be registered under one application for trade-mark of salmon. *Kinney, ex parte,* 72 O. G. 1349.

There can be no assignment of trade-mark recorded in Patent Office unless there is sufficient identification of application and registration. *Laundry Blue Co., in re*, 109 O. G. 806.

"Crescent," and crescent-shaped figure not true alternatives, and cannot be granted registration under one application. *Lazarus, ex parte*, 64 O. G. 1396.

The office having given a design patent to a party for a certain book cover cannot afterward register the same design as a trade-mark for another party. *Lee & Shepard, ex parte*, 24 O. G. 1271.

Where a new mark is likely to deceive purchasers on account of resemblance to one already registered, it should be rejected as the benefit of the doubt should be in favor of owner of registered mark. *Lefebvre, ex parte*, 96 O. G. 841.

Trade-mark "cascarine," on medicine, registered 14 July, 1885, on application in good faith by Iler & Morris of 2 June, 1885. Although Leprince had used it prior to that time in Europe, but not in this country, such use did not give him any rights here in anticipation of registrants. *Leprince* v. *Iler & Morris*, 92 O. G. 189. *But see*: *Luyties* v. *Hollander*, 30 Fed. R. 632, 110.

"Fancy Goods" too general in its designation of class of goods to allow registration of trade-mark. *Lisner's Appeal*, 13 O. G. 455.

Specimens of mark should correspond to drawings. *Listman Mill Co., ex parte*, 119 O. G. 340.

Where it is shown that a mark has been abandoned, a new mark which otherwise would have infringed may be allowed registration. *MacDonald, ex parte*, 85 O. G. 150.

The word "Ceroleum" with words "Dirt Proof Floor Dressing" printed across the face of it, involving only expert skill in type-setting, not registrable on a label, not being artistic. *Miller, ex parte*, 96 O. G. 1855.

An alternative trade-mark may be allowed where the word and the picture are true alternatives, and not otherwise. The words "American Beauty" and a picture of a rose which does not clearly appear to belong to that species not true alternatives in application for registration of trade-mark for corsets. *Muir, ex parte*, 87 O. G. 357.

A refusal of examiner to enter judgment of priority is not appealable, as such a decision does not amount to final judgment. *Mulligan* v. *Tempest Sabre Co.*, 119 O. G. 1924.

"Arrangement of two panels, one in red and one in blue, each bearing a shield and other symbolical devices" is not subject of

registration as a label, but might be as a trade-mark. *National United States Stamp Delivery Co.*, 60 O. G. 893.

"Pictorial representation descriptive of the hammock to which the label applies," proper subject of registration for a label. *Palmer, ex parte*, 58 O. G. 383.

When applicant sought to register as trade-mark for shoes the representation of a shoe and the words "The Greatest Value for the Money" the words are not the essential feature of the mark and should not be registered. *Parker Holmes & Co.*, 85 O. G. 287.

"Peerless" refused registration on malt extract, as being descriptive. *Paragon Malt Extract Co., ex parte*, 121 O. G. 690.

An application for alternative trade-mark "Corn" and representation of a kernel of corn, must be accompanied by *fac-simile* of both word and representation. *Peper, ex parte*, 16 O. G. 678.

Refusal to register one mark for "leather" is a final decision and appealable. *Pfister & Vogel Leather Co., ex parte*, 118 O. G. 2250.

Registration allowed a German citizen of a word under provisions of Article XVII of the Convention of December 11, 1871, according mutual privileges to citizens of the two countries. *Portland Cement Co., ex parte*, 64 O. G. 858.

"Iron-stone," on drain pipe arranged in a curved line, descriptive, and not registrable.

"I do not concede the general proposition that geometric figures can always be registered. Simple circles, ellipses, scrolls, borders, and the like, marked in plain outline, are commonly employed in the trade as enclosures for trade or descriptive names and for terms designating quality, place of manufacture, and other information appropriate to particular classes of goods." *Ruder & Co.*, 13 O. G. 596.

A label to be registrable under the act "must not only possess artistic merit, but it must be descriptive of the article for which it is used.

"The alleged label in this case is said by the applicant to be for music-boxes; but the label itself does not indicate this. It is merely an arbitrary ornamental design having the word 'Regina' thereon, and might very appropriately be used as a trade-mark for various articles." *Regina Music Box Co., ex parte*, 100 O. G. 1112.

Registration of a mark is evidence of what a party claimed as a trade-mark, and representation of red anchor in an oval space

is not same as the word "anchor" and symbol of anchor on proprietary medicines. *Richter* v. *Reynolds*, 59 Fed. R. 577; affirming 52 Fed. R. 445.

Where one assigns all his rights in a new means for treating diseases which he claims to have discovered to a corporation, and thereafter assents to the use of the trade-mark applied to the instrument called "Electropoise," he is held, in a contest between him and the corporation, to have surrendered all his rights. *Sanche* v. *Electrolibation Co.*, 60 O. G. 1189.

An applicant for registration, relying on commerce with Indian tribes, must specify on oath the tribe or tribes. *Schotten & Co., ex parte*, 60 O. G. 576.

Mandamus will not lie to compel the Commissioner of Patents to register a trade-mark which he considers invalid. *Seymour* v. *So. Carolina*, 66 O. G. 1167; *Bronson Company* v. *Duell*, 93 O. G. 1491; *Buffalo Pitts Co.* v. *Duell*, 93 O. G. 1491.

The applicant is not barred from showing a date of adoption prior to that alleged in statement, and the office can consider it in view of the circumstances of the case. *Sherwood* v. *Horton Cato & Co.*, 84 O. G. 2018.

No appeal lies from a decision of Examiner of Trade-marks holding that a party is entitled to registration of a trade-mark. *Sibley Soap Co.* v. *Lambert Pharmacal Co.*, 103 O. G. 2172.

"Pearlicross," allowed registration, but the applicant must not state what changes may be made in the mark without destroying its identity, as it is superfluous and usurps the function of courts. *Small, ex parte*, 101 O. G. 219.

Where party claimed right under registration to mark of a crown as to paints as a class of merchandise, when others had acquired that right as to certain kinds of paints, his claim as a whole was invalid.

"The plaintiffs have not restricted themselves to any particular description of goods comprised in such class. Their registration must stand or fall as a whole, for that to which they declare, in their registration, they intend to appropriate it. There is no provision in regard to trade-marks, such as there has been and is in regard to patents for inventions, that a suit may be maintained where the grant is valid as to a part, but not as to the whole. It follows, therefore, that the registration of this trade-mark, in the form in which it was made, conferred no right on the plaintiffs, in respect to anything purporting to be covered by it." *Smith* v. *Reynolds*, 10 Blatchf. 100, 108.

But see: Smith v. *Reynolds*, 13 Blatchf. 458; IV. 4, 95.

A flag of the United States with a diagonal band bearing word "Standard," stars distributed about the flag, the whole enclosed by two concentric circles between which appear words "Standard Fashion Company, New York," not registrable as trade-mark for patterns for garments. The words and circles not being essential features should be stricken out. *Standard Fashion Co., ex parte*, 89 O. G. 189.

"Eclipse," alone as a trade-mark for paints will not be registered where it appears that the word has been actually used in conjunction with a picture of the sun in eclipse, and is only one feature of the mark. *Standard Underground Cable Co., ex parte*, 119 O. G. 1925.

Registration under act of 1881 not invalidated by act of 1905, and is still *prima facie* evidence. An anticipating mark under that act will bar a subsequent applicant under the new law. "Star," for whiskey, anticipated. *Star Distillery Co., ex parte*, 119 O. G. 964.

The descriptive word "Lotion" cannot be registered as part of a trade-mark associated with arbitrary symbols. *Star Lotion Remedy Co., ex parte*, 100 O. G. 2603.

Fac-simile signature of deceased physician and his picture cannot be adopted by a druggist after his death who had only filled his prescriptions, but a partner who had been engaged in business of dispensing medicines with him might be entitled to them. *Stewart* v. *Einstein* v. *Sawhill*, 64 O. G. 1533.

Registration of the word symbol "rabbit," or representation of a rabbit allowed under drawing of a head of a rabbit for fabrics. *Taylor & Lockett, ex parte*, 93 O. G. 2531.

Registration refused the word "Velvril," as it is descriptive of a nitro-cellulose compound protected by a patent, and would become public property at expiration of patent long before the 30 years allowed under registration. *Velvril Co., ex parte*, 84 O. G. 807.

Where there is erroneous publication of a trade-mark in Official Gazette there should be a republication. *Weil-Haskell Co.* v. *Griffon Co.*, 119 O. G. 649.

Where owner of trade-mark "Velvet Skin," on laundry soap assents in writing to registration of "Velva," on toilet soap, the office still will refuse registration.

"The right to registration cannot be conferred by a license from the real owner, since the law authorizes registration by

the owner alone. *Willard Chemical Co., ex parte*, 107 O. G. 1972.

3. Interference.

Testimony may be offered at interference proceedings to show an adoption prior to date set out in declaration at time of application.

An amendment will not be allowed pending interference proceedings. *Broderick & Bascom Rope Co.* v. *Leschen & Sons Rope Co.*, 100 O. G. 3011.

In interference proceedings the *prima facie* case of a registrant without witnesses is overcome by evidence of applicant by several witnesses, that the mark in issue was extensively used long before the date set out in certificate of registration. *Canepa* v. *Boehm*, 117 O. G. 2089.

A party defeated in interference proceedings in case of a trade-mark, has not the right to be subsequently heard on an allegation that same mark has been used by a third party. Patent law in reference to two years' prior use not applicable, as prior use by public may not give right of trade-mark to public, and as any individual injured may interfere. *Dietz, in re*, 104 O. G. 852.

A party is bound in an interference proceeding by the statement in a trade-mark application as to date of adoption and use, and cannot prove adoption and use prior to that date. *Empire Cycle Co.* v. *Monarch Cycle Mnfg. Co.* v. *Meacham Arms Co.*, 82 O. G. 1689.

Rights under a registered trade-mark may be assigned and an assignee notified according to rule 103 in patent applications may, on proper request, come in and take charge in interference proceedings. It is not necessary for the assignee to re-register mark in his own name. Same practice should be followed in assignments as in patent cases. (Earlier cases overruled.) *Frank* v. *Macwilliam*, 114 O. G. 542.

No preliminary statements are required in trade-mark interferences, as statements in application for trade-marks are sufficient.

While a party in interference proceedings can prove an earlier date than that set out in the application, such proof must be clear and convincing. *Gem Cutlery Co.* v. *Leach*, 114 O. G. 2089.

Burden of proof in interference proceeding is on applicant as

against registrant in trade-mark cases. An applicant must establish his own title, and not seek to merely impeach title of registrant. *Giles Remedy Co.* v. *Giles*, 117 O. G. 2634.

In interference proceedings the subsequent applicant has the burden of proof as against a prior registrant. If he cannot show priority of use, he must show abandonment, and that is not met by cessation of business for a few months due to strikes and there is intention to resume. *Goldsmith* v. *United Shirt Vest Co.*, 119 O. G. 1261.

There can be no interference proceeding between trade-marks both of which arose under Act of 1881. The applications should be amended under Sect. 24 of Act of 1905 so as to bring them within the scope of the latter act. *Graham* v. *Norddeutsche Wollkammereind Kammgarnspinnerei*, 116 O. G. 1735.

Newly discovered evidence as ground for remanding a case in an interference for taking testimony largely a matter of discretion. *Igleheart Bros.* v. *Houston, Meeks & Co.*, 86 O. G. 631; *Igleheart Bros.* v. *Land*, 86 O. G. 632.

A refusal of a witness to answer certain material questions in an interference proceeding will be considered and given its due weight at final hearing. *Independent Baking Powder Co.* v. *Fidelity Mnfg. Co.*, 94 O. G. 222.

Where it appears in interference proceedings that two persons are entitled to use of a mark as a trade-mark, registration will be granted to neither. *Langdon & Batcheller, ex parte*, 61 O. G. 286.

In an interference between the applicant and registrant of a trade-mark, the burden of proof is on applicant to overcome *prima facie* evidence of ownership. *Manitomac Mnfg. Co.* v. *Dickerman*, 57 O. G. 1721.

Notice of opposition to registration of trade-mark must be signed and sworn to by the party injured, not by the attorney, and the signature and oath of attorney cannot be subsequently ratified after the thirty days. *Martin* v. *Martin & Bowne Co.*, 119 O. G. 962.

Motions for dissolution of interferences should be heard by the Examiner of Trade-marks. *Robert Smith Ale Brewing Co.* v. *Beadleston*, 119 O. G. 341.

A party to a trade-mark interference is not restricted to the date of adoption and use set up in the application, but he may introduce testimony to show a date of adoption and use prior thereto. *Sibley Soap Co.* v. *Lambert Pharmacal Co.*, 103 O. G. 2172.

Proceedings on interference under act of 1881 should be finally decided under act of 1905 passed during their pendency. *Silver Lake Co.* v. *Samson Cordage Works*, 116 O. G. 2010.

Priority of use, not necessarily ownership, entitles a party to registration in question of interference. The question of right by ownership may afterwards be settled by *ex parte* proceedings. *Sroufe & Co.* v. *Crown Distilleries Co.*, 97 O. G. 1836.

Date of adoption and use of trade-mark alleged in interfering applications for the registration of a trade-mark is not conclusive; it is to be determined according to the facts and not according to what applicant considers to be the fact. "Adoption and use" of a trade-mark necessarily depend upon the extent to which merchandise with the said trade-mark affixed thereon has been actually sold. (*See Schneider* v. *Williams*, C. D. 1888, 606; *Proctor & Gamble* v. *Columbia Mnfg. Co.*, 44 Ms. Dec. 300.) *Stewart* v. *Einstein* v. *Sawhill*, 61 O. G. 287.

No appeal lies from Examiner who dissolves an interference on the ground that respective parties have no right to make the claims. *Story* v. *Criswell*, 100 O. G. 683.

Rule 13 stating "each applicant and registrant will be held to the date of adoption alleged in the statement filed with his application" is not inconsistent with law and has force of a statute. *Stuart Medicine Co.* v. *Goldaine*, 64 O. G. 1005.

Payment of fee necessary in filing notice of opposition. Where fee is paid after thirty days after publication it is too late and the Commissioner has no authority to extend the time. *Wagner & Sons* v. *Thixton Millet & Co.*, 121 O. G. 690.

Publication of a mark should precede interference proceedings. *Walter Baker & Co. Ltd.* v. *Hawley*, 119 O. G. 653.

No appeal lies on action of Examiner in overruling exceptions to respondent's answer on interference proceedings in trade-marks. *Whittingham* v. *Automatic Switch Co.*, 120 O. G. 659.

The Office cannot entertain notice of opposition 30 days after publication of mark. *Winand* v. *P. J. Drury Co.*, 120 O. G. 2126.

An interference proceeding will not be dissolved where parties agree, if the Office considers that the marks are substantially the same. *Wright* v. *Blumenthal* v. *Mayer* v. *Cushman*, 119 O. G. 2234.

ADDENDA.

A diamond-shaped pattern formed by intersecting diagonal lines on horse shoes held not a trade-mark where not shown to be adopted for the purpose of indicating origin, and not to have come to indicate it by association. Evidence that the nails were never called "Check Mark Nails," that packages were marked with complainant's real trade-mark, name, and address, and that complainant's witness testified that the mark was adopted for betterment of appearance as well as to show origin, all material. Protection refused. *Capewell Horse Nail Co.* v. *Putnam Nail Co.*, 140 Fed. R. 670.

"In Curve" corsets. *Kops Brothers, ex parte*, 121 O. G. 1675.

"Auburn-Lynn," although composed of name of city "Auburn," and of manufacturer "Lynn," is nevertheless good trade-mark, and Lynn has no right to form another corporation with that name. *W. R. Lynn Shoe Co.* v. *Auburn-Lynn Shoe Co.*, 62 Atl. R. 499.

An interference will be dissolved on proof that the mark in issue was registered by a third party over 30 years ago, in 1871, under the unconstitutional act of 1870, and the remedy would be to show by affidavits that the registrant is not still owner. *Schneider* v. *Union Distilling Co.*, 121 O. G. 1676.

Where it is apparent that an interference exists, it will not be dissolved even by agreement of parties. *Windsor Milling & Elevator Co.* v. *Brunner*, 121 O. G. 1676.

APPENDIX

TRADE-MARK LAW OF THE UNITED STATES.

AN ACT To authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the owner of a trade-mark used in commerce with foreign nations, or among the several States, or with Indian tribes, provided such owner shall be domiciled within the territory of the United States, or resides in or is located in any foreign country which, by treaty, convention, or law, affords similar privileges to the citizens of the United States, may obtain registration for such trade-mark by complying with the following requirements: First by filing in the Patent Office an application therefor, in writing, addressed to the Commissioner of Patents, signed by the applicant, specifying his name, domicile, location, and citizenship; the class of merchandise and the particular description of goods comprised in such class to which the trade-mark is appropriated; a description of the trade-mark itself, and a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trade-mark has been used. With this statement shall be filed a drawing of the trade-mark, signed by the applicant, or his attorney, and such number of specimens of the trade-mark, as actually used, as may be required by the Commissioner of Patents. Second, by paying into the Treasury of the United States the sum of ten dollars, and otherwise complying with the requirements of this Act and such regulations as may be prescribed by the Commissioner of Patents.

SEC. 2. That the application prescribed in the foregoing section, in order to create any right whatever in favor of the party filing it, must be accompanied by a written declaration verified by the applicant, or by a member of the firm or an officer of the corporation or association applying, to the effect that the applicant believes himself or the firm, corporation, or association in whose behalf he makes the application to be the owner of the

trade-mark sought to be registered, and that no other person, firm, corporation, or association, to the best of the applicant's knowledge and belief, has the right to such use, either in the identical form or in such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in commerce among the several States, or with foreign nations, or with Indian tribes, and that the description and drawing presented truly represent the trade-mark sought to be registered. If the applicant resides or is located in a foreign country, the statement required shall, in addition to the foregoing, set forth that the trade-mark has been registered by the applicant, or that an application for the registration thereof has been filed by him in the foreign country in which he resides or is located, and shall give the date of such registration, or the application therefor, as the case may be, except that in the application in such cases it shall not be necessary to state that the mark has been used in commerce with the United States or among the States thereof. The verification required by this section may be made before any person within the United States authorized by law to administer oaths, or, when the applicant resides in a foreign country, before any minister, chargé d'affaires, consul, or commercial agent holding commission under the Government of the United States, or before any notary public, judge, or magistrate having an official seal and authorized to administer oaths in the foreign country in which the applicant may be whose authority shall be proved by a certificate of a diplomatic or consular officer of the United States.

SEC. 3. That every applicant for registration of a trade-mark, or for renewal of registration of a trade-mark, who is not domiciled within the United States, shall, before the issuance of the certificate of registration, as hereinafter provided for, designate, by a notice in writing, filed in the Patent Office, some person residing within the United States on whom process or notice of proceedings affecting the right of ownership of the trade-mark of which such applicant may claim to be the owner, brought under the provisions of this Act or under other laws of the United States, may be served, with the same force and effect as if served upon the applicant or registrant in person. For the purposes of this Act it shall be deemed sufficient to serve such notice upon such applicant, registrant, or representative by leaving a copy of such process or notice addressed to him at the last address of which the Commissioner of Patents has been notified.

SEC. 4. That an application for registration of a trade-mark filed in this country by any person who has previously regularly filed in any foreign country which, by treaty, convention, or law, affords similar privileges to citizens of the United States an application for registration of the same trade-mark shall be accorded the same force and effect as would be accorded to the same application if filed in this country on the date on which application for registration of the same trade-mark was first filed in such foreign country: *Provided*, That such application is filed in this country within four months from the date on which the application was first filed in such foreign country: *And provided*, That certificate of registration shall not be issued for any mark for registration of which application has been filed by an applicant located in a foreign country until such mark has been actually registered by the applicant in the country in which he is located.

SEC. 5. That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark —

(a) Consists of or comprises immoral or scandalous matter;

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any State or municipality, or of any foreign nation: *Provided*, That trade-marks which are identical with a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be registered: *Provided*, That no mark which consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual, or merely in words, or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this Act: *Provided further*, That no portrait of a living individual may be registered as a trade-mark, except by the consent of such individual, evidenced by an instrument in writing: *And provided further*, That nothing herein shall prevent

the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of this Act.

SEC. 6. That on the filing of an application for registration of a trade-mark which complies with the requirements of this Act, and the payment of the fees herein provided for, the Commissioner of Patents shall cause an examination thereof to be made; and if on such examination it shall appear that the applicant is entitled to have his trade-mark registered under the provisions of this Act, the Commissioner shall cause the mark to be published at least once in the Official Gazette of the Patent Office. Any person who believes he would be damaged by the registration of a mark may oppose the same by filing notice of opposition, stating the grounds therefor, in the Patent Office within thirty days after the publication of the mark sought to be registered, which said notice of opposition shall be verified by the person filing the same before one of the officers mentioned in section two of this Act. If no notice of opposition is filed within said time the Commissioner shall issue a certificate of registration therefor, as hereinafter provided for. If on examination an application is refused, the Commissioner shall notify the applicant, giving him his reasons therefor.

SEC. 7. That in all cases where notice of opposition has been filed the Commissioner of Patents shall notify the applicant thereof and the grounds therefor.

Whenever application is made for the registration of a trade-mark which is substantially identical with a trade-mark appropriated to goods of the same descriptive properties, for which a certificate of registration has been previously issued to another, or for registration of which another has previously made application, or which so nearly resembles such trade-mark, or a known trade-mark owned and used by another, as, in the opinion of the Commissioner, to be likely to be mistaken therefor by the public, he may declare that an interference exists as to such trade-mark, and in every case of interference or opposition to registration he shall direct the examiner in charge of interferences to determine the question of the right of registration to such trade-mark, and of the sufficiency of objections to registration, in such manner

and upon such notice to those interested as the Commissioner may by rules prescribe.

The Commissioner may refuse to register the mark against the registration of which objection is filed, or may refuse to register both of two interfering marks, or may register the mark, as a trade-mark, for the person first to adopt and use the mark, if otherwise entitled to register the same, unless an appeal is taken, as hereinafter provided for, from his decision, by a party interested in the proceeding, within such time (not less than twenty days) as the Commissioner may prescribe.

SEC. 8. That every applicant for the registration of a trade-mark, or for the renewal of the registration of a trade-mark, which application is refused, or a party to an interference against whom a decision has been rendered, or a party who has filed a notice of opposition as to a trade-mark, may appeal from the decision of the examiner in charge of trade-marks, or the examiner in charge of interferences, as the case may be, to the Commissioner in person, having once paid the fee for such appeal.

SEC. 9. That if an applicant for registration of a trade-mark, or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark, or party to an application for the cancellation of the registration of a trade-mark, is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the court of appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable.

SEC. 10. That every registered trade-mark, and every mark for the registration of which application has been made, together with the application for registration of the same, shall be assignable in connection with the good will of the business in which the mark is used. Such assignment must be by an instrument in writing and duly acknowledged according to the laws of the country or State in which the same is executed; any such assignment shall be void as against any subsequent purchaser for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from date thereof. The Commissioner shall keep a record of such assignments.

SEC. 11. That certificates of registration of trade-marks shall be issued in the name of the United States of America, under

the seal of the Patent Office, and shall be signed by the Commissioner of Patents, and a record thereof, together with printed copies of the drawing and statement of the applicant, shall be kept in books for that purpose. The certificate shall state the date on which the application for registration was received in the Patent Office. Certificates of registration of trade-marks may be issued to the assignee of the applicant, but the assignment must first be entered of record in the Patent Office.

Written or printed copies of any records, books, papers, or drawings relating to trade-marks belonging to the Patent Office, and of certificates of registration, authenticated by the seal of the Patent Office and certified by the Commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor and paying the fee required by law shall have certified copies thereof.

SEC. 12. That a certificate of registration shall remain in force for twenty years, except that in the case of trade-marks previously registered in a foreign country such certificates shall cease to be in force on the day on which the trade-mark ceases to be protected in such foreign country, and shall in no case remain in force more than twenty years, unless renewed. Certificates of registration may be, from time to time, renewed for like periods on payment of the renewal fees required by this Act, upon request by the registrant, his legal representatives, or transferees of record in the Patent Office, and such request may be made at any time not more than six months prior to the expiration of the period for which the certificates of registration were issued or renewed. Certificates of registration in force at the date at which this Act takes effect shall remain in force for the period for which they were issued, but shall be renewable on the same conditions and for the same periods as certificates issued under the provisions of this Act, and when so renewed shall have the same force and effect as certificates issued under this Act.

SEC. 13. That whenever any person shall deem himself injured by the registration of a trade-mark in the Patent Office he may at any time apply to the Commissioner of Patents to cancel the registration thereof. The Commissioner shall refer such application to the examiner in charge of interferences, who is empowered to hear and determine this question and who shall give notice thereof to the registrant. If it appear after a hearing before the examiner that the registrant was not entitled to the use of the mark at the date of his application for registration

thereof, or that the mark is not used by the registrant, or has been abandoned, and the examiner shall so decide, the Commissioner shall cancel the registration. Appeal may be taken to the Commissioner in person from the decision of examiner of interferences.

SEC. 14. That the following shall be the rates for trade-mark fees:

On filing each original application for registration of a trade-mark, ten dollars: *Provided*, That an application for registration of a trade-mark pending at the date of the passage of this Act, and on which certificate of registration shall not have issued at such date, may, at the option of the applicant, be proceeded with and registered under the provisions of this Act without the payment of further fee.

On filing each application for renewal of the registration of a trade-mark, ten dollars.

On filing notice of opposition to the registration of a trade-mark, ten dollars.

On an appeal from the examiner in charge of trade-marks to the Commissioner of Patents, fifteen dollars.

On an appeal from the decision of the examiner in charge of interferences, awarding ownership of a trade-mark or canceling the registration of a trade-mark, to the Commissioner of Patents, fifteen dollars.

For certified and uncertified copies of certificates of registration and other papers, and for recording transfers and other papers, the same fees as required by law for such copies of patents and for recording assignments and other papers relating to patents.

SEC. 15. That sections forty-nine hundred and thirty-five and forty-nine hundred and thirty-six of the Revised Statutes, relating to the payment of patent fees and to the repayment of fees paid by mistake, are hereby made applicable to trade-mark fees.

SEC. 16. That the registration of a trade-mark under the provisions of this Act shall be prima facie evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise

of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.

SEC. 17. That the circuit and territorial courts of the United States and the supreme court of the District of Columbia shall have original jurisdiction, and the circuit courts of appeal of the United States and the court of appeals of the District of Columbia shall have appellate jurisdiction of all suits at law or in equity respecting trade-marks registered in accordance with the provisions of this Act, arising under the present Act, without regard to the amount in controversy.

SEC. 18. That writs of certiorari may be granted by the Supreme Court of the United States for the review of cases arising under this Act in the same manner as provided for patent cases by the Act creating the circuit court of appeals.

SEC. 19. That the several courts vested with jurisdiction of cases arising under the present Act shall have power to grant injunctions, according to the course and principles of equity, to prevent the violation of any right of the owner of a trade-mark registered under this Act, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for wrongful use of a trade-mark the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction. The court shall have the same power to increase such damages, in its discretion, as is given by section sixteen of this Act for increasing damages found by verdict in actions of law; and in assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost which are claimed.

SEC. 20. That in any case involving the right to a trade-mark registered in accordance with the provisions of this Act, in which the verdict has been found for the plaintiff, or an injunction

issued, the court may order that all labels, signs, prints, packages, wrappers, or receptacles in the possession of the defendant, bearing the trade-mark of the plaintiff or complainant, or any reproduction, counterfeit, copy, or colorable imitation thereof, shall be delivered up and destroyed. . Any injunction that may be granted upon hearing, after notice to the defendant, to prevent the violation of any right of the owner of a trade-mark registered in accordance with the provisions of this Act, by any circuit court of the United States, or by a judge thereof, may be served on the parties against whom such injunction may be granted anywhere in the United States where they may be found, and shall be operative, and may be enforced by proceedings to punish for contempt, or otherwise, by the court by which such injunction was granted, or by any other circuit court, or judge thereof, in the United States, or by the supreme court of the District of Columbia, or a judge thereof. The said courts, or judges thereof, shall have jurisdiction to enforce said injunction, as herein provided, as fully as if the injunction had been granted by the circuit court in which it is sought to be enforced. The clerk of the court or judge granting the injunction shall, when required to do so by the court before which application to enforce said injunction is made, transfer without delay to said court a certified copy of all the papers on which the said injunction was granted that are on file in his office.

SEC. 21. That no action or suit shall be maintained under the provisions of this Act in any case when the trade-mark is used in unlawful business, or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or has been abandoned, or upon any certificate of registration fraudulently obtained.

SEC. 22. That whenever there are interfering registered trade-marks, any person interested in any one of them may have relief against the interfering registrant, and all persons interested under him, by suit in equity against the said registrant; and the court, on notice to adverse parties and other due proceedings had according to the course of equity, may adjudge and declare either of the registrations void in whole or in part according to the interest of the parties in the trade-mark, and may order the certificate of registration to be delivered up to the Commissioner of Patents for cancellation.

SEC. 23. That nothing in this Act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party

aggrieved by any wrongful use of any trade-mark might have had if the provisions of this Act had not been passed.

SEC. 24. That all applications for registration pending in the office of the Commissioner of Patents at the time of the passage of this Act may be amended with a view to bringing them, and the certificate issued upon such applications, under its provisions, and the prosecution of such applications may be proceeded with under the provisions of this Act.

SEC. 25. That any person who shall procure registration of a trade-mark, or entry thereof, in the office of the Commissioner of Patents by a false or fraudulent declaration or representation, oral or in writing, or by any false means, shall be liable to pay any damages sustained in consequence thereof to the injured party, to be recovered by an action on the case.

SEC. 26. That the Commissioner of Patents is authorized to make rules and regulations, not inconsistent with law, for the conduct of proceedings in reference to the registration of trade-marks provided for by this Act.

SEC. 27. That no article of imported merchandise which shall copy or simulate the name of any domestic manufacture, or manufacturer or trader, or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States, or which shall copy or simulate a trade-mark registered in accordance with the provisions of this Act, or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured, shall be admitted to entry at any custom-house of the United States; and, in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer or trader, and any foreign manufacturer or trader, who is entitled under the provisions of a treaty, convention, declaration, or agreement between the United States and any foreign country to the advantages afforded by law to citizens of the United States in respect to trade-marks and commercial names, may require his name and residence, and the name of the locality in which his goods are manufactured, and a copy of the certificate of registration of his trade-mark, issued in accordance with the provisions of this Act, to be recorded in books which shall be kept for this purpose in the Department of the Treasury, under such regulations as the Secretary of the

Treasury shall prescribe, and may furnish to the Department facsimiles of his name, the name of the locality in which his goods are manufactured, or of his registered trade-mark; and thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of customs.

SEC. 28. That it shall be the duty of the registrant to give notice to the public that a trade-mark is registered, either by affixing thereon the words "Registered in U. S. Patent Office," or abbreviated thus, "Reg. U. S. Pat. Off.," or when, from the character or size of the trade-mark, or from its manner of attachment to the article to which it is appropriated, this can not be done, then by affixing a label containing a like notice to the package or receptacle wherein the article or articles are inclosed; and in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice.

SEC. 29. That in construing this Act the following rules must be observed, except where the contrary intent is plainly apparent from the context thereof: The United States includes and embraces all territory which is under the jurisdiction and control of the United States. The word "States" includes and embraces the District of Columbia, the Territories of the United States, and such other territory as shall be under the jurisdiction and control of the United States. The terms "person" and "owner," and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this Act, include a firm, corporation, or association as well as a natural person. The term "applicant" and "registrant" embrace the successors and assigns of such applicant or registrant. The term "trade-mark" includes any mark which is entitled to registration under the terms of this Act and whether registered or not, and a trade-mark shall be deemed to be "affixed" to an article when it is placed in any manner in or upon either the article itself or the receptacle or package or upon the envelope or other thing in, by, or with which the goods are packed or inclosed or otherwise prepared for sale or distribution.

SEC. 30. That this Act shall be in force and take effect April first, nineteen hundred and five. All Acts and parts of Acts inconsistent with this Act are hereby repealed except so far as the same may apply to certificates of registration issued under

the Act of Congress approved March third, eighteen hundred and eighty-one, entitled "An Act to authorize the registration of trade-marks and protect the same," or under the Act approved August fifth, eighteen hundred and eighty-two, entitled "An Act relating to the registration of trade-marks."

Approved, February 20, 1905.

An Act to Amend the Laws of the United States Relating to the Registration of Trade-Marks

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of the Act entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States, or with Indian tribes, and to protect the same," approved February twentieth, nineteen hundred and five, be, and is hereby, amended by inserting after the words "description of the trade-mark itself," the words "only when needed to express colors not shown in the drawing," so that the section, as amended, shall read as follows:

"That the owner of a trade-mark used in commerce with foreign nations, or among the several States, or with Indian tribes, provided such owner shall be domiciled within the territory of the United States or resides in or is located in any foreign country which, by treaty, convention, or law affords similar privileges to the citizens of the United States, may obtain registration for such trade-mark by complying with the following requirements: First, by filing in the Patent Office an application therefor, in writing, addressed to the Commissioner of Patents, signed by the applicant, specifying his name, domicile, location, and citizenship; the class of merchandise and the particular description of goods comprised in such class to which the trade-mark is appropriated; a description of the trade-mark itself, only when needed to express colors not shown in the drawing, and a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trade-mark has been used. With this statement shall be filed a drawing of the trade-mark, signed by the applicant, or his attorney, and such number of specimens of the trade-mark as actually used as may be required by the Commissioner of Patents. Second, by paying into the Treasury of the United States the sum of ten dollars, and otherwise complying with the requirements of this Act and such regulations as may be prescribed by the Commissioner of Patents."

Sec. 2. That the Commissioner of Patents shall establish classes of merchandise for the purpose of trade-mark registration, and shall determine the particular descriptions of goods comprised in each class. On a single application for registration of a trade-mark the trade-mark may be registered at the option of the applicant for any or all goods upon which the mark has actually been used comprised in a single class of merchandise, provided the particular descriptions of goods be stated.

Sec. 3. That any owner of a trade-mark who shall have a manufacturing establishment within the territory of the United States shall be accorded, so far as the registration and protection of trade-marks used on the products of such establishment are concerned, the same rights and privileges that are accorded to owners of trade-marks domiciled within the territory of the United States by the Act entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same," approved February twentieth, nineteen hundred and five.

Sec. 4. That this Act shall take effect July first, nineteen hundred and six.

Approved, May 4, 1906.

RULES GOVERNING THE REGISTRATION OF TRADE-MARKS UNDER THE ACT APPROVED FEBRUARY 20, 1905, TO TAKE EFFECT APRIL 1, 1905.

UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., April 1, 1905.

The following rules, designed to be in strict accordance with the provisions of the act approved February 20, 1905, for the registration of trade-marks, are published for gratuitous distribution.

Applicants for registration and their attorneys are advised that their business will be facilitated by the observance of the forms on pages [371–376].

FREDERICK I. ALLEN,
Commissioner of Patents.

CORRESPONDENCE.

1. All business with the Office should be transacted in writing. Unless by the consent of all parties, the action of the Office will be based exclusively on the written record. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.

2. Applicants and attorneys will be required to conduct their business with the Office with decorum and courtesy. Papers presented in violation of this requirement will be returned; but all such papers will first be submitted to the Commissioner, and only be returned by his direct order.

3. All letters should be addressed to "The Commissioner of Patents;" and all remittances by money order, check, or draft should be to his order.

4. A separate letter should, in every case, be written in relation to each distinct subject of inquiry or application. Complaints against the examiner in charge of trade-marks, assignments for record, fees, and orders for copies or abstracts must be sent to the Office in separate letters.

5. Letters relating to pending applications should refer to the name of the applicant, the serial number of the application, and the date of filing. Letters relating to registered trade-marks should refer to the name of the registrant, the number and date of the certificate, and the merchandise to which the trade-mark is applied.

6. The personal attendance of applicants at the Patent Office is unnecessary. Their business can be transacted by correspondence.

7. When an attorney shall have filed his power of attorney duly executed, the correspondence will be held with him.

8. A double correspondence with an applicant and his attorney, or with two attorneys, can not generally be allowed.

9. The Office can not undertake to respond to inquiries propounded with a view to ascertain whether certain trade-marks have been registered, or, if so, to whom, or for what goods; nor can it give advice as to the nature and extent of the protection afforded by the law, or act as its expounder, except as questions may arise upon applications regularly filed.

10. Express, freight, postage, and all other charges on matter sent to the Patent Office must be prepaid in full; otherwise it will not be received.

ATTORNEYS.

11. An applicant or an assignee of the entire interest may prosecute his own case, but he is advised, unless familiar with such matters, to employ a competent attorney. The Office can not aid in the selection of any attorney.

A register of attorneys is kept in this Office, on which will be entered the names of all persons entitled to represent applicants before the Patent Office. The names of persons in the following classes will, upon their written request, be entered on this register:

(*a*) Any person who, on June 18, 1897, was engaged as attorney or agent in the active prosecution of applications for patent before this Office, or had been so engaged at any time within five years prior thereto and is not disbarred, or is or was during such period a member of a firm so engaged and not disbarred, provided that such person shall, if required, furnish information as to one or more applications for patents so prosecuted by him.

(*b*) Any attorney at law who is in good standing in any court of record in the United States or any of the States or Territories thereof and shall furnish a certificate of the clerk of such United States, State, or Territorial court, duly authenticated under the seal of the court, that he is an attorney in good standing.

(*c*) Any person who has been regularly recognized as an attorney or agent to represent claimants before the Department of the Interior, or any bureau thereof, and is in good standing, provided that such person shall furnish a statement of the date of his admission to practice as such attorney or agent, and shall further show, if required by the Commissioner, that he is possessed of the necessary qualifications to render applicants valuable service, and is otherwise competent to advise and assist them in the presentation and prosecution of their applications before the Patent Office.

(*d*) Any person not an attorney at law who shall file a certificate from a judge of a United States, State, or Territorial court, duly

authenticated under the seal of the court, that such person is of good moral character and of good repute and possessed of the necessary qualifications to enable him to render applicants valuable service, and is otherwise competent to advise and assist them in the presentation and prosecution of their applications before the Patent Office.

(*e*) Any firm which, on June 18, 1897, was engaged in the active prosecution, as attorneys or agents, of applications for patents before the Patent Office, or had been so engaged at any time within five years prior thereto, provided such firm or any member thereof is not disbarred, provided the names of the individuals composing the firm are stated, and provided also, that such firm shall, if required, furnish information as to one or more applications prosecuted before the Patent Office by them.

(*f*) Any firm, not entitled to registration under the preceding sections, which shall show that the individuals composing the firm are each and all recognized as patent attorneys or agents, or are each and all entitled to be so recognized under the preceding sections of this rule.

The Commissioner may demand additional proof of qualifications, and reserves the *right to decline to recognize any attorney, agent,* or other person applying for registration under this rule.

Any person or firm, not registered and not entitled to be recognized under this rule as an attorney or agent to represent applicants generally, may, upon a showing of circumstances which render it necessary or justifiable, be recognized by the Commissioner to prosecute as attorney or agent any certain specified application or applications, but this limited recognition shall not extend further than the application or applications named.

No person, not registered as above provided, will be permitted to prosecute, as attorney, applications before the Patent Office.

12. Before any attorney, original or associate, will be allowed to inspect papers or take action of any kind, his power of attorney must be filed. General powers given by a principal to an associate can not be considered. In each application the written authorization must be filed. A power of attorney purporting to have been given to a firm or copartnership will not be recognized, either in favor of the firm or of any of its members, unless all its members shall be named in such power of attorney.

13. Substitution or association may be made by an attorney upon the written authorization of his principal; but such authorization will not empower the second attorney to appoint a third.

14. Powers of attorney may be revoked at any stage in the proceedings of a case upon application to and approval by the Commissioner; and, when so revoked, the Office will communicate directly with the applicant, or such other attorney as he may appoint. An attorney will be promptly notified by the docket clerk of the revocation of his power of attorney.

15. For gross misconduct, the Commissioner may refuse to recognize any person as an attorney, either generally or in any particular case; but the reasons for such refusal will be duly recorded and be subject to the approval of the Secretary of the Interior.

WHO MAY REGISTER A TRADE-MARK.

16. A trade-mark may be registered by any person, firm, corporation, or association domiciled within the territory of the United States or residing in or located in any foreign country which, by treaty, convention, or law, affords similar privileges to the citizens of the United States, and who is entitled to the use of any trade-mark and uses the same in commerce with foreign nations, or among the several States, or with Indian tribes, upon payment of the fee required by law and other due proceedings had. (See Rules 17 and 19.)

Act of Feb. 20, 1905, sec. 1.

17. No trade-mark will be registered to an applicant residing or located in a foreign country unless such country by treaty, convention, or law, affords similar privileges to the citizens of the United States, nor unless the trade-mark has been registered by the applicant in the foreign country in which he resides or is located. In such cases it is not necessary that the trade-mark shall have been used in commerce with the United States or among the States thereof. (See Rule 31.)

Act of Feb. 20, 1905, secs. 1, 2, and 4.

WHAT MAY BE REGISTERED AS A TRADE-MARK.

18. No trade-mark will be registered to an owner domiciled within the territory of the United States unless it shall be made to appear that the same is used as such by said owner in commerce among the several States, or between the United States and some foreign nation or Indian tribe: no trade-mark will be registered to an owner residing in or located in a foreign country unless said country by treaty, convention, or law affords similar privileges to the citizens of the United States: no trade-mark will be registered which consists of or comprises immoral or scandalous matter, or which consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any State or municipality, or of any foreign nation, or which is identical with a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, or which so nearly resembles a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers; or which consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual, or merely in words or devices which are

Act of Feb. 20, 1905, secs. 1, 5, and 21.

descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term: no portrait of a living individual will be registered as a trade-mark, except by the consent of such individual, evidenced by an instrument in writing: and no trade-mark will be registered which is used in unlawful business, or upon any article injurious in itself, or which has been used with the design of deceiving the public in the purchase of merchandise, or which has been abandoned.

19. Any mark used in commerce with foreign nations or among the several States or with Indian tribes may be registered if it has been in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of the act of February 20, 1905. (See Rule 30.)

Act of Feb. 20, 1905, sec. 5.

THE APPLICATION.

20. An application for the registration of a trade-mark must be made to the Commissioner of Patents and must be signed by the applicant.

Act of Feb. 20, 1905, sec. 1.

21. A complete application comprises:

(*a*) A petition, requesting registration, signed by the applicant. (See Form 1, p. 31.)

Act of Feb. 20, 1905, sec 1.

(*b*) A statement specifying the name, domicile, location, and citizenship of the party applying; the class of merchandise, and the particular description of goods comprised in such class, to which the trade-mark is appropriated; a description of the trade-mark itself, and a statement of the mode in which the same is applied and affixed to the goods, and of the length of time during which the trade-mark has been used, and, if the applicant be a corporation or association, it must be set forth under the laws of what State or nation organized. (See sec. 29 of the statute, and Forms 2, 4, and 6, pp. 31, 32, and 33.)

(*c*) A declaration, complying with section 2 of the statute. (See Forms 3, 5, 7, 8, and 9, pp. 31, 32, 33, and 34.)

(*d*) A drawing of the trade-mark, which shall be a facsimile of the same as actually used upon the goods. (See Rules 34 and 35 and Form between pages 32 and 33.)

(*e*) Five specimens (*or facsimiles, when, from the mode of applying or affixing the trade-mark to the goods, specimens can not be furnished*) of the trade-mark as actually used upon the goods.

(*f*) A fee of ten dollars.

22. The petition, the statement, and the declaration must be in the English language and written on one side of the paper only.

23. The name of the applicant will appear in the certificate of registration precisely as it is signed to the statement of the application, and, therefore, the signature to the statement must be the correct signature of the applicant, and the name of the applicant wherever it appears in

the papers of the application must agree with the name as signed to the statement.

24. No information will be given without authority of the applicant respecting the filing of an application for the registration of a trade-mark by any person, or the subject-matter thereof, unless it shall, in the opinion of the Commissioner, be necessary to the proper conduct of business before the Office.

25. All applications for registration pending in the Patent Office at the time of the passage of the act of February 20, 1905, may be amended with a view to bringing them and the certificates issued under such applications under the provisions of said act, and the prosecution of such applications may be proceeded with under its provisions without the payment of further fee. When such an application is amended to bring it under the act of February 20, 1905, it will be given a serial number and date of filing under said act.

Act of Feb. 20, 1905, secs. 14 and 24.

A trade-mark registered under the act of March 3, 1881, may be registered under the act of February 20, 1905, but the application for such registration will be subject to examination in the same manner as other applications filed under said act of February 20, 1905.

26. An application for registration of a trade-mark, filed in this country by any person who has previously regularly filed in any foreign country which, by treaty, convention, or law affords similar privileges to the citizens of the United States an application for registration of the same trade-mark, shall be accorded the same force and effect as would be accorded to the same application if filed in this country on the date on which application for registration of the same trade-mark was first filed in such foreign country: *Provided*, That such application is filed in this country within four months from the date on which the application was first filed in such foreign country.

Act of Feb. 20, 1905, sec. 4.

27. Every applicant for registration of a trade-mark, or for renewal of registration of a trade-mark, who is not domiciled within the United States, shall, before the issuance of the certificate of registration, designate, by a notice in writing, filed in the Patent Office, some person residing within the United States on whom process or notice of proceedings affecting the right of ownership of the trade-mark of which such applicant may claim to be the owner may be served. This notice shall be indorsed upon the file wrapper of the application.

Act of Feb. 20, 1905, sec. 3.

28. In proceedings relating to an application or a registration under the act of February 20, 1905, it shall be deemed sufficient to serve notice upon the applicant, registrant, or representative by leaving a copy of the process or notice of proceedings addressed to him at the last address of which the Commissioner of Patents has been notified.

Act of Feb. 20, 1905, sec. 3.

DECLARATION.

29. The application must be accompanied by a written declaration verified by the applicant, or by a member of the firm, or by an officer of the corporation or association applying, to the effect that he believes himself, or the firm, corporation, or association in whose behalf he makes the declaration, to be the owner of the trade-mark sought to be registered, and that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use the trade-mark, either in the identical form or any such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in commerce among the several States, or with foreign nations, or with Indian tribes, and that the description, drawing, and specimens (*or facsimiles*) truly represent the trade-mark sought to be registered. (See Rule 17 and Forms 3, 5, 7, 8, and 9, pp. 31, 32, 33, and 34.)

Act of Feb. 20, 1905, sec. 2.

30. Where application is made under section 5 of the act of February 20, 1905, on the ground that the mark has been in actual and exclusive use as a trade-mark by the applicant, or his predecessors from whom he derived title, for ten years next preceding the passage of said act, the applicant shall, in addition to the requirements of section 2 of said act, make oath to facts showing such actual use for the period specified, and that, to the best of his knowledge and belief, such use has been exclusive for the period specified, and that the mark is now and has been continuously used by the applicant, or his predecessors, or by those from whom title to the same is derived, as a trade-mark. (See Form 8, page 33.)

31. If the applicant resides or is located in a foreign country, the declaration required shall also set forth that the trade-mark has been registered by the applicant, or that an application for the registration thereof has been filed by him in the foreign country in which he resides or is located, and shall give the date of such registration or of the application therefor, as the case may be. In such cases, it shall not be necessary to state that the mark has been used in commerce with the United States or among the States thereof. (See Form 9, page 34.)

Act of Feb. 20, 1905, sec. 2.

32. The declaration may be made before any person within the United States authorized by law to administer oaths, or, when the applicant resides in a foreign country, before any minister, chargé d'affaires, consul, or commercial agent holding commission under the Government of the United States, or before any notary public, judge, or magistrate having an official seal and authorized to administer oaths in the foreign country in which the applicant may be, whose authority shall be proved by a certificate of a diplomatic or consular officer of the United States. the declaration being attested in all cases, in this and other countries, by the proper official seal of the officer before whom the same is made.

Act of Feb. 20, 1905, sec. 2.

33. Amendment of the declaration will not be permitted. If that filed with the application be faulty or defective, a substitute declaration must be filed.

DRAWING.

34. (1) The drawing must be made upon pure white paper of a thickness corresponding to two-sheet Bristol board. The surface of the paper must be calendered and smooth. India ink alone must be used, to secure perfectly black and solid lines.

(2) The size of a sheet on which a drawing is made must be exactly 10 by 15 inches. One inch from its edges, a single marginal line is to be drawn, leaving the "sight" precisely 8 by 13 inches. Within this margin, all work and signatures must be included. One of the shorter sides of the sheet is regarded as its top, and, measuring downwardly from the marginal line, a space of not less than 1¼ inches is to be left blank for the heading of title, name, number, and date. (See specimen of drawing between pages 32 and 33.)

(3) All drawings must be made with the pen only. Every line and letter, signatures included, must be absolutely black. This direction applies to all lines, however fine, and to shading. All lines must be clean, sharp, and solid, and they must not be too fine or crowded. Surface shading, when used, should be open.

(4) The name of the proprietor of the trade-mark, signed by himself or his attorney of record, must be placed at the lower right-hand corner of the sheet within the marginal line, but in no instance should it encroach upon the drawing.

Act of Feb. 20, 1905, sec. 1.

(5) When the view is longer than the width of the sheet, the sheet should be turned on its side, and the heading should be placed at the right and the signature at the left, occupying the same space and position as in an upright view, and being horizontal when the sheet is held in an upright position.

(6) Drawings should be rolled for transmission to the Office—not folded.

An agent's or attorney's stamp, or advertisement, or written address will not be permitted upon the face of a drawing, within or without the marginal line.

35. The Office, at the request of applicants, will furnish the drawings at cost.

EXAMINATION OF APPLICATIONS.

36. All complete applications for registration are considered, in the first instance, by the examiner in charge of trade-marks. Whenever, on examination of an application, registration is refused for any reason whatever, the applicant will be notified thereof. The reasons for such refusal will be stated, and such infor-

Act of Feb. 20, 1905, sec. 6.

mation and references will be given as may be useful in aiding the applicant to judge of the propriety of further prosecuting his application.

37. The examination of an application and the action thereon will be directed throughout to the merits, but in each letter the examiner shall state or refer to all his objections.

38. If, on examination of an application for the registration of a trade-mark, it shall appear that the applicant is entitled to have his trade-mark registered under the provisions of the law, the mark will be published in the Official Gazette at least once. Such publication shall be at least thirty days prior to the date of registration.

Act of Feb. 20, 1905, sec. 6.

If no notice of opposition be filed within thirty days after such publication, the applicant or his attorney will be duly notified of the allowance of his application, and a certificate of registration will be issued as provided in Rule 52.

The weekly issue closes on Thursday, and the certificates of registration of that issue bear date as of the third Tuesday thereafter.

AMENDMENTS.

39. The statement may be amended to correct informalities, or to avoid objections made by the Office, or for other reasons arising in the course of examination, but no amendments to the description or drawing of the trade-mark will be permitted unless warranted by something in the specimens (*or facsimiles*) as originally filed.

40. In every amendment, the exact word or words to be stricken out or inserted in the statement must be specified, and the precise point indicated where the erasure or insertion is to be made. All such amendments must be on sheets of paper separate from the papers previously filed, and written on but one side of the paper.

Erasures, additions, insertions, or mutilations of the papers and records must not be made by the applicant or attorney.

41. When an amendatory clause is amended, it must be wholly rewritten, so that no interlineation or erasure shall appear in the clause, as finally amended, when the application is passed to issue. If the number or nature of the amendments shall render it otherwise difficult to consider the case, or to arrange the papers for printing or copying, the examiner may require the entire statement to be rewritten.

42. After allowance, the examiner will exercise jurisdiction over an application only by special authority from the Commissioner.

Amendments may be made after the allowance of an application, if the case has not been printed, on the recommendation of the examiner, approved by the Commissioner, without withdrawing the case from issue.

43. After the completion of the application, the Office will not return the papers for any purpose whatever. If the applicant has not preserved copies of the papers which he wishes to amend, the Office will furnish them on the usual terms.

INTERFERENCE, OPPOSITION, AND CANCELLATION.

44. In case of conflicting applications for registration of a trade-mark, or in any dispute as to the right to use the same, which may arise between an applicant and a registrant, the Office will declare an interference, in order that the parties may have an opportunity to prove priority of use, and the proceedings on such interference will follow, as nearly as practicable, the practice in interferences between applications for patents.

Act of Feb. 20, 1905, sec. 7.

45. Any person who believes he would be damaged by the registration of a mark may oppose the same by filing, in duplicate, a written notice of opposition (see Form 10, page 34), stating the grounds therefor, within thirty days after the publication (see Rule 38) of the mark sought to be registered, which notice of opposition shall be accompanied by the fee required by law, and shall be verified by the person filing the same, before one of the officers mentioned in section 2 of the act of February 20, 1905. (See Rule 32.)

Act of Feb. 20, 1905, secs. 6 and 14.

46. Any person deeming himself to be injured by the registration of a trade-mark in the Patent Office, may at any time make application (see Form 11, page 35) to the Commissioner to cancel the registration thereof. Such application shall be filed in duplicate, shall state the grounds for cancellation, and shall be verified by the person filing the same, before one of the officers mentioned in section 2 of the act of February 20, 1905. (See Rule 32.)

Act of Feb. 20, 1905, sec. 13.

47. If it appear, after a hearing before the examiner of interferences, that the registrant was not entitled to the use of the mark at the date of his application for registration thereof, or that the mark is not used by the registrant, or has been abandoned, and the examiner in charge of interferences shall so decide, the Commissioner shall cancel the registration of the mark, unless appeal be taken within the limit fixed.

Act of Feb. 20, 1905, sec. 13.

48. In cases of opposition and of applications for cancellation, the examiner in charge of trade-marks shall forward the files and papers to the examiner in charge of interferences, who shall give notice thereof to the applicant or registrant. The applicant or registrant must make answer at such time, not less than thirty days from the date of the notice, as shall be fixed by the examiner in charge of interferences.

49. The proceedings on oppositions and on applications for cancellation shall follow, as nearly as practicable, the practice in interferences between applications for patents.

APPEALS.

50. From an adverse decision of the examiner in charge of trade-marks upon an applicant's right to register a trade-mark, or to renew the

registration of a trade-mark, or from a decision of the examiner in charge of interferences, an appeal may be taken to the Commissioner in person, upon payment of the fee required by law.

Act of Feb. 20, 1905, secs. 8 and 14.

51. From the adverse decision of the Commissioner of Patents upon the right of an applicant to register a trade-mark, or to renew the registration of a trade-mark, or from the decision of the Commissioner in cases of interference, opposition, or cancellation, an appeal may be taken to the court of appeals of the District of Columbia in the manner prescribed by the rules of that court.

Act of Feb. 20, 1905, sec. 9.

ISSUE, DATE, AND DURATION OF CERTIFICATES.

52. When the requirements of the law and the rules have been complied with, and the Office has adjudged a trade-mark registrable, a certificate will be issued, signed by the Commissioner, under the seal of the Patent Office, to the effect that the applicant has complied with the law and that he is entitled to registration of his trade-mark. The certificate shall state the date on which the application for registration was received in the Patent Office. Attached to the certificate will be a photolithographed copy of the drawing of the trade-mark and a printed copy of the statement and the declaration.

Act of Feb. 20, 1905, sec. 11.

53. A certificate of registration shall remain in force twenty years from its date, except that, in case a trade-mark be previously registered in a foreign country, such certificate shall cease to be in force on the day on which the trade-mark ceases to be protected in such foreign country, and shall in no case remain in force more than twenty years, unless renewed.

Act of Feb. 20, 1905, sec. 12.

51. A certificate of registration may be, from time to time, renewed for like periods on payment of the renewal fees required, upon request by the registrant, his legal representatives, or transferees of record in the Patent Office, and such request may be made at any time not more than six months prior to the expiration of the period for which the certificate of registration was issued or renewed.

Act of Feb. 20, 1905, secs. 12 and 14.

55. Certificates of registration in force on the 1st day of April, 1905, shall remain in force for the period for which they were issued, and shall be renewable on the same conditions and for the same periods as certificates issued under the provisions of the act of February 20, 1905, and, when so renewed, shall have the same force and effect as certificates issued thereunder.

Act of Feb. 20, 1905, sec. 12.

56. A certificate of registration shall not be issued to an applicant located in a foreign country for any trade-mark for registration of which he has filed an application in such foreign country, until such mark has been actually registered by him in the country in which he is located.

Act of Feb. 20, 1905, sec. 4.

ASSIGNMENTS.

57. Every registered trade-mark and every mark for the registration of which application has been made, together with the application for registration thereof, shall be assignable in connection with the good-will of the business in which the mark is used. Such assignment must be by an instrument in writing and duly acknowledged according to the laws of the country or State in which the same is executed. Provision is made for recording such assignments in the Patent Office; but no such assignment will be recorded unless it is in the English language, nor unless an application for the registration of the mark shall have been first filed in the Patent Office, and such assignment must identify the application by serial number and date of filing, or, when the mark has been registered, by the certificate number and the date thereof. No particular form of assignment is prescribed.

Act of Feb. 20, 1905, sec. 10.

58. An assignment shall be void as against any subsequent purchaser for a valuable consideration, without notice, unless it be recorded in the Patent Office within three months from the date thereof.

Act of Feb. 20, 1905, sec. 10.

59. The certificate of registration may be issued to the assignee of the applicant, but the assignment must first be entered of record in the Patent Office.

Act of Feb. 20, 1905, sec. 11.

COPIES AND PUBLICATIONS.

60. After a trade-mark has been registered, printed copies of the statement and declaration in each case, with a photolithographed copy of the drawing of the trade-mark, may be furnished by the Office upon the payment of the fee. (See Rule 63.)

Act of Feb. 20, 1905, secs. 11 and 14.

61. An order for a copy of an assignment must give the liber and page of the record, as well as the name of the applicant; otherwise an extra charge will be made for the time consumed in making a search for such assignment.

62. The Official Gazette of the Patent Office will contain a list of all trade-marks registered, with the name and address of the registrant in each case, an illustration of the trade-mark, a description of the trade-mark itself, and a recitation of the particular description of goods to which it is applied.

FEES.

63. On filing each original application for the registration of a trade-mark $10.00

On filing each application for renewal of the registration of a trade-mark 10.00

Rev. Stat. 4893; act of Feb. 20, 1905, sec. 14.

On filing notice of opposition to the registration of a trade-mark	$10.00
On appeal from the examiner in charge of trade-marks to the Commissioner of Patents	15.00
On appeal from the decision of the examiner in charge of interferences, awarding ownership of a trade-mark or canceling the registration of a trade-mark, to the Commissioner of Patents	15.00
For manuscript copies, for every 100 words or fraction thereof	.10
For recording every assignment, agreement, power of attorney, or other paper, of 300 words or less	1.00
For recording every assignment, agreement, power of attorney, or other paper of more than 300 words and less than 1,000 words	2.00
For recording every assignment, agreement, power of attorney, or other paper of more than 1,000 words	3.00
For abstracts of title:	
For the certificate of search	1.00
For each brief from the digest of assignments	.20
For searching titles or records, one hour or less	.50
Each additional hour or fraction thereof	.50
For a single printed copy of statement, declaration, and drawing	.05
If certified, for the grant, additional	.50
For the certificate	.25

64. Money required for Office fees may be paid to the Commissioner of Patents, or to the Treasurer, or to any of the assistant treasurers of the United States, or to any of the depositaries, national banks, or receivers of public money, designated by the Secretary of the Treasury for that purpose, and such officer shall give the depositor a receipt or certificate of deposit therefor, which shall be transmitted to the Patent Office. When this cannot be done without inconvenience, the money may be remitted by mail, and in every such case the letter should state the exact amount inclosed. All money orders, drafts, and checks should be made payable to the "Commissioner of Patents."

Rev. Stat. 4935.

65. All money sent by mail, to the Patent Office, will be at the risk of the sender. All payments to the Office must be made in specie, Treasury notes, national-bank notes, certificates of deposit, money orders, or certified checks.

REPAYMENT OF MONEY.

66. Money paid by actual mistake, such as a payment in excess, or when not required by law, or by neglect or misinformation on the part of the Office, will be refunded; but a mere change of purpose after the payment of money, as when a party desires to withdraw his application for the registration of a trade-mark, or to withdraw an appeal, will not entitle a party to demand such a return.

Rev. Stat. 4936; act of Feb. 20, 1905, sec. 15.

NOTICE OF REGISTRATION.

67. It shall be the duty of the registrant to give notice to the public that a trade-mark is registered, either by affixing thereon the words "Registered in U. S. Patent Office," or "Reg. U. S. Pat. Off.," or, when from the character and size of the trade-mark, or from its manner of attachment to the article to which it is appropriated, this can not be done, then by affixing a label containing a like notice to the package or receptacle wherein the article or articles are inclosed; otherwise, on a suit for infringement, no damages shall be recovered except on proof that the defendant was duly notified of infringement, and continued the same after such notice.

Act of Feb. 20, 1905, sec. 28.

AMENDMENTS OF THE RULES.

68. All amendments of the foregoing rules will be published in the Official Gazette.

QUESTIONS NOT SPECIFICALLY PROVIDED FOR.

69. All cases not specifically defined and provided for in these rules will be decided in accordance with the merits of each case under the authority of the Commissioner, and such decision will be communicated to the interested parties in writing.

FREDERICK I. ALLEN,
Commissioner of Patents.

DEPARTMENT OF THE INTERIOR.

Approved, to take effect April 1, 1905.

E. A. HITCHCOCK,
Secretary.

FORMS.

The following forms illustrate the manner of preparing papers for applications for registration of trade-marks. Applicants will find their business facilitated by following them closely:

(1) PETITION.

To the Commissioner of Patents:

The undersigned presents herewith a drawing and five specimens (*or facsimiles*) of his trade-mark, and requests that the same, together with the accompanying statement and declaration, may be registered in the United States Patent Office in accordance with the law in such cases made and provided.

(Signature)

Dated , 19 .

(2) STATEMENT FOR AN INDIVIDUAL.

To all whom it may concern:

Be it known that I, , a citizen (*or subject, as the case may be*) of the , residing at , , and doing business at No. , street, in said city, have adopted for my use a trade-mark of which the following is a description:

My trade-mark consists of .

The trade-mark has been continuously used in my business since , .

The class of merchandise to which the trade-mark is appropriated is , and the particular description of goods comprised in said class upon which I use said trade-mark is .

The trade-mark is usually displayed on the packages containing the goods, by placing thereon a printed label on which the same is shown [*or state other modes of application*].

(Signature) .

(3) DECLARATION FOR AN INDIVIDUAL.

STATE OF , COUNTY OF , *ss:*

, being duly sworn, deposes and says, that he is the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes himself to be the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has

the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by him in commerce among the several States of the United States and particularly between [*here name the States*] and (*or*) between the United States and foreign nations or Indian tribes, and particularly with [*here name one or more foreign nations or Indian tribes, or both, as the case may be*]; and that the description, drawing, and specimens (*or facsimiles*) presented truly represent the trade-mark sought to be registered.

(Signature) .

Subscribed and sworn to before me, a , this day of , 19 .

[L. S.] (Signature) .

[*Official character.*]

(4) STATEMENT FOR A FIRM.

To all whom it may concern:

Be it known that we, , a firm domiciled in , county of , State of , and doing business at No. , street, in said city, and composed of the following members, , , , citizens of (*or subjects, as the case may be*) , have adopted for our use a trade-mark, of which the following is a description:

Our trade-mark consists of .

The trade-mark has been continuously used in our business since , .

The class of merchandise to which the trade-mark is appropriated is , and the particular description of goods comprised in said class upon which said trade-mark is used is .

The trade-mark is usually displayed on the packages containing the goods, by placing thereon a printed label on which the same is shown [*or state other modes of application*].

(Signature) ,

By ,

A member of the firm.

(5) DECLARATION FOR A FIRM.

STATE OF , COUNTY OF , *ss:*

, being duly sworn, deposes and says, that he is a member of the firm, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said firm is the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said firm

in commerce among the several States of the United States and particularly between [*here name the States*] and (*or*) between the United States and foreign nations or Indian tribes, and particularly with [*here name one or more foreign nations or Indian tribes, or both, as the case may be*]; and that the description, drawing, and specimens (*or facsimiles*) presented truly represent the trade-mark sought to be registered.

(Signature) .

Subscribed and sworn to before me, a , this day of , 19 .

[L. S.]

(Signature) .

[*Official character.*]

(6) STATEMENT FOR A CORPORATION OR ASSOCIATION.

To all whom it may concern :

Be it known that , a corporation (*or association*) duly organized under the laws of the State of (*or country*), and located in the city of , county of , in said State (*or country*), and doing business at No. , street, in said city of , has adopted for its use a trade-mark of which the following is a description :

The trade-mark consists of .

The trade-mark has been continuously used in our business since , .

The class of merchandise to which the trade-mark is appropriated is , and the particular description of goods comprised in said class upon which said trade-mark is used is .

The trade-mark is usually displayed on the packages containing the goods, by placing thereon a printed label on which the same is shown [*or state other modes of application*].

(Signature) ,

By ,

Secretary (or other officer).

(7) DECLARATION FOR A CORPORATION OR ASSOCIATION.

STATE OF , COUNTY OF , *ss :*

, being duly sworn, deposes and says that he is the secretary (*or other officer*) of the corporation (*or association*), the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation (*or association*) is the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation (*or association*) in com-

merce among the several States of the United States, and particularly between [*here name the States*] and (*or*) between the United States and foreign nations or Indian tribes, and particularly with [*here name one or more foreign nations or Indian tribes, or both, as the case may be*]; and that the description, drawing, and specimens (*or facsimiles*) presented truly represent the trade-mark sought to be registered.

(Signature) .

Subscribed and sworn to before me, a , this day of , 19 .

[L. S.] (Signature) ,

(*Official character.*)

(8) DECLARATION FOR APPLICANTS UNDER THE TEN-YEAR SECTION.

STATE OF , COUNTY OF , *ss:*

, being duly sworn, deposes and says, that he is the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes himself to be the owner of the mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said mark is used by him in commerce among the several States of the United States, and particularly between [*here name the States*] and (*or*) between the United States and foreign nations or Indian tribes, and particularly with [*here name one or more foreign nations or Indian tribes, or both, as the case may be*]; that the description, drawing, and specimens (*or facsimiles*) presented truly represent the mark sought to be registered; and that the mark has been in actual use as a trade-mark of the applicant, or his predecessors from whom he derived title, for ten years next preceding the passage of the act of February 20, 1905, and that, to the best of his knowledge and belief, such use has been exclusive.[a]

(Signature) .

Subscribed and sworn to before me, a , this day of , 19 .

[L. S.] (Signature) ,

(*Official character.*)

(9) DECLARATION FOR FOREIGNERS.

STATE OF , COUNTY OF , *ss:*

, being duly sworn, deposes and says, that he is the applicant named in the foregoing statement; that he believes the foregoing statement is true: that he believes himself to be the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right

to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark has been registered in [*here name the foreign country in which applicant resides or is located, and the date and number of the registration*], (*or*) that an application for registration of said trade-mark was filed by him on the day of , 19 , in [*here name the foreign country in which applicant resides or is located*]; that the description, drawing, and specimens (*or facsimiles*) presented truly represent the trade-mark sought to be registered.[a]

(Signature) .

Subscribed and sworn to before me, a , this day of , 19 .

[L. S.] (Signature) ,

(*Official character.*)

(10) NOTICE OF OPPOSITION.

To the Commissioner of Patents:

In the matter of an application for the registration of a trade-mark for , No. , filed , , , by , of , I , residing at No. , street, in the city of , State of , hereby give notice of my intention to oppose the registration of said trade-mark which was published on page , No. ; of the Official Gazette of , 19 .

The grounds for opposition are as follows: .

Dated this day of , 19 .

(Signature) .

STATE OF , COUNTY OF , *ss:*

On this day of , 19 , before me, a , in and for , , personally appeared , the above-named party, who, being duly sworn, deposes and says that, to the best of his knowledge and belief, the facts above stated are true.

[L. S.] (Signature) ,

(*Official character.*)

(11) FORM FOR APPLICATION FOR CANCELLATION OF TRADE-MARK.

To the Commissioner of Patents:

In the matter of trade-mark No. , registered , 19 , by , of , and published on page , Vol. , No. , of the Official Gazette for , 19 , I, the undersigned, residing at No. , street, in the city of , State of , hereby apply for the cancellation of the registration of the above-noted trade-mark. The grounds for cancellation are as follows:

(Signature)

Dated this day of , 19 .

STATE OF , COUNTY OF , *ss:*

On this day of , 19 , before me, a , in and for , , personally appeared , the above-named party, who, being duly sworn, deposes and says that, to the best of his knowledge and belief, the facts above stated are true.

[L. S.] (Signature) ,
(*Official character.*)

a In case the applicant is a firm, corporation, or association, the declaration should be modified accordingly.

CLASSIFICATION OF REGISTERED TRADE-MARKS.

Agricultural Machines and Implements.
Baking Powder and Yeast.
Beltings, Hose, and Packings.
Beverages.
Blackings and Leather Dressings.
Boots, Shoes, and Lasts.
Brooms and Brushes.
Buttons.
Canned Goods.
Carpets, etc.
Cement, Plaster, and Bricks.
Cleaning and Polishing Preparations.
Coffee and Tea.
Conductors and Insulators.
Confectionery.
Corsets.
Cured Meats.
Dairy Machines and Products.
Dentistry.
Drugs and Chemicals.
Dry Goods.
Electrical Apparatus and Supplies.
Fancy Goods.
Fertilizers.
Firearms, Ammunition, and Explosives.
Fire Extinguishers.
Flour.
Foods and Relishes.
Fuel.
Furniture.
Games and Toys.
Glassware.
Gloves.
Headware.
Household Articles.
Inks.
Jewelry and Plated Ware.
Lamps, Lanterns, etc.
Lard and Tallow.
Laundry Machines and Articles.
Leather and Saddlery.
Locks and Hardware.
Lumber and Manufactures.
Machines and Devices.
Malt Liquors.
Matches.
Medical Compounds.
Metals and Manufactures.
Miscellaneous.
Musical Instruments.
Needles and Pins.
Oils and Lubricants.
Optics and Measuring Instruments.
Paints and Painters' Supplies.
Paper and Envelopes.
Poisons for Animals.
Publications.
Receptacles.
Rope, Cord, and Twine.
Rubber Goods.
Seeds, Plants, and Trees.
Sewing Machines and Attachments.
Sewing Silk, Cotton, and Thread.
Shirts, Collars, and Cuffs.
Soap.
Spices, Mustard, and Salt.
Spirituous Liquors.
Starch, Cornstarch, and Products.
Stationery Miscellany.
Steam and Plumbing Supplies.
Stoves and Furnaces.
Sugar, Sirup, and Molasses.
Surgical Instruments and Appliances.

Tailoring and Clothing.
Time-keeping Instruments.
Tobacco and Tobacco Products.
Toilet Articles and Preparations.
Tools and Cutting Instruments.
Umbrellas, Parasols, and Canes.
Underwear and Furnishings.
Vehicles.
Wines.

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