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THE LAW OF

MERCHANDISE MARKS

AND

THE CRIMINAL LAW OF FALSE MARKING, WITH A CHAPTER ON WARRANTY OF TRADE MARKS AND A COLLECTION OF STATUTES, GENERAL ORDERS AND FORMS.

BY

D. M. KERLY, M.A., LL.B.,

SOMETIME FELLOW AND MACMAHON LAW STUDENT OF ST. JOHN'S COLLEGE, CAMBRIDGE;
AUTHOR OF KERLY ON TRADE MARKS, AND OF "AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY";
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

THIRD EDITION

BY

F. G. UNDERHAY, M.A.,

ONE OF THE EDITORS OF THE THIRD EDITION OF KERLY ON TRADE MARKS, AND OF THE OFFICIAL REPORTS OF PATENT, DESIGN AND TRADE MARK CASES; OF THE INNER TEMPLE, BARRISTER-AT-LAW.

LONDON:

SWEET & MAXWELL, LIMITED,

3, CHANCERY LANE, W.C.

1909.

TK
K396m
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LONDON AND TONBRIDGE.

OCT 17 1922

PREFACE.

When the third edition of "Kerly on Trade Marks" was prepared in 1908, it was thought advisable to omit Book II. of the earlier editions, being the portions dealing with the Merchandise Marks Act and the Criminal Law of False Marking. Proceedings under the Merchandise Marks Act are usually conducted in the first instance in the Police Courts, and it is probably more convenient for practitioners to use a book of moderate size. For these and other reasons this volume is now published as a separate book.

The Law of Trade Marks has, however, a considerable general bearing on that of Merchandise Marks, and in some instances the questions which arise are practically the same or are closely analogous; for instance, the question whether a mark so closely resembles another as to be calculated to deceive very frequently arises under both branches of the law. Frequent references have therefore been given in the notes to the third edition of "Kerly on Trade Marks," which is, for the sake of brevity, referred to as "Kerly." Readers who may desire to consult a smaller book may be referred to the edition of the Trade Marks Act of 1905, by the author and the editor of this book.

Since the year 1901, when the second edition was published, there have been few decisions of importance on the Merchandise Marks Act in the High Court, but numerous prosecutions have brought its provisions into greater prominence than was the case in earlier years. No attempt has been made in this book to refer to all these decisions, but a selection has been made of those which seemed to be useful, either as illustrations of the application of the Act, or as presenting matter of general interest.

Besides the Merchandise Marks Acts of 1887, 1891, and 1894, and the General Orders and Regulations made under them, the Appendix contains forms of indictment and informations, the

International Convention, together with information as to the subsisting international and colonial arrangements, a summary of colonial and foreign laws as to Merchandise Marks, a short statement of the statutes requiring goods to be marked in a specified manner, and the recent Order in Council as to marking foreign plate.

It is proposed by a bill now before Parliament to confer on the Department of Agriculture and Technical Instruction for Ireland powers of undertaking prosecutions in Ireland in respect of offences against the Merchandise Marks Act, 1887, similar to the powers exercisable as regards Great Britain by the Board of Agriculture under the Merchandise Marks (Prosecutions) Act, 1894. The bill as it left the House of Commons is printed in Appendix XIII.

F. G. UNDERHAY.

Long Vacation, 1909.

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THE MERCHANDISE MARKS ACT, 1887.

CHAPTER I.

INTRODUCTION.

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The purposes of the civil and criminal laws as to marks compared.

The civil law relating to trade marks is founded on the rule of the common law, that nobody has any right to represent his goods as the goods of another person.[1] In other words, civil trade mark law deals with and protects the private rights of individual traders, although in some respects the interests of the public are to be regarded, and limit the private right, *e.g.*, in the provision that a trade mark is not to be registered if it contain matter *calculated to deceive*, or which would be contrary to law or morality.[2] The civil law relating to trade marks, so far as it is statutory, is contained in the Trade Marks Act, 1905.[3] The criminal law of false marking is contained in the Merchandise Marks Act, 1887,[4] and certain amending statutes,[5] and includes provisions of which some primarily or solely protect the

[1] *Reddaway* v. *Banham*, [1896] A. C. 199; 13 R. P. C. 218.

[2] Sec. 11 of the Trade Marks Act, 1905.

[3] There are some slight exceptions, *e.g.*, the provisions as to International Arrangements, which are now contained in sec. 91 of the Patents and Designs Act, 1907.

[4] 50 & 51 Vict. c. 28.

[5] Merchandise Marks Act, 1891 (54 Vict. c. 45); Merchandise Marks Prosecution Act, 1894 (57 & 58 Vict. c. 34).

public, and others also protect the individual. For instance, the sections which relate to the application to goods of false trade descriptions as to quantity and weight are protective of the public and not of any particular trader, while sec. 2, which makes the forgery of a trade mark an offence, protects the owner of the trade mark and also the public. In an Irish case[1] Fitzgibbon, L.J., speaking with reference to the Merchandise Marks Act, 1887, said, "In my opinion the objects of the legislation as regards trade marks are two: First, the protection of persons who have the exclusive right to use trade marks and who have a monopoly of them; and secondly, the protection of the public against being deceived into purchasing goods made by people other than the proprietors of the trade marks on the faith of which the goods are bought. These objects are distinct, and we have to determine under the words of the Act what the protection is which the legislature has deemed it necessary to give for the purpose of securing each of them."

Common law insufficient.

At the common law it was an offence to cheat by fraudulently selling the goods of A. under the pretence that they were the goods of B., or to sell goods under any material false pretence that they were different goods from what in fact they were, and such false pretences might have been effected by using spurious trade marks or other deceptive marks of origin or description, upon the goods sold; but the mere imitation of a trade mark, unless it happened to be a Sheffield cutler's mark,[2] or the mere impression or use of a false mark, was not criminally punishable.[3] A Select Committee of the House of Commons, appointed in 1862 to consider several trade marks and merchandise marks Bills, was assured by the witnesses called before it that false marking had become extremely prevalent, to the serious detriment of honest trading. Not only were the trade marks of well-known English manufacturers frequently infringed at home and flagrantly copied abroad, so that the manufacturers both lost the custom of the buyers of the spuriously marked goods and suffered in reputation through the inferiority of the goods sold as theirs, but false marks of description, of length, quantity, material, make, and the like—what are now known as trade descriptions[4]—were applied to goods by unscrupulous traders with impunity.

[1] *Thwaites* v. *McEvilly*, 21 R. P. C. 397, at p. 399.

[2] See below, p. 102.

[3] See below, p. 18.

[4] Merchandise Marks Act, 1887, sec. 3.

And the witnesses complained, with good reason, that the existing law was wholly inadequate to cope with these evils.

Report of the Select Committee of 1862.

In 1862, the demand for more efficient protection resulted in Bills being introduced into the House of Commons for establishing a system of registration of trade marks, and for the institution of new criminal offences in regard to false marking. These Bills were referred to a Select Committee of the House, who reported against the Trade Marks Bills, which were not proceeded with, and it was not until 1875 that the earliest Registration Act[1] was passed. A Bill dealing with the criminal law was, however, favourably reported on, and it became law under the title of the Merchandise Marks Act, 1862.[2] Unfortunately, the Committee declined several drastic proposals for amendment, which were afterwards adopted with conspicuous success in the Merchandise Marks Act of 1887, and the Act of 1862, which was passed upon their Report, was, it is believed, a dead letter from its first enactment. At any rate, when another Committee on merchandise marks were appointed, in 1887, complaints precisely similar to those made to the former Committee were urgently repeated to them.

The Merchandise Marks Act of 1862.

As the Act of 1862 was repealed by that of 1887, it is unnecessary here to summarise its clauses. In substance the offences created by it were very nearly the same as those existing under the later statute, but it was vitiated by defects which have now been removed, for, while it enacted that the forgery of a trade mark with intent to defraud,[3] or the false application of a trade mark to goods,[3] or to the envelope of goods,[4] with the like intent, should be misdemeanours, it left the onus of proving the intent to defraud of the person charged upon the prosecutor, and it made no provision for the summary prosecution of these offences. The Act was also deficient in omitting to provide for the seizure of falsely marked goods upon importation from abroad,[5] and it was, moreover, a monument of complicated and redundant drafting.

[1] 38 & 39 Vict. c. 91. The Merchandise Marks Act, 1862, contained some provisions as to civil remedies, namely, secs. 19, 21 and 22.

[2] 25 & 26 Vict. c. 88. There were at a much earlier date special enactments prohibiting the imitation of Sheffield marks; see below, p. 102.

[3] Sec. 2.

[4] Sec. 5.

[5] The Customs Act of 1876, s. 42, forbade the importation of articles of foreign manufacture bearing the names, marks, or brands of manufacturers resident in the United Kingdom, &c.

The International Convention.

In 1884 Great Britain acceded to the International Convention for the Protection of Industrial Property, to which all important civilised States, except Russia, now belong,[1] and thereby formally engaged to co-operate in the execution of the stipulations contained in the Convention and Protocol[2] agreed upon between the original parties thereto, at Paris, in the previous year. By Article IX. of the Convention it is provided that all goods illegally bearing a trade mark or trade name may be seized on importation into those States of the Union where the mark or name has a right to legal protection, and that the seizure shall be effected at the request of either the proper public department or of the interested party, pursuant to the internal legislation of each country.[3] It became necessary, accordingly, to amend the law, and out of several Bills introduced into Parliament for this purpose, the Committee of the House of Commons selected and amended the Merchandise Marks Law Consolidation and Amendment Bill, which subsequently became the Merchandise Marks Act of 1887.

The Merchandise Marks Act of 1887.

The last-mentioned Act[4] provides that any person shall be guilty of an offence, punishable on indictment or on summary conviction by fine or imprisonment, who either (1) forges a trade mark by making or imitating it without the consent of the proprietor, or by falsifying any genuine mark; or (2) falsely applies any trade mark to goods, by applying it, or an imitation of it, without the consent of the proprietor; or (3) applies to goods any false trade description, that is, a description or indication as to the number, quantity, measure, &c., or the place or country of origin of the goods, or the mode of manufacturing them, or their material, or as to their being the subject of an existing patent, privilege, or copyright, which is false in a material respect; or (4) sells or exposes, or has in his possession for sale, or any purpose of sale or manufacture, any goods to which a forged trade mark or false trade description is applied, or to which any trade mark, or imitation of a trade mark, is falsely applied.[5] A criminal intention on the part of the person charged is a necessary element of each of the above-mentioned

[1] See list, Appendix, pp. 154, 159.

[2] See Appendix, p. 154.

[3] The Act of Brussels, Dec. 14th, 1900, amending the Convention, is referred to in the Appendix, p. 154. The Madrid Convention of 1891 as to false indications of origin is set out on p. 160.

[4] The Act is printed at length in the Appendix, p. 106.

[5] Subsidiary offences, such as making dies for forging trade marks, are here passed over.

offences;[1] but the burden of proving that he has acted with the consent of the proprietor of the trade mark, or without intent to defraud, or otherwise innocently, as also the burden of establis ing any of the special excuses allowed by the Act, is cast upon the person charged as soon as it is established that he has done any of the acts which, coupled with such criminal intention and in the absence of these excuses, bring his case within the definition of an offence under the statute. The Act, moreover, forbids[2] the importation of goods by means of or in relation to which an offence against it has been committed, and also of all goods of foreign manufacture bearing any name or trade mark being or purporting to be that of a manufacturer or trader within the country, unless it be accompanied by a definite indication of the country where the goods were made or produced. It contains also some special provisions with regard to the marking of watch cases.

The Act is directed only against false marking.

It will be seen, therefore, that the Act is directed against false marking only. Deceptive marks or deceptive trade descriptions are forbidden by it to be placed upon goods, but it does not operate to make marking of any kind compulsory, and it does not extend to cases of verbal false descriptions.[3]

The Merchandise Marks Act Committee of 1890.

The Act attained a considerable success, but it did not fully satisfy the trading community, and three years after its passing another Committee of the House of Commons were appointed to consider its working. And by their Report[4] the Committee stated that, while there was a consensus of opinion that the Act of 1887 had generally been most beneficial to the manufacturing interests of the country, and that the importation of fraudulently marked goods, or of goods bearing a false indication of origin, had materially diminished since the Act came into operation, yet complaint had been made that its operation in regard to goods in transit to foreign States had occasioned serious inconvenience and loss to the shipping industries. This complaint, however, the Committee believed to be ill-founded, and they refused to recommend the exemption from the Act of the goods referred to.

The Custom House authorities, however, by the Consolidated Instructions of 1900, gave directions under which goods in

[1] *Gridley* v. *Swinborne*. 52 J. P. 739, 791; 5 T. L. R. 71 (1888). Coleridge. L.C.J., and Grantham, J.; and see below, p. 57.

[2] See. 16, below, p. 77.

[3] Below, p. 25.

[4] M. M. A. Report, 1890.

transit, in the absence of information calling for their examination, are generally allowed to pass without scrutiny.[1]

The Merchandise Marks Act, 1891.

The Committee also refused to accept either a proposal to increase the stringency of the Act by providing that all foreign goods should be marked with an indication of origin, or a proposal to relax it by allowing the general mark "Made abroad" where the Act now requires the particular country of origin to be signified.[2] On the other hand, with a view to stopping the importation of adulterated articles, which, if they bore no trade description at all, did not come under the Act, they recommended that the "Customs Entry,"[3] in which both the description of goods imported and the port from which they come must be stated, should be made a "trade description" within the Act, and that, in cases affecting the general interest of the country, or of a section of the community, or of a trade, prosecutions under the Act should be undertaken by the Board of Trade. The Merchandise Marks Act of 1891 was passed to carry these proposals into effect. By an Act of 1894 the Board of Agriculture, now the Board of Agriculture and Fisheries, has also been authorised to undertake prosecutions.[4]

International and colonial arrangements.

A foreigner who is the owner of a trade mark, acquired as such in England by use and consequent reputed connection with its owner, has always had the same right to protection in our Courts as a subject of the United Kingdom[5] (unless he happened to be an alien enemy), and neither the Registration Act of 1875 nor the Merchandise Marks Acts of 1862 or 1887 conferred any special privilege or right of protection for their trade marks or trade names upon subjects of this, as distinguished from subjects of other States. Many treaties existed, moreover, by which this country agreed to give to the subjects of other countries the same rights of protection in respect of their trade marks as were enjoyed by its own subjects.[6]

When the Patents, Designs and Trade Marks Act, 1883, was passed, the International Convention,[7] already referred to, had just been drawn up, and in contemplation of the accession of this country thereto, which took place in the following year,[8]

[1] Para. 36, printed below, p. 121.
[2] See below, p. 83.
[3] See below, pp. 24, 39.
[4] Below, p. 67.
[5] *The Collins Co.* v. *Reeves*, 28 L. J. Ch. 56 (1858), Stuart, V.-C.
[6] See a paper presented to Parliament, 1872, C. 633.
[7] See Appendix, p. 154.
[8] March 17th, 1884.

sec. 103 was inserted, with the view, apparently, of fulfilling the obligations entered into by the United Kingdom with the other contracting States; but it met those obligations in some respects very imperfectly.[1] Her Majesty was empowered by sec. 104 of the Act of 1883, by Order in Council,[2] to apply the provisions of the above-mentioned section, with such variations or additions as might seem fit, to any British possession.[3]

Secs. 103 and 104 of the Act of 1883 have now been repealed and replaced by sec. 91 of the Patents and Designs Act, 1907.[4] The Act contains a saving as to Orders in Council made under the repealed secs. (see sec. 98.)

The protection of the Merchandise Marks Act, 1887, extends to any trade mark which, either with or without registration, is protected by law in any British possession[4] or foreign State to which the provisions of sec. 91 of the Patents and Designs Act, 1907, are, under Order in Council, for the time being applicable.[5]

[1] For instance, as regards the registration in this country of marks of foreigners registrable in the country of origin, but not complying with the requirements of a registrable trade mark under the Registration Acts. See *Californian Fig Syrup Tm.*, 40 C. D. 620; 6 R. P. C. 126 (1888); and *Carter Medicine Co.'s Tm.*, [1892] 3 Ch. 472; 9 R. P. C. 401.

[2] See the list, Appendix, p. 151.

[3] For the definition of British possession, see p. 17.

[4] Printed in Appendix VIII., p. 150.

[5] M. M. A. 1887, sec. 3 (1), p. 14, "trade mark," and Interpretation Act, 1889, sec. 38.

CHAPTER II.

THE MERCHANDISE MARKS ACT, 1887.

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A SHORT account of the Merchandise Marks Act, 1887,[1] and of the Act of 1862, which it repealed and replaced, will be found in the Introduction,[2] and the nature of the contents and subject-matter of the Act can be readily gathered from the table placed at the head of this chapter, and secs. 2, 3, 4, 5, 6 of the Act, which are set out below. The table of sections and the text of the statute itself are printed at length in Appendix I. (p. 106).

[1] This Act is quoted throughout this and the following chapters as "M. M. A. 1887," and the Merchandise Marks Act, 1891, as "M. M. A. 1891." The Report of the Select Committee of the House of Commons of 1862 is quoted as "M. M. A. Report, 1862," that of the Committee of 1887 as "M. M. A. Report. 1887," that of the Committee of 1890 as "M. M. A. Report, 1890," and that of the Committee of 1897 as "M. M. A. Report, 1897."

[2] As reference is made frequently throughout this book to the 3rd edition (1908) of Kerly on Trade Marks, it is shortly referred to as Kerly. The reader is also referred to the shorter book on the Trade Marks Act, 1905, Kerly and Underhay.

The most important substantive enactments of the Merchandise Marks Act, 1887, are comprised in the sub-secs. (1) and (2) of sec. 2 of the Act, which enumerate the principal offences against which the Act was directed; the greater part of the remainder of the statute being directed to the definition and explanation of the terms employed in the sub-sections referred to, and the provision of machinery for the prosecution and punishment of the offences created by them. In addition to the provisions relating to these offences, the Act contains a very important provision (sec. 16) prohibiting the importation of deceptively or spuriously marked goods, and some special provisions as to marks on watches (secs. 7 and 8). Two subsidiary sections of the Act, namely, sec. 17, dealing with the statutory warranty implied by the sale of marked goods,[1] and sec. 20, imposing a penalty for false representations as to royal warrants[2] are considered in other chapters of this work.

Sec. 2 is divided into six sub-sections, which deal respectively with the offences against the Act, (1) and (2); penalties, (3);[3] destruction of forfeited articles, (4);[4] appeals against convictions (5);[5] and prosecutions (6).[6]

It provided as follows:—

Offences as to trade marks and trade descriptions.

"2.—(1) Every person who—

"(*a*) forges any trade mark; or

"(*b*) falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive; or

"(*c*) makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade mark; or

"(*d*) applies any false trade description to goods; or

"(*e*) disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark; or

"(*f*) causes any of the things above in this section mentioned to be done,

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act.

[1] Chap. III., p. 91.
[2] Below, p. 99.
[3] Page 65.
[4] Page 65.
[5] Page 71.
[6] Page 65.

"(2) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

"(*a*) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and

"(*b*) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

"(*c*) That otherwise he had acted innocently;

be guilty of an offence against this Act.

"(3) Every person guilty of an offence against this Act shall be liable (p. 65)—

"(i.) on conviction on indictment, to imprisonment, with or without hard labour, for a term not exceeding two years, or to fine, or to both imprisonment and fine; and

"(ii.) on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding twenty pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding fifty pounds; and

"(iii.) in any case, to forfeit to her Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed.

"(4) The Court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the Court thinks fit (p. 65).

"(5) If any person feels aggrieved by any conviction made by a court of summary jurisdiction, he may appeal therefrom to a court of quarter sessions (p. 71).

"(6) Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted, and any articles liable to be forfeited under this Act by a court of summary jurisdiction may be forfeited, in manner provided by

the Summary Jurisdiction Acts: Provided that a person charged with an offence under this section before a court of summary jurisdiction shall, on appearing before the Court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires be so tried accordingly."

Offences by a corporation or a partnership.

Every person (s. 2 (1)).—Person means person or persons,[1] and includes any body of persons corporate or unincorporate.[2] According to the letter of the statute, therefore, a corporation or a private partnership, or trade society, could, as such, be convicted and fined for an offence under the statute; and in various cases such convictions have taken place,[3] although the point as to whether corporations or partnerships are within the statute has not been expressly raised and determined. In modern cases, however, no difficulty has been felt in construing statutes so as to cast a duty, which is enforceable through the criminal law, upon corporations,[4] notwithstanding the objections that a corporation cannot act except through its agents, who have no authority to do any criminal or other illegal act;[5] that a principal is never criminally liable[6] for the acts of his agent which he has not specially authorised, unless expressly made so by statute in any particular case;[7] and that a specific criminal intent cannot be attributed to a corporation.[8] It would be a serious curtailment of the usefulness of the Act if the limited liability companies, by which so much of the trade of the country is now carried on,

[1] 52 & 53 Vict. c. 63, s. 1.

[2] M. M. A. 1887, s. 3 (1).

[3] Cf. *Jones Brothers'* case, Times, Jan. 9 and 16, 1899.

[4] See *The Queen* v. *Tyler*, [1891] 2 Q. B. 588, and the cases there cited; and per Ld. Blackburn in *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 App. Cas. at p. 869 (1881).

[5] *Re The Royal British Bank, Ex parte Nicol*, 3 De G. & J. 387; 28 L. J. Ch. 257 (1859).

[6] It was held in *The Queen* v. *Stephens*, L. R. 1 Q. B. 702 (1865), that the owner of works carried on by agents for his profit might be indicted for a nuisance committed by the agents without his knowledge and against his general directions, on the ground that the case was in substance a civil proceeding.

[7] *Chisholm* v. *Doulton*, 22 Q. B. D. 736 (1889); *Budd* v. *Lucas*, [1891] 1 Q. B. 408. As to the liability of masters under sec. 2, sub-secs. 1 and 2, see below, pp. 51, 61.

[8] On the general question of the liability of a corporation for crimes, see Brice's Ultra Vires, 3rd ed., Chap. XIII., and for torts, Chap. XII., and Buckley on the Companies Acts, 9th ed., pp. 88, 625; and *Barwick* v. *English Joint Bank*, L. R. 2 Ex. 259 (1866); *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317 (1880); and *British Mutual Banking Co. Ld.*, v. *Charnwood Forest Ry. Co.*, 18 Q. B. D. 714 (1887), all cases as to the liability of a corporation for the fraud of its agents; *Cornford* v. *Carlton Bank. Ld.*, [1899] 1 Q. B. 392; [1900] 1 Q. B. 22; 68 L. J. Q. B. 196, 1020, Darling, J., and C. A. malicious prosecution (in the Court of Appeal the point was abandoned).

could not be reached by the pecuniary penalties instituted by it; for proceedings against their officers for their own share in causing or participating in the offences charged might often be inadequate to stop the mischief aimed at by the Act.[1]

If a corporation can be convicted under the Act and fined, there seems to be no principle upon which unincorporated bodies can be held to be outside its operation. And where all the members of a partnership are individually guilty of an offence there is no further difficulty in holding the partnership itself liable also, since its property, upon which the fine inflicted would be levied, is the property of the several partners. A question may, however, arise—if some partners establish on their own account one of the defences specified in the Act, for instance, show that they acted without attempt to defraud, under sec. 2 (1), or that they complied with the provisions of sec. 2 (2), (a) and (b), while others fail to do so—whether the partnership, and through it the innocent partners, according to their interest in its property, are liable to be fined for the offences charged, because the proceedings have been taken against the firm. The case is precisely similar to that of an offending corporation having some innocent corporators; and, it is submitted, the question must be answered in the affirmative.

Liability of servants and workmen.

As regards persons employed on behalf of others, see sec. 6.[2] That section does not apply to offences under the clauses in sec. 2 (1) (a) and sec. 2 (1) (e),' although it is difficult to see why it should not. And as regards the acts of a servant, done in obedience to the instructions of his master, see sec. 19 (3).[3]

Sec. 2 (1) deals with three groups of offences: forging trade marks, (a), (c), and (e); falsely applying trade marks to goods (b); and applying false trade descriptions, (d); the general clause (f) adding the following offence—causing any of the other offences to be committed.

[1] See per Denman, C.J., in *The Queen* v. *Great North of England Ry. Co.*, 9 Queen's Bench Rep. 315; 16 L. J. M. C. 16 (1846). A company registered under the Companies Acts can be convicted of an offence under sec. 6 of the Sale of Food and Drugs Act, 1875, *mens rea* not being necessary: *Pearks, Gunston & Tee, Ld. v. Ward*, [1902] 2 K. B. 1. See also *Lawler* v. *Egan*, [1901] 2 I. R. 589, Sale of Poisons (Ireland) Act, 1870. A corporation is civilly liable for misrepresentations by its servants authorised to sell its goods resulting in passing off its goods as those of another person: *Grierson, Oldham & Co., Ld. v. Birmingham Hotel and Restaurant Co., Ld.*, 18 R. P. C. 158 (1901), Buckley, J.; in that case the representations were made contrary to express instructions. See also *Havana Cigar, &c. Factories Ltd.* v. *Tiffin* (1905), *Ld.*, 26 R. P. C., 473 (1909), C. A.

[2] "Persons employed," p. 52.

[3] Page 51.

1. Forging Trade Marks.

Sec. 2 (1).

"(a) Forges any trade mark;

"(c) Makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade mark;

"(c) Disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark."

What is a trade mark.

Trade Mark.]—For the purposes of the Act—

"The expression 'trade mark' means a trade mark registered in the Register of Trade Marks kept under the Patents, Designs, and Trade Marks Act, 1883, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of the 103rd section[1] of the Patents, Designs, and Trade Marks Act, 1883, are, under Order in Council, for the time being applicable."[2]

The parts of the Patents, Designs and Trade Marks Act, 1883, relating to trade marks, together with the amending sections of the Act of 1888, have been repealed by the Trade Marks Act, 1905,[3] with certain exceptions, of which sec. 103 was one.[4] The register is now kept under sec. 4 of the Trade Marks Act, 1905, and by sec. 6 the register of trade marks existing at the date of the commencement of the Act, and all registers of trade marks kept under previous Acts which are deemed part of the same book as such register, are incorporated with and form part of the register. By virtue of sec. 38 of the Interpretation Act, 1889,[5] references in the Merchandise Marks Act, 1887, to the provisions of the parts of the Act of 1883 repealed and re-enacted by the Act of 1905 must now be construed as references to the provisions of the Act of 1905.

For the purposes of the Act of 1905, a trade mark is defined to mean a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of the

[1] See below, p. 16, and Kerly, Chap. XX., p. 576.

[2] Sec. 3 (1). Appendix, p. 150.

[3] 5 Edw. VII., c. 15.

[4] Sec. 103 is now repealed by the Patents and Designs Act, 1907, and is replaced by sec. 91 of that Act; see below, p. 16.

[5] 52 & 53 Vict. c. 63.

manufacture, selection, certification, dealing with, or offering for sale (sec. 8).

Registered trade mark.

The question what marks are registrable as trade marks is not within the scope of this book, but comes under the law of trade marks.[1] Any entry made on the register without sufficient cause or wrongly remaining on the register may be expunged or varied by the Court, upon application, under sec. 35 of the Trade Marks Act, 1905.[2]

Proof of registration is effected by a copy of, or extract from, the register, purporting to be signed by the Registrar, and sealed with the seal of the Patent Office,[3] or by a certificate purporting to be under the hand of the Registrar.[4]

Where the trade mark is improperly registered.

The question may arise whether registered, in the above definition, means only "actually registered," or means "properly registered." It is submitted that registered in fact is the true construction, for any other would, to a great extent, defeat the operation of the Act. It cannot have been intended that, in the summary proceedings before two justices contemplated by the Act, inquiries should be entered upon, such as those undertaken on applications under sec. 35, to remove trade marks from the register: for instance, inquiries whether a registered trade mark was a common mark or a descriptive mark, or whether, if registered as an old mark, it was in fact used as registered before the 13th of August, 1875.[5] A similar question arises with regard to "the proprietor" of a registered trade mark.[6]

By sec. 40 of the Trade Marks Act, 1905, in all legal proceedings relating to a registered trade mark the fact that a person is registered as proprietor of such trade mark is prima facie evidence of the validity of the original registration of such trade mark and of all subsequent assignments and transmissions of the same; and by sec. 41 of the same Act the original registration is after the expiration of seven years from the date of such original registration (or seven years from the passing of the Act, whichever shall last happen) to be taken to be valid in all respects, unless such original registration was obtained by fraud, or unless the trade mark offends against the provisions of the

[1] Secs. 9 and 62 of the Act of 1905; Kerly, Chap. VIII., p. 128. As to the effect of registration, see secs. 38 to 41, Kerly, Chap. XII., p. 321.

[2] Kerly, Chap. XI., p. 276.

[3] Act of 1905, sec. 50.

[4] Ibid., sec. 51.

[5] See Kerly, Chap. XI., p. 276, "Rectification of the Register."

[6] Below, p. 18.

Act, e.g., as being calculated to deceive.[1] Sec. 41 contains a proviso saving the rights of persons whose user of the mark extends back anterior to the user of the registered trade mark. Subject to the provisions of sec. 41, and to any limitations and conditions entered upon the register, the registration of a person as proprietor of a trade mark, if valid, gives to such person the exclusive right to the use of such trade mark upon or in connection with the goods in respect of which it is registered.[2] Persons concurrently registered as a rule acquire no rights against one another by virtue of registration. In prosecutions under (a), (c), or (e) of sec. 2 (1) of the Merchandise Marks Act it is sufficient so far as the trade mark is concerned to prove that the trade mark is registered. No doubt, if a plausible claim for rectification were seriously put forward in criminal proceedings based upon a registered trade mark, an adjournment, to enable an application to the High Court to be made under sec. 35, would be granted pending the result of such application. And the existence of such a claim might of itself, in many cases, be sufficient to negative the intent to defraud, which is an element of each of the offences under the M. M. A., sec. 2 (1), or to show that the person charged had acted innocently, within the meaning of the M. M. A., sec. 2 (2).

The M. M. A. 1862.

The Act of 1862 applied only to trade marks as defined by the Act.[3] No register of trade marks existed when the Act was passed.

Unregistered trade marks.

Unregistered trade marks within the United Kingdom are not protected by the Act as trade marks, but they are in many cases protected by the provisions relating to the application of a false trade description under the extension of that term contained in sec. 3 (2) and (3).[4] The number of such trade marks in use was at the date of the passing of the M. M. A. very large, exceeding, it was said, the number of registered trade marks,[5] and it is still considerable. Infringements of them, in general, can be restrained in actions for "passing off"[6] even where, under sec. 42[7] of the Act of 1905, they do not form the subject of an action for infringement, properly so called.

International and colonial arrangements.

Secs. 103 and 104 of the Patents, Designs and Trade Marks

[1] Kerly, Chap. XII., p. 321, "Effect of Registration."

[2] Sec. 39.

[3] 25 & 26 Vict. c. 88, sec. 2.

[4] See below, pp. 43—47.

[5] M. M. A. Report, 1887, evidence of Mr. Courtenay Boyle, Qq. 400, 420. The bulk of the cotton marks were unregistered; evidence of Mr. Wright, Q. 3981.

[6] Kerly, Chap. XVI., p. 477.

[7] Ibid., Chap. XII., p. 334.

Act, 1883 (International and Colonial arrangements), and the amending section of the Act of 1885,[1] have been repealed by the Patents and Designs Act, 1907,[2] but conventions and Orders in Council made under the repealed section and in force at the commencement of the last-mentioned Act continue in force, and may be repealed, altered, or amended as if made under that Act.[3] Sec. 91 of the Act of 1907 in substance re-enacts the repealed sections. It will be found set out in the Appendix, with a list of the foreign States and British possessions with respect to which Orders in Council have been made.[4]

Trade marks in British possessions.

"British possession," in the definition of a trade mark, means any part of his Majesty's dominions, exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are, for the purposes of this definition, to be deemed one British possession.[5]

By sec. 9—

How described in pleading.

"In any indictment, pleading, proceeding, or document in which any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that trade mark or forged trade mark to be a trade mark or forged trade mark."

Forges.]—By sec. 4—

What is forging a trade mark.

"A person shall be deemed to forge a trade mark who either—

"(a) without the assent of the proprietor of the trade mark makes that trade mark or [a[1]][6] a mark so nearly resembling that trade mark as to be calculated to deceive; or

"(b) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise;

and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark.

"Provided that in any prosecution for forging a trade mark, the burden of proving the assent of the proprietor shall lie on the defendant."[7]

[1] Sec. 6.
[2] Sec. 98.
[3] Proviso to s. 98 (1).
[4] Page 150.
[5] Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (2).
[6] [a[1]] is not in the Act.
[7] Below, p. 56. Cf. sec 5 (3), p. 23.

So that the phrase covers the three distinct offences, (a), [a[1]], and (b).

Forgery of a trade mark at common law.

At common law the offence of forgery is the making or alteration of a writing or document to the prejudice of another person's right with intent to defraud,[1] and a trade mark is not a writing or document within the definition.[2] But the sale of goods under a spurious mark, which the vendor knew to be spurious, has been held in many cases to constitute obtaining money by false pretences.[3]

In *R.* v. *Smith*,[2] where the prisoner was charged with having forged imitations of Borwick's baking powder labels, Pollock, C.B., said: "The issuing of this wrapper without the stuff within it would be no offence. In the printing of these wrappers there is no forgery; the real offence is the issuing them with fraudulent matter in them."[4] The offence under the M. M. A. is, however, complete, whether the forged trade marks be applied to goods or not, unless intent to defraud is disproved. The application of a trade mark, whether forged or genuine, to goods other than the goods of the proprietor of the trade mark is an offence under ss. 2 (1) (b), 2 (1) d, and 3 (2).

The proprietor.

(a) *The proprietor*]—is the registered proprietor,[5] or his assignee, who is possessed of the goodwill of the business for which the trade mark in question was acquired and used.[6] It has been held, in civil cases, that the assignee of a registered trade mark need not register the assignment before commencing proceedings to restrain, or to obtain damages in respect of an infringement,[7] and the rule will, no doubt, apply also in proceedings under the M. M. A. The question whether a defendant charged under the Act can go behind the Register and deny the title of the registered proprietor has already been referred to.[8]

[1] Not necessarily to defraud a particular person. 24 & 25 Vict. c. 98, s. 41; Archbold, 23rd ed., p. 718.

[2] *R.* v. *Smith*, 8 Cox, 32: 27 L. J. M. C. 225 (1858), C. C. R.: Seb. Dig. p. 89. See also *R.* v. *Closs*, 7 Cox, 494: 27 L. J. M. C. 54, C. C. R. (1857). imitation of painter's name on copy of a picture.

[3] *R.* v. *Dundas*, 6 Cox, 380 (1883): *R.* v. *Ardley*, L. R. 1 C. C. R. 301 (1871); Seb. Dig. "False Pretences." Cf. *R.* v. *Ardley*, 7 Cox, 312; 26 L. J. M. C. 84, C. C. R. (1857).

[4] Cf. the civil case of *Farina* v. *Silverlock*, cited below, p. 19.

[5] Act of 1905, sec. 4. Cf. Kerly, p. 67.

[6] Ibid., sec. 22; Kerly, Chap. XIII., p. 345. Assignment and Devolution of Trade Marks.

[7] *Ihlee* v. *Henshaw*, 31 C. D. 323; 3 R. P. C. 15 (1886), North, J. See, however, Kerly, p. 387.

[8] Ante, p. 15.

"Proprietor" includes any body of persons, corporate or unincorporate.[1]

Without the assent of the Proprietor, &c.]—The owner of goods of the kind which a trade mark is properly used to indicate—that is to say, goods of the manufacture or selection, &c.,[2] of the proprietor of the trade mark—and of the class for which the trade mark is used, is entitled to apply the trade mark to them. He may, for instance, lawfully replace soiled labels,[3] or refill, with the proprietor's goods, stamped bottles or cases, and he may label goods purchased in bulk, and broken up into smaller quantities, with the vendor's mark.[4] Where such goods have been purchased of the proprietor, it is submitted, he would be estopped from denying his assent to the use of the trade mark. In any case such use would not be use with intent to defraud. And if it were shown that the marks made by the person charged were made solely for such use, he would not, it is submitted, be guilty of an offence under the Act. In *Farina* v. *Silverlock*,[5] Lord Cranworth held that the defendant, a printer, who copied the Farina Eau de Cologne labels, was not guilty of infringement if he established his allegation that he printed the copies only to replace worn-out labels properly used in connection with the plaintiff's scent; but this he in fact failed to do.[5]

Assent of the proprietor.

[a[1]] *So nearly resembling, &c.*]—This is taken from the civil law with regard to trade marks.[6] Such resemblance is the test of infringement where a mark is not actually copied.[7] The persons whom the alleged spurious mark must be calculated to deceive are, in actions for infringement or passing off, taken to be any class of probable purchasers of the goods in connection with which the marks are to be used, whether the immediate purchasers from the manufacturers, the ultimate purchasers from the last retailers, or intermediate purchasers. Foreign purchasers are to be considered, if the marks circulate in foreign markets, and the bearing of their probable ignorance of the English

Making a mark nearly resembling a trade mark.

[1] Sec. 3 (1).

[2] Kerly, Chap. II., p. 53. Definition of trade mark in sec. 3 of the Act of 1905, ante, p. 14; and Kerly, Chap. XIX., p. 569.

[3] *Farina* v. *Silverlock*, 1 K. & J. 509; 24 L. J. Ch. 632; 6 De G. M. & G. 214; 26 L. J. Ch. 11 (1855). Wood, V.-C., and Cranworth, C.

[4] *Condy* v. *Taylor*, 56 L. T. 891 (1887), Kekewich, J.; and Kerly, pp. 394, 395.

[5] 30 L. T. 242; 31 L. T. 99, Q. B.; and 4 K. & J. 650, Wood, V.-C.

[6] Sec. 72 of the Act of 1883, now replaced by sec. 19 of the Act of 1905.

[7] Kerly, Chap. XV., p. 400. And see the rules of comparison stated in Kerly, pp. 237—256.

language upon the question whether the resemblance between the marks before the Court is calculated to deceive is also material. There seems no ground for holding that buyers within the United Kingdom only are to be considered in the application of the Act.

Where a trade description is used only so as to be brought to the notice of expert dealers in the goods to which it is applied, it is not treated by the Custom House authorities as false or falsely applied, under sec. 16 of the Act, if it does not deceive such dealers, although it might deceive the buyers who have no expert knowledge.[1] It may be assumed that a corresponding construction would be applied in the case of marks which nearly resemble trade marks.

The phrase "so nearly resembling," &c., appears also in sec. 2 (1) (b) and sec. 5 (3). In sec. 3 (2) the words used are "calculated to lead persons to believe that the goods (to which a false trade description is applied) are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are." This is the deception a forged or false trade mark is calculated to produce, and it is difficult to see how the more general expression "calculated to deceive" in the present and the first above-named sub-sections can have any different meaning.

Falsifying a trade mark.

(b) *Falsifies any genuine trade mark.*]—The assent of the proprietor[2] is no defence under this head—that is, unless it in fact negatives any intent to defraud.

The sub-section reproduces the substance of part of sec. 5 of the Act of 1862.

An alteration of a genuine trade mark, such as to make it resemble another registered trade mark, might fall under (a) or [a[1]].

The retailer of goods bearing a trade mark might alter the mark with intent to pass off it, and the goods upon which it appeared, as his own. The use of a trade mark so altered would fall within sec. 2 (1) (b) and sec. 5 (1) (d) as a false application of the trade mark, and it might also amount to the application of a false trade description within sec. 2 (1) (d) and sec. 3 (2). The sub-section is probably intended to meet cases of fraudulent alterations, such as that suggested, where no use or application can be proved.

[1] See below, p. 88. [2] Above, p. 19.

2. Falsely Applying a Trade Mark to Goods.

Sec. 2 (1).

"(b) Falsely applies to goods any trade mark,[1] or any mark so nearly resembling[2] a trade mark as to be calculated to deceive."

Goods.]—This is defined by sec. 3 (1) to mean anything which is the subject of trade, manufacture, or merchandise. Goods.

Trade marks are registered only for definite classes of goods,[3] and the rights of the proprietor of a trade mark are restricted to goods of the class for which it is registered, and for which it is actually used or intended to be used. He can have no right in respect of its user upon goods in which he does not deal.[4] It is submitted, upon the same principle, that it would not be an offence under this head to apply a trade mark registered for cotton goods, for instance, to ironware, without the assent of the proprietor of the trade mark, even if such use could be held to be a use with intent to defraud.

Where a trade mark is falsely applied the offence is constituted apart from deceit or probability of deception, unless the defendant proves that he acted without intent to defraud.[5]

Applies to Goods.] —By sec. 5— Sec. 5 (1).

"(1) A person shall be deemed to apply a trade mark or a mark or a trade description to goods who— Applying marks and descriptions.

"(a) applies it to the goods themselves; or

"(b) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or

"(c) places, or encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade or manufacture, in, with, or to any covering, label, reel or other thing to which a trade mark or trade description has been applied; or

"(d) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are

[1] Page 14, "trade mark."

[2] Page 19, "so nearly resembling."

[3] Act of 1905, secs. 8 and 26; Kerly, Chap. V., p. 103.

[4] Kerly, p. 327.

[5] *Thwaites* v. *McEvilly*, 21 R. P. C. 397 (1904), L.JJ. Ireland, a decision under sec. 2 (2). Cf. *Woolley* v. *Morrison*, 21 R. P. C. 349 (1904), Ct. of Sess., Scotland.

designated or described by that trade mark or mark or trade description.

Sec. 5 (2). Covering. Label.

"(2.) The expression 'covering' includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper; and the expression 'label' includes any band or ticket.

"A trade mark, or a mark, or trade description, shall be deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing."[1]

Sub-sec. (1) (c) covers such cases as the refilling of bottles to which a trade mark or trade description has previously been applied.[2]

Sub-sec. (1) (d) is exceedingly general in its terms. It has been held, in cases of trade description, to extend to a description in an invoice sent with or immediately after the goods,[3] even where the description was originally made verbally, and was added to the invoice at the request of the purchaser of the goods.[4]

A trade description is not "applied" to goods within the meaning of the Act unless it is physically applied.[5]

In *Starey* v. *Chilworth Gunpowder Co.*,[6] the false trade description was painted on the barrels in which gunpowder was delivered by government contractors to the government agents.

The words "calculated to lead to the belief," &c., at the end of the sub-section, may be compared with the corresponding words "calculated to deceive," used elsewhere in the Act.[7]

[1] For sec. 5 (3), see next page. As to what is a sufficient application of a spurious trade mark to goods to constitute an infringement, see Kerly, p. 395.

[2] As in *Wood* v. *Burgess*, 24 Q. B. D. 162 (1889), a case under the Act. See, also, *Thwaites* v. *McEvilly*, 21 R. P. C. 397, L.JJ. (Ireland) (1904), and *Woolley* v. *Morrison*, 21 R. P. C. 349, Ct. of Sess., Scotland (1904); the Covent Garden cases, *Munro* v. *Hunter*, 21 R. P. C. 296 (1904), Channell, J.; *Major* v. *Franklin*, [1908] 1 K. B. 712; 25 R. P. C. 406; and the infringement cases cited in Kerly, p. 395.

[3] *Budd* v. *Lucas*, [1891] 1 Q. B. 408, Pollock and Charles, JJ.

[4] *Coppen* v. *Moore* (No. 1), [1898] 2 Q. B. 300; 67 L. J. Q. B. 689. And see *Cameron* v. *Wiggins*, [1901] 1 Q. B. 1.

[5] *Langley* v. *Bombay Tea Co., Ld.*, [1900] 2 Q. B. 460; 69 L. J. Q. B. 752, Grantham and Channell, JJ. In a Scotch case the offence was held to have been committed although the defendant, while appropriating the trade mark and bottles of the prosecutor, put his own labels on the bottles as well: *Burns* v. *Turner*, 25 Ct. of Sess. Ca., 4th ser., 38 (1898), Lord Justice Clerk Kingsburgh, Ld. Trayner, Ld. Moncreiff.

[6] 24 Q. B. D. 90 (1888), Coleridge, L.C.J., and Mathew, J.

[7] See above, p. 19.

Falsely applies, &c.]—By sec. 5—

"(3) A person[1] shall be deemed to falsely apply to goods[2] a trade mark or mark, who without the assent of the proprietor[3] of a trade mark[4] applies[5] such trade mark, or mark so nearly resembling it as to be calculated to deceive;[6] but in any prosecution for falsely applying a trade mark or mark to goods, the burden of proving the assent of the proprietor shall lie on the defendant."[7]

This sub-section corresponds to sec. 4 (a),[8] defining the offence of forging a trade mark. The reference in it to a mark resembling a trade mark is redundant, as to falsely apply a mark so nearly resembling a trade mark, &c., is, by sec. 2 (1) (b), declared to be a distinct offence.

3. Applying a False Trade Description to Goods.

Sec. 2 (1) (d).

"(d) Applies any false trade description to goods."[9]

The Act does not extend to false descriptions of quality.

The sale of goods under a false trade description may constitute an offence of cheating or obtaining goods by false pretences at common law. The application of a false trade description was made a substantive offence by the Act of 1862, from sec. 7 of which Act the provisions in the present Act under this head are substantially taken. That Act did not, and the present Act does not, extend to descriptions of quality[10] as apart from descriptions of kind; but it is the intention of the present Act, under the sections dealing with trade marks, which are of the nature of trade descriptions,[11] and under the sections dealing with false trade descriptions, extended by sec. 3 (2) and (3) to marks in general which fill the office of trade marks, to reach all false merchandise marks, other than marks of quality.[12]

[1] "Person," p. 12.

[2] "Goods," p. 21.

[3] "Proprietor," p. 18; "assent of the proprietor," p. 19.

[4] "Trade mark," p. 14.

[5] "Applies to goods," p. 21.

[6] "So nearly resembling," p. 19.

[7] Below, p. 56; cf. sec. 4, p. 17.

[8] Page 17.

[9] "Goods," p. 21.

[10] See also p. 33, note (3).

[11] The Act of 1905, sec. 3, defines a trade mark as meaning a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of the trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale. See also Kerly, Chap. II., p. 22.

[12] *Quality.*—Adulteration, or the sale of goods not of the nature or quality demanded, or pretended, is made a criminal offence by other statutes in many special instances. By far the most important of these statutes are the Sale of Food and Drugs Acts, 1875, 1879, and 1899 (38 & 39 Vict. c. 63, and 42 &

What is a trade description.

Trade Description.]—By sec. 3 (1)—

"The expression 'trade description' means any description, statement, or other indication, direct or indirect—

"(a) as to the number (p. 26), quantity, measure (p. 27), gauge, or weight (p. 27) of any goods, or

"(b) as to the place or country in which any goods were made or produced (p. 28), or

"(c) as to the mode of manufacturing or producing any goods (p. 32), or

"(d) as to the material of which any goods are composed (p. 32), or

"(e) as to any goods being the subject of an existing patent (p. 34), privilege, or copyright;

Customary trade description.

and the use of any figure,[1] word, or mark which, according to the custom of the trade (p. 37), is commonly taken to be an indication of any of the above matters shall be deemed to be a trade description within this meaning of this Act."

M. M. A. 1891. Customs entry.

And by the M. M. A. 1891, s. 1, it is provided that—

"[f] the Customs entry[2] relating to imported goods shall, for the purposes of the M. M. A., 1887, be deemed to be a trade description applied to goods."

Verbal trade description.

It has been decided by a Divisional Court that the provisions of sec. 2 (2) of the M. M. A., 1887, which make it an offence to sell goods to which a false trade description is applied, do not apply where the description is entirely verbal, still less where it is a mere inference from conduct, e.g., the act of a salesman in

43 Vict. c. 30 and 62 & 63 Vict. c. 51), by which it is an offence to mix injurious ingredients with any article of food, or any drug, with intent that the same may be sold, or to sell the article of food or drug so mixed: to sell articles of food or drugs not of the nature, substance, and quality demanded by the purchaser; to abstract from an article of food, with intent that the same may be sold without notice, any part of it so as *injuriously to affect its quality*, substance, or nature, or to sell (without notice) the article so altered, and to import margarine and other foods insufficiently described upon their containers. For cases under these Acts, see the Law Reports Digest, "Adulteration." Among other statutes may be mentioned 6 & 7 Will. 4, c. 37 (bread); 4 Geo. 2, c. 14, 17 Geo. 3, c. 29 (tea); 5 Geo. 1. c. 11, s. 23 (coffee); 37 & 38 Vict. c. 49, s. 14. 48 & 49 Vict. c. 51, s. 8 (beer); 32 & 33 Vict. c. 112 (seeds); 56 & 57 Vict. c. 56 (agricultural fertilisers and feeding stuffs); the Margarine Act, 1887 (50 & 51 Vict. c. 29); and the Butter and Margarine Act, 1907 (7 Edw. 7, c. 21).

[1] I.e., numeral. Cf. *Ex parte Stephens*, 3 C. D. 660.

[2] See p. 39, below.

handing over to a customer a parcel (alleged to contain a false trade description) without comment.[1] The whole framework of the statute, with the exception of sec. 20 (inf. p. 99), points to the necessity for a written or printed mark, or a physical mark in some other sense than a purely verbal description. But unintelligible writing may be explained by a statement made at the time of sale.[2]

Frauds effected under cover of verbal false descriptions.

The non-inclusion of verbal statements leaves a large class of frauds untouched by the Act.[3] Goods, for instance, which have passed through the Customs under cover of an explanation placed upon their coverings may be sold retail without the explanation, and with a verbal false description; as, of course, may also goods which, bearing no description at all, or no false description, could not be stopped on importation, or home-made goods. Mr. Poland, K.C., expressed the view that the imitation of the crystals of Demerara sugar in beetroot sugar, and its sale as Demerara sugar, was not an offence under the Act.[4] Sales upon such verbal false statements may, however, amount to the offence of cheating or obtaining money by false pretences, if they are deliberate false statements of matters of fact known to the person charged, and are made in order to induce, and do actually induce, the buyer to purchase.

Imitation Demerara sugar.

Imitations of "get-up."

Goods may be passed off as those of the manufacture or merchandise of some person other than the person whose they are, by an imitation of the get-up and without an explicit description of them as the goods of the first person, or any piracy or colourable imitation of his trade mark or trade name. This fraud forms the ground of a civil action.[5] Such imitations may be false trade descriptions applied to the goods under sec. 3 (2).[6]

Words forming part of the goods.

Words forming part of the goods upon which they appear cannot, it would seem, be taken to be a trade description applied to

[1] *Coppen* v. *Moore* (No. 1), [1898] 2 Q. B. 300; 67 L. J. Q. B. 689, Wright and Darling, JJ.; *Langley* v. *Bombay Tea Co., Ld.*, [1900] 2 Q. B. 460, Grantham and Channell, JJ.

[2] *Cameron* v. *Wiggins*, [1901] 1 Q. B. 1, Lawrance and Kennedy, JJ.; evidence to show that "N.M." meant New Zealand Mutton was held to be admissible.

[3] Proceedings may be taken under the Sale of Food and Drugs Acts in cases coming within those statutes: see *Coppen* v. *Moore* (No. 1), [1898] 2 Q. B., per Wright, J., at p. 304; 67 L. J. Q. B. at p. 690.

[4] See the case and opinion set out, M. M. A. Report, p. 166.

[5] Kerly, Chap. XVI., p. 488.

[6] Below, p. 43.

those goods within the meaning of the Act, although they may, in fact, give or suggest some description, statement, or other indication within the definition just cited, for the description is treated in the definition as an addition to the "goods," which are complete without it. This is the view taken by the Customs authorities in the application of sec. 16.[1] For instance, English words in verses on Christmas cards; the title of a book; the words *fast* and *slow* upon the regulator of a watch; mottoes and words of friendship on handkerchiefs, crockery, and so forth, are not treated by the Customs authorities as indications that the goods were produced in an English-speaking country. "On *such* goods, made abroad, it has been thought" by the Customs authorities "wiser to regard (with some exceptions) English wording which goes no further than above mentioned (that is to say, which does not go into such statements as 'printed in England,' or 'very superfine cards,' or 'London lever watch,' &c.) as part of the 'goods,' and as not, therefore, rendering the goods liable under the Act, even though the general appearance given to them may be on this account, and on account of the wording, unquestionably English."[2]

Trade description may be a trade mark.

The trade description may be a trade mark or part of a trade mark,[3] or may include a trade mark;[4] but the case of a false name or initials is dealt with specially.[5]

Number.

(a) *Number, &c.*]—This sub-section is directed to descriptions applied to coverings[6] purporting to contain a specified or indicated number, quantity, &c., of goods, as well as to descriptions attached to the goods themselves. It meets such frauds as the practice of marking upon cotton goods the number of laps or folds by a figure so placed as to be "commonly taken" to indicate the number of yards in the marked piece, the true number of yards being in fact less than the number marked.[7]

It has been questioned whether the words in the clause cover indications of width, dimension, and weight per unit of length, which are of great importance in the textile trades; but it is

[1] See M. M. A. Report, 1890, Appendix I., p. 275, a paper handed in by Mr. Follett, Solicitor of the Board of Customs, from which the illustrations in the text are taken.

[2] From the paper referred to in the last note.

[3] Sec. 3 (1). "False trade description," p. 40.

[4] Sec. 3 (2), p. 43.

[5] Sec. 3 (3), p. 45.

[6] Sec. 5 (2), p. 22.

[7] See the evidence of Mr. Bailey, Q. 1966 et seq., M. M. A. Report, 1890.

submitted that they do, and it is said that the Manchester magistrates have so construed them.[1]

Measure.]—The description of casks of beer as *barrels* in an invoice sent with them has been held to be a statement within the definition that the casks contain thirty-six gallons each ;[2] and the description in an invoice "kils. 1" to be a statement that the casks contained 18 gallons, the proper measure of a kilderkin. Measure.

Weight.]—In a civil case it has been held that goods done up in cases and supplied according to contract, the cases being marked as one-pound cases, could not be forced upon a purchaser if they were actually under the weights indicated, although not deficient by more than an alleged customary allowance, on the ground that the purchaser could not sell them without committing an offence under the Act.[4] Weight.

An information laid against a tea company alleged that a description of a packet of tea as containing a quarter pound was a false trade description. The tea was wrapped in a piece of lead or silver paper having on it, in small type, "quarter pound gross weight," the packet was tied up with string and weighed just over a quarter of a pound, but the tea contained in it weighed 3¾ozs. Under the string of the packet was inserted a ticket, having on it the words "quarter pound 2s. 8d. tea ticket" with the name and address of the company, and on the other side a notice to the effect that every purchaser of tea from a quarter of a pound upwards was given some useful article or a check, and by saving a number of these checks a prize could be obtained. The justices held that the ticket constituted a false trade description. The company appealed, and it was contended that the ticket was merely a voucher for a prize, and further that the words on it must be read with the words "quarter pound gross weight," so as to be qualified by them ; the appeal, however, was dismissed.[5]

Where a description is applied to goods showing that the weight

[1] See previous note.

[2] *Budd* v. *Lucas*, [1891] 1 Q. B. 408, Pollock, B., and Charles, J.

[3] *North Eastern Breweries, Ld.* v. *Gibson*, 68 J. P. 356 (1904), Div. Ct. : the explanation that the process of coopering casks had the effect of diminishing their capacity did not avail the appellants, it being found that they knew that this was so.

[4] *Hooper* v. *Balfour*, W. N., [1890] 61 ; 62 L. T. 646 ; *Green and Balfour's Arbitration*, W. N., [1890] 139, 156, Kay, J., and C. A. ; and see *Guinness, Son & Co., Ld.* v. *Wythe*—a case decided by a metropolitan police magistrate—30 L. Jo. 455 (1895).

[5] *Star Tea Company, Ld.* v. *Whitworth*, 91 L. T. 87 ; 68 J. P. 443 ; 2 L. G. R. 1000 ; 20 Cox. C. C. 658 ; 20 T. L. R. 539 (1904). Div. Ct., Ld. Alverstone, L.C.J., Wills and Kennedy, JJ.

supplied is less than that for which the customer asks, no offence against sec. 3 (1) (a) is committed.[1]

(b) *Place or country.*]—This sub-section was regarded by many of the advocates of the Bill as the most important clause of the definition; it is under cover of it that goods made abroad and so marked as to suggest that they are made in England are brought within the Act, and are made liable to seizure by the Customs authorities in accordance with sec. 16.[2]

Place of origin.

The chief difficulty in the application of this clause of the definition arises from the fact that the clause is apparently framed on the assumption that all goods will be wholly made or produced in one place or country, whereas in fact many kinds of goods are worked upon in several before they are finished and ready for the market, or are made up of parts made or produced in different countries. *Bischop* v. *Toler*[3] was a case of this kind. A person had in his possession, for sale, margarine packed in cardboard boxes, marked with the words "French factory." The margarine consisted of a substance, called *Le Dansk*, manufactured from animal fat at a factory in Paris, and sent thence to a factory at Southampton, where, by admixture with Danish butter and English milk, it assumed the form in which it was offered for sale. It was only when the margarine assumed this form that it was described as *Le Dansk*. The words "French factory" were held to be a "false trade description" within secs. 2 and 3 of the M. M. A., 1887, inasmuch as the margarine first became a finished product in England, while it was sold in circumstances which represented it to the buyer as having been manufactured in France. It has been held by a metropolitan police magistrate that the principle laid down in the *Le Dansk* case, that an article becomes a finished product at the time when it assumes the form in which it is offered for sale, although applicable to chemical combinations in which the several parts are lost in the whole composition, is not applicable to mechanical combinations in which all the parts remain unaltered, and that therefore the description of a watch, in which at least three wheels and four

[1] *Langley* v. *Bombay Tea Co., Ld.* [1900] 2 Q. B. 460; 69 L. J. Q. B. 727. Grantham and Channell, JJ. The wrapper on the goods bore the words "The weight of this packet including the wrapper is half lb."

[2] And in accordance with the agreements arrived at by the Commissioners at the International Convention, Conference of Rome, in 1886. This Convention has not been ratified.

[3] 65 L. J. M. C. 1 (1895), Ld. Russell of Killowen, L.C.J., and Cave, J.

pinions of the "train," in addition to other parts of greater or less importance, were of foreign origin, as an "English lever" was a false trade description.[1]

The difficulty above referred to is partly met by the definition of a false trade description as one which is false in a material respect, for this reduces it to a question of fact.[2] No doubt, any Court, in determining whether the indication of a particular country as the place of manufacture was false in this sense or not, would be guided by the custom of the trade in the goods concerned, that is, supposing it to be consistent with honesty. The description of goods partly made in each of two countries as made in a third would, it may be assumed, be indefensible under any custom, unless it fell within the general saving of sec. 18 as a "conventional" or "generic" description lawfully and generally used at the passing of the Act, as, for instance, *French polish*, *American leather*, or *Indian rubber*. The last-mentioned section, however, only protects a trade description of place or country calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced (the goods not being actually made or produced in the place or country indicated or suggested), if there is added to the trade description immediately before or after the name of that place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually

[1] *Lancashire Watch Co.* v. *H. D. Williamson, Ld.*, Times, March 5, 1900. In the Q. B. D. (*Williamson* v. *Tierney*, 83 L. T. 592; 65 J. P. 70; 17 T. L. R. 174 (1901). Ld. Alverstone, L.C.J., Kennedy and Phillimore, JJ.) the Court held that the mere fact that part of the watch was made abroad was not sufficient to make the description false, but that if the magistrate decided the case on what he held to be the recognised meaning of the word "English" as applied to watches, his decision would not be disturbed. In re-stating the case the learned magistrate said that he came to the conclusion, as a determination of fact upon evidence produced before him, that in the watch trade no watch was regarded as an English watch, or was rightly called English, which contained foreign parts of material importance other than the hair- and main-spring, or things of comparatively insignificant character, such as screws, and that certain parts of the watches were of most material importance, and were imported from abroad in such a condition that they were foreign parts when they arrived in this country, and remained foreign parts after they had been operated upon, polished, and fitted into the watch by the appellants. The Court, therefore, dismissed the appeal.

[2] See for instance the *Tarragona Port* case, where a wine consisting as to one-third of high-priced wine from Tarragona in Spain, intended for blending, and as to two-thirds of wine made from grape-must, was sold under a label which contained the words "Stower's Tarragona Port (blended with wine produced from finest foreign grapes), blended, bottled, and guaranteed by," &c. The summons was dismissed, as well as a subsequent appeal: *Hooper* v. *Riddle & Co.*, 95 L. T. 424; 21 Cox, 277; 70 J. P. 417 (1906), Div. Ct., Ld. Alverstone, L.C.J., Ridley and Darling, JJ.

made or produced, with a statement that they were made or produced there.[1] From this has arisen the now familiar notices, "Made in Germany," "Made in France," &c.[2]

It is to be observed that the provision in sec. 18 requiring the addition of the name of the place or country of actual manufacture is only applicable where the trade description is calculated to mislead.[3] It is not necessary, for instance, to mark *Morocco* leather or *Brussels* carpets as made in England, since the term is not calculated to lead any buyer to think the leather was made in Morocco or the carpet in Brussels.

A recent illustration of the application of the section as to place is the "Witney" Blanket case, in which the defence was that the term "Witney" applied to blankets described a particular class and quality of manufacture, namely, a raised blanket with a border. The magistrate found that it was not proved that at the date of the passing of the Merchandise Marks Act, 1887, the term had been applied to blankets to indicate the class or method of manufacture, and that the term was calculated to mislead as to the place where the blankets were made.[4]

By **sec. 10 (2)**—

Evidence of country of origin.

> "In the case of imported goods, evidence of the port of shipment shall be primâ facie evidence of the place or country in which the goods were made or produced."

[1] Sec. 18, below, p. 49; and see *Bischop* v. *Toler*, 65 L. J. M. C. 1 (1895), at pp. 2 and 3.

[2] In *Robinson & Barnsdale, Ld.'s* case, the words "made in England," on the back of a cigar-box, did not save from a conviction for applying a false trade description to boxes of English-made cigars, which bore the words Havannah and Santiago, &c.—Times, April 2nd, 1901. In a recent cigar case the prosecution alleged that the combination of words, marks, and labels used (including the words "Bella de Cuba") were calculated to lead to the belief that the goods were made and produced in the island of Cuba or that the cigars were composed of Havana tobacco, and were a false trade description. The defence was that some of the things complained of were in common use and that the boxes bore labels within the lids "guaranteed British make," and that the cigars were made with Havana tobacco, that is to say, tobacco grown in the island of Cuba, or close to it, and were Havana cigars, and that the defendants had acted innocently. The prosecution succeeded, and an appeal failed. *Godfrey Phillips & Sons'* case, Times, July 24th, 1909. As to the use of a shamrock suggesting an indication of Irish origin, see *Gamage, Ld.'s* case, Times, Aug. 9th, 1907.

[3] Cf. "So nearly resembling," ante, p. 19.

[4] *Rylands & Sons, Ld.'s* case, Times, April 9th, 1909; leave to appeal was given. In *Daniels'* case, Times, March 6th, 1907, (Donegal Tweed) it was held that an offence had been committed. There have been several instances of prosecutions at the instance of the Irish Industrial Development Association in respect of the misuse of the word "Irish" or of indicia of Irish origin. The most recent are reported in the newspapers of Sept. 15th, 1909.

And the port of shipment is stated in the Customs entry,[1] which is now itself a trade description applied to the goods referred to by it.[2]

The practice of the Customs authorities, under sec. 16, with regard to the matters above referred to, was described by Mr. Follett, to the Committee of 1890, in the following terms[3]: "As general rules, the board have acted on the principle that goods must (as indeed is in accordance with sec. 10 of the Act) be held prima facie to have been the make or produce of the country from which they last come; and that if a qualifying description to that effect is remonstrated against on the ground that it would be untrue as to a material part, there must be a statement as to that part. For instance, if there were an importation of German cutlery with the name of an English dealer, and a qualification of *made abroad* were objected to on the ground that the handles (taking it to be knives), or the woodwork (taking it to be planes), were made in England and sent out by the dealer to be fitted, then it would be required that these should be stated, *blades made in Germany*. Similarly (although as to the important part of the goods the circumstances are just reversed), it was required that if British goods were sent abroad to be finished in any respect, as, for instance, yarns to be dyed, that fact must be stated, *dyed abroad*, when they are re-imported.

Customs practice as to country of origin.

Goods finished abroad.

"As regards goods coming in in an incomplete state, or merely as parts of an intended complete article, the Board have felt that they could do no more than deal with them as they stand, taking care that there is no description either of the parts themselves or of the whole goods to which they are going to be added which can form an incorrect indication as to the make of the imported portion."

Foreign goods finished in England.

In the case of goods imported through the ports of a country other than that of their origin, for example, Swiss goods coming through a French port and marked as Swiss, the practice of the authorities is to detain them until a declaration by the importer, or other evidence regarded as satisfactory, is tendered to show that the goods are in fact Swiss.

Imports from inland country.

It has been held in an Irish case that the description of bacon which was killed in America, and was cured by the defendant Lipton partly in America and partly in Ireland, as "Lipton's cure," and "own cure at Lipton's market," was not a false trade description; although the magistrates and one of the judges who

[1] Below, p. 39. [2] M. M. A., 1891, sec. 1. [3] Ante, p. 26, n. (1).

heard the case thought the use of the description by an Irish shopkeeper was likely to be deceptive.[1]

In a case where a tradesman sold bacon, which really came from Ireland, as "finest Wiltshire cut," and was prosecuted for applying a false trade description to the commodity, the defence was successfully set up, both before the justices and in the High Court, that the description referred, not to the place of origin of the bacon, but to the cut.[2]

It is provided by sec. 16 (4)[3] that—

Goods bearing the name of an English place.

"Where there is on any goods a name which is identical with or a colourable imitation of the name of a place in the United Kingdom, that name, unless accompanied by the name of the country in which such place is situate, shall be treated for the purposes of this section as if it were the name of a place in the United Kingdom."

This provision is expressly restricted to the purposes of the section in which it occurs, that is, the section dealing with the importation of deceptively or spuriously marked goods; but the rule laid down in the clause would probably be adopted in regard to any suggested false trade description by the use upon goods of a name like the name of an English, Scotch, or Irish place. Goods marked simply "Rugby," for example, would be taken to be falsely described even if they were made in Rugby, Tennessee.

(c) *Mode of manufacturing, &c.*]—In the Irish case referred to above it was also held that the description in question was not an offence within this clause.[4] Other illustrations of false trade descriptions under this heading are "guaranteed hand-made"[5] "and hand-cut"[6] applied to cigarettes not made and tobacco not cut by hand.

Material.

(d) *Material, &c.*]—In a case where goods were marked and described as "natural wool" goods, this was held by the magistrates at Leicester to be an indication within the definition that the goods were all, or substantially all, woollen, although a

[1] *R.* v. *Lipton*, 32 L. R. Ir. 115 (1893), Q. B. D.

[2] *Morris* v. *Royle*, 31 L. Jo. 339 (1896). See also *Harrod's Stores* case. Times, January 9th, 1898, in which it was held on the facts that the term "Dresden" as applied to china indicated the factory from which the wares came, and not the style of decoration.

[3] See, further, p. 86, and "Customs entry," p. 39.

[4] See note (1) above.

[5] *Kirshenbaim* v. *Salmon and Gluckstein*, [1898] 2 Q. B. 19.

[6] *R.* v. *Phillips*, 65 J. P. 41 (1901). See also *R.* v. *Bramall*, Times, December 18th, 1891, where a description of machine-cut files as "hand-cut" was held to be an offence.

custom to call cheap mixtures of cotton and a little wool "natural wool" was alleged.[1]

"Flannelette" has been held by a metropolitan police magistrate not to be a "false trade description," although the material was found on analysis to consist entirely of cotton, without the faintest trace of any wool. Except for a ticket bearing the word "flannelette," with the price, attached to the goods, no representation was made to the public as to the meaning of the word "flannelette." The magistrate was not satisfied that it was believed by the public to contain wool, or was bought on that ground, and he held that "flannelette" might fairly be construed as meaning "an article not quite equal to flannel, but clearly resembling it, and much cheaper."[2]

The expression "soda crystals" has been held to be a false trade description of a substance containing 18 per cent. or more of sulphate of soda, the expression being commonly understood in the trade as meaning washing soda and to be a guarantee that the substance is carbonate of soda, containing not more than 2 per cent. of the sulphate.[3]

[1] *Leicester* case, Times newspaper, October 20th, 1893; and see *Meadows* v. *Catesby & Sons*, 107 L. T. Jo. 440 (1899), where it was held, by a metropolitan police magistrate, a false trade description to describe a mattress containing sixty or seventy per cent. of jute or hemp as a "wool" mattress. There have also been convictions where trinkets were invoiced as composed of 800 parts silver out of 1,000, whereas they fell considerably short (Birmingham, *Pell's* case), and where carbolic acid was sold as Condy's Fluid (Wandsworth, *Hall's* case). See paper by Mr. G. B. Ellis on "The Merchandise Marks Act" in the *Trans. Chart. Inst. of Pat. Agents*, Vol. XVII., p. 83.

[2] *Whiteley's* case, Times, January 16th, 1895; and see *Nicholl's* case (1896), a prosecution before a metropolitan police magistrate for selling lard solidified with beef stearine as pure lard.

[3] *Fowler* v. *Cripps*, [1906] 1 K. B. 16, Div. Ct. Mere commendatory terms of quality are not within the sub-section, and in some cases there may be a difficulty in saying whether the description used falls within the sub-section as a description of material, or is merely a term of quality. This was one of the defences set up in *Rex* v. *Adcock, Easton & Co.*, where the defendants were summoned for applying a false trade description, namely, "chloros," to a disinfectant, and selling the same. They had contracted to supply "chloros" to a borough council, and the specification laid down that sodium hypochlorite was required, and specified the strength. The prosecution alleged that the disinfectant supplied did not answer to the description of "chloros," but was of less strength. The prosecution was at the instance of the United Alkali Co., who alone sold "chloros," and alleged that "chloros" obtained from them had been adulterated. The defendants said that after getting some "chloros" from the company they had attempted to make it themselves, but that some evaporation of chlorine had taken place. They argued that even if the disinfectant supplied was of less strength than "chloros," they had committed no offence under sec. 3 (1), but, if any

In a prosecution for selling goods as "Trinidad bitumen," it was alleged that it was, as applied to the goods in question, a false trade description, as the term indicated bitumen from Trinidad Lake, whereas the goods in question were made from a material called mangak, a bituminous product containing 90 per cent. of bitumen. It was found that the lake bitumen was not pure bitumen, and that pure bitumen could not be used for any industrial purpose unless an alteration were made in it, and that mangak could be properly called bitumen. The summonses were dismissed.[1]

Patent or design.

(c) *Existing patent or registered design.*]—By sec. 89 of the Patents and Designs Act, 1907, it is provided that—

Sec. 89 of the Act of 1907.

"(2) If any person falsely represents that any article sold by him is a patented article, or falsely describes any design applied to any article sold by him as registered, he shall be liable for every offence, on conviction under the Summary Jurisdiction Acts, to a fine not exceeding five pounds.

"(3) If any person sells an article having stamped, engraved, or impressed thereon or otherwise applied thereto the word 'patent,' 'patented,' 'registered,' or any other word expressing or implying that the article is patented or that the design applied thereto is registered, he shall be deemed for the purposes of this section to represent that the article is a patented article or that the design applied thereto is a registered design.

"(4) Any person who, after the copyright in a design has expired, puts or causes to be put on any article to which the design has been applied the word 'registered,' or any word or words implying that there is a subsisting copyright in the design, shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding five pounds."

These provisions replaced those of sec. 105 of the Patents, &c. Act, 1883, so far as regards patents and designs. The only material alteration made by sub-sec. (2) is the introduction of the word "falsely," which did not appear in the corresponding repealed sub-section, instead of words expressing the representation to be contrary to the fact. Sub-sec. (4) is new. The introduction of the word "falsely" probably prevents sub-section (2)

offence had been committed, it was under sec. 3 (2). The defendants were fined.—*Times*, October 26th and 28th, and November 4th, 1901.

[1] *Keys'* case, *Times*, March 18th, 1909.

applying to a case in which no patent has ever existed, but the word "patent" has become part of the trade name of the goods and has been used by the manufacturer in his description of them.[1] It also saves the use of such an ordinary name of commerce as "patent leather."

Penalty on falsely representing a trade mark as registered.

The similar provisions as to trade marks are now contained in sec. 67 of the Trade Marks Act, 1905, which is as follows:—

"(1) Any person who represents a trade mark as registered which is not so, shall be liable for every offence on summary conviction to a fine not exceeding five pounds.

"(2) A person shall be deemed, for the purposes of this enactment, to represent that a trade mark is registered, if he uses in connection with the trade mark the word 'registered,' or any words expressing or implying that registration has been obtained for the trade mark."

It was held, under the Act of 1883, that application for a patent,[2] or provisional protection,[3] does not authorise the use of the words "patent" or "patented"; but it is submitted that the acceptance of the complete specification for a patent does, for it entitles the applicant to "the like privileges and rights as if a patent for the invention had been sealed on the date of the acceptance."[4]

The section just cited from the Patents and Designs Act seems to apply to the case of a false representation in respect of an article for which a patent has at some time been granted, but which has ceased to exist by effluxion of time or otherwise;[5] sec. 3 (1) (e) of the M. M. A. clearly extends to such a case.

There is no provision similar to sub-sec. (3) of the above section in the M. M. A., and the use of the words "patent" or "patented" does not necessarily, therefore, amount to a description, statement, or other indication that the goods to which they are

[1] *Edelsten* v. *Vick*, 11 Ha. 78 (1858), Wood, V.-C. (Taylor & Co.'s Patent Solid-headed Pins); *Gridley* v. *Swinborne*, 53 J. P. 739, 791; 5 T. L. R. 7 (1881), Div. Ct. (Swinborne's Patent Refined Isinglass), held not to be a false trade description; and see Kerly, p. 429 et seq.

[2] So held by a magistrate in *R.* v. *Crampton*, 3 R. P. C. 367 (1886). See further as to this section below, p. 99.

[3] So held by a magistrate in *R.* v. *Wallis*, 3 R. P. C. 1 (1886).

[4] Act of 1907, s. 10. And see *R.* v. *Townsend*, 13 R. P. C. 265 (1896), Worship Street Police Court: per contra in *Gruebler's* case, Times, November 22nd, 1894, cited p. 36.

[5] Sec. 105 of the Act of 1883 did not so apply. It is not clear why sub-sec. 4, which deals with the case of an expired copyright, but not of an expired patent, was, on the construction suggested in the text, required. It creates a separate offence.

applied are subject to an existing patent. A false claim of patent rights contained in a trade mark is a bar to the interference of the Court for the protection of the trade mark, and the cases decided on this subject will, no doubt, apply, so far as they go, in the construction of the present sub-section; but they do not lay down any definite rules.[1]

In *Gridley* v. *Swinborne*,[2] a case under the Act of 1883, Coleridge, L.C.J., said that where the original patentee continued to use his old labels containing the word "patent," there was no necessary implication of fraud; and the Court held that the defendant, who had sold goods, made from gelatine, under a patent which expired in 1847, as "Swinborne's patent refined isinglass," was not guilty of any offence under the Act. In a case at Wolverhampton, however, Messrs. H. & T. Vaughan, lock manufacturers, were convicted under sub-sec. (e) for selling locks stamped "Vaughan's Patent" for which there was no existing patent, although the article was of their own manufacture;[3] and it was held in a later case at the Mansion House to be no defence to a charge of selling articles marked "Patent," in contravention of sec. 105 of the Act of 1883, that the defendant's specification had been officially "accepted" by the Patent Office, although sec. 15 of that Act provided that on acceptance the applicant shall have the like privileges and rights as if a patent had been sealed on the day of acceptance.[4]

In a case in Ireland, the defendants had sold a box of baking powder bearing a label with the words "Trade Mark—Royal—Registered," and on the obverse side the words "Manufactured by Royal Baking Powder Company, New York." The label in question was not registered in England, though it was registered in the United States. It was held that the use of the word "Registered" amounted to a representation that the word was registered in the United Kingdom, which was not affected by the words describing where the article was manufactured, and that accordingly a contravention of sec. 105 had been committed.[5] But the use of the words "trade mark" without any reference

[1] See Kerly, Chap. XV., p. 429.

[2] 52 J. P. 739. 791; 5 T. L. R. 71 (1888), Coleridge, L.C.J., and Grantham, J.

[3] Times, February 25th, 1888.

[4] *Gruebler's* case, Times, November 22nd, 1894. But see *R.* v. *Townsend*, 13 R. P. C. 265 (1896), Worship Street Police Court. See p. 35.

[5] *Wright, Crossley & Co.* v. *William Dobbin & Co.*, 15 R. P. C. 21 (1898). O'Brien, L.C.J., O'Brien and Boyd, J.J. *MacSymons' Stores, Ld.* v. *Shuttleworth*. 15 R. P. C. 748 (1898), Day and Channell, JJ., was a similar case.

to registration is not a representation that the mark is registered.[1] The wrongful representation of a trade mark as registered does not appear to fall within sec. 3 (1) (e) of the M. M. A., since it is not a representation that the goods to which it is applied are themselves the subject of an existing privilege.

Custom of the trade.

Custom of the trade.[2]]—Custom does not here mean the custom of merchants, which is part of the common law,[3] or any of the six consuetudines mentioned by Coke.[4] It is more akin to the custom or usage of a particular trade or market which is resorted to in order to import terms into commercial contracts not inconsistent with their words, or to explain the meaning of the expressions employed in them, that is, a particular custom to be established by evidence,[5] or to the "custom of the country" imported into agricultural tenancies and leases, of which it is said it "must be applied to the approved habits of husbandry in the neighbourhood under circumstances of the like nature."[6] The custom is, therefore, the existing and generally recognised practice or usage of the trade, whether old or recent; but if recent, sufficiently old to have become generally recognised and followed.[7]

The words may be compared to those used in the first sentence of sec. 18—"lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods."[8]

In judging whether an alleged trade mark, or a mark tendered for registration as a trade mark, is calculated to deceive by reason of its resemblance to another trade mark or otherwise, the civil Courts, as has already been shown, consider all the circumstances of the trade concerned, and admit the evidence of persons engaged in the trade as to those circumstances.[9]

The evidence to prove a custom within the definition above

[1] *Son Son Co.* v. *Britten*, [1899] 1 Ch. 692; 16 R. P. C. 137.

[2] Cf. "Common repute" in sec. 7, below, p. 73.

[3] Blackstone, Vol. I., p. 74.

[4] 2 Inst. 58.

[5] See *Wigglesworth* v. *Dallison*, 1 Smith L.C., 11th ed., p. 545, and the cases cited in the notes.

[6] 2 Platt, 279, cited in Stroud's Dic., s. v.

[7] "Usage of trade is a general and prevailing course of business, and witnesses who are called to prove it should cause their minds to revolve over instances known to them of its having been acted upon." *Hall* v. *Benson*, 7 C. & P. 711.

[8] See pp. 49, 51.

[9] Kerly, Chap. X., "Restrictions on Registration," pp. 247, 256.

stated must obviously be similar to the expert evidence just mentioned—that is to say, it must be given by persons engaged in the trade, whether as manufacturers, merchants, or retailers, or by persons in the employment of such persons, or otherwise practically acquainted (for instance, as conductors of technical or trade journals) with the customs to which they depose.

In a case where the question was whether the imposition on a vest of German manufacture, after its importation into England, of the words "Dr. Jaeger's Sanitary Woollen System Company, Sole Concessionaires: Pure Wool Warranted," was a "false trade description" under sec. 2 (1), evidence was held admissible as to whether, according to the custom of the trade, the imposition of such words would be taken to indicate English manufacture.[1]

Where the name "soda crystals" was alleged to be a false trade description of a substance containing 18 per cent. of sulphate of soda as well as carbonate of soda, and the person charged contended that crystallised sulphate of soda was a species of soda crystals, and that the description was therefore true, evidence was admitted which established that the name was commonly understood in the trade to indicate crystallised carbonate of soda containing not more than 2 per cent. of sulphate of soda, and a conviction was upheld by the Divisional Court.[2]

In a case where an alleged custom in the furniture trade, to deliver goods upon sale or return, was set up in answer to a claim under the reputed ownership clauses of the Bankruptcy Act, Cave, J., said the question was, "whether it amounted to a custom of the trade of so notorious a character that anyone making inquiry of persons cognizant of the trade might ascertain that it was a custom."[3] It is necessary to prove the custom in

[1] *Watson* v. *Dr. Jaeger's Sanitary Woollen System Co.*, 43 T. L. R. 150 (1897), Wright and Bruce, JJ. Evidence was also held admissible in this case as to alleged statements of the defendants' salesmen that the goods were English. The case was remitted on these points, but the summons was dismissed, both the alleged custom and the statements above mentioned having been held not to be proved. An appeal by case stated at the request of the Board of Trade was proposed, but not taken. See 32 L. J., p. 262.

[2] *Fowler* v. *Cripps*, [1906] 1 K. B. 16.

[3] *Ex parte Nassau*, 2 T. L. R. 339 (1886). See also *Ex parte Watkins*, 8 Ch. 520 (1873), and *Ex parte Powell*, 1 C. D. 563 (1875), (Bankruptcy), where it is said that in order to establish a custom it must be proved to have existed so long, and to have been so extensively acted upon, that the ordinary creditors of the debtor in his trade may be reasonably presumed to have known it.

each case until eventually it becomes so well understood that the Courts will take judicial notice of it.[1]

The part of the sub-section relating to the custom of the trade does not, by implication, exclude other evidence to explain the meaning of unintelligible writing.[2]

Customs entry.

Customs entry.]—The Customs entry for imported goods is a statement made up from the bill of lading[3] for purposes of Customs duty, and signed and declared to be true by the importer or his agent. It contains the name of the port or place from whence the goods come, and a description of the number of packages and of the quantity and description of goods, in accordance with the requirements of the Official Import List. It was made a trade description under the principal Act by the Act of 1891, upon the recommendation of the Committee of 1890, and in accordance with the following passage from their report: "The evidence given before your Committee has, in their opinion, conclusively proved that goods (notably, articles of consumption) come into this country in large quantities in an adulterated form, but cannot, according to the evidence given by the Customs authorities, be detained under sec. 3 (d)[4] of the M. M. A., because, in most instances, they bear no trade description as defined by secs. 3 and 5 of the said Act. Your Committee are of opinion that much harm is being done to legitimate trade by the impunity with which spurious articles are introduced into this country. They therefore propose that the Act should be amended by making the Customs 'entry,' which must bear a description of the goods imported, a 'trade description' within the meaning of the Act. The adoption of this amendment would, in the opinion of your Committee, give the Customs power to detain goods, the 'trade description' of which is false as to the material of which they are composed."

Report of the M. M. A. Committee of 1890 on fraudulent importations.

No general obligation to mark the place of origin.

The Committee refused to recommend that it should be made compulsory to mark all goods with an indication of origin, on the ground that this "would seriously restrict trade, and virtually destroy the business of warehousemen, commission agents, and small masters."

[1] Per Channell. J., in *Moult* v. *Halliday*. [1898] 1 Q. B. 125.

[2] *Cameron* v. *Wiggins*. [1901] 1 Q. B., Lawrance and Kennedy, JJ.

[3] See Mr. Seymour's evidence, M. M. A. Report, 1890. Q. 4821.

[4] False trade description as to the material of which any goods are composed.

What is a false trade description.

False trade description.[1]]—By sec. 3 (1)—

"The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act."

The last part of the definition would have been more appropriately placed in the definition of a "trade description."[2]

The "false name or initials of a person" is specially dealt with by sec. 3 (3),[3] and the definition just stated is expanded by sec. 3 (2), which is set out below.[4]

So that "false trade description" under the Act includes—

(1) A trade description false in a material respect as regards the goods to which it is applied.

(2) An alteration of a trade description, whether false or not, such as to make it false in a material respect.

(3) Figures, words, or marks, or an arrangement or combination thereof, such as are reasonably calculated to lead persons to believe that the goods to which they are applied are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are (sec. 3 (2)).

(4) A false name or initials within sec. 3 (3).[5]

False.]—False is construed by the Customs authorities in the application of sec. 16 to mean, not "misleading," but simply "untrue."[6] It is immaterial that the buyer was not deceived.[7] And it has been held by the Privy Council on a section of a New Zealand Act corresponding to sec. 16 that the innocence of the owner of the goods cannot affect the question of the exclusion of goods to which a false trade description is applied.[8] The expression "false description" is taken from the Act of 1862,

[1] "Trade description," p. 24.
[2] "Trade description," p. 24.
[3] *Below*, p. 45.
[4] Page 43.
[5] Below, p. 45.
[6] See Mr. Follett's evidence, above, p. 26, n. (1).
[7] See *Kirschbaum v. Salmon and Gluckstein*. [1898] 2 Q. B. 19; 67 L. J. Q. B. 601, Ld. Russell of Killowen, C.J., Hawkins, Day, Wills, and Wright, JJ.
[8] *Commissioners of Trade and Customs v. Bell*. [1902] A. C. 563.

sec. 7, where it certainly means a description intended to deceive, since it is coupled with the phrase "for the purpose of falsely indicating, &c.," but the construction just mentioned seems, on the whole, to be that intended by the Act, for *false* is contrasted with *genuine* in secs. 2 (2) (a), 4 (b), 6 (c), and 17; false declarations are referred to in sec. 8 (3); and sec. 18 seems to contemplate that some false descriptions within its scope may not be misleading. It is doubtful, however, whether, for the purposes of the Act, there is any substantial difference in effect between the two meanings. The essence of a description is that it should suggest something, and if it suggests what is untrue it is misleading.

In *The Patent Isinglass* case,[1] Coleridge, L.C.J., said that a false description within the Act meant something more than a mere inaccurate or mistaken description. There must be a criminal intent, a *mens rea* in the application; this is inferred because the Act creates criminal offences, and the construction adopted is consistent with the reference to "intent to defraud" in sec. 2 (1), and the defence that the person charged had "acted innocently," which is admitted by sec. 2 (2).

Material respect.

False in a material respect.]—This expression was chosen, after much consideration, to meet the case of descriptions which are partly false; for instance, descriptions of mixed, or composite goods, referring to some or one only of their composite parts. The clause was inserted "because it was considered impossible to test the exact percentage of a particular material, the name of which was assigned to the article."[2] Under it, the Court is left to decide as a question of fact whether it is false, for example, to describe textile goods made partly of cotton as *natural wool*;[3] a material consisting entirely of cotton as "flannelette";[4] a cask containing less than thirty-six gallons of beer as a barrel;[5] gelatine made from cod sounds as patent isinglass;[6] or a watch with an English case and an English movement, but a Swiss regulator, as an English watch;[7] or, generally, goods partly

[1] *Gridley* v. *Swinborne*, 52 J. P. 739, 16th, 1895.

[2] See the evidence of Mr. Courtenay Boyle, Assistant Secretary to the Board of Trade, M. M. A. Report, 1887, Qq. 38 et seq.

[3] See *The Leicester* case, above, p. 33, Times newspaper, October 20th, 1893.

[4] *Whiteley's* case, Times, January

[5] *Budd* v. *Lucas*, [1891] 1 Q. B. 408.

[6] *Gridley* v. *Swinborne*, 52 J. P. 739, 791; 5 T. L. R. 71 (1888).

[7] As to watches, see *Williamson* v. *Tierney*, 17 T. L. R. 174 (1900) (English Lever), and above, p. 29; also sec. 7, below, p. 73. It is said that all English watches have Swiss regulators.

made in the United Kingdom and partly abroad, as made in the United Kingdom.[1]

Materially or substantially false.

"False in a material respect" is here treated as equivalent to materially or substantially false, so that the question is one of degree, and as regards some of the attributes referred to in the definition of trade description, no other meaning could be given to it. A description of weight, for example, can only be false by being too great or too small. But, as regards some of the other attributes referred to, the phrase seems more properly to mean that the matter falsely stated is material to be truly stated to the persons concerned, that is, the probable buyers, or others to whom the description is addressed. For example, if goods go through different stages in the course of manufacture in different countries, it is conceivable that only the country where they are finished, or where any other particular stage is passed, is material to be named,[2] and that, therefore, for the purposes of the Act, the goods may be well described only as made in that country.[3] So, if the material of which goods are made is a metallic alloy, as the gold of commerce, it may be immaterial to state truly the nature of the baser metal (provided there is no false statement as to its absence, or its proportion in the mixture).

In *Davenport* v. *Apollinaris Co., Ld.*,[4] the company was charged with selling Apollinaris water to which, it was alleged, a false trade description, namely, "Apollinaris Natural Mineral Water," had been applied. It appeared that the water came from the Apollinaris spring, and that, whilst stored in a tank, a small proportion of the iron in it became eliminated, a small proportion of common salt was added, and a considerable quantity of carbonic acid gas was given off, but after the water was removed from the tank, carbonic acid gas from the spring was re-introduced into the water so as to raise it to a somewhat greater degree of effervescence than it originally possessed. The magistrate found that the description did not constitute a false trade description and dismissed the summons, and an appeal failed, it being held that the description was not in any respect false in a material particular, and that the processes were for the purpose of preserving

[1] See p. 28, "place or country," and *R.* v. *Lipton*, above, p. 32.

[2] Cf. the case of watches, below, p. 75.

[3] But see *Bischop* v. *Toler*, 65 L. J. M. C. 1 (1895), above, p. 28.

[4] 89 L. T. 19; 67 J. P. 323; 20 Cox, C. C. 502 (1903), Div. Ct., Ld. Alverstone, L.C.J., and Channell, J.

the water as nearly as possible in its natural condition, the differences being quite immaterial and unimportant.

Doctrine of equivalents inapplicable.

The materiality of a false trade description cannot be made dependent on a "doctrine of equivalents." If an article is sold under such a description—*e.g.*, machine-made cigarettes as "guaranteed hand-made"—the false description will not cease to be material because the article sold was as good as, or better than, that asked for by the purchaser.[1]

Limits of error allowed.

The Committee of 1890 were strongly urged to recommend the adoption, as part of the Act, of certain definite limits in regard to measure, within which a deficiency from the measure actually indicated by a trade description should not be, but beyond which it should be deemed to be, false in a material respect; but they declined to suggest the enactment as a rule of law of what they regarded as properly a matter of evidence.

The limits suggested by the Manchester Chamber of Commerce in 1888, and adopted under the Indian Merchandise Marks Act, are set out in the Appendix.[2]

Alteration of a trade description.

Alteration.]—The person who makes the alteration which causes the trade description to be false applies the false trade description.[3]

This clause of the definition relates only to alterations of the description, not to alterations of the goods described so that the description becomes false as applied to them. An alteration, for example, by the adulteration of marked goods, such as to make them cease to be the goods described, may be an offence against the Act, if, within sec. 5 (1) (c) or (d), the person making the alteration, applies the description to the altered goods, since it is false as regards them.

Application of false trade description.

Applies any false trade description.]—Sec. 5 defines when a person shall be deemed to apply a trade description to goods. It has been already set out.[4]

By sec. 3—

"(2.) The provisions of this Act respecting the application of a false trade description to goods shall extend to the

[1] *Kirshenboim* v. *Salmon & Gluckstein*. [1898] 2 Q. B. 19; 67 L. J. Q. B. 601, Ld. Russell of Killowen, C.J., Hawkins, Day, Wills, and Wright, JJ. The term "hand-cut" has been held by a metropolitan police magistrate to be a false trade description when applied to machine-cut tobacco: *Cohen, Weenen & Co.'s* case, Times, May 3rd, 1899.

[2] Page 175. M. M. A. Report, 1890, p. 322. Evidence of Mr. Bailey, Q. 2021.

[3] Cf. forgery of a trade mark by altering a genuine trade mark, sec. 4 (b), above, p. 17.

[4] Above, p. 21.

application to goods[1] of any such figures,[2] words,[3] or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are."

This sub-section does not in terms refer to goods to which a false trade description has been applied, as the next and corresponding sub-sec. 3 (3) does. It is difficult to see any reason for the change of language, and, it is submitted, it makes no difference in the construction of the Act, for it is not possible to extend the definition of "application" without extending correspondingly the class of things to which the application is made.

The name *Chilworth Gunpowder Co., Ld.*, placed by contractors for the supply of gunpowder to the Government, upon barrels of powder, in the place where the name of the contractor was required to be inserted, was held in *Starey* v. *Chilworth Gunpowder Co.*[4] to be a false trade description, the powder being imported German powder, and not the manufacture of the defendants, and it being clear, as the Court held, that, in the particular case, contractor meant manufacturer, the defendants having dealt with the Government as manufacturers only, although it is commonly a word of ambiguous meaning, capable of signifying either maker or vendor, or both. This decision must have been under sec. 3 (2), for sec. 3 (3) did not apply; but the question suggested above was not argued or referred to.

An unregistered trade mark may be a trade description.

The sub-section makes the offence of applying a false trade description include that of forging a (registered) trade mark, which is itself a separate offence under sec. 2 (1) (a), and also that of forging a trade mark which is unregistered and therefore not a trade mark within the meaning of the Act,[5] for the office of a trade mark is to indicate that goods are the manufacture or merchandise of the persons with whose business or goods the trade mark is identified by registration or use.

Names and initials.

The following sub-section deals with false names and initials.

[1] See sec. 5. above, p. 21.

[2] I.e., numerals. *Ex parte Stephens*, 3 C. D. 659 (1876). Jessel, M.R.

[3] For names and initials, see sec. 3 (3), below, p. 45.

[4] 24 Q. B. D. 90 (1889). Coleridge, L.C.J., and Mathew, J.

[5] See sec. 3 (1), above, p. 14. "trade mark."

That sub-section may possibly be held to be restricted to a very small class of such names and initials,[1] and the question may then arise whether names and initials which are so used as not to fall within it are *words* within the present sub-section. On a strict construction it may be difficult to hold that a general word in one sub-section can include a particular meaning introduced by an appropriate word into a co-ordinate sub-section immediately following the first; but there are many cases of overlapping sections and provisions in the present Act, and, if it be necessary in order to carry out the obvious intention of the Act, it is submitted that the interpretation suggested ought to be adopted.

Calculated to lead persons to believe, &c.

Calculated to lead, &c.]—The phrase may be compared with "calculated to deceive," of sec. 2 (2) and sec. (4) (a),[2] and with "intent to defraud," of sec. 2 (1).[3] The persons intended are any class of probable purchasers of, or dealers in, the goods, so that it would be no defence to prove that the immediate purchasers, the persons to whom the goods falsely described were sold, if the offence were committed upon a sale, were not in fact deceived. This is the rule adopted in infringement cases.[4] In such cases proof of actual deception is not a necessary part of the plaintiff's case,[5] although its unexplained absence may be significant, if the alleged deceptive mark has been long in the market;[6] and it is no excuse for the defendant to show that the actual buyers from him of the spuriously marked goods knew whose goods they were. They generally do know, and are parties to the intended frauds.[7]

(4.) By sect. 3—

False name or initials.

"(3) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied,[8] shall extend to the application to goods of any false name or initials of a person,[9] and to goods with the false[10] name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression 'false name or initials' means, as

[1] See below, p. 46.
[2] Above, p. 17.
[3] Page 57, post.
[4] See Kerly, Chap. X., p. 235; Chap. XV., p. 404.
[5] Kerly, p. 401.
[6] Kerly, p. 259.
[7] *Lever* v. *Goodwin*, 36 C. D. 1; 4 R. P. C. 472 (1887), C. A.
[8] This clause is omitted from the preceding sub-sec. 3 (2), see p. 43.
[9] "Person," sec. 2 (1), p. 14.
[10] Cf. "false trade description," sec. 3 (1), p. 40, and "falsely apply," sec. 5 (3), p. 23.

applied to any goods, any name or initials of a person which—

"(a) are not a trade mark[1] or part of a trade mark, and

"(b) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description, and not having authorised the use of such name or initials, and[2]

"(c) are either those of a fictitious person or of some person not bonâ fide carrying on business in connection with such goods."

This is an awkwardly drawn sub-section, not in harmony with the remainder of the Act. The insertion of the negative clause (a), for instance, is not in accord with the general plan of allowing sections creating similar and similarly punished offences to overlap, and the expression colourable imitation is in other sections represented by the phrase "so nearly resembling, &c."

The sub-section seems to be intended to extend the protection of the Act to trade names which are protected by the civil law much in the same way as trade marks,[3] and also to stay frauds perpetrated by the use of "blind names,"[4] that is, names belonging, in fact, to no one, but so used as to appear to be the names of respectable firms.

By the letter of the sub-section, a name or initials, to fall within its terms, must fulfil each of the conditions (a) and (b) and (c); but it is submitted that the second *and* should be *or*, for no name can be identical with the name of a person carrying on business in connection with the goods, and at the same time be that of a person not bonâ fide so carrying on business.[5] The Courts have no difficulty in reading *or* for *and* where the context requires it.[6]

Reading (b) and (c) as alternatives, the operation of the subsection is to forbid the use of any false name or initials (not being a registered trade mark,[7] or part of a registered trade mark)

[1] "Trade mark," i.e., registered trade mark, sec. 3 (1), p. 14.

[2] Quære "or," see below.

[3] See Kerly, Chap. XVI., p. 477.

[4] Below, p. 48.

[5] The view suggested has now been adopted by the Q. B. D. in Ireland, *R.* v. *Lipton*, below, p. 49.

[6] As in *Townsend* v. *Read*, 10 C. B. N. S. 317; 30 L. J. M. C. 245; and see Stroud's Dictionary, "or for and."

[7] Or trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of sec. 91 of the Patents, &c. Act, 1907, are applied. See pp. 14, 16.

which is either an unauthorised copy or imitation of a trade name or trade initials, or is the trade name or trade initials of no one, or no one bonâ fide carrying on business, i.e., is a "blind name." If this is the correct view of the sub-section, it is an offence within sec. 2 (1) (d) or sec. 2 (2) to apply to any goods any name or initials of a person other than the trade name of a person who has authorised the application, or to sell, &c., any goods to which any name or initials of a person, other than the trade name of a person applied with his authority, have been applied.[1]

Name.]—"The expression 'name' includes any abbreviation of a name."[2]

False name or initials.]—The adjective "false" governs the whole sub-section. Its effect seems to be to restrict the operation of the section to names and initials which are not the personal or the trade names or initials of the persons applying them.[3]

(a) *Not a trade mark.*]—Trade mark means trade mark registered or otherwise within sec. 3 (1).[4] Many trade marks consist of or include the names of their proprietors, or of the predecessors in trade of their proprietors, and a trade name, if used in connection with the goods which its owner deals in, almost necessarily becomes a trade mark if it is distinctive.[5] The reason for excluding trade marks and parts of trade marks seems to be that they are elsewhere dealt with under the heads of forgery and false application of a trade mark;[6] but this is not the case as regards parts of a trade mark which do not so nearly resemble the trade mark as to be calculated to deceive within the meaning of sect. 4.[7] Trade marks which are or include names or initials, and which do not fall within the definition,[8] are included within this sub-section if they comply with conditions (b) and [or] (c).

(b) *A colourable imitation, &c.*]—This expression is commonly used in infringement and passing-off cases. It is equivalent to the phrase, used elsewhere in the Act, so nearly resembling as to be calculated to deceive,[9] which has been already discussed.

Of the same description.]—Both trade mark and trade name

[1] For the civil law relating to trade names, see Kerly, Chap. XVI., and for the right of a man to honestly use his own name in his trade, ibid., p. 532.

[2] Sec. 3 (1).

[3] Cf. "false," above, p. 40; and see p. 48, below.

[4] Page 14, "trade mark."

[5] See Kerly, Chap. VIII., p. 136, "name marks."

[6] Sec. 2 (1) (a), p. 14; and 2 (1) (b), p. 21.

[7] Page 17.

[8] Page 14, "trade mark."
Sec. 4 (a). p. 19.

rights are limited to the class of goods for which they are registered or used.[1]

Proof of authority of proprietor.

Not having authorised.]—This is more generally expressed than "without the assent of the proprietor," which is the phrase used elsewhere in the Act,[2] and already discussed, but it has probably just the same meaning.

There is no provision in the present sub-section casting the onus of proving the authority in question upon the defendant. This is probably due to an oversight.

(c) *Either those of a fictitious person or of some person not bonâ fide carrying on business in connection with the goods.*]—Apart from this Act it is perfectly legal, and the practice is very common, for a trader to use as his trade name some name other than his own, and either the name of his predecessors in business or a name chosen for some other reason, not being such a name as to infringe the rights of any other person in respect of his trade name.[3] It is submitted that the Act does not make the practice illegal, but that the above sub-section, under clause (c), is directed against the application to goods of any name which is not the trade name of the person who applies it, whether that trade name is his personal name or not, for the whole sub-section is governed by the use of the words "false name," and "false name or initials," and the trade name of the person using it is not a false name, nor are his trade initials false initials.[4]

Trade name of repute.

Blind names.

Evidence was given before the Committee of 1887[5] of the fraudulent use of well-sounding names which were not trade names at all, and were used, not to identify the goods to which they were applied with the person applying them, or with any other manufacturer or merchant, but to suggest that they were the manufacture or merchandise of some seemingly respectable firm. Spanish-sounding names on pseudo-Spanish cigars,

[1] See sec. 39 of Act of 1905, and Kerly, Chap. V., p. 103.

[2] Sec. 4 (a), p. 19; sec. 5 (3), p. 23.

[3] Kerly, Chap. XVI., p. 493.

[4] Cf. as to the meaning of "false," p. 40. In *Macmillan* v. *Ehrmann Bros., Ld.*, 21 R. P. C. 647 (1904), where the defendants had adopted the trade name of "Macfarlane & Co." for their trade in whisky, Vaughan Williams, L.J., expressed regret that, "according to the law of this country you can for trade purposes adopt a name which is not yours, and use it with a sort of suggestion that you are the sole agents of the non-existent people whose picturesque name you have chosen to adopt because you hope that customers will draw all sorts of favourable inferences in respect of the wares you sell."

[5] See, for instance, the evidence of Mr. Freeman, M. M. A. Report, 1887, Qq. 2871 et seq.; of Mr. Hughes, ibid., Q. 1805; and Mr. Lockwood, ibid., Q. 1992.

"The Sheffield Knife Company," there being no such company, and the trade names of defunct firms, were cited as examples of such "blind names," as they are called. Sub-sec. 3 (3) (c) seems to have been directed to stop the use of such names as these. It was stated before the Committee of 1890 that the Act had failed in this particular,[1] but the statement was made under the assumption that the conditions (a), (b), and (c) were all required to be complied with, (b) and (c) not being treated as alternative, as is suggested above. The Committee did not think fit to recommend any alteration of the sub-section.

Fictitious.]—The words "a fictitious or non-existing person," in sec. 7 (3) of the Bills of Exchange Act, 1882, have been held to apply to a case where the name used, as that of the payee of a forged bill, was the name of an actual person who was known to the acceptor and accustomed to have business dealings with him, but who had not, and was never intended by the drawer to have, any interest in the bill.[2]

The description of bacon cured by Lipton as "Tracey's cure," where Tracey was Lipton's foreman curer, has been held, in Ireland, to be an offence under sec. 3 (3) (c); although a custom was alleged for bacon dealers to describe their second quality goods by the names of their foremen curers.[3] No evidence of the custom was adduced.

Not bonâ fide carrying on business, &c.]—The name and initials of a person who is carrying on business in connection with the goods are dealt with under the preceding head, sec. 3 (3) (b).

Provisions of the Act as to false description not to apply in certain cases.

CONVENTIONAL DESCRIPTION.—By sec. 18—

"Where at the passing of this Act[4] a trade description is lawfully and generally applied to goods of a particular class or manufactured by a particular method, to indicate a particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied: Provided that where such trade description includes the name of a place or country,

[1] Evidence of Mr. Hughes, M. M. A. Report, 1890, Q. 5011, and Mr. Follett, p. 277.

[2] *The Governor and Company of the Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107; *Clutton* v. *Attenborough*, [1897] A. C. 90; 66 L. J. Q. B. 221. Cf. *Vinden* v. *Hughes*, [1905] 1 K. B. 795, and *North and South Wales Bank, Ld.* v. *Macbeth*, [1908] A. C. 137.

[3] *R.* v. *Lipton*, 32 L. R. Ir. 115 (1892), Q. B. D.

[4] August 23rd, 1887.

and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner, with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there."[1]

This general saving with regard to what are commonly called "generic descriptions," but may more accurately be termed "conventional descriptions," seems to have been suggested by a discussion which took place before the Committee of 1887, as to whether the name *Balbriggan hose*[2] was properly applied to hosiery manufactured in Ireland at Balbriggan only, or to hosiery of the same description made at several places in England, and in particular at Nottingham. It is based upon the fact that descriptions at first applied to, and appropriate for, a group within a class constantly become used for the whole class, and are at length as appropriate for the rest of it as for the particular group. The case of trade marks in this way become *publici juris* by piracy, misuse or abandonment, is not uncommon.[3] *Liebig's Extract*, *American leather cloth*, *French chalk*, *patent leather*, are examples of conventional descriptions within the section. The question whether an alleged conventional description does indicate the particular class or method of manufacture of the goods, i.e., the kind of goods, is of course a question of fact to be established by evidence. It corresponds to the question whether an alleged trade mark or trade name of goods was the symbol or name of any goods of the kind, or the symbol or name of the plaintiff's goods of the kind only, which constantly arose for determination in trade mark cases before the Registration Acts, and still frequently arises in trade name and passing-off cases.[4]

It is to be noted that the section only applies to trade descriptions lawfully and generally applied at the passing of the Act.[5]

[1] Cf. 28, "*place or country*," and see the Madrid Convention, Art. IV., App., p. 160.

[2] As to this instance, see Customs General Order, Appendix, p. 118, and Trade Marks (*India*), Appendix, p. 179.

[3] See Kerly, Chap. XIV., p. 362.

[4] See Kerly, pp. 37, 507.

[5] See the Witney Blanket Case cited above, p. 30.

"Lawfully" must mean not only so as not to be obnoxious to any then existing trade name or trade mark rights, or to particular statutes such as the Cutlers Acts,[1] but also so as not to be within the prohibitions of the M. M. A. of 1862. That Act, however, contained a section (sec. 9) corresponding to sec. 18, but not limited to descriptions in use at the commencement of the Act. "Generally applied" means, it is submitted, applied by probable purchasers and persons dealing in the goods in question.

In *The Patent Isinglass* case[2] the Court held that a good defence might have been raised under this section upon the finding of the magistrate that the article in question had been known to the trade as patent isinglass, although it was made from cod sounds. But it may be doubted whether such a finding would be sufficient if it were shown that the description deceived the public, although it was understood by the trade.[3]

4. Causing an Offence to be Committed.

"(f) Causes any of the things above in this section mentioned to be done."

Sec. 2 (1). Master and servant.

Master and servant.]—The provisions of sec. 2 (2) of the M. M. A., 1887, make a master criminally liable for acts done by his servants in contravention of the section when acting within the general scope of their employment, although contrary to their master's orders, unless the master can show that he has acted in good faith and has done all that it was reasonably possible to do to prevent the commission of offences by his servant.[4]

By sec. 19 (3)—

"Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the United Kingdom who bonâ fide acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master."

[1] Below, p. 102.

[2] *Gridley* v. *Swinborne*, 52 J. P. 739, 791; 5 T. L. R. 71 (1888), Coleridge, L.C.J., and Grantham, J. See also per Holmes, J., in *R.* v. *Lipton*, p. 49, note (3).

[3] See *Ford* v. *Foster*, L. R. 7 Ch. 611; and see *Hooper* v. *Balfour*, W. N. [1890] 61, 139, cited ante, p. 27, under "weight."

[4] *Coppen* v. *Moore* (No. 2), [1898] 2 Q. B. 306; 67 L. J. Q. B. 689 (overruling a dictum of Pollock, B., in *Budd* v. *Lucas*, [1891] 1 Q. B. 408), Ld. Russell of Killowen, C.J., Sir F. H. Jeune, P., Chitty, L.J., Wright, Darling, and Channell, JJ.; and see further, as to the nature of the defence in such cases, below, pp. 55, 63.

It seems an obvious inference from this section and from sec. 6,[1] relating to persons employed by others in the ordinary course of business, that servants and persons employed who do not come within the terms of the sections are to be liable for acts done in obedience to the instructions of their masters or employers (though they may, of course, be able to show that they acted without intent to defraud, or innocently). And this accords with the ordinary law that every person who either actually does, or authorises, or procures to be done, a criminal act is guilty of the crime.[2]

Thus, under the Pharmacy Act, 1868,[3] an unregistered chemist's assistant has been held liable to penalties for selling poisons on behalf of his master, who was himself duly registered.

Both sec. 19 (3) and sec. 6 are restricted to cases of masters or employers resident in the United Kingdom.

Bonâ fide.]—It is difficult to attach any definite meaning to this expression in the section. It can hardly be construed to import the requirements of reasonable precaution, and having no reason to suspect the genuineness of the trade mark or trade description, expressed in sec. 6 (b) and (c). It may mean without knowledge of the illegal character of the act, or merely that the person excepted has in reality, and not colourably only, acted as a servant and in obedience to his master's instructions. The last meaning suggested, however, would make the words mere surplusage. Compare sec. 6, which is next considered.

On demand has given full information.]—Compare sec. 2 (2) (b),[4] and sec. 6 (d).

Persons employed.]—By sec. 6—

Exemption of certain persons employed in ordinary course of business.

> "Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves—
>
> "(a) That in the ordinary course of his business he is employed, on behalf of other persons, to make dies,

[1] See below.

[2] See Archbold, 23rd ed., pp. 12 et seq.; and sec. 11, below, p. 55.

[3] 31 & 32 Vict. c. 121, s. 15. *The Pharmaceutical Society* v. *Wheeldon*, 24 Q. B. D. 683 (1890), Div. Ct. An action for penalties.

[4] Page 63, below.

blocks, machines, or other instruments for making, or being used in making, trade marks, or as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

"(b) That he took reasonable precautions against committing the offence charged; and

"(c) That he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and

"(d) That he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied—

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence."

This section appears, in effect, to offer to any person charged with either of the offences mentioned in it the alternative of satisfying the four requirements specified in it, or of proving that he acted without intent to defraud within the meaning of sec. 2 (1).[1] It is probable that the latter will usually be the easier course, and it is submitted, although with some doubt, that, in judging whether the defendant has acted without intent to defraud, the fact that he has not acted as the section indicates,—for instance, has taken no precautions,—is not to be regarded where he shows that he did not know, believe, or suspect, that the mark or description in question was forged, or false, or falsely applied.

The Bleachers' protest.

Much evidence was given before the Committee of 1887 on behalf of the Association of Bleachers, whose members are accustomed in the ordinary course of their business to mark trade marks and descriptions upon goods, and to pack the goods according to their customers' orders, to show that from the enormous number of the marks[2] and descriptions employed in

[1] Below, p. 57, "intent to defraud."

[2] 60,000 cotton marks were registered as trade marks before 1887. There were probably many more unregistered, but in use.

the textile trade, and the fact that many contain words in Oriental languages with which the bleachers are not acquainted, it would be a great hardship to cast upon them the duty of verifying the title to, and the genuineness of, every mark furnished to them by their customers. The association presented a memorial to the chairman of the Committee protesting against the Bill under their consideration in its then form, and suggested for insertion into it a section nearly corresponding to the present section, but without the modifications (b), (c), and (d). The section was, no doubt, based upon these representations and proposals.[1]

Clauses 2 (1) (a) ("forges any trade mark") and 2 (1) (e) ("disposes of or has in his possession any die, &c., for the purpose of forging a trade mark") are omitted from the section, and so also is sub-sec. 2 (2) ("exposing, &c., for sale goods to which a forged trade mark, &c., has been applied").

The first condition (a) is triple, so that the person charged must prove in all six propositions to bring himself within the section.

Precautions:—Information.]—Clauses (b) and (c) correspond to clause (a) of sec. 2 (2); clause (d) to clause (b) of sec. 2 (2),[2] except that the words "on demand made by or on behalf of the prosecutor" are there inserted. Under the present section, it seems, the party charged must volunteer the information if it is not demanded, but, on the other hand, he can give it at any time down to the hearing of the charge.

Costs.]—Compare sec. 14.[3] This penalty is omitted from sec. 2 (2), because the information there referred to must be given on demand as a condition of the special defence allowed by the sub-section.

Accessories.

Accessories.]—The offences dealt with by the Act are all misdemeanours, and there are, accordingly, no accessories to them. The provision of the Act of 1862 (sec. 13) making every person who shall aid, abet, counsel, or procure the commission of an offence under the Act guilty of a misdemeanour, has not been introduced into the present Act, and any such person can, consequently, only be convicted of an offence if he has committed it as a principal under sec. 2 (1) (f) ("causes any of the things

[1] M. M. A. Report, 1887, pp. 254, 266.

[2] See below, pp. 58, 63.

[3] Page 69, below. Similar penalties as to costs are imposed by the Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 7, and the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25.

above in this section mentioned to be done"), or under one of the special headings. Sec. 11, set out below, is not directed to the punishment of accessories generally, as the side-note wrongly suggests, but to the punishment of offences committed abroad.

Offences committed abroad.]—By sec. 11—

Punishment of accessories [to offences committed abroad].

"Any person who, being within the United Kingdom, procures, counsels, aids, abets, or is accessory to the commission, within the United Kingdom, of any act, which, if committed in the United Kingdom, would under this Act be a misdemeanour, shall be guilty of that misdemeanour as a principal, and be liable to be indicted, proceeded against, tried, and convicted in any county or place in the United Kingdom in which he may be, as if the misdemeanour had been there committed."

The side-note to this section in the Queen's Printers' copy (punishment of accessories) is misleading. The section is directed to meet offences committed abroad by persons in the United Kingdom. In general, offenders can only be prosecuted in the counties or districts where their offences were committed,[1] and penal Acts are to be read, if possible, as not creating any offence to be committed outside the country for which they are enacted.[2]

The civil Courts will interfere by injunction to prevent steps being taken, or anything done within the jurisdiction, with a view to, or for the purpose of, infringing the plaintiff's trade mark, or passing off goods as his abroad.[3]

5. Defences under Sec. 2 (1).

The sub-section concludes with the words "shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act."

The provisions of the Act referred to are sec. 6[4] (persons employed); sec. 13[5] (vexatious indictments); sec. 15[6] (limitation for prosecutions); and sec. 19 (3)[7] (servants acting under their master's orders).

[1] See Archbold, 23rd ed., pp. 35 et seq. There are many exceptions by statute. See, in particular, as regards the places mentioned in the list at p. 152 (53 & 54 Vict. c. 37).

[2] *Macleod* v. *Att.-Gen. for New South Wales*, [1891] A. C. 455.

[3] *Rodgers & Sons, Ld.* v. *Rottgen*, 5 T. L. R. 678 (1889), Kay, J.; *Société Anonyme des Verriers de l'Etoile's Tm.*, [1894] 1 Ch. 61; [1894] 2 Ch. 26; 10 R. P. C. 436; 11 R. P. C. 142, Stirling, J., and C. A.

[4] Page 52.

[5] Page 69.

[6] Page 68.

[7] Page 51.

Proof of innocence.

Unless he proves.[1]]—The policy of the Act is, when once it has been established that a trade mark has been made without the assent of the proprietor, or that a false description has been applied to goods, or that goods to which a forged trade mark has been applied have been sold by the person charged,[2] or any other thing done which, if done with such a criminal intent as is contemplated by the Act, would be an offence, to cast upon the person charged the onus of disproving the existence of such intent, and this is carried further by casting upon him also the onus of proving the assent of the proprietor,[3] where that is material. Great stress was laid upon this feature of the Act when the Bills upon which the Act was founded were before the Committee of 1887, as the almost total failure of the Act of 1862 was believed to be due to the necessity for the prosecutor in prosecutions under it to prove the intent to defraud.[4] There are now upon the statute book a good many Acts by which the onus of proof of justification or excuse is cast on the person charged.[5] For instance, the application of any of the marks scheduled to the Public Stores Act, 1875,[6] without authority (proof of which authority lies on the party accused), is a misdemeanour; and so is being found at night having in possession housebreaking implements without lawful excuse (proof of which excuse lies on the party charged).[7] Purchasing, or receiving, or having in possession forged bank notes or bills, knowing them to be forged,[8] and making or having in possession coining tools[9] without lawful authority (the proof of which authority lies on

[1] Cf. the second part of sec. 2, p. 61, and the Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), sec. 24, by which, if a defendant relies on any provision or exception in the Act, he must prove that he falls within it.

[2] The master is primâ facie liable for the act of his servant, being within the scope of his employment, even though contrary to his orders, but may meet that primâ facie case successfully by showing that he acted without intent to defraud: *Coppen* v. *Moore* (No. 2), [1898] 2 Q. B. 306; 67 L. J. Q. B. 689, Ld. Russell of Killowen, C.J., Sir F. H. Jeune, P., Chitty, L.J., Wright, Darling, and Channell, JJ.

[3] Sec. 4, p. 17; sec. 5 (3), p. 23. Proof of the authority required under sec. 3 (3) (b) is not thrown on the person charged.

[4] M. M. A. Report, 1887. See the evidence of Messrs. Hughes, Lockwood, and Uttley. The Committee of 1862 were strongly urged to report in favour of the insertion of similar provisions as to the onus of proof in the Act of that year, but they declined to do so. M. M. A. Report, 1862, evidence of J. T. Smith, Q. 2643.

[5] See a paper by Mr. J. T. Smith in M. M. A. Report, 1862, p. 162.

[6] 38 & 39 Vict. c. 25, s. 4.

[7] 24 & 25 Vict. c. 96, s. 58.

[8] 24 & 25 Vict. c. 98, s. 13.

[9] 24 & 25 Vict. c. 99, s. 24.

the party accused) are felonies. The Sale of Food and Drugs Act, 1875,[1] and the Margarine Act, 1887, are other instances.[2]

And by the common law, wherever the act charged is not indifferent, but in itself unlawful, the proof of justification or excuse in such case lies on the defendant, and on failure thereof, the law implies a criminal intent.[3]

Intent to defraud.

Intent to defraud.]—This does not mean intent to defraud any particular person.[4] So that an offence may be committed, although precautions are taken to prevent the immediate purchaser from the person charged being deceived, as, for example, by adding to a false trade description upon a covering a label which bears the name of the person whose manufacture or merchandise the goods within the covering really are, or which is otherwise explanatory, for the label may be intended to be removed, and the goods passed on to the ultimate purchasers with the false trade description unqualified.[5]

The provision of the Act of 1862, s. 12, that, where in proceedings in respect of an offence under that Act it should be necessary to allege or mention an intent to defraud, it should not be necessary to allege or prove an intent to defraud any particular person,[6] has not been reproduced, probably because the onus of proof has, in the present Act, been shifted to the person charged. It appears that the absence of the provision makes no difference to the effect of the Act.

"The words 'intent to defraud' in this Act mean more than an intent to cheat a customer." They apply to cases "where a person uses a particular mark without any intent in so doing to induce a buyer to accept goods which might otherwise be

[1] See secs. 5 and 8. See *Betts* v. *Armstead*, 20 Q. B. D. 771.

[2] Cf. also the presumption of guilty knowledge from evidence of possession of recently stolen goods. Archbold, 23rd ed., p. 552.

[3] Per Ld. Mansfield, *R.* v. *Woodfall*, 5 Burr. 2667, note (1).

[4] *Wood* v. *Burgess*, infra. Cf. forging a trade mark, above, p. 18, note (1).

[5] *Wood* v. *Burgess*, 24 Q. B. D. 162 (1889), Coleridge, L.C.J., and Mathew, J., a case under sec. 2 (2), and *Thwaites* v. *McEvilly*, 21 R. P. C. 397 (1904), L.JJ., Ireland, where it was held that the defendant, who had knowingly sold goods bearing the trade mark of another manufacturer, had not "acted innocently" within the meaning of sec. 2 (2), although he had added his own labels and had not intended to deceive anyone. See also p. 60, note (7). And cf. "so nearly resembling," sec. 4 (a), ante, p. 19, and "calculated to lead," sec. 3 (2), above, p. 45; and the civil law rule, Kerly, pp. 234, 408, and *Lever* v. *Goodwin*, 36 C. D. 1; 4 R. P. C. 492 (1887), C. A.

[6] Similar sections occur in 24 & 25 Vict. c. 98, s. 44 (forgery), 24 & 25 Vict. c. 96, s. 88 (false pretences), and 24 & 25 Vict. c. 97, s. 58 (malicious injuries to property).

rejected."[1] And in a case where the offence consisted in English manufacturers placing their name on goods manufactured by other persons, but equal in quality to their own,[2] Coleridge, L.C.J., said: "In the present case all further controversy is superfluous when once one has ascertained with certainty what *fraud* means in the Act. I agree that if the word is used in the sense of putting off a bad article on a customer in order to get money unfairly, there is no evidence here of anything of the kind having been done. On the contrary, it is expressly found that the article supplied was as good as that contracted for. But that, I think, is not the correct meaning of the word *fraud* as used in this Act of Parliament. The Act is directed against the abuse of trade marks, and the putting off on a purchaser of not a bad article, but an article different from that which he intended to purchase and believes he is purchasing. It would apply to cases where a particular article, manufactured by a particular person, had acquired a widespread reputation (as, for instance, happened in the celebrated case of the fish sauces[3]) and some one supplied another and a different article under that name, so as to make the purchaser take something which he did not know he was taking."

On the other hand, the Act does not apply to mere cases of inaccurate or mistaken descriptions. The charges under it are criminal charges, and, according to the ordinary rule, a criminal intent—a *mens rea* in the person charged—must be made out.[4] It is immaterial that the buyer was not deceived.[5]

Giving information.

Reasonable precautions.—Giving information.]—Where special defences are provided by the Act, in sec. 2 (2) (a) and (b),[6] and sec. 6,[7] the matters to be proved by the person charged include, that he took all reasonable precautions against committing an offence against the Act, and that he gave all the information in his power[8] with respect to the persons from whom he obtained

[1] Per Mathew, J., in *Starey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90 (1889). See also the judgment of Channell, J., in *Christie, Manson & Woods* v. *Cooper*, [1900] 2 Q. B. 522.

[2] See note (1).

[3] *Burgess* v. *Burgess*, 3 De G. M. & G. 896; 22 L. J. Ch. 675.

[4] *Gridley* v. *Swinborne*, 52 J. P. 739, 791; 5 T. L. R. 71 (1888), Coleridge, L.C.J., and Grantham, J.; *Budd* v. *Lucas*, [1891] 1 Q. B. 408.

[5] See *Kirschenbaum* v. *Salmon & Gluckstein*, [1898] 2 Q. B. 19; 67 L. J. Q. B. 601, Ld. Russell of Killowen, C.J., Hawkins, Day, Wills, and Wright, JJ.

[6] Below, pp. 61, 62.

[7] Above, p. 52.

[8] See also sec. 19 (3), above, p. 51.

the marked goods, or the person on whose behalf the mark or description in question was applied. No doubt it was intended by the draftsmen of the Act to make these matters tests of innocent conduct on all charges under the Act, but it is submitted that the provisions respecting them cannot be imported into sections, as the above section, where they are not expressed; in fact, this has recently been held to be so in regard to sec. 2 (2).[1] The most ordinary evidence to show that the party charged acted without intent to defraud, or "otherwise innocently,"[2] would be evidence of ignorance of the facts on which the charge is based: for instance, evidence that he did not know or suspect that the mark forged was a trade mark; that the goods to which the trade description was applied were not the goods described; or evidence that he believed he had the assent or authority of the proprietor of the trade mark in question to apply it.

Evidence of the defendant and his wife.

Evidence of the defendant.]—By sec. 10 (1) (in any prosecution for an offence against this Act)—

> "A defendant, and his wife, or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and, if called, shall be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness."

Rebutting evidence.]—If the person charged gives, or calls, evidence to show that he acted without intent to defraud, the prosecutor may give rebutting evidence, and, in particular, evidence of transactions similar to the offence charged, in which the person charged was concerned, and antecedent (but, it is said, not subsequent[3]) to that offence.[4]

The above provisions seem to be impliedly superseded by the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36). But the extent to which that statute repeals such provisions has not yet been determined.[5]

[1] *Christie, Manson & Woods* v. *Cooper*, [1900] 2 Q. B. 522, Grantham and Channell, JJ.; and see "otherwise acted innocently," below, p. 64.

[2] Sec. 2 (2) (c), below, p. 64.

[3] *R.* v. *Holt*, 30 L. J. M. C. 11 (1861).

[4] *Budd* v. *Lucas*, [1891] 1 Q. B. 408, Pollock, B., and Charles, J., evidence of previous short deliveries. *R.* v. *Francis*, L. R. 2 C. C. R. 128, a case of false pretences.

[5] See *R.* v. *Dunning*, 31 L. J. 33 (1899), C. C. C.; *R.* v. *Brazil*, 31 L. J. 132; 63 J. P. 138 (1899), Sussex Assizes, Wills, J. See also Archbold, 23rd ed., p. 398. As to cross-examination in reference to previous convictions, see *Charnock* v. *Merchant*, [1900] 1 Q. B. 474.

6. Sale or Possession of Falsely-marked Goods.

Sub-sec. 2 (2) provides that—

"Every person [1] who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark [2] or false trade description [3] is applied,[4] or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied,[5] as the case may be, shall" (unless he establishes one of specified defences [6]) "be guilty of an offence against this Act."

Where a registered trade mark is falsely applied, deceit and the risk of misleading are assumed or become immaterial and the offence is prima facie committed; and the condition or burden is thrown on the defendant of proving that he comes within (a), (b), or (c) of sec. 2 (2).[7]

Cases where possession or sale is an offence prima facie.

Some other cases where possession is made an offence prima facie are collected at p. 56. Imitating the mark of the Birmingham Proof House for gun barrels, or knowingly selling any barrel bearing an imitation of such mark [8]; marking the mark of a hammer on cutlery not made of hammered steel, or having in possession for the purposes of sale articles so marked; marking cutlery, or having in possession for sale cutlery marked, with a false indication of quality, or with the words *London* or *London made*, unless the cutlery were manufactured in the City of London,[9] or within twenty miles thereof, are misdemeanours.

By the Margarine Act, 1887, s. 6,[10] it is provided that every package, whether open or closed, and containing margarine,[11] shall be branded or marked in a certain way, and that "if such

[1] Page 12.
[2] Page 14.
[3] Pages 24, 40.
[4] Page 21.
[5] Page 23.
[6] See p. 61.
[7] Per Fitzgibbon, L.J. (Ireland), in *Thwaites* v. *McEvilly*, 21 R. P. C. 397 (1904). In this case it was also held that the defendant did not "act innocently," although he had attached his own labels to the goods, as he knew that he had applied to goods of his own manufacture the trade mark of another person. Cf. *Woolley* v. *Morrison*, 21 R. P. C. 349 (1904), Ct. of Sess., Scotland, and *Donahoe* v. *Cherry*, 26 R. P. C. 545 (1908), L.JJ., Ireland.
[8] 53 Geo. III. c. 115.
[9] 59 Geo. III. c. 7. See a paper by Mr. J. T. Smith, M. M. A. Report, 1862, p. 162.
[10] 50 & 51 Vict. c. 29. This section is amended in certain details by the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51).
[11] The provisions of the Margarine Act, 1887, as to margarine are now extended to margarine cheese by the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 5.

margarine be exposed for sale, by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser," a specified label. It has been held that a parcel of margarine placed behind a screen out of the sight of purchasers in a shop, and from which portions were cut for sale to them, is not,[1] but that parcels done up in wrappers and placed in the shop so that the wrappers, but not the margarine itself, could be seen by purchasers, are "exposed for sale" within the meaning of this section.[2] In a later case, slices of bread, spread with a mixture of Danish butter and margarine, and also haddocks on which was put margarine cut from a lump kept on a shelf, were sold at a refreshment room for consumption on the premises; no margarine was sold to customers to take away, and the establishment was conducted strictly as a refreshment house. There were no labels either on the slices or on the lump of margarine; but notices were posted in the shop that "Nothing but a mixture of the best Danish butter and margarine is sold at this establishment." It was held that the margarine had not been exposed for sale by retail within the meaning of sec. 6 of the Act of 1887, and that the machinery of that section was inapplicable to such a course of business.[3]

It has been held that the provisions of this sub-section make a master criminally liable for acts done by his servants in contravention of the section when acting within the scope of their employment, although contrary to the master's orders,[4] unless he can rebut the prima facie presumption of guilt by one or other of the methods pointed out in the Act.

7. Defences under Sec. 2 (2).

Sub-sec. (2) declares the person charged, if he falls within the earlier part of the sub-section, to be guilty of an offence against the Act—

"Unless he proves—

"(a) That having taken all reasonable precautions against committing an offence against this Act, he had at the time

[1] *Crane* v. *Laurence*, 25 Q. B. D. 152 (1890), Cave and Smith, JJ. See also case of *Butter Association* v. *Edmonds*, 30 L. Jo. 214 (1895).

[2] *Wheat* v. *Brown*, [1892] 1 Q. B. 418, Lawrance and Wright, JJ.

[3] *Moore* v. *Pearce's Dining and Refreshment Rooms*, [1895] 2 Q. B. 657; 73 L. T. 400, Ld. Russell of Killowen, C.J., Cave, J. See also *World's Tea Co.* v. *Gardner*, 59 J. P. 358 (1895), Day and Wright, JJ.

[4] *Coppen* v. *Moore* (No. 2), [1898] 2 Q. B. 306.

of the commission of the alleged offence no reason to suspect the genuineness [1] of the trade mark, mark, or trade description; and

"(b) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things [2]; or

"(c) That otherwise he had acted innocently."

The onus of establishing the innocence of any person charged, whose case is shown to fall within the earlier part of the section, is, therefore, as under the corresponding sub-section (1),[3] already considered, cast upon the person charged. Clauses (a) and (b) of sub-sec. (2) of sec. 2 apply to cases where the goods in question are in the possession of the accused for sale, or are sold with the forged trade mark or false trade description already stamped upon or otherwise applied to them. But any defendant to whose case clauses (a) and (b) apply is entitled to prove that he "acted innocently" otherwise than by proving that he had taken all reasonable precautions against committing the offence, and that he had no reason to suspect the genuineness of the trade mark or trade description.[4] Where the false trade description is applied on the occasion and as part of the terms of sale, the accused must rely for his exculpation upon clause (c)—viz., by showing that he had acted innocently.[5]

The special defences (a) and (b) correspond to (b), (c), and (d) of sec. 6,[6] except that the information here referred to is to be given on demand, and in sec. 6 there is a special provision as to

[1] Page 59. Cf. sec. 6 (c), p. 53, and sec. 17, p. 91, and also "false," p. 40.

[2] Pages 54, 58, 63.

[3] Page 55.

[4] *Christie, Manson & Woods* v. *Cooper*, [1900] 2 Q. B. 522, Grantham and Channell, JJ. See also p. 61.

[5] *Coppen* v. *Moore* (No. 2), [1898] 2 Q. B. 306, at p. 313; 67 L. J. Q. B. 689, at p. 693; *Christie, Manson & Woods* v. *Cooper*, ubi supra. In this case the appellants had catalogued goods for sale by auction as "Dresden china," but, having received information before the sale leading them to doubt the genuineness of the marks on the china, they sold it "for what it was." It was held that the absence of *mens rea* was a good defence, and the conviction by the magistrate was quashed. The point whether the person charged can only resort to (c) when the false trade description is not affixed to the goods themselves, but has been used upon the occasion and as part of the terms of sale, was not decided by the Privy Council in *Commission of Trade and Customs* v. *Bell*, [1902] A. C. 563, but *Coppen* v. *Moore* was referred as "of great importance and no little authority."

[6] Page 53.

costs, which does not occur here. Rebutting evidence may be given by the prosecution to displace these defences.[1]

Information as to principal offender.

Gave all the information.]—In the evidence given before the Committees of 1862 and 1887, great stress was laid upon the importance of compelling retail traders and others found in possession of spurious goods, or found offering them for sale, to give such information as should lead to the discovery of the real, or the original, offenders. For frauds by false marking can usually only be detected when the goods are offered to the general public, and the goods are then in the hands of persons who are, or may be, or may speciously pretend to be, innocent of the frauds. Mr. Hindmarch, Q.C., the draftsman of the Act of 1862, described the provisions for disclosure as of the essence of the Bill upon which the Act was founded.[2]

Provision for disclosure in the M. M. A., 1862.

By sec. 6 of the last-mentioned Act,[3] a person who sold, &c., any article together with a forged trade mark, &c., was bound, upon demand in writing, by or on behalf of the persons whose trade mark was forged, &c., and within twenty-four hours after the demand, to give full information in writing of the name and address of the person from whom, and the time when, he obtained the article. And any justice of the peace might order such information to be given. Refusal or neglect to comply with the order was punishable by a penalty of 5*l.*, and was prima facie evidence of guilty knowledge at the time when he sold the article, on the part of the person refusing or neglecting.

There is no provision in the present Act corresponding to this and enabling an order for disclosure to be made, or making refusal or neglect to give information evidence of guilty knowledge or intent. Proof that the person charged has given all the information in his power is made a term of the special defences under sec. 2 (2) (b) and sec. 6 (d), and under sec. 14 the Court, upon a prosecution, in making an order for costs, may have regard to the information given by, and the conduct of, the defendant and prosecutor respectively; but it is quite conceivable that a defendant might refuse to give information with impunity, except as to payment of costs, and secure an acquittal under the general defences of sec. 2 (1) (without intent to defraud), or

[1] Page 59.

[2] M. M. A. Report, 1862. Q. 2865.

[3] 25 & 26 Vict. c. 88. The section is much abbreviated.

sec. 2 (2) (c) (acted innocently). In a civil action against him, based upon the same offences, the person charged could, of course, be compelled to make the disclosure on "discovery," if it were relevant to the issues raised.

"Otherwise acted innocently."

(c) *That otherwise he had acted innocently.*]—Compare "without intent to defraud," above, p. 56. Whether the defendant tenders evidence or not, and whether any of the special defences sanctioned by the Act is set up or not, the Court must, in order to convict, be satisfied that he acted with a criminal intent in doing the acts complained of.[1] But where the defendant has knowingly applied a false trade description to goods, he cannot bring himself within clause (c) by showing that he had no intention of deceiving the buyer, but acted from some other motive, e.g., a desire to save expense by using up a stock of old labels which had ceased to be a true description of the goods to which they were applied.[2]

Thus where manufacturers of mineral waters had refilled bottles belonging to another manufacturer and embossed with his trade mark and had sold bottles so refilled, it was held that they had committed an offence under sec. 2 (2), notwithstanding that they had put their own labels on the bottles. Although there was no intent to defraud, it was held that, having knowingly applied to their goods the trade mark of another person, the defendants could not be said to have "acted innocently."[3]

The statute enables a defendant to prove that he had "acted innocently" otherwise than by proving that he had taken all reasonable precautions against committing the offence, and that he had no reason to suspect the genuineness of the trade mark or trade description, &c.[4] Innocence of any intention to infringe the Act might co-exist with a suspicion as to the genuineness of the mark or description.[5]

[1] *Gridley* v. *Swinborne*, 52 J. P. 739, 791; 5 T. L. R. 71 (1888), Coleridge, L.C.J., and Grantham, J.

[2] *Kirshenbaim* v. *Salmon & Gluckstein*, [1898] 2 Q. B. 19; 67 L. J. Q. B. 601, Ld. Russell of Killowen, C.J., Hawkins, Day, Wills, and Wright, JJ.

[3] *Thwaites* v. *McEvilly*, 21 R. P. C. 397 (1904), Ll.J., Ireland. Cf. *Donohoe* v. *Cherry*, 26 R. P. C. 545 (1908), before M.R. (Ireland), an action in which it was held that the defendants had acted innocently, where, in spite of all reasonable precautions having been taken, a few instances were proved, in a large trade, of bottles embossed with the plaintiff's name being filled and labelled by the defendants.

[4] *Christie, Manson & Woods* v. *Cooper*, [1900] 2 Q. B. 522. As to this defence, see also *R.* v. *Phillips*, "Times," July 21th, 1909, cited above, p. 30, note (2).

[5] Per Channell, J., [1900] 2 Q. B. at p. 529.

8. Punishment.

By sec. 2 (3) and (4)—

"(3.) Every person guilty of an offence against this Act shall be liable—

"(i.) on conviction on indictment, to imprisonment, with or without hard labour, for a term not exceeding two years, or to fine, or to both imprisonment and fine; and Fine and imprisonment.

"(ii.) on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding twenty pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding fifty pounds; and

"(iii.) in any case, to forfeit to her Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed. Forfeiture of the goods.

"(4.) The Court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the Court thinks fit."

Forfeiture and destruction.[1]]—Sec. 21 of the Act of 1862 authorised the Court in any suit at law or in equity for forging a trade mark, &c., to order the goods bearing the spurious marks to be destroyed; and the various sections of the Act imposing penalties contained provisions for forfeiture and destruction to the same effect as the sections set out above.

In cases of infringement of trade mark the Court of Chancery would have interfered, and now the High Court of Justice interferes, independently of sec. 21 of the Act of 1862, to order the destruction or delivery up of spuriously marked articles, but if the marks can be completely removed, the Court permits this to be done without requiring the articles to be destroyed.[2]

9. Prosecution.

By sec. 2—

"(6.) Any offence for which a person is under this Act liable to punishment on summary conviction may be

[1] Cf. sec. 12 (3), p. 72, by which compensation for loss may be awarded to an innocent party out of the proceeds of forfeited goods. And as to forfeiture on importation, see sec. 16, p. 77.

[2] Kerly, Chap. XV., p. 150, *Slazenger & Sons* v. *Feltham & Co.*, 6 R. P. C. 531 (1889), C. A.

prosecuted, and any articles liable to be forfeited under this Act by a Court of summary jurisdiction may be forfeited, in manner provided by the Summary Jurisdiction Acts:[1] Provided[2] that a person charged with an offence under this section before a Court of summary jurisdiction shall, on appearing before the Court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires be so tried accordingly."

The Court in Scotland is the Sheriff Court,[3] and the Summary Jurisdiction Acts there mean the Summary Procedure Act, 1864, and any Acts amending the same.[3] In Dublin, the Summary Jurisdiction Acts are the Acts regulating the powers and duties of justices of the peace for the police district of Dublin metropolis, and, as regards the rest of Ireland, the "Summary Jurisdiction Acts" means the Petty Sessions (Ireland) Act, 1851, and any Act amending the same. The "Court of summary jurisdiction" means justices acting under those Acts.[4]

Indictment and information.]—For forms of these, see the Appendix, p. 143.

Official prosecutions.]—It is provided by sec. 2 of the M. M. A., 1891, that—

Official Prosecutions.

"2.—(1.) The Board of Trade may, with the concurrence of the Lord Chancellor, make regulations providing that in cases appearing to the Board to affect the general interests of the country, or of a section of the community, or of a trade, the prosecution of offences under the M. M. A., 1887, shall be undertaken by the Board of Trade, and prescribing the conditions on which such prosecutions are to be so undertaken. The expenses of prosecutions so undertaken shall be paid out of moneys provided by Parliament.

"(2.) All regulations made under this section shall be laid before Parliament within three weeks after they are made if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act, and shall be

[1] 42 & 43 Vict. c. 49.

[2] Below, p. 68.

[3] Sec. 21. Any aggrieved person can prosecute in Scotland, with the concurrence of the Procurator Fiscal: *Burns* v. *Turner*, 25 Ct. of Sess. Ca., 4th ser., 38 (1898). Lord Justice Clerk Kingslargh, Ld. Trayner, Ld. Monereiff.

[4] Sec. 22. The compromise of a prosecution is, it seems, not improper. See *Fisher* v. *Apollinaris Co.*, 10 Ch. 297 (1875). L.JJ.

published under the authority of her Majesty's Stationery Office.

"(3.) Nothing in this Act shall affect the power of any person or authority to undertake prosecutions otherwise than under the said regulations."

This provision was made upon the recommendation of the Committee of 1890.

The regulations made by the Board of Trade under the Act[1] are set out in the Appendix, p. 139. The fifth of such regulations provides that the Board may, before undertaking a prosecution at the instance of any applicant, require the applicant to give security for costs on such terms and in such manner as it thinks proper.

It is provided by sec. 1 of the Merchandise Marks (Prosecution) Act, 1894,[2] that—

"The powers exercisable by the Board of Trade under the M. M. A., 1891, with respect to the prosecution of offences under the M. M. A., 1887, may, in cases which appear to the Board of Agriculture to relate to agricultural and horticultural produce, be exercised by that Board, and in such cases the former Act shall apply as if the Board of Agriculture were referred to therein instead of the Board of Trade."

By sec. 2 it is provided that—

"This Act shall not apply to Ireland."

This Act was passed in accordance with a recommendation of a Select Committee of the House of Lords, appointed in 1893, to consider the question of the marking of foreign meat.[3]

The former Board of Agriculture is now the Board of Agriculture and Fisheries,[4] and the Merchandise Marks (Prosecutions) Act, 1894, applies to the produce of any fishing industry in the same manner as it applies to agricultural or horticultural produce.[5]

The regulations made by the Board of Agriculture under the Act of 1894 are set out in the Appendix, p. 140.

[1] May 21st, 1892. A list of the prosecutions instituted by the Board of Trade from January, 1888, to the end of 1896 will be found in the *Trans. Chart. Inst. Pat. Agents*, 1897—8, at p. 130.

[2] 57 & 58 Vict. c. 19. The Act is to be read with the M. M. A., 1887 and 1891.

[3] 1893 (214). p. xviii., para. 110.

[4] Board of Agriculture and Fisheries Act, 1903 (3 Edw. VII. c. 31).

[5] Sec. 1 (8) of Act mentioned in last note.

A circular letter, dated February 1st, 1895, addressed by the Board of Agriculture to secretaries of Chambers of Agriculture, agricultural societies and farmers' clubs, on the working and interpretation of the Merchandise Marks (Prosecution) Act, 1894, will be found in the Appendix, post, p. 140.

Indictment, right to be tried by.

Right to be tried by indictment.]—If notice of this right be not given to the person charged on his appearing in Court, and before the charge is gone into, the proceedings are invalid.[1] And, *semble*, it is immaterial whether or not the defendant knew of his right to be tried by jury, and whether or not the Court knew before the proceedings commenced that he intended to plead guilty in the course of the case.[2] This was so held in a case under sec. 17 of the Summary Jurisdiction Act, 1879, by which a similar duty of informing a defendant, charged with one of the offences included under the section, of his right to be tried by a jury is cast upon the Court of summary jurisdiction.[3] There are numerous special Acts comprising corresponding provisions.[4]

Limitation of prosecutions.]—By sec. 15—

Limitations.

> "No prosecution for an offence against this Act shall be commenced after the expiration of three years next after the commission of the offence, or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens."

Sec. 18 of the Act of 1862 was to the same effect. The ordinary period of limitation upon the summary prosecution of offences is six months.[5]

A question may arise as to whether the above section applies to a prosecution for the special offences created by sec. 8 or sec. 20 of the Act,[6] since the phrase "an offence against this Act" which occurs in it, is taken from sec. 2, and does not

[1] 11 & 38 & 39 Vict. c. 63 s. 11 under which it is a condition precedent to the right of the purchaser of adulterated goods to take proceedings that he should have given the seller notice of his intention to have the goods analysed [illegible] [2] [illegible] [3] See Douglas Summary Jurisdiction Acts 9th ed. p. 118 [4] Summary Jurisdiction Act 1879 sec. 11 Stone's Justices' Manual 19th ed. p. 10, Douglas pp. 11 [illegible] [5] [illegible] [6] [illegible]

occur in those sections. It is submitted that sec. 15 does not apply, and that, accordingly, the ordinary rule of six months' limitation holds for prosecutions under sec. 8 or sec. 20.

Vexatious Indictments Act.]—By **sec. 13**—

Vexatious Indictments Act.

"The Act of the session of the twenty-second and twenty-third years of the reign of her present Majesty, chapter seventeen, intituled 'An Act to prevent vexatious indictments for certain misdemeanours,'[1] shall apply to any offence punishable on indictment under this Act, in like manner as if such offence were one of the offences specified in section one of that Act, but this section shall not apply to Scotland."

The effect of this is, that no bill of indictment can be presented to, or found by, any grand jury for an offence under the Act, unless either the prosecutor has been bound over to prosecute or give evidence; or the person charged has been committed to or detained in custody, or has been bound over to answer an indictment for the offence; or the indictment is preferred with the consent of a judge, the attorney-general, or the solicitor-general. And where a justice refuses to commit, or to hold to bail a person charged with an indictable offence under the Act to be tried for the same, the justice may, and must at the desire of the prosecutor, take the recognizance of the prosecutor to prosecute and transmit the recognizance, information, and depositions, if any, to the Court in which the indictment ought to be preferred, in the same manner as if he had committed the person charged for trial.[2]

Costs.

By **sec. 14** —

"On any prosecution under this Act the Court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor, by the defendant, having regard to the information[3] given by and the conduct of the defendant and prosecutor respectively."

This is subject to the special rule of sec. 9,[4] where the defence allowed by that section is set up.

This section gives the Court unlimited jurisdiction over the costs, without reference to the result of the prosecution, except

[1] 22 & 23 Vict. c. 17.

[2] Sec. 13.

[3] Sec. 15.

[4] Sec. 9.

so far as this is made a subject for consideration by the reference to conduct. It may be compared with Ord. 65, r. 1,[1] and sec. 5 of the Judicature Act, 1890, which deal with the costs of civil proceedings.[2] Under Ord. 65, r. 1, it is held that a lump sum, assessed by the Court, may be awarded as costs;[3] that a successful plaintiff may be ordered to pay the costs of the action;[4] but that the defendant cannot be ordered to pay them where the plaintiff had no cause of action.[5] The discretion must, of course, be exercised judicially and on fixed principles of general application.[6]

The ordinary rule as to the costs of summary proceedings is, that if a conviction or order is made, the justices may order the defendant to pay to the prosecutor or complainant, and if the information or complaint is dismissed, the prosecutor or complainant to pay to the defendant, such costs as they think just and reasonable.[7]

Where a fine ordered to be paid on a conviction by a Court of summary jurisdiction does not exceed five shillings, then, except so far as the Court may think fit to expressly order otherwise, an order shall not be made for payment by the defendant to the informant of any costs, and the Court shall, except so far as they think fit to expressly order otherwise, direct all fees payable or paid by the informant to be remitted or repaid to him; the Court may also order the fine or any part thereof to be paid to the informant in or towards the payment of his costs.[8]

Under sec. 12 (3)[9] compensation may be awarded to an innocent party out of the proceeds realised from forfeited goods for any loss sustained by him in dealing with such goods.

[illegible]

Appeal.

By sec. 2 (5)—

"If any person feels aggrieved by any conviction made by a Court of summary jurisdiction, he may appeal therefrom to a Court of quarter sessions."

The appeal will be governed by sec. 31 of the Summary Jurisdiction Act, 1879, and the provisions of that section must be complied with.[1]

The decision of justices upon any point of law, or if it is alleged to be in excess of jurisdiction, may also be questioned by requiring the justices to state a case for the determination of the King's Bench Division ;[2] an order or conviction made by them without jurisdiction may be quashed upon a *certiorari* ;[3] and if they have refused to hear and determine a case in which they have jurisdiction they may be ordered to do so by *mandamus*.[3]

A person convicted on indictment has such rights of appeal as are conferred by the Criminal Appeal Act, 1907.[4]

Saving of other Proceedings.

By sec. 19 (1) and (2)—

"(1.) This Act shall not exempt any person from any action, suit, or other proceeding which might, but for the provisions of this Act, be brought against him.

"(2.) Nothing in this Act shall entitle any person to refuse to make a complete discovery, or to answer any question or interrogatory in any action, but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Act."[5]

Search Warrant.

By sec. 12

"(1.) Where, upon information of an offence against this Act," a justice has issued either a summons requiring the defendant charged by such information to appear to answer to the same or a warrant for the arrest of such defendant,

Where a prosecution is pending

and either the said justice on or after issuing the summons or warrant, or any other justice, is satisfied by information on oath that there is reasonable cause to suspect that any goods or things by means of or in relation to which such offence has been committed are in any house or premises of the defendant, or otherwise in his possession or under his control in any place, such justice may issue a warrant under his hand by virtue of which it shall be lawful for any constable named or referred to in the warrant, to enter such house, premises, or place at any reasonable time by day, and to search there for and seize and take away those goods or things; and any goods or things seized under any such warrant shall be brought before a Court of summary jurisdiction for the purpose of its being determined whether the same are or are not liable to forfeiture[1] under this Act.[2]

Where the owner of the goods cannot be found.

"(2.) If the owner of any goods or things which, if the owner thereof had been convicted, would be liable to forfeiture under this Act, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and a Court of summary jurisdiction may cause notice to be advertised stating that, unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be forfeited, and at such time and place the Court, unless the owner or any person on his behalf, or other person interested in the goods or things, shows cause to the contrary, may order such goods or things or any of them to be forfeited.

Disposal of forfeitures [illegible] to innocent party

"(3.) Any goods or things forfeited under this section, or under any other provision of this Act,[1] may be destroyed or otherwise disposed of, in such manner as the Court by which the same are forfeited may direct, and the Court may, out of any proceeds which may be realised by the disposition of such goods (all trade marks and trade descriptions being first obliterated), award to any innocent party any loss he may have innocently sustained in dealing with such goods."

Forfeiture without conviction.] An offence against the Act comprises two distinct elements, first, the doing of one of the specified acts, for instance, making a trade mark without the

[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]

assent of the proprietor, applying a false trade description to goods, or having in possession for sale any goods to which a forged trade mark is applied; and, secondly, doing this with intent to defraud, or not innocently, and without any of the special defences mentioned in the Act. The existence of the first element can be ascertained from the chattel, article, instrument, or thing by means of, or in relation to which the offence,[1] if committed at all, has been committed; but the existence of the second can only be established in relation to the conduct of a particular person, here referred to generally as "the owner" of the goods or things. The Act, however, in almost all cases casts the onus of establishing that he acted without intent to defraud, or otherwise innocently, or a special defence upon the person charged, and, in the absence of any evidence by "the owner," evidence supplied by inspection of the goods themselves, or otherwise given in relation to them, and the marks applied to them will be sufficient for the purpose of forfeiting the goods under the section.[2]

Marks on Watch Cases.

By sec. 7—

Application of the Act to watches.

"Where a watch case has thereon any words or marks which constitute, or are by common repute[3] considered as constituting, a description of the country[4] in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall *primâ facie* be deemed to be a description of that country within the meaning of this Act, and the provisions of this Act with respect to goods to which a false trade description has been applied,[5] and with respect to selling or exposing for or having in possession for sale, or any purpose of trade or manufacture, goods with a false trade description,[6] shall apply accordingly, and for the purpose of this section the expression 'watch' means all that portion of a watch which is not the watch case."[6]

Gold or silver watch cases, whether of British make or

[1] Sec. 2 (1) (a) p. 60.

[2] Cf. sec. 10 below, p. 80; sec. 6 p. 28 *supra*.

[3] Cf. section of the Act in sec. 3 (1) note p. 37.

[4] Sec. sec. 3 (1) 'place or country.'

[5] Sec. 2 (2).

[6] In the amendment

imported into Great Britain, are required to be stamped with assay marks, of which the most important are the hall marks, showing the standard of purity of the metal.[1] Evidence was adduced before the Committee of 1887 to show that the English hall mark upon a watch case containing a foreign movement was understood by buyers to be an indication that the movement was of English make, and, further, that the introduction of the letter *F* into the hall marks put upon imported watch cases, which had been provided for by the Customs Tariff Act, 1876,[2] was not sufficient to enable buyers to distinguish foreign from English-made cases. The section set out above, and sec. 8 of the Act, were accordingly introduced for the purpose of preventing the assay marks from leading, or being used to lead, to deception.[3] It is said that the provisions have been successful, and have proved highly beneficial to the English watch trades.[3]

On examination, sec. 7 appears to be a special case falling within provisions elsewhere contained in the Act, for words or marks which constitute, or are by common repute considered as constituting a description of the country in which the movement was made, marked upon the case would seem to be a "trade description" within sec. 3 (1),[4] "applied to" the whole watch within sec. 5,[5] and if the movement has not, in fact, been made in the country indicated by the description, the trade description is false within sec. 3 (1).[6] This is another instance of overlapping, of which several cases occur in the Act. It is submitted that the construction of the wider general provisions ought not to be affected, in regard to watches, by the presence of the narrower special section here referred to.[7]

The section applies only where the double condition that the watch case has upon it words or marks which constitute, or are by common repute considered as constituting a description, of the country where the movement was made, and that the movement bears no description of the country where it was made, is fulfilled. It does not, therefore, extend to the sale of a watch in a case marked so as to indicate that the movement was made in any country other than that where it was in fact made, if the

[1] The statutes are very numerous. See Appendix, p. 147.

[2] 39 & 40 Vict. c. 35, s. 1, amended by the Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 10.

[3] See "Watches" in the indexes to the M. M. A. Reports, 1887 and 1890.

[4] Page 21.

[5] Page 21.

[6] Page 40.

[7] Cf. p. 45.

movement itself is marked with a description of the country in which it was made, although a purchaser who did not notice or appreciate the conflict between the marks, might be misled by the mark on the case. But any such sale would, it is submitted, fall within the general provisions dealing with false trade descriptions of the Act.

Movements partly made abroad.

Description of the country where it was made.]—It is often difficult to say what country is the country where a movement was made, since almost, if not quite, all English movements contain foreign-made parts, for instance, the chain, hair spring, and regulator, and sometimes foreign-made movements are imported in the rough and are finished in England.[1] In regard to the former case there was a general, but not unanimous, agreement among the expert witnesses called before the Committee of 1887 that, at any rate, if the foreign-made parts are only those mentioned, the movement may fairly be described as English made, but in regard to the latter there was a decided difference of opinion.[2] This difficulty has already been referred to in considering what is meant by "false in a material respect."[3] It must be solved in each case according to the view the Court takes, having regard to such usages of the trade as are proved to exist, and as can be supposed to be familiar to the ultimate buyers.

Primâ facie be deemed.]—It is impossible to attach any sensible meaning to the words *primâ facie* in this section. They were probably intended only to enable the person charged to show that the words or marks in question do not constitute, and are not by common repute considered as constituting a description of the country in which the movement was made, as alleged, but for this they are both unnecessary and inappropriate.

Marking watch cases.]—By sec. 8—

"(1.) Every person[4] who after the date[5] fixed by Order in Council sends or brings a watch case, whether imported or not, to any assay office in the United Kingdom for the purpose of being assayed, stamped, or marked, shall make

[1] *Williamson* v. *Tierney*, 17 T. L. R. 174 (1900), and Times, April 18th, 1901, cited p. 29. was such a case.

[2] See "Watches" in the index to M. M. A. Report, 1887.

[3] Above, p. 41. See also "place or country," p. 28, and sec. 18, p. 49.

[4] Sec. 2 (1), p. 12, "person."

[5] November 28th, 1887; "London Gazette," December 9th, 1887.

a declaration declaring in what country or place the case was made. If it appears by such declaration that the watch case was made in some country or place out of the United Kingdom, the assay office shall place on the case such a mark (differing from the mark placed by the office on a watch case made in the United Kingdom), and in such a mode as may be from time to time directed by Order in Council.

"(2.) The declaration may be made before an officer of an assay office, appointed in that behalf by the office (which officer is hereby authorised to administer such a declaration), or before a justice of the peace, or a commissioner having power to administer oaths in the Supreme Court of Judicature in England or Ireland, or in the Court of Session in Scotland, and shall be in such form as may be from time to time directed by Order in Council.

"(3.) Every person who makes a false declaration for the purposes of this section shall be liable, on conviction on indictment, to the penalties of perjury, and on summary conviction to a fine not exceeding twenty pounds for each offence."[1]

See sec. 7, above, p. 73. The Order in Council now in force is printed in the Appendix, p. 135.

The section is only directed to secure that foreign-made cases shall bear a distinctive mark. It does not prevent English movements being put into foreign cases, or foreign movements into English cases.

The Committee of 1897 recommended that the marks of foreign origin placed upon watches or watch cases ought to be required in equally visible letters upon the dome or dial of the watch itself, inasmuch as the watch is often made abroad, but imported in order to be placed in a British hall-marked case and then sold as of home manufacture.[2]

Watches and clocks.

Importation of marked watches.]—By sec. 42 of the Customs Act, 1876,[3] the importation of clocks and watches, or any other article of metal impressed with any mark or stamp representing, or in imitation of, any legal British assay, mark, or stamp, or purporting by any mark or appearance to be of the manufacture of the United Kingdom is prohibited.

[1] See sec. 15, p. 68, "limitation."

[2] M. M. A. Report, 1897, p. 70.

[3] 39 & 40 Vict. c. 36.

10. Prohibition on Importation.

By sec. 16[1]—

"Whereas it is expedient to make further provision for prohibiting the importation of goods which, if sold, would be liable to forfeiture under this Act; be it therefore enacted as follows:

Goods liable to forfeiture under the Act, or bearing British or Irish trade marks or names.

"(1.) All such goods, and also all goods of foreign manufacture bearing any name or trade mark being or purporting[2] to be the name or trade mark of any manufacturer, dealer, or trader in the United Kingdom, unless such name or trade mark is accompanied by a definite indication of the country in which the goods were made or produced, are hereby prohibited to be imported into the United Kingdom, and, subject to the provisions of this section,[3] shall be included among goods prohibited to be imported as if they were specified in section forty-two of the Customs Consolidation Act, 1876.[4]

Customs regulations.

"(2.) Before detaining any such goods or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs may require the regulations under this section, whether as to information, security, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the goods are such as are prohibited by this section to be imported.

"(3.) The Commissioners of Customs may from time to time make, revoke and vary, regulations, either general or special, respecting the detention and forfeiture of goods the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

[1] The sub-sections are badly arranged. (4) should have been placed second.

[2] For the interpretation of "purports" in the Consolidated Instructions of 1900, see para. 5. Appendix, p. 118.

[3] I.e., sub-secs. (2) and (3).

[4] 39 & 40 Vict. c. 36. See p. 79.

Names like names of places in the United Kingdom.

"(4.) Where there is on any goods a name which is identical with or a colourable imitation of the name of a place in the United Kingdom, that name, unless accompanied by the name of the country in which such place is situate, shall be treated for the purposes of this section as if it were the name of a place in the United Kingdom.

Customs regulations.

"(5.) Such regulations may apply to all goods the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

"(6.) The Commissioners of Customs, in making and in administering the regulations, and generally in the administration of this section, whether in the exercise of any discretion or opinion, or otherwise, shall act under the control of the Commissioners of her Majesty's Treasury.

"(7.) The regulations may provide for the informant reimbursing the Commissioners of Customs all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

"(8.) All regulations under this section shall be published in the 'London Gazette' and in the 'Board of Trade Journal.'

Customs Act, 1876.

"(9.) This section shall have effect as if it were part of the Customs Consolidation Act, 1876,[1] and shall accordingly apply to the Isle of Man as if it were part of the United Kingdom.

"(10.) Section two of the Revenue Act, 1883,[2] shall be repealed as from a day[3] fixed by regulations under this section, not being later than the first day of January, one thousand eight hundred and eighty-eight, without prejudice to anything done or suffered thereunder."

This section is a most important part of the scheme of the Act, for it, so far as it is effective, stops at the outset a class of frauds which, according to the evidence given before the Committees of 1862 and 1887, were widely prevalent and continually increasing,

[1] 39 & 40 Vict. c. 36, s. 42, pp. 79, 80.

[2] 46 & 47 Vict. c. 55, s. 2, amending the last-cited section.

[3] January 1st, 1888. Customs Regulations of December 1st, 1887, Appendix, p. 131.

to the grave detriment of English manufacturers. Its main provisions are in accordance with the legislation now adopted in most civilised countries, under the International Convention, drawn up at the conference on the subject of Industrial Property and Merchandise Marks, at Paris, in 1883, and amended at the subsequent Conferences at Madrid, in 1891, and at Brussels, in 1900. The terms of the several Conventions are set out in the Appendix, pp. 154—161.

The International Conventions.

According to English law these terms, or the terms of any of the numerous treaties concluded between this country and other countries for the mutual protection of the trade mark and allied rights of their respective subjects, have no application to or between subjects, and cannot be recognised as having any legal effect, except so far as they have been embodied in the municipal law of the several countries.[1] An English Court is not competent to inquire into a matter involving the construction of treaties or other acts of state, or to treat them as in any way operative to create or modify rights or duties, and the Crown cannot sanction any invasion by its officers of the rights of private individuals as they exist according to the municipal law, on the ground that it is necessary in order to comply with or compel obedience to a treaty.[2]

France was, apparently, the first country to take effective steps to stop the importation of goods made abroad, and bearing words or marks describing them as made in the country of importation;[3] but sec. 42 of the Customs Act of 1876, amended by the now repealed section of the Revenue Act of 1883, was amply sufficient for the purpose, if it had been effectively enforced.

Sec. 42 of the Customs Act, 1876.

Sec. 42 of the Customs Act, 1876, contains a list of goods among which the goods enumerated in this section are to be considered as included, and it provides that—

> "The goods enumerated and described in the following table of prohibitions and restrictions inwards are hereby prohibited to be imported or brought into the United

[1] See Art. IX. of the International Convention, p. 155; and *The Californian Fig Syrup Co.'s Tm.*, 40 C. D. 620; 6 R. P. C. 126 (1888), Stirling, J., decided on sec. 103 of the Patents, &c. Act, 1883; and *Lauri* v. *Renad*, [1892] 3 Ch. 402. The Court may refer to a treaty, in accordance with which an Act has been passed, to ascertain the circumstances to which the Act was intended to apply, as an aid to its construction. *Re Carter Medicine Co.'s Tm.*, [1892] 3 Ch. 472; 9 R. P. C. 401, North, J.

Walker v. *Baird*, [1892] A. C. 491.

[3] See M. M. A. Report, 1887, Index, "France."

Kingdom, save as hereby excepted;[1] and if any goods so enumerated and described shall be imported or brought into the United Kingdom contrary to the prohibitions or restrictions contained therein, such goods shall be forfeited, and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct."[2]

Only marked goods come within the prohibition.

The policy of the Act is to prevent fraudulent marking, whether by means of forged trade marks or false trade descriptions, and this section, as the remainder of the Act, only applies to goods which bear marks bringing them within its terms. There is no general obligation to stamp imported goods with any indication of origin.[3] And if the deceptive marks which make such an indication necessary under the Act appear only upon the covering or package of goods, it is considered sufficient that the qualifying indication of origin should be stamped on the covering or package only also.[4]

If sold.—All such goods.]—In delivering the judgment of the Privy Council in a recent case[5] on the similar section of the New Zealand Act, Sir Ford North said, "Their Lordships think that the words 'goods which if sold would be liable to forfeiture' must be read as meaning 'goods which if sold would be liable to forfeiture on conviction of the seller,' or, what comes to the same thing, as equivalent to the expression, 'goods the sale of which would expose the seller to the liability of having the goods forfeited by due process of law,' . . . goods falsely marked are liable to forfeiture in a very intelligible sense. There is an inchoate liability, although the seller may escape conviction and its consequences by proving facts which the Act treats as a sufficient excuse"; and it was held that the fact that the respondent had "acted innocently" did not protect the goods. The goods which are liable to forfeiture under this section,[6] in addition to those specially enumerated in sub.-sec. (1),

[1] There are no general exceptions, but only exceptions relative to particular classes of goods, none of which are here material.

[2] For the section dealing with the importation of watches, see p. 76.

[3] M. M. A. Report, 1890; and see General Order, Consol. Instr. of February 26th, 1900, post, p. 117, para. 2.

[4] See below, p. 84, note (3).

[5] *Commissioners of Trade and Customs* v. *Bell*, [1902] A. C. 563. The sections under consideration were secs. 89 and 104 of the New Zealand Patents, Designs, and Trade Marks Act, 1889. This construction of the section is that which was submitted in the former editions of this book.

[6] See the summary in the Customs General Order of February 26th, 1900, paras. 3, 4 and 19, Appendix, p. 117.

are, therefore, goods which, if sold, would be liable to forfeiture under the Act, that is, by the joint operation of sec. 2 (3) (iii.) and sec. 2 (1), goods or things to which any forged trade mark[1] or false trade description[2] is applied,[3] or to which any trade mark,[4] or mark so nearly resembling a trade mark as to be calculated to deceive,[5] is falsely applied.[6] The decision referred to above is in accordance with the principle of throwing upon the person charged the onus of proving that he acted without intent to defraud, or that he is protected by one of the special defences specified in the Act, or that he acted otherwise innocently.[7] Otherwise there could be no forfeiture under this part of the section, except where an offence would have actually been committed had the goods been sold; and sale by an innocent person would not constitute an offence. The construction accords with the remainder of the section, and with the older Acts, for it is plain that the forfeitures constituted by the latter part of sub-sec. (1) are independent of proof of guilty intention on the part of any one, and the clauses of sec. 42 of the Customs Consolidation Act of 1876, and sec. 2 of the Revenue Act of 1883, which are replaced by this section, contained no reference to the knowledge, intention, or purposes of the importer, or of any other person in relation to the goods.[8]

Goods bearing English words or names.

So far as can be judged from the summary of agricultural produce detained under the Act in the years 1888 and 1889, which is appended to the M. M. A. Report, 1890, a very large proportion of the goods seized upon importation is seized because they bear words or lettering in the English language.[9]

As regards words forming parts of the goods on which they appear, see ante, p. 25; and as regards goods partly made in two or more countries, p. 28.

Goods from the Colonies or the United States.

The practice of the Custom House authorities in the matter was stated by Mr. Follett, in the paper already cited,[10] to be based upon the conclusion that "the use of the English language and of English trade descriptions was misleading and primâ facie inadmissible on foreign goods; but that this could

[1] Page 14.
[2] Page 40.
[3] Page 21.
[4] Page 14.
[5] Page 19.
[6] Page 23.
[7] Sec. 2 (2) (c), p. 64.
[8] Cf. sec. 12, "Search warrant," and "Forfeiture without conviction," pp. 71, 72.
[9] See sec. 3 (1) (b), "place or country," p. 28.
[10] M. M. A. Report, 1890, Appendix, p. 275.

not be held to apply to foreign goods coming from the United States or the Colonies."

Goods bearing British or Irish trade marks or names.

All goods of foreign manufacture, &c.]—The prohibition of this part of sub-sec. (1) is absolute (subject to the proviso contained in it) without regard to intention, or to any licence or right to use the name or trade mark from the proprietor, and it applies where the name or trade mark has been applied by the proprietor himself, or in accordance with his orders, for the section is intended to guard against the importation of goods which appear to be home-made, because they bear the name or trade mark of a manufacturer, &c. in the United Kingdom, in cases where the name or trade mark is used honestly, and in cases where it is used with, as well as where it is used without, the concurrence of the manufacturer.[1] The last cases are already provided for, since the goods would be liable to forfeiture under the earlier parts of the Act.

Only manufactured goods are included.

Manufactured goods only come within this part of the sub-section, although the Act generally applies to all goods whatsoever which are the subject of trade, manufacture, or merchandise.[2] According to the view of the Act taken by the Customs authorities, goods which have undergone any process of manufacture—for instance, ground wheat, or hides tanned in the least degree—are manufactured goods.[3]

Bearing any name, &c.]—It is unfortunate that the expression "having applied to them," which is defined in the Act,[4] was not here used instead of "bearing." It is doubtful whether a name or mark which is not placed upon the goods or their covering, but is otherwise used in connection with them in any manner calculated to lead to the belief that the goods are designated or described by it, would be borne by the goods within the meaning of the sub-section.[5]

Name.[6]]—This includes any abbreviation of a name,[7] and, therefore, initials which are the equivalent of a name in the market, as, for instance, D. L. R. & Co. for De La Rue & Co.[8]

Trade-mark.]—According to the definition of the Act, trade

[1] See Customs General Order, p. 21. And cf. the use of a trade mark which constitutes an infringement, Kerly, p. 395.

[2] Sec. 3 (1), "goods," p. 21.

[3] M. M. A. Report, 1890, Evidence of Messrs. Seymour and Follett, Q. 286.

[4] Sec. 5, p. 23.

[5] This would be within sec. 5 (d), February 26th, 1900, r. 29, Appendix, p. 123.

[6] See "names and initials," p. 44.

[7] Sec. 3 (1).

[8] Mr. Follett, M. M. A. Report, 1890, p. 276.

mark means a registered trade mark, or a trade mark which is protected in any British possession or foreign State to which the provisions of sec. 103 of the Patents, &c. Act, 1883 (now sec. 91 of the Patents and Designs Act, 1907), are applied.[1] In other parts of the Act marks nearly resembling trade marks are specially mentioned.[2]

Customs register of names and marks.

To enable the Customs officers to carry out the provisions of the section prohibiting the importation of goods marked with the names or trade marks of manufacturers, dealers, or traders within the United Kingdom, registers of the names and trade marks of such persons as choose to avail themselves of them are kept at the various ports of the United Kingdom in accordance with rules 26—28 of the Customs General Order of February 26th, 1900.[3]

"Made in Germany."

Indication of the country, &c.]—The Committee of 1890 refused to recommend that the words "Made abroad" be accepted as sufficient to pass the goods instead of the words "Made in Germany," &c., then required, where, without the statement as to origin, the goods marked would fall within the section.[4] But a recommendation to this effect has been made by the Committee of 1897;[5] and now with regard to (a) goods, whether manufactured or raw, having applied to them any description, figures, words, &c., which by being or including, either expressly or by reference, the name of a place in, or a part of, the United Kingdom, or otherwise constitute a statement or indication that the goods were made or produced in the United Kingdom, the words "Made abroad" will be generally sufficient.[6] With regard to (b) goods of foreign manufacture bearing any name or mark which is, or purports[7] to be, the name or trade mark of a manufacturer, dealer, or trader in the United Kingdom, the name of the country is a sufficient indication without the words "Made in," if the name or trade mark only appears. Where there is

[1] Sec. 3 (1); above, p. 14.

[2] E.g., sec. 4 (a) and sec. 5 (3).

[3] Appendix, p. 122. See the form of declaration or registration, p. 132.

[4] Cf. the case of goods bearing English words, pp. 25 and 31. Where a trade description suggesting an English origin has to be explained, and it does not fall within sec. 16 (1), the qualification "Made abroad" is sufficient.

[5] M. M. A. Report, 1897, p. iv.

[6] Customs General Order of February 26th, 1900, rr. 4 (a), 7, 8, Appendix, pp. 118, 119.

[7] As to the meaning of "purports" in this connection, see the Customs General Order of February 26th, 1900, r. 5, Appendix, post, p. 118.

an address, as "John Smith, Sheffield," then the qualification must be "Made in Germany," or similar words. "Germany" alone would not counteract "Sheffield."[1] With regard to (c) goods, whether manufactured or raw, having applied to them a generally used trade description which, in indicating a particular class of goods or method of manufacture, includes expressly the name of a place in, or a part of, the United Kingdom, and is thereby calculated to mislead as to the place of manufacture or production of the goods, the full statement "Made" (e.g.) "in Germany" is required.[2]

An indication which can readily be removed—for instance, words on a label attached by a string—is not accepted as sufficient to take the goods out of the section.[3] It is, of course, a question of fact whether the explanation does accompany the objectionable name or trade mark, and a merely pretended accompanying would be of no account.

The Customs officers are not expected to decide whether goods were actually made or produced in the country from which in the qualification they are stated to come: the name of *some* foreign country, or of some place in a foreign country, is sufficient.[4] If the goods bear the name of a place identical with, or a colourable imitation of, the name of a place in the United Kingdom, the name should be accompanied by the name of the country in which the place is situated—e.g., Boston in Massachusetts, by the name "United States," or by the initials "U. S. A.," or even by the abridgment "Mass."[5]

In 1896 orders were given by the Customs to detain goods only where they bore marks raising a direct claim to British origin, or bearing a name or trade mark of some one known firm having its principal place of business in the United Kingdom, without qualification. The Committee of 1897, however, expressed the

[1] Customs General Order of February 26th, 1900, rr. 4 (b), 8, Appendix, post, pp. 118, 119.

[2] Customs General Order of February 26th, 1900, rr. 4 (c), 8, Appendix, post, pp. 118, 119.

[3] M. M. A. Report, 1890, Q. 1953. The Lords' Committee on the Marking of Foreign Meat (1893) reported that: "Traders complain that importers are only compelled by the M. M. A. to apply the mark of foreign origin to the package, and that the contents are systematically branded by English importers with English titles." Report, p. x.

[4] Customs General Order of February 26th, 1900, r. 9, Appendix, p. 119. Cf. r. 30, App., p. 123, as to qualifying marks added as a condition of release.

[5] Ibid., r. 10, Appendix, p. 119. As to "initials" generally, see ibid., r. 12, Appendix, p. 119.

opinion that while these orders have given great relief, it is unnecessary and uncalled-for to detain goods and insist upon a qualification because they are marked with English words of description, if intended for sale in this country, or with words in the language of that to which they are consigned, unless such words are calculated to deceive the purchaser in regard to the country of origin. The Committee added that the practice of the Customs should, in their opinion, be in the direction of requiring the excision of offending marks, rather than in that of adding a qualifying mark.[1] In accordance with this recommendation[1] a rule has been laid down to the effect that trade descriptions in the English language applied to foreign goods are not to be regarded as a direct or indirect indication that the goods are of British or Irish origin, unless the Customs officers have good ground for considering that such trade descriptions are specially designed to convey, and do, in fact, convey, an impression of British or Irish origin for the goods.[2] These regulations have considerably diminished the number of cases in which goods have had to be stopped.[3]

Goods in transit.

Importation.]—In spite of a strong appeal from shipping agents and other traders, whose businesses were said to be adversely affected by the working of the Act, the Committee of 1890 refused to recommend the exclusion of goods in transit from the operation of the M. M. A.

Such a recommendation was, however, made by the Committee of 1897,[4] and although to give full effect to it an alteration in the law would be required, the Commissioners of Customs, acting in the spirit of the recommendation, have adopted the principle that no examination, transhipment, or transit of goods is to be made specially for the purpose of scrutinising marks, and such goods are not detained under the M. M. A. unless they infringe its provisions in one or other of the following ways:—(a) By bearing marks which raise a clear and direct claim to British origin; (b) by bearing the name or trade mark of a manufacturer, dealer, or trader in the United

[1] M. M. A. Report, 1897, p. iv.

[2] See 42nd Rep. Commrs. of Customs, 1898, p. 8; also Customs General Order of February 26th, 1900, r. 11, Appendix, post, p. 119.

[3] See 43rd Rep. Commrs. of Customs, 1899, p. 10.

[4] The objections to the inclusion of goods in transit are forcibly summed up in the M. M. A. Report, 1897, pp. iii, iv. Under the Madrid Convention of 1891, the authorities are not bound to effect the seizure of goods in transit. Appendix, p. 160.

Kingdom; (c) by bearing a trade mark specially registered at the Customs.[1]

Name of place in the United Kingdom.

Name of place in the United Kingdom.]—Sub-sec. (4), dealing with offences effected by false trade descriptions as to place or country,[2] is more stringent than the proviso of sec. 18, since that only applies where the use of the name of a place or country is calculated to deceive.

The three classes of cases under this sub-section have been set out above[3] in dealing with *Indication of the country of origin*. They include, as will be observed, in effect cases—(a) where the name is intended to refer to the place in the United Kingdom of which it is the name, and to that alone; (b) where the name is that of a foreign place to which it is intended to refer—for instance, Boston; (c) where the name has originally been taken from the place in the United Kingdom, but is used to describe the goods or their process of manufacture, without any reference to the place being intended.

(a) Goods supplied according to an order from an English trader to a foreign manufacturer requiring the latter to put the address of the former on goods manufactured for him, would come under the first class, and so also would goods bearing such inscriptions as "A present from Brighton," as well as goods expressly marked *English*, *Irish*, *London-made*, or with any similar express misstatements;[4] (b) the second class, which relates to manufactured goods and not to entirely raw goods, is unimportant; (c) Kidderminster carpets, Windsor soap, Balbriggan hose, Shetland shawls,[5] and Cheddar cheese, are examples of the third class. Where, however, such a description has become associated with a particular class of goods in a manner practically to preclude any probability of deception, as "Portland cement" and "Bath chaps," the description need not be accompanied by a statement of the country of actual production. This applies also to the case of colonial names describing, for instance, classes of wool, &c. where, although the names are British, the circumstances preclude mistake.[6] The saving contained in

[1] 42 Rep. Commrs. of Customs, 1898, p. 8; General Order of February 26th, 1900, r. 36, Appendix, post, p. 124.

[2] Sec. 3 (1) (b), "place or country," p. 28; sec. 18, p. 49.

[3] See p. 83.

[4] Cf. Customs General Order of February 26th, 1900, rr. 4 (a), 37, Appendix, pp. 118, 124.

[5] These examples are given in the Customs General Order, r. 6, Appendix, p. 118.

[6] Customs General Order, r. 6.

sec. 18 with regard to conventional or generic descriptions[1] does not apply to sec. 16 (4), for the words of the latter are precise, that the name shall be treated as if it were the name of a place in the United Kingdom, and therefore not a description of the goods. In any case, however, the proviso of sec. 18 requires the name of the place or country where the goods were actually made or produced to be added, if the description includes the name of a place or country, and is calculated to mislead.

Customs regulations.]—The general orders[2] and other regulations[2] issued by the Customs authorities under the Acts are set out in Appendix IV. The regulations provide, in accordance with the Act, that where goods are detected by the officers to be such as are prohibited to be imported, they are to be detained.[3] They do not, however, contemplate that the officers will be competent of their own knowledge to detect the attempted infringement of the Act in all cases, or in all classes of cases;[4] and accordingly they make provision for the officers to act upon information[5] given by private persons, for instance, by the owners of trade marks or names which are likely to be wrongly used on imported goods, and in certain cases they require the informants to give security,[6] or to make a deposit of money,[7] as a condition of the detention of the goods. The register of names and trade marks for the use of Customs officers has already been referred to.[8]

An information relating to a forged trade mark, alleged to be one recognised in a British possession or foreign State, will not be good unless it relates to a possession or State to which sec. 103 of the Patents, &c. Act, 1883, or the substituted sec. 91 of the Patents and Designs Act, 1907, has been applied by Orders in Council. A list of such possessions and States will be found at p. 151.

Special regulations as to particular goods.

Special regulations as to particular goods have been made in some cases, besides the general regulations just referred to. The

[1] Above, p. 49.
[2] Appendix, pp. 117 et seq.
[3] Pages 118, 130.
[4] General Order of February 26th, 1900, rr. 9, 12.
[5] Regulations 2 and 3. Form of notice to Customs officer, p. 131. General Order of February 26th, 1900, rr. 46—49, Appendix, p. 126.
[6] Form of bond, p. 132. Regulations, 3, 4, 7, pp. 130, 131.
[7] General Order of February 26th, 1900, r. 47, p. 126.
[8] Page 83; General Order of February 26th, 1900, r. 26. Form of declaration, p. 132.

Marks not intended to reach purchasers.

earliest of these relate to watches.[1] The other exemptions from detention under the Act are of packing cases (containing goods) having the name of a port or place of destination applied to them in which the goods are clearly not intended to be sold or exposed for sale;[2] address marks, when they are merely and manifestly such, for purposes of carriage only;[3] sardines from places other than France bearing the trade description *Sardines à l'huile*;[4] samples or patterns, readily distinguished as such and valueless in themselves (so far as British origin is concerned);[5] goods not produced in the United Kingdom, such as wine, tea, and other produce not grown in this country, such as linseed, rapeseed, &c. (so far as British origin is concerned); this exemption is applied further to some special forms of manufacture which by shape, make or colour cannot be mistaken for the manufacture here of the same article, e.g., Dutch cheese, of the kind well known to be made in Holland, bearing the initials of British dealers;[6] "coverings," such as boxes, capsules, bottles, &c., if the marks, such as royal arms, refer not to the coverings themselves, but to the goods to be covered, and it is shown to the satisfaction of the officer that they will be British goods, or goods as to which British marks are not objectionable.[7] The rule last stated applies to coverings (such as ornamental boxes for tobacco, tea, or confectionery) with names on them of firms who have ordered the coverings for their own goods, or where such firms, though not having actually ordered the coverings themselves, consent in writing to their importation for such goods.[8]

Address marks.

Sardines.

Goods not produced in United Kingdom.

"Coverings."

Grain sacks.

The name and address of a merchant in this country upon grain sacks are regarded as an indication that the grain is of British origin, and require the addition of a statement of the country of production. In the case of grain imported in bulk and transferred *after due entry and clearance* into sacks on board the importing ship, such marking of the sacks does not need to be qualified with a statement of the foreign origin of the

[1] General Order of January 18th, 1888, p. 133; and see General Order of February 26th, 1900, r. 45, p. 126.

[2] General Order of February 26th, 1900. r. 13, p. 120.

[3] Ibid., r. 13, p. 120.

[4] General Order of December 18th, 1888, p. 138.

[5] General Order of February 26th, 1900. r. 17, p. 120.

[6] Ibid., r. 18.

[7] Ibid., r. 14, p. 120. If, as rarely happens, the marks refer distinctly to the coverings, the case should be reserved for the Board. Ibid.

[8] General Order of February 26th, 1900. r. 15, p. 120.

grain.[1] And by the General Order of the 26th of February, 1900,[2] discretionary powers have been conferred on officers, without a special order, to admit goods within the letter of the Act which are either articles, not dutiable, sent to an individual as presents or for personal use; articles, not new and manifestly private property, and old, used, or damaged articles sent into the United Kingdom for repairs; returned samples of no value, made by competing firms in the United Kingdom; certain foreign samples imported for purposes of manufacture or comparison, or British returned goods, not dutiable, or in respect of which no drawback could have been received.

Goods for private use.

Goods for repair.

Samples.

Returns.

The authorities when they have seized goods as contravening the Act, either forfeit and destroy or sell them, or release them upon receiving satisfactory explanations, or upon the removal or qualification of the objectionable marks, and, in some instances, upon the payment of fines.[3] The officers are directed to take care that, in all cases where the Board allow qualifying words to be added before the delivery of goods, such words are applied in characters clear, conspicuous, and as indelible as the marks requiring qualification, and in close proximity to those marks.[4]

Practice of the Customs authorities.

Any proceedings taken against the Customs authorities or their officers, in respect of anything done or omitted in execution or intended execution of their duties under the Act, fall within the Public Authorities Protection Act, 1893,[5] so that the proceedings must be commenced within six months; judgment for the defendant carries costs as between solicitor and client; the defendant may plead a tender of amends, and if the plaintiff does not recover more than the amount tendered, the defendant is entitled to costs (but this provision is not to affect costs on any injunction in the action); and if, in the opinion of the Court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceedings, the Court may award to the defendant costs as between solicitor and client.[6]

Proceedings against the Customs authorities.

[1] General Order of February 26th, 1900, r. 16, p. 120.

[2] Rr. 31—35, p. 123.

[3] See the return of goods detained in transit down to March, 1890, M. M. A. Report, 1890, Appendix, p. 326.

[4] General Order of February 26th, 1900, r. 41, p. 125.

[5] 56 & 57 Vict. c. 61, which has repealed 39 & 40 Vict. c. 36, ss. 267 to 272, and 40 & 41 Vict. c. 13, s. 4.

[6] This replaces the old requirement of one month's notice of action. Where at the trial by a judge with a jury of an

It has been held that an officer is not liable in trespass for detaining goods while in doubt whether they ought to be detained or not, and until the Commissioners of Customs had given directions concerning them, although he might, it was said, have been liable in damages for so detaining them for an unreasonable time.[1] In an earlier case, it was held that for a wrongful refusal, except upon payment of an excessive amount of duty, to sign a bill of entry in order to enable goods to pass, an officer might be sued.[2] The orders of his superior officer do not afford any defence for an officer who has acted illegally to the prejudice of any British subject.[3]

action against a public authority the latter succeeds, but the judge is satisfied that such good cause appears as to warrant him, under R. S. C., O. 65, r. 1, in depriving the defendant authority of costs, he may do so notwithstanding sec. 1 of the Public Authorities Protection Act, 1893: *Bostock* v. *Ramsey Urban Council*, [1900] 1 Q. B. 357; [1900] 2 Q. B. 616, Ld. Russell of Killowen, C.J., and C. A.; overruling the decision of Bruce, J., in *Cree* v. *St. Pancras Vestry*, [1899] 1 Q. B. 693; 68 L. J. Q. B. 389. The provision does not apply to appeals, *Fielden* v. *Morley Corporation*, [1900] A. C. 133.

[1] *Jacobsohn* v. *Blake*, 6 M. & G. 919; 7 Scott, N. R. 772 (1844).

[2] *Barry* v. *Arnaud*, 10 Ad. & El. 670 (1839).

[3] See *Walker* v. *Baird*, [1892] A. C. 491; *Sands* v. *Child*, 3 Lev. 352 (1693) and *Entick* v. *Carrington*, 19 St. Tr. 1043 (1765). And see further *Raleigh* v. *Goschen*, [1898] 1 Ch. 73; 69 L. J. Ch. 59, Romer, J.

CHAPTER III.

WARRANTY OF TRADE MARKS AND TRADE DESCRIPTIONS.

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It is provided by sec. 17 of the Merchandise Marks Act, 1887, that:—

"On the sale or in the contract for the sale of any goods to which a trade mark,[1] or mark, or trade description[2] has been applied,[3] the vendor shall be deemed to warrant that the mark is a genuine[4] trade mark and not forged[5] or falsely applied,[6] or that the trade description is not a false trade description[7] within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee."

This section corresponds to sec. 19 of the Merchandise Marks Act, 1862, but the older section applied only to trade marks which were applied to goods sold, and the implied warranty was that the trade marks were "genuine and true, and not forged or counterfeit, and not wrongfully used."

Trade mark[8] here means registered trade mark or trade mark protected by law in any British possession or foreign State to which sec. 91 of the Patents and Designs Act, 1907, is applicable.[9] Trade mark

[1] "Trade mark," sec. 3 (1), see below.

[2] "Trade description," sec. 3 (1). Page 24.

[3] "Applied," sec. 3 (2), and sec. 5 (1). Page 21.

[4] "Genuine," cf. sec. 2 (2) (a). Page 61.

[5] "Forged," sec. 4. Page 17.

[6] "Falsely applied," sec. 5 (3). Page 23.

[7] "False trade description," sec. 3 (1), Page 40.

[8] "Trade mark," sec. 3 (1). Page 14.

[9] The reference is to sec. 103 of the Act of 1883, but by virtue of sec. 38 (1) of the Interpretation Act, 1889, the

The section, however, in fact imports a warranty of the genuineness of unregistered English trade marks, at any rate when the application of them to the goods is reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of the proprietor of the trade mark, and also of any trade mark, whether registered or not, which the mark applied to the goods purports to be, for in such cases the mark, if not genuine, is a false trade description applied to the goods.[1] "Mark," where it first occurs in the section, can hardly include an unregistered trade mark, for the warranty implied is that the mark is a genuine trade mark, that is, a genuine registered trade mark, and that it does not purport to be. "Mark," where it occurs the second time, should be trade mark or mark.

The several terms occurring in the section have the meanings given to them respectively by the sections of the Merchandise Marks Act, 1887, which are referred to in the notes on the preceding page.[2] The general effect of the implied warranty is that the trade marks, or marks purporting to be trade marks, applied to the goods, are used with the assent of the proprietor of the trade marks which they purport to be, and that the statements made or implied by the trade descriptions are true.

Statement in writing to the contrary.

The saving at the end of the section is, it will be observed, very carefully expressed. The statement required to prevent the implication of a warranty must be in writing, signed, delivered at the time of sale, and accepted by the vendee.[3] What

reference is now to the re-enactment. As to the trade marks so protected, see the list in the Appendix, p. 151.

[1] See. 3 (2).

[2] See also Appendix, p. 108.

[3] The *Food and Drugs Act*, 1875 (38 & 39 Vict. c. 63), s. 25, enables the vendor to set up as a defence that he purchased the adulterated goods under a written warranty and resold them unaltered. See *Laidlaw* v. *Wilson*, [1894] 1 Q. B. 74; *Robertson* v. *Harris*, [1900] 2 Q. B. 117; *Elliott* v. *Pilcher*, [1901] 2 K. B. 817; *Watts* v. *Stevens*, [1906] 2 K. B. 323; *Evans* v. *Weatheritt*, [1907] 2 K. B. 80, on the question, where the warranty is not given in express reference to a particular consignment, what evidence is necessary to connect any particular consignment with the warranty. Sec. 20 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), requires notices of the intention to rely on the warranty as a defence to be given to the purchaser and to the person who has given the warranty. Giving a false warranty is an offence, sec. 27 of the Act of 1875, unless the person giving it had reason to believe the statements or descriptions to be true, sec. 23 of the Act of 1899. Sec. 9 makes any alteration in the article without disclosure to the purchaser an offence. A notice exhibited in the shop may be such a disclosure: *Spiers and Pond* v. *Bennett*, [1896] 2 Q. B. 65. Cf. *Pearks, Gunston and Tee, Ld.* v. *Houghton*, [1902] 1 K. B. 889, and *Dawes* v. *Wilkinson*, [1907] 1 K. B. 279. Know-

"accepted by the vendee" means is not clear. It would probably be construed to import at least that the vendee understood that he was to get no warranty, and that he completed the purchase on that footing.

Implied warranty at common law.

Apart from the statutory warranties implied by the Merchandise Marks Act, it is held, at common law,[1] that when a purchaser orders goods from a firm who are manufacturers only of such goods, and not dealers in them, then, unless it is shown that in the particular trade, or as regards the particular goods, there is a custom for the manufacturer to supply the goods of other makers, the purchaser must be assumed to have contracted with the particular manufacturers in reliance on the general excellence of the work of their firm, and he is entitled (in the absence of any express stipulation to the contrary) to have goods of the manufacturer's own make delivered in performance of the contract.[2]

Warranty where goods are described by a trade mark.

It is a question of fact, or, if there is a written contract, of construction, whether a manufacturer or vendor has agreed to deliver goods, which are referred to by a trade mark in the contract, stamped with the mark, and being, therefore, goods of the kind properly denoted by it, or whether he has agreed only to deliver goods of the same quality as those which are denoted by the mark. Thus, in *Hopkins* v. *Hitchcock*,[3] where the contract was for iron described as "S. and H. (crown) bars," and the vendors were Hopkins & Co., the successors of Snowden and Hopkins, iron marked "H. & Co." with a crown was delivered, and the jury found that the mark was not a material part of the bargain. Judgment was given for the vendors in an action for the price of the iron, and the Court of Queen's Bench upheld the judgment, on the ground that the contract

ledge of the adulteration on the purchaser's part is not a defence: *Heywood* v. *Whitehead*, 76 L. T. 781 (1897). Under sec. 17 of the Merchandise Marks Act, such questions can hardly arise. The statement in writing must, if the construction in the text is adopted, be a term of the contract. Disclosure that, for example, a trade mark is not genuine without the statement would not prevent a warranty being implied. Under the Food and Drugs Act proof of scienter is necessary to a conviction for giving a false warranty, *Derbyshire* v. *Houliston*, [1897] 1 Q. B. 772.

[1] Warranties of the genuineness of marks are implied, in respect of anchors and chain cables, by 37 & 38 Vict. c. 51, s. 4, and in respect of hops, by 29 & 30 Vict. c. 37, s. 8.

[2] Per Cotton, L.J., in *Johnson* v. *Raylton*, 7 Q. B. D. 438 (1881), Cotton and Brett, L.JJ., Bramwell, L.J., dissenting; *Starey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90 (1889), Div. Ct.

[3] 14 C. B. (N. S.) 65; 32 L. J. C. P. 154 (1863).

was for iron of a particular quality, not for iron bearing a particular mark.[1]

Pictures ascribed to particular artists.

A somewhat similar question has arisen upon sales of pictures under the names of the supposed painters of them, and in such cases the matter to be decided is whether the use of the artist's name amounts to a warranty by the vendor that the picture in question is his, or merely to an expression of the vendor's opinion.

In the case where pictures had been sold as "Views in Venice, Canaletto," and they were not by Canaletto,[2] the question was left to the jury; but where the supposed artist was an old master, Lord Kenyon, at *Nisi Prius*, held that it was impossible to make the case one of warranty. The pictures, he said, were the work of artists of some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore or not; the catalogue only expressed the opinion of the vendor, but left the determination to the buyer's own judgment.[3]

Remedy for breach of the warranty.

The remedy for breach of warranty, whether implied under the section set out above, or at common law,[4] or imported by express agreement in any contract in regard to goods sold or agreed to be sold, is an action for damages, reduction of the agreed price, or rescission of the contract. The rules determining the nature and extent of the remedy are now contained in the Sale of Goods Act, 1893,[5] from which the following sections are quoted:—

"53.—(1.) Where there is a breach of warranty by the

[1] Section 14 of the Sale of Goods Act, 1893, which deals with the implied condition that goods sold for a particular purpose are reasonably fit for that purpose, does not come within the scope of this work, but it may be noticed that it has been held that the sale of an article under the descriptive name by which it is known in the trade is not a "contract for the sale of a specified article under its patent or other trade name" within the proviso of that section, *Gillespie* v. *Cheney, Eggar & Co.*, [1896] 2 Q. B. 59. On the sale of a patented article the implied warranty of title under sec. 12 of the Sale of Goods Act, 1893, does not extend to the validity of the patent, nor to a warranty that the purchaser will be able to use the article without infringing the rights of other patentees, *Monforts* v. *Marsden*, 12 R. P. C. 266 (1895), Russell, L.C.J.

[2] *Power* v. *Barham*, 7 C. & P. 356; 4 Ad. & E. 472; 5 L. J. K. B. (N. S.) 83 (1835) (Canaletto died in 1768). The jury found there was a warranty.

[3] *Jendwine* v. *Slade*, 2 Esp. N. P. C. 572 (1797) (Teniers and Claud Lorraine, who died in 1694 and in 1682 respectively).

[4] See Benjamin on Sale, Book IV., Part II., Chap. I.

[5] 56 & 57 Vict. c. 71.

seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

"(a.) Set up against the seller the breach of warranty in diminution or extinction of the price; or

"(b.) Maintain an action against the seller for damages for the breach of warranty.

"(2.) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

"(3.) In the case of a breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

"(4.) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price, does not prevent him from maintaining an action for the same breach of warranty if he has sustained further damage.

"(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act."

"54. Nothing in this Act shall affect the right of the buyer or seller to recover interest or any special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration has failed."

Rescission of the contract for breach of warranty.

The right to rescind the contract and return the goods is dealt with by an earlier section of the same Act.

"11.—(1.) In England or Ireland—

When condition is to be treated as warranty.

"(a.) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

"(b.) Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated, or a warranty the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case upon the construction of the contract.

A stipulation may be a condition, though called a warranty in the contract.[1]

"(c.) Where a contract is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated,[2] unless there be a term of the contract, express or implied, to that effect.

The Scotch rule.

"(2.) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

"(3.) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise."

Damages for breach of warranty of trade mark.

The warranty implied by the Merchandise Marks Act will accordingly operate to enable an innocent purchaser of goods which have been forfeited under that Act, or which have led to a prosecution, entailing expenses upon him, to recover damages in respect of the loss or expenses from the vendor, for such damages directly and naturally result in the ordinary course of events from the breach of warranty. It will also enable the purchaser to recover from the vendor any damages which may have been recovered from the purchaser by a sub-purchaser upon a resale by him, at any rate where the goods were known by the vendor to have been bought for the purpose of resale.[3]

[1] See *Behn* v. *Burness*, 3 B. & S. 756; 32 L. J. Q. B. 204 (1863), Blackburn on Sale, 2nd ed., p. 198; and *Nadel* v. *Martin*, 20 R. P. C. 129 and 723; 23 R. P. C. 41 (1906), H. of L.; *Burchem* v. *Wren*, 21 R. P. C. 683 (1904), Darling, J.; *Henderson* v. *Shiels*, 24 R. P. C. 109 (1907), Parker, J., in which questions arose whether, on the construction of agreements for sale and license of patents, a guarantee of validity was a condition or a mere warranty.

[2] *Street* v. *Blay*, 2 B. & Ad. 460 (1831); *Heyworth* v. *Hutchinson*, L. R. 2 Q. B. 447 (1867); *Hooper* v. *Balfour*, 62 L. T. 646 (1890); *Re Green and Balfour*, 63 L. T. 97, 325 (1890).

[3] *Hammond* v. *Bussey*, 20 Q. B. D. 79 (1887), C. A.; *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413. See further, as to consequential damages, *The Argentino*, 13 P. D. 191 (1888), C. A.

Indemnity to manufacturer infringing a trade mark at his customer's request.

A manufacturer has at common law, and apart from any question of implied warranty, a right of indemnity by his customer, if, in compliance with the customer's orders, he innocently places a mark upon goods made for him, and the mark turns out to be an infringement of some third person's trade mark, so that the manufacture is rendered liable to an action by the owner of the trade mark.[1]

Third party notice.

In an action for infringement of trade mark the defendant served a third party notice on his vendor, claiming to be indemnified by him against liability on the ground that the goods were innocently purchased by him in good faith from the third party in the ordinary way of trade, and that the third party supplied the same to him without notification of any infringement or wrong as in the claim alleged in the action; and an order was made that the third party notice should be tried immediately after the action, and that the third party should have liberty to take such part in the action as the judge at the trial should think fit.[2]

[1] *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537; 30 L. J. Q. B. 137 (1861). As to the defence of the manufacturer in any such case upon proceedings under the Merchandise Marks Act, see sec. 2 (2), sec. 6, and sec. 19 (3) of that Act, above, Chap. II., pp. 51, 52, 61.

[2] *Hennessy* v. *Dompé*, 19 R. P. C. 338 (1903). At the trial, however, the third party was treated as a defendant, so that the action was tried as between the original plaintiff and both defendants, and, the plaintiff failing, he was ordered to pay the costs of both. On appeal, both defendants submitted to an order on terms, 20 R. P. C. 175 (1903).

CHAPTER IV.

MISCELLANEOUS MATTERS.

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False Representation as to Registration of Trade Mark.

Penalty on falsely representing a trade mark as registered.

By sec. 67 of the Trade Marks Act, 1905 :—

"(1.) Any person who represents a trade mark as registered which is not so, shall be liable for every offence on summary conviction [1] to a fine not exceeding five pounds.

"(2.) A person shall be deemed, for the purposes of this enactment, to represent that a trade mark is registered, if he uses in connection with the trade mark the word 'registered,' or any words expressing or implying that registration has been obtained for the trade mark." [2]

An infringement of the section is not necessarily a bar to an application for the registration of the trade mark which has been wrongly described as registered.[3] The use of the word "Registered" has been held to indicate registration in the United Kingdom.[4]

[1] As to the Isle of Man, see sec. 70; and as to Scotland, sec. 72.

[2] This corresponds to and substantially re-enacts, so far as relates to trade marks, sec. 105 of the Patents, &c., Act, 1883. As to false representations in respect of patents and designs, see now sec. 89 of the Patents and Designs Act, 1907. See below, p. 99.

[3] *James' Tm.*, 33 C. D. 392; 3 R. P. C. 340 (1886), C. A.: "registered shape": and *Altman's Application*, 21 R. P. C. 53 (1904), Kekewich, J., and *Lyle and Kinahan's Application*, 24 R. P. C. 37 and 249 (1907), Kekewich, J., and C. A., in both of which cases the use of the word "registered" before registration was proved to have been by a bonâ fide mistake.

[4] *Wright, Crossley & Co.* v. *William Dobbin & Co.*, 15 R. P. C. 21 (1898), in Ireland. *MacSymons' Stores, Ld.* v. *Shuttleworth*, 15 R. P. C. 748 (1898), in England. See above, p. 35. The use of the words "Trade Mark," in relation to an unregistered trade mark, is not necessarily an offence under the section: *Sen Sen Co.* v. *Britten*, [1899] 1 Ch. 692; 16 R. P. C. 137.

False Representation as to Patent or Design.

By sub-sec. 2 of sec. 89 of the Patents and Designs Act, 1907, it is an offence for any person falsely to represent that any article sold by him is a patented article, or falsely to describe any design applied to any article sold by him as registered; and by sub-sec. 3, if any person sells an article having stamped, engraved, or impressed thereon, or otherwise applied thereto, the word "patent," "patented," or "registered," or any word expressing or implying that the article is patented or that the design applied thereto is registered, he shall be deemed for the purposes of the section to represent that the article is a patented article or that the design applied thereto is a registered design.[1] The word "falsely" in sub-sec. 2 probably prevents the sub-section applying to a case in which no patent has ever existed but the word "patent" has become part of the trade name of the goods and has been used by the manufacturer in his description of them.[2] It also saves the use of such ordinary names of commerce as "patent leather" and "patent medicine."[3] It is submitted that a limitation must be placed upon the literal meaning of the enactment which will exclude these cases from the section.[4]

False Representation as to Royal Warrant.[5]

False representation as to Royal warrant.

By sec. 20 of the M. M. A. of 1887:—

"Any person[6] who falsely represents that any goods are made by a person holding a Royal warrant, or for the service of Her Majesty, or any of the Royal Family, or any Government department, shall be liable, on summary conviction,[7] to a penalty not exceeding £20."

[1] These provisions replace sec. 105 of the Act of 1883, in which, however, the word "falsely" did not occur.

[2] *Edelsten* v. *Vick*, 11 Hare, 78 (1858). Wood, V.-C. (Taylor & Co.'s Patent Solid-headed Pins); see further Kerly, Chap. XV., p. 401; *Gridley* v. *Swinborne*, 52 J. P. 739, 791; 5 T. L. R. 71 (1888). Div. Ct. (Swinborne's Patent Refined Isinglass), held not to be a false trade description.

[3] See Kerly, p. 431.

[4] Application for a patent or provisional protection does not authorise the use of the word "patent"; but it is submitted the acceptance of the complete specification of a patent does. See *R.* v. *Townsend*, 13 R. P. C. 265 (1896). Cf. *Grueber's* case, Times, November 22nd, 1894, referred to above, pp. 35, 36.

[5] See also sec. 68 of the Trade Marks Act, 1905, set out on p. 100.

[6] See above, p. 12.

[7] In Scotland, in the Sheriff Court (sec. 21); and in the Dublin police district, the Courts of the justices under the Petty Sessions Act, 1851 (s. 22).

Unauthorised Assumption of Royal Arms.

Unauthorised assumption of Royal Arms.

By sec. 90 of the Patents and Designs Act of 1907 :—

"(1.) The grant of a patent under this Act shall not be deemed to authorise the patentee to use the Royal Arms or to place the Royal Arms on any patented article.

"(2.) If any person, without the authority of His Majesty, uses in connection with any business, trade, calling, or profession, the Royal Arms (or arms so nearly resembling them as to be calculated to deceive) in such a manner as to be calculated to lead to the belief that he is duly authorised to use the Royal Arms, he shall be liable on conviction, under the Summary Jurisdiction Acts,[1] to a fine not exceeding £20."

"Provided that nothing in this section shall be construed as affecting the right, if any, of the proprietor of a trade mark containing such arms to continue to use such trade mark."

Sub-sec. 1 is new. Sub-sec. 2 corresponds to sec. 106 of the Patents, &c. Act, 1883, but it requires the authority to be that of His Majesty, omitting the former words "or of any of the Royal Family, or of any government department." Its provisions are now supplemented by those of sec. 68 of the Trade Marks Act, 1905, which were introduced into that Act at the suggestion of the Association of Royal Warrant holders. The section is as follows :—

"If any person, without the authority of His Majesty, uses in connection with any trade, business, calling, or profession, the Royal Arms (or arms so closely resembling the same as to be calculated to deceive) in such manner as to be calculated to lead to the belief that he is duly authorised so to use the Royal Arms, or if any person without the authority of His Majesty or of a member of the Royal Family, uses in connection with any trade, business, calling, or profession, any device, emblem, or title in such manner as to be calculated to lead to the belief that he is employed by or supplies goods to His Majesty or such member of the Royal Family he may, at the suit of any person who is authorised to use such arms or such device, emblem, or title, or is authorised by the Lord Chamberlain to take proceedings in that behalf, be restrained by injunction or interdict from continuing so to use the same : Provided that nothing in this section

[1] As to the Isle of Man, see sec. 96, and as to Scotland, see sec. 94 of the same Act.

shall be construed as affecting the right, if any, of the proprietor of a trade mark containing any such arms, device, emblem, or title to continue to use such trade mark."

This section adds to the remedy by summary prosecution provided by sec. 90 of the Patents and Designs Act, 1907, a civil remedy by injunction applicable not only to the misuse of the Royal Arms, but also to the use of any device, emblem, or title in such manner as to be calculated to lead to the belief that the person using the same is employed by, or supplies goods to, His Majesty, or a member of the Royal Family. The class of persons who may institute proceedings under the section without the authority of the Lord Chamberlain will, in some instances, *e.g.*, the use of the Royal Arms, be a rather wide one. It will be in the discretion of the Court to refuse relief if the plaintiff is not likely to be in any way damnified.[1]

With regard to the proviso, it may be noticed that, except in the case of marks used before August 13th, 1875, the Registrar is not to register (1) the Royal Arms or crests, or arms or crests so nearly resembling them as to lead to mistake, (2) representations of any member of the Royal Family, (3) representations of British Royal Crowns, (4) the British national flags, (5) the word "Royal," (6) any other words, letters or devices calculated to lead persons to think that the applicant has Royal patronage or authorisation.[2]

In a prosecution under sec. 106 of the Patents, &c. Act, 1883, the defendant unsuccessfully contended that he was entitled to use the Royal Arms as he held a patent for an invention which he was using in his business, and the Patent Office was a Government department.[3] A defence in another case that the defendants were contractors to Government departments, also failed.[4]

Falsification of the Register of Trade Marks.

By sec. 66 of the Trade Marks Act, 1905:—

Falsification of entries in Register.

"If any person makes or causes to be made a false entry in the Register kept under this Act, or a writing falsely purporting

[1] Injunctions have been granted by consent under the section in *Royal Warrant Holders' Association* v. *Slade & Co., Ld.*, 25 R. P. C. 245, (1908) and *Same* v. *E. J. Kitson, Ld.*, 26 R. P. C. 157 (1909).

[2] Rules 11 and 12, Kerly, at p. 657.

[3] *Webber & Co.'s* case, Times, February 2nd, 1897.

[4] *Wood's* case, Times, May 14th, 1903.

to be a copy of an entry in any such Register, or produces or tenders or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanour.[1]

Cutlery Marks.

The Cutlers Marks Act, 1819.

By the Act 59 Geo. III. c. 7, it is forbidden to mark cutlery and the other goods mentioned in the Act with the figure of a hammer, unless the goods have been wrought or forged, or to place false marks of quality upon such goods, or to falsely mark them as London made; and the offences created by the Act extend to selling, or having in possession for the purpose of sale, such goods marked in breach of the Act. The material provisions of the Act[2] may be summarised as follows:—

Hammer marks.

1. Where any knives, knife-blades, forks, razors, razor-blades, scissors, shears, and other articles of cutlery, edge tools and hardware requiring a cutting edge, of wrought steel, or of iron and steel, are made by means of the hammer, the maker may mark the figure of a hammer upon them before they are ground.

3. No one may mark such figure on any of the goods enumerated not so made, before the bonâ fide sale of the goods to the user, or have in his possession for the purpose of sale, or sell any such goods not so made, and being marked with such figure, under penalty of forfeiture of the goods and a fine of £5 for every dozen.

Quality marks.

4. No one may mark on any of the goods enumerated, whether made with the hammer or cast in a mould, before the bonâ fide sale of the same to the user, "any word or words which shall or may denote or indicate the quality of such articles to be otherwise than the real and true quality thereof," or have in his possession for the purpose of sale, or sell any such goods so marked, under penalties as aforesaid.

London *made*.

5. No one may mark on any of the goods enumerated whether made with the hammer or cast in a mould, before the bonâ fide sale of the same to the user, the word or words *London* or *London made*, or any word or words having any similitude thereto, unless the goods were made in the City of London, or within twenty

[1] Replacing, as to the Trade Mark Register, sec. 93 of the Patents, &c. Act, 1883. As to the Registers of Patents and Designs, see now sec. 89 (1) of the Patents and Designs Act, 1907.

[2] Sec. 17 has been repealed by the Stat. Law Rev. Act, 1873, and sec. 2 by the Stat. Law Rev. Act, 1874, secs. 8–10 in part, and secs. 11–13 and 15 wholly, repealed by 47 & 48 Vict. c. 43, s. 4.

miles distance therefrom, or have in his possession, &c., or sell (as before) under a penalty of forfeiture and fine or £10 a dozen articles.

Innocent purchasers.

7. Any one having in his possession for the purposes of sale, or selling any of the goods aforesaid contrary to the Act, who shall, before information or complaint laid against him, prove satisfactorily by oath before one or more justice or justices that he purchased the goods with the marks thereon without knowing they were marked contrary to the Act, and shall discover to two or more justices the name of the person from whom he bought, so that the latter shall be prosecuted to conviction, shall not be liable to penalties himself,[1] but shall be entitled to two-thirds of the penalty recovered from his vendor, as any other informer.

Counterfeiting Sheffield corporate marks.

The Cutlers' Co. Act of 1814 contains a provision inflicting penalties upon any person who counterfeits or imitates assigned corporate marks; and by sec. 81 (13) of the Patents, &c. Act of 1883, this provision was extended to any mark entered in the Sheffield Register,[2] but the Trade Marks Act of 1905 contains no such provision, no doubt because it was considered that sufficient protection is now given by the Merchandise Marks Act, 1887. The section of the first-mentioned Act is as follows[3]:—

"If any member or members of the Cutlers' Company, or any other person or persons using, exercising, or carrying on any of such arts or trades as aforesaid within the said lordship or liberty, or six miles compass of the same, shall at any time after the passing of this Act strike, engrave, impress or use, or cause or procure to be stricken, engraved, impressed or used upon his or their goods, wares, or manufactures, any mark, device, stamp, or impression, with intent to counterfeit or imitate any mark or device assigned, or which may hereafter be assigned, by the said master, wardens or searchers and assistants of the said company, to be used by any other person, the person or persons so offending shall, for every such offence, forfeit and pay (in lieu of the penalty imposed by the said last recited Act[4]) any sum not exceeding £20, one moiety whereof shall be paid to the person whose mark shall have been so counterfeited or imitated, and the other moiety to the said master

[1] Cf. M. M. A., sec. 2, "unless he proves," pp. 55, 61.

[2] Kerly, Ch. VI., p. 112.

[3] 54 Geo. III. c. 119, s. 5 (local).

[4] The Cutlers' Co. Act of 1791.

and wardens of the said company; and the provisions in the said last recited Act[1] contained for the recovery and application of the penalty thereby imposed shall be used, applied, and put in force for the recovery and application of the penalty hereby made payable, as fully and effectually as if the same provisions were in this Act severally and separately repeated and re-enacted."

The sections of the Cutlers' Co. Act of 1791,[2] which are referred to and incorporated by the last-mentioned section, provide (sec. 26) that the penalties may be sued for by the company, or (sec. 27) recovered summarily before a justice or justices of the West Riding of York, or of the County of Derby, who shall have power to award costs, and to issue a distress warrant, or, if the goods of the offender are insufficient, to commit him to the House of Correction for one month to enforce payment of the penalty. Sec. 28 contains a form of conviction, and sec. 29 gives an appeal to quarter sessions.

Statutes relating to particular goods.

A number of statutes requiring special marks to be placed upon particular classes of goods are summarised in the Appendix, p. 146.

[1] The Cutlers' Co. Act of 1791.

[2] 31 Geo. III. c. 58 (local).

APPENDICES.

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APPENDIX I.

MERCHANDISE MARKS ACT, 1887.

(50 & 51 Vict. c. 28.)

ARRANGEMENT OF SECTIONS.

SECTION.

1. Short title.
2. Offences as to trade marks and trade descriptions.
3. Definitions.
4. Forging trade mark.
5. Applying marks and descriptions.
6. Exemption of certain persons employed in ordinary course of business.
7. Application of Act to watches.
8. Mark on watch case.
9. Trade mark, how described in pleading.
10. Rules as to evidence.
11. Punishment of accessories.
12. Search warrant.
13. Extension of 22 & 23 Viet. c. 17, to offences under this Act.
14. Costs of defence or prosecution.
15. Limitation of prosecution.
16. Prohibition on importation.
17. Implied warranty on sale of marked goods.
18. Provisions of Act as to false description not to apply in certain cases.
19. Savings.
20. False representation as to Royal Warrant.
21. Application of Act to Scotland.
22. Application of Act to Ireland.
23. Repeal of 25 & 26 Viet. c. 88.

An Act to consolidate and amend the Law relating to Fraudulent Marks on Merchandise. [23rd August, 1887.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Merchandise Marks Act, 1887.

Offences as to trade marks and trade descriptions.

2.—(1.) Every person who—

(a) forges any trade mark (pp. 14 to 20); or

(b) falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive (pp. 21 to 23); or

(c) makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade mark (pp. 14 to 20); or
(d) applies any false trade description to goods (pp. 23 to 51); or
(e) disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark (pp. 14 to 20); or
(f) causes any of the things above in this section mentioned to be done (p. 51),

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud (pp. 55 to 59), be guilty of an offence against this Act.

(2.) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

(a) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and
(b) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or
(c) That otherwise he had acted innocently;

be guilty of an offence against this Act (pp. 61 to 64).

(3.) Every person guilty of an offence against this Act shall be liable (p. 65)—

(i.) on conviction on indictment, to imprisonment, with or without hard labour, for a term not exceeding two years, or to fine, or to both imprisonment and fine; and
(ii.) on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding twenty pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding fifty pounds; and
(iii.) in any case, to forfeit to her Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed.

(4.) The Court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the Court thinks fit (p. 65).

(5.) If any person feels aggrieved by any conviction made by a court of summary jurisdiction, he may appeal therefrom to a court of quarter sessions (p. 71).

(6.) Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted, and any articles liable to be forfeited under this Act by a court of summary jurisdiction may be forfeited, in manner provided by the Summary Jurisdiction Acts: Provided that a person charged with an offence under this section

42 & 43 Vict. c. 49.

before a court of summary jurisdiction shall, on appearing before the court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires be so tried accordingly (p. 66).

Definitions.

3.—(1.) For the purposes of this Act—

46 & 47 Vict. c. 57.

The expression "trade mark" means a trade mark registered in the Register of trade marks kept under the Patents, Designs, and Trade Marks Act, 1883, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of the one hundred and third section of the Patents, Designs, and Trade Marks Act, 1883, are, under Order in Council, for the time being applicable (p. 14):

The expression "trade description" means any description, statement, or other indication, direct or indirect,

(a) as to the number, quantity, measure, gauge, or weight, of any *goods*, or

(b) as to the place or country in which any goods were made or produced, or

(c) as to the mode of manufacturing or producing any goods, or

(d) as to the material of which any goods are composed, or

(e) as to any goods being the subject of an existing patent, privilege, or copyright,

and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act (pp. 24 to 39):

The expression "false trade description" means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act (pp. 40 to 51):

The expression "goods" means anything which is the subject of trade, manufacture, or merchandise (p. 21):

The expressions "person," "manufacturer, dealer, or trader," and "proprietor" include any body of persons corporate or unincorporate (p. 12):

The expression "name" includes any abbreviation of a name (p. 47):

(2.) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are (p. 43).

(3.) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any

false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means as applied to any goods, any name or initials of a person which—

(a) are not a trade mark, or part of a trade mark, and
(b) are identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description, and not having authorised the use of such name or initials, and
(c) are either those of a fictitious person or of some person not bonâ fide carrying on business in connection with such goods (pp. 45 to 49).

Forging trade mark.

4. A person shall be deemed to forge a trade mark who either—
(a) without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling that trade mark as to be calculated to deceive; or
(b) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise;

and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark.

Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant (p. 17).

Applying marks and descriptions.

5.—(1.) A person shall be deemed to apply a trade mark or mark or trade description to goods who—
(a) applies it to the goods themselves; or
(b) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or
(c) places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied; or
(d) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark or mark or trade description (p. 21).

(2.) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper; and the expression "label" includes any band or ticket.

A trade mark, or mark, or trade description, shall be deemed to be applied, whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing (p. 22).

(3.) A person shall be deemed to falsely apply to goods a trade mark, or mark, who without the assent of the proprietor of a trade mark applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive, but in any prosecution for falsely applying a trade mark or mark to goods, the burden of proving the assent of the proprietor shall lie on the defendant (p. 23).

Exemption of certain persons employed in ordinary course of business.

6. Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves—

(a) That in the ordinary course of his business he is employed on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(b) That he took reasonable precautions against committing the offence charged; and

(c) That he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(d) That he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied—

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence (pp. 52 to 55).

Application of Act to watches.

7. Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall primâ facie be deemed to be a description of that country within the meaning of this Act, and the provisions of this Act with respect to goods to which a false trade description has been applied, and with respect to selling or exposing for, or having in possession for, sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly, and for the purposes of this section the expression "watch" means all that portion of a watch which is not the watch case (p. 73).

Mark on watch case.

8.—(1.) Every person who after the date fixed by Order in Council sends or brings a watch case, whether imported or not, to any assay office in the United Kingdom for the purpose of being assayed, stamped, or marked, shall make a declaration declaring in what country or place the case was made. If it appears by such declaration that the watch case was made in some country or place out of the United Kingdom, the assay office shall place on the case such a mark (differing from the mark placed by the office on a watch case made in the United Kingdom), and in such a mode as may be from time to time directed by Order in Council (pp. 75, 134).

(2.) The declaration may be made before any officer of an assay office, appointed in that behalf by the office (which officer is hereby authorised to administer such a declaration), or before a justice of the peace, or a commissioner having power to administer oaths in the

Supreme Court of Judicature in England or Ireland, or in the Court of Session in Scotland, and shall be in such form as may be from time to time directed by Order in Council (p. 135).

(3.) Every person who makes a false declaration for the purposes of this section shall be liable, on conviction on indictment, to the penalties of perjury, and on summary conviction to a fine not exceeding twenty pounds for each offence (p. 76).

Trade mark, how described in pleading.

9. In any indictment, pleading, proceeding, or document, in which any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or fac-simile, to state that trade mark or forged trade mark to be a trade mark or forged trade-mark (p. 17).

Rules as to evidence.

10. In any prosecution for an offence against this Act,—

(1.) A defendant, and his wife or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and, if called, shall be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness (p. 59).

(2.) In the case of imported goods, evidence of the port of shipment shall be primâ facie evidence of the place or country in which the goods were made or produced (p. 30).

Punishment of accessories.

11. Any person who, being within the United Kingdom, procures, counsels, aids, abets, or is accessory to the commission, without the United Kingdom, of any act which, if committed in the United Kingdom, would under this Act be a misdemeanour, shall be guilty of that misdemeanour as a principal, and be liable to be indicted, proceeded against, tried, and convicted in any county or place in the United Kingdom in which he may be, as if the misdemeanour had been there committed (p. 55).

Search warrant.

12.—(1.) Where, upon information of an offence against this Act, a justice has issued either a summons requiring the defendant charged by such information to appear to answer to the same, or a warrant for the arrest of such defendant, and either the said justice on or after issuing the summons or warrant, or any other justice, is satisfied by information on oath that there is reasonable cause to suspect that any goods or things by means of or in relation to which such offence has been committed are in any house or premises of the defendant, or otherwise in his possession or under his control in any place, such justice may issue a warrant under his hand by virtue of which it shall be lawful for any constable named or referred to in the warrant, to enter such house, premises, or place at any reasonable time by day, and to search there for and seize and take away those goods or things; and any goods or things seized under any such warrant shall be brought before a court of summary jurisdiction for the purpose of its being determined whether the same are or are not liable to forfeiture under this Act.

(2.) If the owner of any goods or things which, if the owner thereof had been convicted, would be liable to forfeiture under this Act, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and a court of summary jurisdiction may cause notice to be advertised stating that, unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be forfeited, and at such time and place the Court, unless the owner or any person on his behalf, or other

person interested in the goods or things, shows cause to the contrary, may order such goods or things or any of them to be forfeited.

(3.) Any goods or things forfeited under this section, or under any other provision of this Act, may be destroyed or otherwise disposed of, in such manner as the Court by which the same are forfeited may direct, and the Court may, out of any proceeds which may be realised by the disposition of such goods (all trade marks and trade descriptions being first obliterated), award to any innocent party any loss he may have innocently sustained in dealing with such goods (pp. 71 to 73).

Extension of 22 & 23 Vict. c. 17, to offences under this Act.

13. The Act of the session of the twenty-second and twenty-third years of the reign of her present Majesty, chapter seventeen, intituled, "An Act to prevent vexatious indictments for certain misdemeanours," shall apply to any offence punishable on indictment under this Act, in like manner as if such offence were one of the offences specified in section one of that Act, but this section shall not apply to Scotland (p. 69).

Costs of defence or prosecution.

14. On any prosecution under this Act the Court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively (p. 69).

Limitation of prosecution.

15. No prosecution for an offence against this Act shall be commenced after the expiration of three years next after the commission of the offence, or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens (p. 68).

Prohibition on importation.

16. Whereas it is expedient to make further provision for prohibiting the importation of goods which, if sold, would be liable to forfeiture under this Act; be it therefore enacted as follows (pp. 77 to 90):

(1.) All such goods, and also all goods of foreign manufacture, bearing any name or trade mark being or purporting to be the name or trade mark of any manufacturer, dealer, or trader in the United Kingdom, unless such name or trade mark is accompanied by a definite indication of the country in which the goods were made or produced, are hereby prohibited to be imported into the United Kingdom, and, subject to the provisions of this section, shall be included among goods prohibited to be imported as if they were specified in section forty-two of the Customs Consolidation Act, 1876 (pp. 80 et seq).

39 & 40 Vict. c. 36.

(2.) Before detaining any such goods, or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs may require the regulations under this section, whether as to information, security, conditions, or other matters to be complied with, and may satisfy themselves in accordance with those regulations that the goods are such as are prohibited by this section to be imported (p. 87).

(3.) The Commissioners of Customs may from time to time make, revoke, and vary regulations, either general or special, respecting the detention or forfeiture of goods the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of

this section, and the mode of verification of such evidence (p. 87).

(4.) Where there is on any goods a name which is identical with or a colourable imitation of the name of a place in the United Kingdom, that name, unless accompanied by the name of the country in which such place is situate, shall be treated for the purposes of the section as if it were the name of a place in the United Kingdom (p. 32).

(5.) Such regulations may apply to all goods the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

(6.) The Commissioners of Customs, in making and in administering the regulations, and generally in the administration of this section, whether in the exercise of any discretion or opinion, or otherwise, shall act under the control of the Commissioners of Her Majesty's Treasury.

(7.) The regulations may provide for the informant reimbursing the Commissioners of Customs all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

(8.) All regulations under this section shall be published in the "London Gazette" and in the "Board of Trade Journal."

(9.) This section shall have effect as if it were part of the Customs Consolidation Act, 1876, and shall accordingly apply to the Isle of Man as if it were part of the United Kingdom.

(10.) Section two of the Revenue Act, 1883, shall be repealed as from a day fixed by regulations under this section, not being later than the first day of January one thousand eight hundred and eighty-eight, without prejudice to anything done or suffered thereunder. 46 & 47 Vict. c. 55.

Implied warranty on sale of marked goods.

17. On the sale or in the contract for the sale of any goods to which a trade mark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee (p. 91).

Provisions of Act as to false description not to apply in certain cases.

18. Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied: Provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner, with that name, the name of the place or country in which the goods were actually made

or produced, with a statement that they were made or produced there (p. 49).

Savings.

19.—(1.) This Act shall not exempt any person from any action, suit, or other proceeding which might, but for the provisions of this Act, be brought against him.

(2.) Nothing in this Act shall entitle any person to refuse to make a complete discovery, or to answer any question or interrogatory in any action, but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Act.

(3.) Nothing in the Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the United Kingdom who bonâ fide acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master (p. 51).

False representation as to royal warrant.

20. Any person who falsely represents that any goods are made by a person holding a royal warrant, or for the service of Her Majesty, or any of the Royal Family, or any Government department, shall be liable, on summary conviction, to a penalty not exceeding twenty pounds (p. 99).

Application of Act to Scotland.

21. In the application of this Act to Scotland the following modifications shall be made:—

The expression "Summary Jurisdiction Acts" means the Summary Procedure Act, 1864, and any Acts amending the same.

The expression "justice" means sheriff.

The expression "Court of Summary Jurisdiction" means the Sheriff Court, and all jurisdiction necessary for the purpose of this Act is hereby conferred on sheriffs.

Application of Act to Ireland.

22. In the application of this Act to Ireland, the following modifications shall be made:—

The expression "Summary Jurisdiction Acts" means, so far as respects the police district of Dublin metropolis, the Acts regulating the powers and duties of justices of the peace of such district, and as regards the rest of Ireland means the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.

14 & 15 Vict. c. 93.

The expression "Court of Summary Jurisdiction" means justices acting under those Acts.

Repeal of 25 & 26 Vict. c. 88.

23. The Merchandise Marks Act, 1862, is hereby repealed, and any unrepealed enactment referring to any enactment so repealed shall be construed to apply to the corresponding provision of this Act; provided that this repeal shall not affect—

(a) any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; nor

(b) the institution or continuance of any proceeding or other remedy under any enactment so repealed for the recovery of any penalty incurred, or for the punishment of any offence committed, before the commencement of this Act; nor

(c) any right, privilege, liability, or obligation acquired, accrued, or incurred under any enactment hereby repealed.

APPENDIX II.

MERCHANDISE MARKS ACTS, 1891.

(54 Vict. c. 15.)

An Act to amend the Merchandise Marks Act, 1887.

[11th May, 1891.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Customs entry to be trade description. 50 & 51 Vict. c. 28.

1. The customs entry relating to imported goods shall, for the purposes of the Merchandise Marks Act, 1887, be deemed to be a trade description applied to the goods (p. 39).

Official prosecutions.

2.—(1.) The Board of Trade may, with the concurrence of the Lord Chancellor, make regulations[1] providing that in cases appearing to the Board to affect the general interests of the country, or of a section of the community, or of a trade, the prosecution of offences under the Merchandise Marks Act, 1887, shall be undertaken by the Board of Trade, and prescribing the conditions on which such prosecutions are to be so undertaken. The expenses of prosecutions so undertaken shall be paid out of moneys provided by Parliament.

(2.) All regulations made under this section shall be laid before Parliament within three weeks after they are made if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act, and shall be published under the authority of Her Majesty's Stationery Office.

(3.) Nothing in this Act shall affect the power of any person or authority to undertake prosecutions otherwise than under the said regulations (pp. 66, 139).

Short title.

3. This Act may be cited as the Merchandise Marks Act, 1891, and the Merchandise Marks Act, 1887, and this Act may be cited together as the Merchandise Marks Acts, 1887 and 1891.

[1] See below, p. 139.

APPENDIX III.

MERCHANDISE MARKS (PROSECUTIONS) ACT, 1894.

(57 & 58 Vict. c. 19.)

An Act for enabling the Board of Agriculture to undertake Prosecutions in certain cases under the Merchandise Marks Act, 1887.

[20th July, 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Power of Board of Agriculture to prosecute in certain cases.

54 & 55 Vict. c. 15.

50 & 51 Vict. c. 28.

1. The powers exercisable by the Board of Trade under the Merchandise Marks Act, 1891, with respect to the prosecution of offences under the Merchandise Marks Act, 1887, may in cases which appear to the Board of Agriculture to relate to agricultural or horticultural produce be exercised by that Board, and in such cases the former Act shall apply as if the Board of Agriculture were referred to therein instead of the Board of Trade (p. 67 and pp. 128 to 133).

Extent of Act.

2. This Act shall not extend to Ireland.[1]

Short title.

3. This Act may be cited as the Merchandise Marks (Prosecutions) Act, 1894, and shall be read with the Merchandise Marks Acts, 1887 and 1891.

[1] As to Ireland, see Preface.

APPENDIX IV.

GENERAL ORDERS UNDER THE MERCHANDISE MARKS ACT, 1887.

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A. Consolidated Instructions (with the Customs Regulations)	117
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A.—General Order 15/1900.

Custom House, London,
26th February, 1900.

Consolidated Instructions.

The following consolidation of the General Orders and other instructions on the subject of the Merchandise Marks Act of 1887, is issued for the information and guidance of the officers.

1. The regulations made by the Board under sec. 16 of the Merchandise Marks Act, 1887, will be found on page 18 (p. 128).

Goods without marks.

2. Goods imported into the United Kingdom which do not bear any marks whatever, either on the goods themselves or on the coverings containing them, are not subject in any way to the Act, and therefore need not bear any statement or indication, such as "Made abroad," "Made in Germany," &c.

3. Although the Act draws no special distinction, except as regards the requirement of qualification in certain cases under sec. 16, between goods prohibited on account of marks suggesting British origin and goods prohibited on other grounds, for the purposes of customs administration it is convenient to deal with them separately. The goods, therefore, prohibited under the Act to which the attention of officers is called may be classed under two heads:

(A) Goods with marks which suggest British origin and require, in order to legalise their importation, some counteracting qualification (paragraph 4).

(B) Goods with marks prohibited on other grounds (paragraph 19).

It is to be noted that by sec. 1 of the Merchandise Marks Act, 1891 (54 Vict. c. 15), the customs entry relating to imported goods shall, for the purposes of the Merchandise Marks Act, 1887, be deemed to be a trade description applied to the goods.

(A) Goods with Marks suggesting British Origin.

4. Goods falling under (A) may be again subdivided :—

(a) Goods, whether manufactured or raw, having applied to them any description, figures, words, or marks, or arrangement or combination thereof, which by being or including, either expressly or by reference, the name of a place in or a part of the United Kingdom (*e.g.*, "Irish" = "of Ireland"), or in any other way, constitute a statement or other indication, direct or indirect, that the goods were made or produced in the United Kingdom.

(b) Goods of foreign manufacture bearing any name or mark which is, or purports to be, the name or trade mark of a manufacturer, dealer, or trader in the United Kingdom.

(c) Goods, whether manufactured or raw, having applied to them a generally used trade description, which in indicating a particular class of goods or method of manufacture, includes expressly the name of a place in, or a part of, the United Kingdom, and is thereby calculated to mislead as to the place of manufacture or production of the goods. This class, though in fact only a case of (a), is dealt with specially by the Act (sec. 18).

5. (A) (b) relates to manufactured goods, and not to entirely raw goods, and the word "purports" is to be understood as referring to any name or names reasonably suggesting a British manufacturer, dealer, or trader, whether the name is or is not known to the officer; or as referring to a trade mark, not being merely matter of decoration or ornament, which reasonably suggests itself as British by containing English wording, or other representation specially designed to convey, and, in fact, conveying, an impression of British manufacture.

Places indicating *method of* manufacture.

6. As to (c) that the words "trade description which in indicating a particular class of goods or method of manufacture, includes the name of a place in or a part of the United Kingdom, and is thereby calculated to mislead" (*see* 4 (c)) mean such terms as Kidderminster Carpets, "Balbriggan" on Hosiery, or "Shetland" on Shawls, and the like, which, although they might be held to be merely phrases descriptive of method of manufacture, are yet calculated to mislead as to place of origin. Where, however, such a description has become associated with a particular class of goods in a manner practically to preclude any probability of deception, as "Portland Cement" and "Bath Chaps," the description need not be accompanied by a statement of the country of actual production. This applies also to the case of colonial names describing, for instance, classes of wool, &c., where, although the names are British, the circumstances preclude mistake.

7. All such goods as above specified are to be detained and reported to the Board unless they are qualified as follows:—

As to (a), by a definite indication of make or production out of the United Kingdom.

As to (b), by a definite indication of the country in which the goods were made.

As to (c), by the name of the country in which the goods were actually made or produced, with a statement that they were made or produced there.

When "made in" not required.

8. With regard to (a), "Made abroad" will be generally sufficient. With regard to (b), the name of the country is a sufficient indication, without the words "made in," if the name or trade mark only appears. Where there is an address, as "John Smith, Sheffield," then the qualification must be "Made in Germany," or similar wording; "Germany" alone would not counteract "Sheffield"; (c) requires the full statement "Made in Germany."

Actual place of origin.

9. Officers are not expected to decide whether goods were actually made or produced in the country from which in the qualification they are stated to come; the name of *some* foreign country, or of some place in a foreign country is sufficient.

Place name alike in United Kingdom and abroad.

10. If the goods bear the name of a place identical with, or a colourable imitation of, the name of a place in the United Kingdom, the name should be accompanied by the name of the country in which the place is situated. Thus Boston, in Massachusetts, should be accompanied by the name "United States," or by the initials "U.S.A.," or even by the abridgment "Mass."

English language on goods.

11. The use of the English language applied as a description to goods imported from non-English speaking countries is not, simply *as* language and where not involving the name of any place in, or part of, the United Kingdom, a "direct," and, as a rule, is not to be regarded as an "indirect," indication of British origin. Where, however, there is good ground for considering that the use of the language was specially designed to convey, and does in fact convey, an impression of such origin, then the language will be a description within (a) of paragraph 4.

Initials.

Initials.

12. "Initials" under the Act, though not treated as names generally, are to be so treated in certain cases, in which the following are all of which the officers need take cognizance:—

(i.) Where the initials are followed by affixes distinctly suggesting a British firm as "& Co." from countries where that affix is not used, which includes all the continental countries except Germany, and "Brothers" or "Bros." or the like, which applies to all non-English speaking countries. This holds as to all goods whether manufactured or raw; but in respect of baskets and the like, holding raw fruit, eggs, &c., and sent to and from the Continent, the rule, when the baskets, &c., will not meet the eyes of retail buyers, is not strictly applied.

(ii.) Where, in respect of manufactured goods, the name or mark of a manufacturer, dealer, or trader in the United Kingdom is prohibited, on foreign goods, even his own property, without a definite qualification, the initials will fall within the prohibition if they are easily recognisable as those of persons or firms so well known as to make the initials practically equivalent to the name itself; and also, where they are the initials of known consignees of the goods who will bring them into consumption in the same "coverings." Where the consignees are not known, and no special fact calls attention to the goods, they may, as regards initials, be passed.

Packing Cases and Coverings.

Cases and coverings.

13. Goods will not be liable to detention when the name of a port or place of destination is applied to mere packing cases or outer wrappers in which goods are clearly not intended to be sold or exposed for sale, or if exposed for sale, then in an export market. Address marks, when they are merely and manifestly such, for purposes of carriage only, are not marks within the Act.

14. "Coverings" such as boxes, capsules, bottles, &c., are to be judged with discrimination as to whether the marks, if any, on them, refer to them, or to the goods they are to cover. If the marks on them refer, as is rarely the case, distinctly to the coverings, the case should be reserved for the Board. If the marks, such as Royal Arms, or the like, refer to the goods to be covered, and it is shown to the satisfaction of the officer that they will be British goods, or goods as to which British marks are not objectionable, and do not refer to the coverings themselves, then the coverings may be regarded as not contrary to the Act.

15. This principle will apply to coverings (such as ornamental boxes for tobacco, tea, or confectionery), with names on them of firms who have ordered the coverings for their own goods, or where such firms, though not having actually ordered the coverings themselves, consent in writing to their importation for such goods.

Grain Sacks.

Grain sacks.

16. The name and address of a merchant in this country upon grain sacks, are to be regarded as an indication that the grain is of British origin, and will require the addition of a statement of the country of production. In the case of grain imported in bulk and transferred *after due entry and clearance* into sacks on board the importing ship, such marking of the sacks need not be qualified with a statement of the foreign origin of the grain.

Samples, &c.

Samples.

17. Samples or patterns, readily distinguished as such, and valueless in themselves, are not to be treated as under the Act so far as British origin is concerned.

Goods not Produced in the United Kingdom.

Non-products of United Kingdom.

18. Goods not produced in the United Kingdom, such as wine, tea, and other produce not grown in this country, such as linseed, rapeseed, &c., are also treated as not under the Act, so far as British origin is concerned. This is applied further to some special forms of manufacture which, by shape, make, or colour, cannot be mistaken for the manufacture here of the same article, as, for instance, Dutch cheese of the kind well known to be made in Holland, bearing the initials of British dealers.

(B) Goods Prohibited on other Grounds.

19. Goods prohibited on grounds other than marking suggestive of British origin are those which, whether manufactured or raw, have applied to them a false trade description.

(a) As to the place or country in which they were made or produced ;

(b) As to trade marks or names so as to constitute forgery ;
(c) As to number, quantity, measure, gauge or weight, and mode of manufacture or material ;
(d) As to being the subject of any existing patent, privilege, or copyright.

Marks as between foreign countries.

20. As to (a), this relates, of course (British origin having been dealt with above), to questions between two foreign countries; that is to say, to goods with marks indicating make or production in a place or country which is not that in which the goods were made or produced. The Act does not specify particularly what is to be the qualification here ; but if the mark indicates, expressly, or by reference, a place or country not that, in reality, of the make or production of the goods, there must be a definite qualification to the effect that the goods were not made or produced in the place or country indicated ; *or*, a definite indication of the place or country in which the goods were made or produced.

Mark including place name.

21. A mark which, though not naming, *includes* the name of a place or country, is to be held as naming such place or country. For instance, a wine, the produce of Germany, and described as "Port" or "Sherry" (which words include the names of the places Oporto and Xeres), should have that description accompanied by the statement "produced in Germany," or should be described as "German Port" or "Australian Sherry," &c. Such a mark as "Lancashire Swedish" on Swedish iron, where the qualifying word follows the misleading name, may be admitted. As in marks suggesting British origin, exception to this rule is made in cases where the name of a place in a trade description is indicative merely of the character of the goods, and is not calculated to mislead as to the country of origin. The description "Brussels Carpet" is an exception of this kind.

Port of shipment evidence of origin.

22. For judging between two foreign countries the Act provides that, in the absence of proof to the contrary, the port of shipment of goods shall be primâ facie evidence of the place or country in which the goods were made or produced : and this rule the officers can, generally, act upon. Where, however, the port of shipment is merely an ordinary trading route from some inland country, as Rotterdam or Antwerp with respect to Germany, or Hamburg with respect to Austria, the officers may, if they have no reason to doubt the good faith of the importer, accept the statement that the goods are the make or produce of the inland country.

Foreign language not of country of origin.

23. The use of language of one foreign country on goods of another must not be viewed more strictly than its use in cases indicating British origin, dealt with in paragraph 11. The use of a certain language is allowed freely to *all* countries when, by custom, that language is usually applied to such goods ; *e.g.*, Spanish on tobacco and cigars, when the recognised words are applied only to colour, shape, size, and the like ; or French on sardines, when confined to the words "Sardines à l'huile," without any additional French description.

Forging trade-mark.

24. The forging of a trade mark (par. 19 (b)) is the application to goods of any figure, words, or marks, or arrangement or combination thereof, reasonably calculated to lead persons to believe that the goods are the manufacture or the merchandise of some person other than the person whose manufacture or merchandise they really are ; and this

includes the name or initials of a person. The figures, words, or marks applied need not be an actual trade mark, or actual name or initials, provided they are a colourable imitation of the mark, name, or initials of a person carrying on business in connection with goods of the same description, and are used without his authority.

Registration.

Registration.

25. As to goods under all the three heads, (b), (c), and (d), of paragraph 19, the difficulty of detection by officers, without special information, and more particular examination than is ordinarily bestowed for revenue purposes, is greater than in the case of goods falling under (a), but as regards the forging of trade marks (b), as above explained, while it would not be possible for officers to enter into the examination of all names and marks so as to detect fraud of this kind, the Board have, nevertheless, felt that a manufacturer, dealer, or trader who has reason to believe that his name or trade mark is one not unlikely to be imitated, so as to constitute a forgery, is entitled to ask that, without the requirement of information beforehand, goods so marked shall be stopped; and to meet this the Board have established the following system.

Detention on account of registration.

26. They have established a system of registration of name or marks so that a manufacturer, dealer, or trader may register his name or mark at such port or ports as he desires. In respect of names or marks so registered, it will be the duty of the officers, at the particular port or ports, to prevent the delivery of goods to which such names or marks or imitations of them as above explained may be applied, unless the delivery is authorised by the registered proprietor.

27. When goods are thus detained on account of names or marks which have been registered in this department, care is to be taken in every case that, in addition to the usual notice of seizure required under sect. 207 of the Customs Consolidation Act, information of the detention, and of the cause of such detention, shall be at once given in writing to the person who has so registered his name or mark, or to the representative appointed by him to authorise delivery of the goods, who is to be informed that unless immediate attention is given to the matter the goods will be released. If, at the end of forty-eight hours, the collector (or other principal officer concerned) does not receive a reply he will release the goods; but collectors will observe that the limit to the time of detention here laid down does not apply in cases where the marks are such as to render the goods liable to detention irrespective of the question of registration. In any case of detention under this system of registration the Board, if they see fit, may order security to be given if prolongation of the detention is requested, and the matter is, at all, one of doubt.

Registering foreign marks: and agency.

28. Any manufacturer, dealer, or trader, whether British or foreign, may register his name or mark; but officers may refuse registration to any name or mark which they consider to be of a character too indefinite or indistinct to recognise, referring to the Board in any case of doubt. An applicant for registration must prove his proprietorship of the name or mark by declaration (see Form C. in the Appendix); and if, in order

to avoid delay, he desires to do so, he may appoint an agent to give authority for delivery of his goods.

Registered marks on goods imported by owner.

29. It must, however, be distinctly understood that the use by any manufacturer, dealer, or trader in the United Kingdom of even his *own* name on foreign goods, and the use by any manufacturer, dealer, or trader, on like goods, of words, figures, or marks of any kind stating or indicating, directly or indirectly, make or production in the United Kingdom, are prohibited unless such goods are properly qualified by the required definite indication of origin. It must, therefore, be clearly explained to every person registering a name or mark which involves any such statement or indication, as will probably often be the case, that, while the name or mark will be guarded by such registration, it will not be rendered admissible unless duly qualified, as the law may require, in every case.

Release when qualified.

30. Goods bearing a mark registered in this department may be delivered by the officers without reference to the Board on receipt by them of the authority of the proprietor of the mark, or of his duly appointed agent, provided the mark be properly qualified, as in this Order shown.

General.

British Returned Goods.

British returned goods.

31. British goods returned bearing the name, brand, or mark of any British manufacturer may be admitted upon proof of their origin being furnished. This may be done by Bill of Store; or by a declaration by the importer that the goods are, to his knowledge, British goods returned, and were originally manufactured in this country; or by and with the consent in writing of the proprietor of such name, brand, or mark, or his legal representative (42 & 43 Vict. c. 21, s. 6).

32. The declaration by the importer as to the British origin of the goods may be in the usual form as an ordinary customs document, but if the officer sees reason to doubt it, he should refer the papers to the Board; and he should, in no case, require a statutory declaration, under the Act as to such declarations, without the Board's order.

33. On any other point British goods returned will not be dealt with except on information.

Goods for Private Use.

Private use.

34. Dutiable.—Tobacco, including cigars, not exceeding 20 lb., wine not exceeding twelve gallons, and spirits not exceeding one-half that quantity, in any one consignment, may be admitted free of the Act, on the officer being satisfied that the goods are for private use.

35. Non-dutiable.—Such goods sent as presents, or for personal use, and not in any process of sale or purchase, are similarly free of the Act, and this especially includes articles not new, and which are manifestly private property, such as clothing, or other personal effects, and old, used, and damaged articles sent for repairs, imported by, or consigned to, persons whose names are on them. This applies also to presents to corporate bodies or public institutions.

Goods in Transit.

Transhipment goods.

36. Under the Transhipment Regulations, transhipment and transit goods are not to be specially examined for the purpose of scrutinising marks *in the absence of information* (General Order $\frac{1}{1}\frac{0}{8}\frac{0}{8}$); nor are such goods to be detained under the Merchandise Marks Act unless they infringe its provisions in one or other of the following ways:—

(a) By reason of their bearing marks which raise a clear and direct claim to British origin; or

(b) By reason of their bearing the name or trade mark of a manufacturer, dealer, or trader in the United Kingdom, without qualification; or

(c) By reason of their bearing a trade mark specially registered at the customs.

When the marks on a package, or on goods found therein, contravene the Merchandise Marks Act, all the packages of the same mark on the entry are to be examined, the packages with other marks being treated as if on a separate entry.

This direction also applies to goods entered for home consumption, but intended to be forthwith re-shipped for exportation, on production of satisfactory evidence (such as Bills of Lading, Invoices, &c.), of the final destination abroad of the goods; but they are subject to examination under G. O. $\frac{1}{1}\frac{1}{8}\frac{1}{8}\frac{5}{5}$, as laid down in G. O. $\frac{1}{1}\frac{1}{8}\frac{1}{8}\frac{0}{5}$, par. (8).

Marks not descriptive but part of the Goods.

Marks where part of goods.

37. Wording or marking, whatever may be its character, if it is not a description "applied" to goods, but part of the goods themselves, as, for instance, the regulating words on a thermometer, the titles of books, Christian names on handkerchiefs, such words as "A present from Margate" on china, and the like, are not amenable to the Act.

Goods imported for advertising purposes only, and not for sale, although bearing the name, or name and address of a British trader, provided he is not a maker of, or dealer in, such articles, may be delivered upon a written statement to that effect from the person whose name is on the goods.

Reports of Detention.

Detained goods to be reported at once: monthly and quarterly.

38. Report (on Form 294) is to be made immediately of all cases of detention of goods, stating briefly the number of packages detained, the port from which they come, the marks and numbers of the packages, the description and value of the goods, and the objectionable marking, whether by means of labels or on the goods themselves, on account of which they are detained. Reference should be made to any previous cases of the importation of illegally marked goods consigned to the same merchants or coming from the same consignor.

A monthly return is to continue to be made to the Board, being forwarded to the solicitor on Forms 401 and 402.

A quarterly return is to be made to the Board (Div. IV.) on Form No. 398, for which purposes the present form of record at the various stations is to be maintained.

When report dispensed with.

39. Immediate reports of detentions of goods may be dispensed with when such detentions are made in consequence of the absence of evidence that the marks on the goods are correct, provided that the officers have reason to believe that such evidence will be forthcoming within a reasonable time. On production of the evidence, the officers, if satisfied therewith, will deliver the goods. This direction will include British returned goods bearing marks which would be open to objection on goods of foreign origin; also goods bearing marks indicative of origin in some country other than that from which the goods are imported, when such marks are believed to be authentic.

All marks to be reported.

40. The whole of the marks found on the detained goods should be reported, including the marks on cartons, cases, &c., containing the goods and not merely the actual mark for which the detention has been made.

Qualifying Words to be conspicuous, &c.

Qualification to be conspicuous.

41. The officers are to take care that, in all cases where the Board allow qualifying words to be added before the delivery of goods, such words are applied in characters clear, conspicuous, and as indelible as the marks requiring qualification, and in close proximity to those marks.

Seizures and Unclaimed Goods.

Seizures. Full examination.

42. In all cases in which goods are ordered to be retained as seizures, a *full examination* of the contents of all the packages should be made as soon as the order for seizure is given, and any discrepancy between the marks originally reported and those found on the goods should be communicated to the Board forthwith.

But if an importer should express a wish not to have *all* his packages opened, officers may forgo this upon a consent in writing from him, or his agents, that the whole consignment shall be taken as having marks applied to them similar to those on the goods in the packages already opened.

Goods in London not claimed within two months.

43. Goods which have been placed under detention on account of illegal marks, and in respect of which no applications have been made by the importers for, or no steps taken to carry out the conditions imposed by the Board on their release, are to be removed to the Queen's Warehouse, within two months from the date of the Board's order for their detention, without special directions in each case, if the officers see no circumstances which call for exceptional treatment. They are to be entered in the Monthly Seizure Account.

Patent or Copyright on Goods.

Goods for sale: patent or copyright.

44. In order that there may be no risk of goods protected by patent or copyright in the United Kingdom being offered for sale by this department, in submitting accounts of seizures under the Act, particular attention should be called in column 8 to any goods included for disposal marked "Patent," or "Copyright," or which the officers have any reason to suppose are patented, or the subject of copyright, in this country.

Watch Cases and Watches.

Watch cases and watches.

45. A special provision as to watch cases and watches is made by sec. 7 of the Act. It provides that, as regards watches, any mark on the case is to be deemed to extend to the watch. If, therefore, a watch case is made in this country, with any statement or indication of origin, such as, for instance, a British hall mark, and having been exported, is returned with a foreign movement, then, in the absence of a counter description on the watch itself, the mark on the case will apply to the watch.

General Order $\frac{9}{1858}$, which goes fully into this subject, is not affected by this Consolidating Order.[1]

Procedure on Information.

Detentions on information.

46. It must be borne in mind that information, in itself, even though given, is not a mandate to the Crown to detain; and no detention should on account of it be made where it is clear that the law would be against it. Officers may sometimes see at once that a consignment to which the information points does not infringe the law, and they will then not detain the goods. But they are authorised to make, when necessary, a fuller examination than ordinarily takes place.

Deposit or bond.

47. In any other case the officer will detain the goods, and require (if it is not already given) immediate security, as in Regulation 4 (p. 20).[2] The sufficiency of the sureties named in the notice of information must be tested in the usual way. Regulation 7 (p. 20)[3] shows when the security will be delivered up.

No security, no detention.

Whenever security is not duly given, there will be no further detention.

Information as to origin.

48. Information will not generally touch the point of origin. Whenever it does do so, and affects the interests of "British Possessions" or "Foreign States," if the name complained of is found to be applied to the goods, and is the name of a country, or of a place in a country, not the country of the port of shipment, the officer may, in the absence of proof of make or produce at the place or in the country named on them, be satisfied that the alleged infringement clearly exists. This is in accordance with the principle in paragraph 22.

Forged marks in certain States and British Possessions.

49. Whenever an information relates to a forged trade mark alleged to be one recognised in a British Possession or foreign State, information will not be good unless it relates to a Possession or State to which sec. 103 of the Patents, Designs, and Trade Marks Act, 1883, has been applied by Orders in Council,[4] viz.:—

British Possessions ...	New Zealand. Queensland. Tasmania. Western Australia.

[1] Printed p. 133.
[2] Page 130, below.
[3] Page 131, below.
[4] Other Orders in Council have been made since the date of the general Orders. The full list of the British Possessions and Foreign States in respect of which Orders in Council have been made will be found on pp. 151, 152.

Foreign States in Europe	Belgium. Denmark, including Faroë Islands. France. Greece. Italy. The Netherlands. Norway. Portugal, including Azores and Madeira. Roumania. Servia. Spain. Sweden. Switzerland.
In N. and S. America and the W. Indies	Brazil. Ecuador. Mexico. Paraguay. San Domingo. Surinam and Curaçao. The United States of America. Uruguay.
In Africa	Tunis.
In Asia	Japan. Netherlands East India Colonies.

Definitions.

50. The officers will note the meanings given by the Act to the Definitions.
following expressions, viz.:—

"Goods" "Trade Mark" *"Trade Description" "False Trade Description" "Person" "Manufacturer" "Dealer" or "Trader" "Proprietor" "Name" "Name or initials"	Sec. 3, and 54 Vict. c. 15, s. 1.
"Applied" "Falsely applied" "Coverings"	Sec. 5, (1), (2), and (3).

51. The following General Orders are hereby cancelled :—
Nos. 81 and 99 of 1887.
Nos. 10, 14, 26, 33, 39, 44, 121, 122, 125 and 147 of 1888.
No. 7 of 1889.
Nos. 1 and 8 of 1890.
Nos. 50 and 68 of 1893.
No. 4 of 1894.
Nos. 4, 28, 34 and 82 of 1895.
Nos. 4 and 9 of 1896.
No. 63 of 1897.

The following Circular Letters are also cancelled :—
Nos. 1, 4, 5, 8, 33 and 36 of 1889.
No. 6 of 1890.
Nos. 9 and 20 of 1891.
No. 13 of 1892.
The following London Port Orders are also cancelled :—
Nos. 9, 18, 21, 61, 70, 72, 74 and 76 of 1888.
Nos. 23, 48 and 52 of 1889.
Nos. 2 and 6 of 1890.
Nos. 12 and 58 of 1893.
No. 19 of 1894.
No. 13 of 1895.
No. 4 of 1898.
The following General Orders on the subject are not affected, viz. :—
$\frac{9}{1888}$, $\frac{30}{1888}$ (with directions as to examining London Port Order No. $\frac{73}{1888}$), and $\frac{43}{1897}$.

By order of the Board,
JOHN COURROUX.

REGULATIONS MADE BY THE COMMISSIONERS OF CUSTOMS UNDER SECTION 16 OF THE MERCHANDISE MARKS ACT, 1887.

WHEREAS by the Merchandise Marks Act, 1887 (hereinafter called "the Act"),

After various provisions against the sale, or exposure for sale, or possession for sale, trade, or manufacture, of goods with forged trade marks or false trade descriptions, or trade marks falsely applied to them ;

And after defining (amongst other things) the expression "trade mark" in manner therein set forth, with reference to "The Patents, Designs, and Trade Marks Acts, 1883," and the law of indicated British Possessions and Foreign States ;

And after defining the expression "trade description" as any description, statement or other indication, direct or indirect, as to number, quantity, measure, gauge, or weight of goods, as to place or country in which any goods were made or produced, as to the mode of manufacturing or producing any goods, or as to the material of which any goods are composed, or as to any goods being the subject of any existing patent, privilege, or copyright ;

And after defining the expressions "false trade description," "goods," "apply," and "falsely apply" ;

It is provided by section 16 that,

(i.) All such goods as above mentioned, and

(ii.) All goods of foreign manufacture, bearing any name or trade mark, being or purporting to be, the name or trade mark of any manufacturer, dealer, or trader, in the United Kingdom, unless such name or mark be accompanied by definite indication of the country in which such goods were made or produced,

shall be prohibited to be imported, and, subject to the provisions

of the said section, shall be included among goods prohibited to be imported, as if they were specified in section 42 of "The Customs Consolidation Act, 1876."

And whereas by section 18 of the Act, after authorising the continued use of trade descriptions lawfully and generally applied to goods of the particular class, or manufactured by a particular method, to indicate such class or method, it is provided that, where such trade description includes the name of a place or country calculated to mislead as to where the goods were actually made or produced, such goods not having been actually made or produced there, the said reciting section should not apply (and, consequently, goods so marked would be prohibited), unless there be added to the trade description, immediately before or after the name of the place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there.

And whereas it is also provided by the said section 16 that the Commissioners of Customs (hereinafter called "the commissioners"), may, from time to time, make, revoke and vary regulations, either general or special, respecting the detention and forfeiture of goods the importation of which is prohibited as hereinbefore mentioned, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of the said section, and the mode of verification of such evidence.

And it is further provided by the said last-mentioned section :—

That before detaining goods or taking proceedings with a view to the forfeiture thereof under the law relating to the customs, the commissioners may require that such regulations as aforesaid shall be complied with, and satisfy themselves as to the liability of the goods to forfeiture.

That such regulations may apply to all goods, the importation of which is prohibited by the said section, or different regulations may be made respecting different classes of such goods.

And also that the regulations may provide for the informant reimbursing the commissioners all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

And it is also provided by the said section that section 2 of the Revenue Act, 1883, shall be repealed from a day to be fixed by regulations under the said reciting section, such day not being later than the 1st day of January, 1888, without prejudice to anything done or suffered thereunder.

And whereas section 2 of the Revenue Act, 1883, is the law under, and by virtue of which, goods of foreign manufacture infringing the proprietary rights of British subjects in names, addresses, and trade marks, or bearing or having upon them, under certain conditions, the name of a place in or a part of the United Kingdom, are, at the present time, detected and stopped by officers of customs acting on their own observation and responsibility, under

directions laid down by the commissioners, and without the requirement of previous information, security, or other conditions.

Now, therefore, the commissioners under and by virtue of the hereinbefore recited power in that behalf, hereby make and require to be complied with the following regulations, viz. :—

1. Goods prohibited to be imported as hereinbefore recited, having applied to them forged trade marks, false trade descriptions, or marks, names, or descriptions otherwise illegal, which, upon examination, are detected by the officers of customs, are to be detained by them without the requirement of previous information.

In giving information with a view to detention an informant must fulfil the following conditions, viz. :—

(i.) He must give to the collector or superintendent or the chief officer of customs of the port (or sub-port) of expected importation, notice in writing, stating,
the number of packages expected, as far as he is able to state the same,
the description of the goods by marks or other particulars sufficient for their identification,
the name or other sufficient indication of the importing ship,
the manner in which the goods infringe the Act,
the expected day of the arrival of the ship.

(ii.) He must deposit with the collector or other officer as aforesaid a sum sufficient, in the opinion of that officer, to cover any additional expense which may be incurred in the examination required by reason of his notice.

3. If, upon arrival and examination of the goods, the officer of customs is satisfied that there is no ground for their detention, they will be delivered. If he is not so satisfied, he will decide either to detain the goods as in a case of detention upon ordinary examination, or to require security from the informant for reimbursing the commissioners or their officers all expenses and damages incurred in respect of the detention made on his information and of any proceedings consequent thereon.

4. The security thus required must be an immediate *ad valorem* deposit of ten pounds per cent. on the value of the goods as fixed by the officer from the quantities or value shown by the entry; and also, subsequently, a bond to be completed within four days in double the value of the goods,[1] with two approved sureties. The *ad valorem* deposit will be returned upon completion of the bond, and will not be required if, as an alternative where time permits, the informant prefers to give a like bond before examination upon estimated value of the goods declared to by him under statutory declaration. If the security is not duly given as above required, there will be no further detention of the goods.

5. In the above regulations the words "officer of customs" means an officer acting under general or special direction of the commissioners, and the words "value of the goods" mean value irrespective of duty.

6. The "notice" and "bond" required as above shall be in the forms contained in the schedule to these regulations, or in such

[1] See the Regulations of May 1st, 1905, printed below, p. 133.

other forms as the commissioners may from time to time order and direct.

7. The security taken under these regulations will be given up at the times following, that is to say :—

Where given before examination, and if no detention, forthwith.
Where given on detention :—

If the forfeiture is completed, either by lapse of time or ultimate condemnation by a court of justice, then on such completion of forfeiture.

If the forfeiture is not completed,[1] then

If the goods are released by the Commissioners, and no action or suit has been commenced against them, or any of their officers, in respect of the detention, then at the expiration of three months from the time of detention ; or, if the goods are released for failure of proceedings taken for the forfeiture and condemnation thereof upon information under section 207 of "The Customs Consolidation Act, 1876," and no action or suit has been commenced against the commissioners, or any of their officers, in respect of the detention, then at the expiration of three months from the trial of such information.

If within such periods as aforesaid any such action or suit as aforesaid has been commenced, then upon the ultimate conclusion of such action or suit, and the fulfilment of the purpose for which security was given.

8. These regulations apply to transhipment and transit goods as well as to goods landed to be warehoused, or for home consumption.

9. The 1st day of January, 1888, is, by these "regulations," fixed as the day from which section 2 of the "Revenue Act, 1883," shall be repealed, subject to the terms of the recited Act ; and these regulations will take effect from the date of such repeal.

CHARLES DU CANE
H. MURRAY
HORACE SEYMOUR
} Commissioners of H.M. Customs.

Custom House, London,
1*st December*, 1887.

SCHEDULE.

A.—(NOTICE.)

The Merchandise Marks Act, 1887.

To the Collector, Superintendent, or Chief Officer of Customs at the Port * of

I hereby give you notice that the undermentioned goods, that is to say,† are about to be imported into your port on about the day of next in the ‡ from .

That such goods are liable to detention and forfeiture being §

* Or Sub-Port.

† Describe the goods, number of packages, marks used, and any other particulars necessary for their identification.

‡ Describe the ship, and give name or indication.

§ State how the goods infringe the Act, and if the infringement is one as to a forged trade mark protected in a British Possession or foreign State, state the Possession or State ; or, if the infringement is one as to place or country of origin, state the name of the place or country falsely used.

[1] See the Regulations of May 1st, 1905, printed below, p. 133.

That Mr. of and Mr. of are prepared to become my sureties in such bond as may be required upon detention of the goods.

And I request that the said goods may be detained and dealt with accordingly.

Dated this day of , 188 .

A. B.
[*or* Agent for] .

NOTE.—Mr. refers to his bankers [*or* solicitors], and Mr. to his bankers [*or* solicitors] as to his sufficiency for the penalty of the bond.

B.—(BOND.)

The Merchandise Marks Act, 1887.

KNOW ALL MEN BY THESE PRESENTS, THAT WE A. B. and are held and firmly bound unto Our Sovereign Lady Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, in the sum of pounds to be paid to our said Lady the Queen, her heirs or successors. For which payment well and truly to be made we bind ourselves, jointly and severally, our heirs, executors, and administrators firmly by these presents. Sealed with our seals. Dated this day of in the year of our Lord one thousand eight hundred and .

Whereas the above-named A. B. has by a notice dated the day of informed the collector of customs at that the undermentioned goods, that is to say, were about to be imported into the port of contrary to sec. 16 of the Merchandise Marks Act, 1887, and requested that the said goods should be detained and dealt with accordingly. And whereas the said goods duly arrived in the said port on the day of last, and are now detained pursuant to the said notice. Now the condition of this obligation is such that if the said A. B. his executors or administrators, shall well and effectually indemnify, save harmless, and keep indemnified, her Majesty, her heirs and successors, and all her and their officers of customs, and their executors or administrators, from and against all loss or damage, payment or payments, and all costs and expenses which her said Majesty, her heirs or successors, and her and their officers of customs, their executors or administrators, shall or may sustain or incur by reason or on account of any detention of the said goods following upon the information contained in such notice and any proceedings consequent upon such detention, then this obligation shall be void, or otherwise shall be and remain in full force and virtue.

Signed, sealed, and delivered.

C.—MERCHANDISE MARKS ACT, 1887.

(50 & 51 Vict. c. 28.)

Declaration on Registration under Paragraph 28 of General Order .

Port of

I *, hereby declare that † , ‡ the proprietor . of § , viz., , which || expect to be applied to goods imported, from time to time, at this port; and that || have appointed Mr. ¶ of , to be ** agent, to give authority for the delivery of such goods.

* Full name and address of declarant.

† "I," or "I and my partners, trading as Messrs. ," or "such and such a company, of which I am the representative official," or "so and so, of such and such a place abroad, whom I represent in this country."

‡ "Is" or "are."

§ "The following name as a trade description," or "the following trade mark," or "the following name as a trade description and trade mark."

|| "I" or "we."

¶ This portion as to appointment of agent may be erased, where such appointment is not desired.

** "My" or "our."

I make this solemn declaration conscientiously, believing the same to be true, and by virtue of the Statutory Declaration Act, 1835.

(Signed) .

Declared this day of , 188 , at .
Before me

A commissioner to administer oaths, &c.

N.B.—Registration in pursuance of this declaration is subject to the provisions of the Act which forbid the importation, by a registered proprietor, even of his own goods which bear, in name or mark, any statement or indication, direct or indirect, of make or produce in the United Kingdom unless qualified as the Act requires.

Further Regulations made by the Commissioners of Customs under Section 16.

Whereas it is provided by section sixteen of the Merchandise Marks Act, 1887, that the Commissioners of Customs (hereinafter referred to as the Commissioners) may from time to time make, revoke, and vary regulations, either general or special, respecting the detention and forfeiture of goods, the importation of which is prohibited by that section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of the said section, and the mode of verification of such evidence.

And whereas on the first day of December, eighteen hundred and eighty-seven, the Commissioners made certain regulations, and it has become necessary to vary them in respect of the two matters hereinafter referred to.

Now, therefore, the Commissioners, in pursuance of the powers vested in them, do hereby vary the said regulations as follows:—

1. The amount for which security by bond is to be given under Regulation No. 4 shall be such sum not less than double the value of the goods as the Commissioners may require.

2. The time at which the security may be given up under Regulation No. 7, if forfeiture is not completed and no action or suit has been commenced against the Commissioners or any of their officers in respect of the detention, shall be at the expiration of six months from the date of detention or the trial of the information.

Dated at the Custom House, London, this first day of May, nineteen hundred and five.

T. J. Pittar,
F. S. Parry,
R. F. Crawford,
Commissioners of His Majesty's Customs.

B.—General Order 9/1888.

Custom House, London,
18*th January*, 1888.

Sir,

In accordance with paragraph 33 of General Order 99/1887, I now transmit to you the directions of the Board, to enable you to deal with

watch cases and watches, under the Merchandise Marks Act; the latter term, watches, meaning, as provided by section 7 of the Act, "all that portion of a watch which is not the watch case."

Your attention has already, by G. O. 81/1887, been called to the position in which watch cases, under this section, stand in relation to watches; and the consequent importance of the assay mark on watch cases, which mark, by virtue of section 3 (1) of the Act, would be deemed a trade description as to place or country of origin.

You will note, in addition, that by section 8 (1) of the Act, provision is made for preventing foreign-made watch cases from obtaining the mark placed on a watch case made in the United Kingdom; and it is enacted that a different mark shall be placed on foreign watch cases of such pattern, and in such mode as directed by Order in Council.

An Order in Council to this effect, dated the 28th of November last,[1] was published in the "London Gazette" of 9th December last, and a copy of this order, together with sheets 1 and 2 of Appendix to Schedule II. therein referred to, which contain diagrams of the required new marks, are sent to you herewith.

You will carefully study these sheets, and note how the marks apply variously to the different assay offices in the United Kingdom.

The directions to be observed by you in applying this new law will relate to—

(a) Watch cases with assay marks imported alone.
(b) Like watch cases imported with the watches, that is to say, watches of foreign manufacture in them.

(a) *Watch Cases with Assay Marks imported alone.*

If the cases are wholly unmarked, or are duly marked in accordance with the Order in Council, or with a foreign assay mark, and there is not, in addition, any wording on any part of the case proper, or on the dome, indicating *make* or *produce in* the United Kingdom, the goods may be delivered. If, on the other hand, there is any such wording, the goods must be detained and the matter referred to the Board.

If the cases are marked with a British hall mark as placed on watch cases made in the United Kingdom, you will detain the goods unless they are entered as "British goods brought back," in which case they may be admitted under the usual regulations.

(b) *Watch Cases imported with the Watches in them.*

If the cases are wholly unmarked, or are marked either
In accordance with the Order in Council, or
With a foreign assay mark, or
With a British assay mark as placed on a watch case made in the United Kingdom, and with an equally conspicuous statement either above or below the assay mark, that the watch is of foreign make;

[1] Now repealed and replaced by the Order in Council of May 7th, 1907. See below, C.

And if there is no wording either as an addition on the case or dome, or upon the watch itself, whether on the dial or the plate, or any part of the works, indicating make or produce in the United Kingdom, then the goods may be delivered.

If, on the other hand, there is any such wording, the goods must be detained and the matter referred to the Board.

If the cases are marked with a British assay mark as placed on a watch case made in the United Kingdom, and with no statement of foreign make on the cases, as required above, you will detain them as a seizure, unless there is upon the dial of each watch and also on the top "plate" (where the watch is of that construction) or on the bottom "plate" (where the watch is of that construction) visibly, between the "bridges," an indelible and definite indication of the place or country in which the watches were made. Such an indication will be considered definite, if it is, or contains only the name of the place or country of origin; if in addition, it contains the name of a place in, or a part of the United Kingdom, as, for instance, "Geneva and London," or if there is anywhere on the watch an indication by figures, words, or otherwise, that the watch might be the make or produce of the United Kingdom, then, in addition to the name of place or country of origin, there must be a distinct statement that the watches were there made.

I am, Sir, your obedient Servant,

E. GOODWYN.

The Collector at

C.

ORDER IN COUNCIL PRESCRIBING FORM OF DECLARATION AS TO THE COUNTRY IN WHICH FOREIGN WATCH CASES[1] HAVE BEEN MADE, AND THE MARKS TO BE PLACED THEREON BY THE SEVERAL ASSAY OFFICERS.[2]

At the Court at Buckingham Palace, the 7th day of May, 1907.

PRESENT,

The King's Most Excellent Majesty in Council.

Whereas by the Merchandise Marks Act, 1887 (50 and 51 Vict. c. 28), it is, amongst other things, provided that:—

Section 8 (1).—Every person who after the date fixed by Order in Council sends or brings a watch case, whether imported or not, to any assay office in the United Kingdom for the purpose of being assayed, stamped, or marked, shall make a declaration declaring in what country or place the case was made. If it appears by such declaration that the

[1] Gold and silver watch cases forming parts of finished watches imported into the United Kingdom from abroad are gold and silver plate within the meaning of sec. 59 of the Customs Act, 1842, and of sec. 10 of the Revenue Act, 1883, *Goldsmiths' Co.* v. *Wyatt*, [1907] 1 K. B. 95.

[2] S. R. and O., 1907, No. 384. It repeals and replaces an Order in Council of November 28th, 1887.

watch case was made in some country or place out of the United Kingdom, the assay office shall place on the case such a mark (differing from the mark placed by the office on a watch case made in the United Kingdom), and in such a mode as may be from time to time directed by Order in Council:

(2) The declaration may be made before an officer of an assay office, appointed in that behalf by the office (which officer is hereby authorised to administer such a declaration), or before a justice of the peace, or a commissioner having power to administer oaths in a Supreme Court of Judicature in England or Ireland, or in the Court of Session in Scotland, and shall be in such form as may be from time to time directed by Order in Council:

(3) Every person who makes a false declaration for the purposes of this section shall be liable on conviction on indictment, to the penalties of perjury, and on summary conviction to a fine not exceeding twenty pounds for each offence;

And whereas by Order in Council dated the 28th November, 1887, Her late Majesty did order and declare the marks to be placed by the Authorities mentioned in such Order upon watch cases which had been made in some country or place out of the United Kingdom;

And whereas it appears expedient to alter the marks prescribed by the Order in Council dated the 28th November, 1887;

Now, therefore, His Majesty, by and with the advice of His Privy Council, and in exercise of the powers vested in him by the above-recited provision of the said Act, is pleased to order and declare and doth hereby order and declare that where it appears by the declaration required by the above-recited provisions that such watch cases have been made in some country or place out of the United Kingdom, then the following Authorities, that is to say:—

The Wardens and Commonalty of the Mystery of Goldsmiths of the City of London;
The Guardians of the Standard of Wrought Plate, Birmingham;
The Company of Goldsmiths of the City of Chester;
The Guardians of the Standard of Wrought Plate, Sheffield;
The Incorporation of Goldsmiths of the City of Edinburgh;
The Goldsmiths Company of the City of Glasgow;
The Fraternity or Company of the City of Dublin;

shall respectively cause to be placed on such watch cases the marks more particularly described and delineated in Schedule II. hereunto annexed, and such marks shall be substituted for the marks prescribed by the said Order in Council of the 28th November, 1887:

And it is hereby further ordered and declared that the declaration to be made shall be in the form set forth in Schedule I. hereto annexed:

And it is hereby further ordered and declared that as from the coming into operation of this Order the said Order in Council dated the 28th November, 1887, shall be repealed:

This Order shall come into operation on the fourteenth day of May, 1907.

A. W. FITZROY.

SCHEDULE I.

Form of Declaration.

I[1] of do hereby declare that the (watch case) (watch cases) (brought) (sent) by me this day to the assay office at in number and in a parcel marked (was) (were) made in .

Declared at this day of 19 .

Before me,[2]

NOTE.—This Declaration may be made before an officer of an assay office appointed in that behalf by the office or before a Justice of the Peace, or a Commissioner having power to administer oaths in the Supreme Court of Judicature in England or Ireland or in the Court of Session in Scotland.

[1] Insert name, address, and description of Declarant.

[2] Signature of person before whom Declaration is made and appropriate description in accordance with note above.

SCHEDULE II.

On Foreign Gold Watch Cases.

The Hall Mark particular to each Assay Office as shown in Figure 1 of the Appendix hereto: the carat value of the gold, together with the decimal equivalent of the carat value, as shown in Figure 2 of the Appendix.

On Foreign Silver Watch Cases.

The Hall Mark particular to each Assay Office, as shown in Figure 1 of the Appendix hereto, together with the decimal equivalent of the standard value of the silver, as shown in Figure 2 of the Appendix.

The mark for the annual date letter is to be added by each Assay Authority after the mark for the particular Hall and the mark for standard.

APPENDIX.

N.B.—The marks described in this Schedule are identical with those prescribed by the Order in Council dated the 11th day of May, 1906, made under the provisions of the Hall Marking of Foreign Plate Act, 1904.

Figure 1.

PARTICULAR MARK FOR EACH ASSAY AUTHORITY.

[*The Marks are shown in the Order.*]

Figure 2.

REPRESENTATION OF STANDARD MARKS.

[*The Standard Marks follow in the Order.*]

GENERAL ORDER 38/1907.

CUSTOM HOUSE, LONDON,
29*th June*, 1907.

IMPORTED GOLD AND SILVER WATCH CASES (WITH OR WITHOUT WORKS).

A copy of an Order in Council, dated 7th May, 1907, altering the marks prescribed to be placed upon foreign-made watch cases by the

Order in Council, dated 28th November, 1887, is transmitted herewith for the information and government of Officers concerned.

Officers are further informed that, in accordance with a recent decision in the High Court, watch cases (either with or without works inserted therein) are deemed to be plate within the meaning of Section 59 of the Customs Act, 1842, and Section 10 of the Revenue Act, 1883, and that, as from the 1st instant inclusive, all such goods imported are therefore to be treated as subject to these Acts in regard to assay.

The attention of importers of Watches is to be called to this Order.

The following amendments are to be made in the Importation Code, viz.:—[*The amendments follow in the Order*].

By Order of the Board.

R. HENDERSON.

D.—BY BOARD'S ORDER ON No. 37366/1888.

Sardine Trade.

Sardines from Spain and Portugal imported into this country, *marked with names of French places or in the French language*, but without the qualification required by the Merchandise Marks Act, 1887, may be delivered up to the 30th of June, 1889 (inclusive). After that date, sardines which are not imported from France will not be admitted to this country unless duly qualified, when they bear upon them the names of places in France or descriptions in the French language other than the trade description "Sardines à l'huile," which will be admissible on sardines from whatever part of the world they may be imported.

By order,

(Signed) E. GOODWYN.

Custom House, London,
18*th December*, 1888.

APPENDIX V.

REGULATIONS MADE BY THE BOARD OF TRADE WITH THE CONCURRENCE OF THE LORD CHANCELLOR UNDER SECTION 2 OF THE MERCHANDISE MARKS ACT, 1891, WITH REGARD TO THE PROSECUTION OF OFFENCES UNDER THE MERCHANDISE MARKS ACT, 1887.[1]

1. The prosecution of offences under the Merchandise Marks Act, 1887, shall, subject to the condition hereinafter prescribed, be undertaken by the Board of Trade in cases which appear to the Board to affect the general interests of the country, or of a section of the community, or of a trade.

2. Every application to the Board to undertake a prosecution shall be accompanied by the following documents:

(a) A statement showing the nature and circumstances of the case, and sufficient to enable the Board to form an opinion whether the case affects the general interests of the country, or of a section of the community, or of a trade.

(b) A statement showing the facts which, if the Board undertake the prosecution, will be capable of proof, and setting out the proofs and names of the witnesses available to prove such facts.

The Board may require the above statements to be supplemented, or additional evidence to be furnished.

3. If, on the evidence, the Board is of opinion that there is no reasonable prospect of a conviction being obtained, the Board will not, unless it thinks fit, undertake the prosecution.

4. If the Board is of opinion that the prosecution would be better or more properly conducted under some other Act of Parliament other than the said Act, the Board will not undertake the prosecution.

5. The Board may, before undertaking a prosecution, require the applicant to give security for costs on such terms and in such manner as it thinks proper.

6. For the purpose of carrying these regulations into effect, the Board may, from time to time, prescribe the use of such forms and give such directions as it may deem expedient.

M. E. HICKS-BEACH,
President of the Board of Trade.

21*st May*, 1892.

I concur,
HALSBURY, C.

[1] Statutory Rules and Orders, 1892, p. 973.

REGULATIONS made by the Board of Agriculture[1] with the concurrence of the Lord Chancellor, pursuant to Section 1 of the Merchandise Marks (Prosecutions) Act, 1894, with regard to the Prosecution of Offences under the Merchandise Marks Act, 1887, relating to Agricultural or Horticultural Produce.

1. The Board of Agriculture shall, where it appears to them from the statements hereinafter mentioned that there is a reasonable prospect of a conviction being obtained, and subject to the other conditions in the next following regulation prescribed, undertake the prosecution of offences under the Merchandise Marks Act, 1887, in cases which appear to the Board to relate to agricultural or horticultural produce and to affect the general interests of the country, or of a section of the community, or of a trade.

2. (i.) Every application to the Board to undertake a prosecution shall be accompanied by the following documents:—

(a) A statement showing the nature and circumstances of the case, and sufficient to enable the Board to form an opinion whether the case relates to agricultural or horticultural produce and affects the general interests of the country, or of a section of the community, or of a trade.

(b) A statement of the facts capable of proof, with the names and addresses of the witnesses available to prove such facts.

(ii.) The Board may require the above statements to be supplemented or additional evidence to be furnished.

3. For the purpose of carrying the foregoing regulations into effect, the Board may, from time to time, prescribe the use of such forms and give such directions as they may deem expedient.

T. H. Elliott,
Secretary to the Board of Agriculture.

27th October, 1894.

I concur,
Herschell, C.

MERCHANDISE MARKS (PROSECUTIONS) ACT, 1894.

Board of Agriculture,
4, Whitehall Place,
London, S.W.,
1st February, 1895.

Sir,

I am directed by the Board of Agriculture to say that they think it may be useful that they should communicate to you the following information as to the effect of the Merchandise Marks (Prosecutions) Act, 1894, and as to the procedure to be adopted on applications for prosecutions thereunder.

[1] Now the Board of Agriculture and Fisheries, see Board of Agriculture and Fisheries Act, 1903 (3 Edw. VII., c. 31).

The Act referred to enabled the Board, with the concurrence of the Lord Chancellor, to make regulations providing that in cases appearing to the Board to relate to agricultural or horticultural produce, and to affect the general interests of the country, or of a section of the community, or of a trade, the prosecution of offences under the Merchandise Marks Act, 1887, should be undertaken by the Board, under such conditions as they might prescribe, and the Board have accordingly, with the concurrence of the Lord Chancellor, made regulations in the following form :—

[The regulations referred to are set out *ante* at p. 140.]

The Merchandise Marks Act, 1887, provided, inter alia, that every person who applies any false trade description to goods shall, subject to the provisions of the Act, and unless he proves that he acted without intent to defraud, be guilty of an offence under the Act, and although various other offences of an analogous character are specified in the Act of 1887, the Board apprehend that the provision above cited is that to which it will most frequently be necessary to resort in order to check the malpractices of which complaint has been so generally made amongst British agriculturists.

It is important to observe that the expression "goods" in the Act of 1887 is defined to mean "anything which is the subject of trade, manufacture, or merchandise"; that the expression "trade description" is defined by the Act to mean "any description, statement, or other indication, direct or indirect, (*a*) as to the number, quantity, measure, gauge, or weight of any goods, or (*b*) as to the place or country in which any goods were made or produced, or (*c*) as to the mode of manufacturing or producing any goods, or (*d*) as to the material of which any goods are composed, or (*e*) as to any goods being the subject of an existing patent, privilege, or copyright; that the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, is to be deemed to be a trade description within the meaning of the Act; and, lastly, that the expression "false trade description" is defined to mean "a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect," and that the fact that a trade description is a trade mark, or part of a trade mark, is not to prevent such trade description from being a false trade description within the meaning of the Act.

The Board have little doubt that the law as it now stands should be sufficient to enable cases in which fraudulent misrepresentations of the place of origin are applied to agricultural produce to be dealt with as they deserve, and, so far as the Board are concerned, they will be very willing to exercise the new powers which Parliament has conferred upon them with a view to the removal of the sense of grievance which undoubtedly exists on the part of many agriculturists in respect to what they consider and, in the opinion of the Board, very legitimately so, as competition unfair in character.

The Board have certainly no wish that the Act passed last session under their auspices should remain a dead letter so long as any legitimate ground for complaint on the part of home producers remains, but

it is beyond the power of the Board to be of assistance in this matter unless agriculturists themselves are able and willing, either individually or through the instrumentality of their various organisations, to co-operate with the Board by bringing under their notice specific cases in which there is prima facie ground for believing that an offence under the Act of 1887 has been committed.

The Board would be glad, therefore, if you would take steps to bring this matter under the notice of your fellow members at an early opportunity, with a view to its being considered whether any, and if so, what, action can be taken by them in the direction indicated in the preceding paragraph. Applications which may be made to the Board to undertake prosecutions for offences under the Act of 1887 should comply fully with the requirements of the regulations above set out, and it is desirable that they should be made as soon as possible after the alleged offence has been committed.

I am, Sir,

Your obedient Servant,

T. H. ELLIOTT,

Secretary.

APPENDIX VI.

FORMS OF INDICTMENT AND INFORMATION.

Form of Indictment.[1]

Middlesex } The jurors for our Lord the King upon their oath present
to wit. } that C. D. before and on the day of was the proprietor of a certain trade mark duly registered in the Register of trade marks kept under the Trade Marks Act, 1905, and in the said Register numbered ( ); and that A. B. on the day of ,[2] the said C. D. then being the proprietor of the said trade mark as aforesaid, unlawfully, and with intent to defraud, did apply the said trade mark to certain goods, to wit [*describing them*], without the assent of the said C. D., contrary to the Merchandise Marks Act, 1887 [*or* the statute in that case made and provided] ;

Second Count.]—And the jurors aforesaid, upon their oath aforesaid, do further present that C. D., before and on the day of , was the proprietor of a certain trade mark duly registered in the Register of trade marks kept under the Trade Marks Act, 1905, and in the said Register numbered ( ), and that A. B., on the day of ,[2] the said C. D. then being the proprietor of the said trade mark as aforesaid, unlawfully, and with intent to defraud, and without the assent of the said C. D., did apply to certain goods, to wit [*describing them*], a certain mark, to wit [*describing it*], so nearly resembling the said trade mark as to be calculated to deceive, contrary to the Merchandise Marks Act, 1887 [*or as above*].

Information for an Offence against the Merchandise Marks Act, 1887[3].

In the Borough of , in the County of .
The day of , 190 .
The information and complaint of A., of , who [upon oath] states that B., of , was on or about the day of , 190 , guilty of an offence against the Merchandise Marks Act, 1887, by

[1] It is not necessary to aver that the defendant elected to be tried by jury. See *R.* v. *Chambers*, 65 L. J. M. C. 214 : 18 Cox. C. C. 401 (1896), Lord Russell of Killowen, C. J., Pollock, B., Hawkins, Grantham and Lawrance, JJ., C. C. R.

[2] If the date of the offence charged is more than one year before that of the presentation of the indictment, add, "and that the said C. D. first discovered the commission of the offence herein charged after the of ." See sec. 15.

[3] Summary Jurisdiction Rules, 1886, r. 31 ; the information must be for one offence only. Summary Jurisdiction Act,

unlawfully selling goods to which a false trade description, namely "soda," was applied, such description relating to the material of which the said goods were composed.

1. On the day of , 190 , C. by my instructions went to the shop of the said B., in , and gave a verbal order for (amongst other things) seven pounds of washing soda, and in response to such order he was supplied by the agent of the said B., in the presence of the said B., with certain goods and with a bill describing the said goods as "soda."

2. The said goods have been analysed, and thereby it has been ascertained that they are not "washing soda" or "soda," but are a mixture made up of about 45 per cent. of "soda" adulterated with about 55 per cent. of "Glaubers salts."

3. The said "Glaubers salts" is sulphate of sodium. It is useless for the purposes for which "soda" is bought and used, and is injurious for such purposes. It will not wash and will not soften water, but it destroys soap. It is much cheaper than "soda," which it resembles in appearance, and it is for that reason used as an adulterant.

4. "Soda," or "washing soda" (the descriptions being synonymous) means, and is understood by the trade and public to mean, commercial carbonate of sodium, and it ought not to contain, and in the ordinary course does not contain, more than 2 per cent. of impurities or admixture. A mixture of Glaubers salts and soda cannot honestly or properly be described or sold as soda or "washing soda." It is a false trade description to so describe it.

[Signature.]

Taken before me,
[Signature]
Justice of the Peace for the
Borough of .

Statements of Offences[1].

Unlawfully and with intent to defraud did forge a certain trade mark duly registered in the Register kept under the Trade Marks Act, 1905, and therein numbered , of which trade mark one C. D. was then the proprietor, within the meaning of the Merchandise Marks Act, 1887, contrary to the said Act.

Unlawfully and with intent to defraud did falsely apply to certain goods, to wit [*describing them*], a certain trade mark duly registered [*as above*], of which [*as above*], within the meaning of the Merchandise Marks Act, 1887, contrary to the said Act.

Unlawfully and with intent to defraud did apply to certain goods, to wit, gelatine (on the day of , sold by the said A. B. to), a false trade description as to the materials of which such goods were composed, by which description the said goods were falsely indicated to be isinglass[2], contrary, &c.

1848, s. 10, but the summons cannot be dismissed on the ground of more than one offence being included. The justices may, however, require the prosecutor to elect on which count he will proceed, *Rodgers* v. *Richards*, [1892] 1 Q. B. 555. Informations are not usually in writing or upon oath in summary cases.

[1] See note (3), p. 143.

[2] See *Gridley* v. *Swinborne*, 52 J. P. 791.

Unlawfully and with intent to defraud did sell [*or* did expose for sale] certain goods, to wit, gelatine (on the day of , sold by the said A. B. to), to which had been applied a false trade description as to the materials of which such goods were composed, whereby the goods were falsely indicated to be isinglass,[1] contrary, &c.

Unlawfully and with intent to defraud did apply a false trade description, whereby the said goods were falsely described to be subject to an existing patent,[2] contrary, &c.

Unlawfully did sell [*or* did expose for sale] certain goods, to wit [*describing them*], to which a false trade description had been applied,[1] contrary, &c.

At the parish of Saint Michael in the said city, on the 16th of January, 1890, unlawfully did apply a certain false trade description, namely, the word "barrel," to certain goods, to wit, to a certain cask of beer, false as to the measure [*or* gauge] thereof, contrary to the provisions of the Merchandise Marks Act, 1887.[3]

On the 7th and 11th of February, 1889, at Purfleet, in the parish of , and the county of , unlawfully did apply [*or* cause to be applied] a false trade description, to wit, the letters, figures, and words "Gunpowder, Chilworth Gunpowder Company, R.L.G.4," to certain goods, viz., gunpowder, contrary to the statute 50 & 51 Vict. 28, s. 2.[3]

[1] See *Gridley* v. *Swinborne*, 52 J. P. 791.

[2] *Budd* v. *Lucas*, 55 J. P. 550.

[3] *Starey* v. *Chilworth Gunpowder Co.*, 54 J. P. 436.

APPENDIX VII.

STATUTES REQUIRING PARTICULAR CLASSES OF GOODS TO BE MARKED IN A SPECIFIED MANNER[1] IN ENGLAND.[2]

Anchors and Chain Cables.]—Manufacturer to place his name or initials and the number and weight of the anchor on every anchor (57 & 58 Vict. c. 60, s. 543); contract for sale of chain cable or anchor exceeding in weight 168 lbs. to imply a warranty of testing and stamping (62 & 63 Vict. c. 23, s. 2 (1)); no chain cable or anchor of greater weight than 168 lbs. to be sold unless tested and stamped according to the Anchor and Chain Cables Act, 1899 (62 & 63 Vict. c. 23, s. 1 (1)).

Bread.]—Penalty for making or exposing for sale any bread made wholly or partially of peas, beans, potatoes (not including potato-yeast), or any sort of corn or grain other than wheat, unless it be marked with a Roman M. The Act applies only beyond ten miles from the Royal Exchange, London. 6 & 7 Will. 4, c. 37, s. 10. But the same provision is made for the excepted area by 3 Geo. 4, c. cvi.

Butter.]—Imitations of butter to be sold only as "margarine." *See* "Margarine."

Buttons (metal).]—Penalties for marking, ordering, or exposing for sale any words or marks denoting quality on metal buttons, or any words or marks on the undersides thereof, unless the buttons be silver-plated or gold gilt; only the marks, gilt, plated, double or treble gilt to be marked: penalties for falsely marking buttons; Act not to extend to buttons of gold, silver, tin, pewter, lead, tin and lead, tinned iron, Bath metal, white metal, any of these metals inlaid with steel, or buttons plated on shells. 36 Geo. 3, c. 60.

Cards.]—Playing cards (except toy cards) to be sold in stamped wrappers. 25 & 26 Vict. c. 22, ss. 1, 2, 28, 36; 27 & 28 Vict. 56, s. 6. So as to foreign cards. 16 & 17 Vict. c. 107, ss. 114—116; 39 & 40 Vict. c. 36, s. 286.

Chain Cables.]—*See* "Anchors."

Chicory and Coffee.]—Imitations of coffee and coffee mixtures not

[1] A more detailed summary of all or most of these statutes will be found in Mr. Safford's "Law of Merchandise Marks," Appendix D., and in Mr. Sebastian's "Trade Marks." The author was indebted to the former book for the suggestion of many of the classes of goods referred to, and to the Official Index to Statutes for reference to the statutes mentioned under the different heads. Statutes (as the Copyright Acts, for example) which require marks to be put upon particular goods in order to secure some right or privilege (as copyright in designs, for instance) are not here included. They would naturally be sought for in works devoted to the law regarding the rights or privileges in question.

[2] The Scotch and Irish statutes are given by Mr. Safford.

to be sold, except in packets containing one or more quarters of a pound, each packet bearing a label showing the amount of duty, and a label showing the constituents of the mixture. 45 & 46 Vict. c. 41, s. 6.

CLOCKS.]—Bearing marks implying manufacture in the United Kingdom not to be imported. 39 & 40 Vict. c. 36, s. 42.

CUTLERY.]—*See* above, p. 102, and Sheffield marks, Kerly on Trade Marks, p. 112.

GOLD.]—*See* "Plate."

GUNPOWDER.]—If sold in quantities greater than 1 lb., to be packed in closed packages and labelled "Gunpowder." 38 & 39 Vict. c. 17, s. 32.

HOPS.]—Bags to be marked with the name of the owner, the parish and county where they were grown, and the date, number, and weight; penalty for false marking. 54 Geo. 3, c. 123, s. 1; 29 & 30 Vict. c. 37, s. 2. Implied warranty that the marks are genuine. 29 & 30 Vict. c. 37, s. 18.

LINEN.]—Penalties for affixing counterfeit marks to linen. 17 Geo. 2, c. 30; 18 Geo. 2, c. 24. English linen for exportation to be marked with name and place of abode of the maker and of the exporter, the year and number and length. 18 Geo. 2, c. 24, s. 2.

MARGARINE.]—All imitations of butter to be sold, and marked, when exposed for sale, as "margarine." 50 & 51 Vict. c. 29, ss. 3—7. Penalties for dealing in, selling, or exposing for sale any margarine contrary to the Act. *Ibid.* s. 7. Considerable amendments, affecting both milk-blended butter and margarine, are made by the Butter and Margarine Act, 1907 (7 Edw. 7, c. 21). *See* also the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51).

MEDALS (Exhibition).]—Penalties for false representations as to grants of medals or certificates of the Exhibitions of 1851 or 1862. 26 & 27 Vict. c. 119.

PLATE.[1]]—The rules regulating the marking and standards of fineness required and allowed in respect of gold and silver goods are contained in the statutes referred to below.[2] They require to be marked on the goods the first letters of the Christian and surnames of the worker (12 Geo. 2, c. 26, s. 5), and the *assay mark* of the town where the goods were made, or (if they were not made in an assay town) marked (2 Hen. 6, c. 17, London; 12 & 13 Will. 3, c. 4, York,[3] Exeter, Bristol,[4] Chester, and Norwich; 1 Anne, c. 3, Newcastle-on-Tyne; 13 Geo. 3, c. 52, Sheffield; 5 Geo. 4, c. lii. s. 1, *local*, Birmingham), the variable or date mark to show the year of marking (12 & 13 Will. 3, c. 4, s. 3; 12 Geo. 2, c. 26, s. 5). And, in addition, on gold wares of twenty-two or eighteen carats fineness, the *standard* and *quality* marks of a crown and 22 (7 & 8 Vict. c. 22, s. 15), or a crown and 18 (38 Geo. 3, c. 69, s. 2) respectively; and on silver wares of 11 ozs. 10 dwts. and 11 ozs. 2 dwts. fineness, the standard marks of Britannia and a lion *passant* respectively (6 Geo. 1, c. 11, s. 41; 12 Geo. 2, c. 26), and a *duty* mark[5] of the king's head. (24 Geo. 3, sess. 2, c. 53, s. 5.)

Before 1854, gold wares were required to be of either twenty-two or

[1] See Encyclopædia Britannica, "Plate."

[2] These statutes are summarised by Mr. Sebastian, 4th ed., p. 614, and Mr. Safford, p. 204.

[3] The marks for these towns are now discontinued.

[4] Bristol never exercised its right to mark: Sebastian, 4th ed., p. 614.

[5] The duty on plate is now abolished: 53 Vict. c. 8, s. 10.

eighteen carats fineness (38 Geo. 3, c. 69); but her Majesty was authorised, under an Act of that year (17 & 18 Vict. c. 96), by Order in Council, to allow any standard for gold plate not being less than one-third part of the whole in fine gold, and to approve any instrument for stamping or marking the wares, setting forth in figures the actual fineness thereof according to the standard declared. The new inferior standard gold wares were declared not to be liable to duty. Under this Act, the nine, twelve, and fifteen carat gold standards have been authorised.

Silver wares must all be of either the 11 ozs. 10 dwts. or 11 ozs. 2 dwts. of silver to the pound troy standard. (6 Geo. 1, c. 11.)

The following wares are exempted from marking:—chains, necklace beads, lockets, filigree work, shirt buckles or brooches, stamped medals, or spouts to china, stone, or earthenware teapots, or any of them, of any weight; tippings, swages, or mounts, or any of them, not exceeding 10 dwts. of silver each, except only necks and collars for castors, cruets, or glasses, appertaining to any sort of stands or frames; silver goods not weighing 5 dwts., except necks, collars, and tops for castors, cruets, or glasses appertaining to any sort of stands or frames, buttons to be affixed or set on any wearing apparel, solid sleeve buttons, and solid studs, not having a bissiled edge soldered on, wrought seals, blank seals, bottle tickets, shoe clasps, patch boxes, salt spoons, salt shovels, salt ladles, tea spoons, tea strainers, caddy ladles, buckles (shirt buckles or brooches before mentioned excepted), and pieces to garnish cabinets, or knife cases, or tea chests, or bridles, or stands, or frames. (30 Geo. 3, c. 31.) Gold wedding rings are to be marked as gold plate. (18 & 19 Vict. c. 60, s. 1.)

Imported foreign plate, except ornamental plate, made before 1800 (5 & 6 Vict. c. 56, s. 6), is to be marked as English plate (5 & 6 Vict. c. 47, s. 59), and under sec. 2 of 39 & 40 Vict. c. 35, had to be marked with the figure F on an oval shield. The hall mark of foreign plate is now regulated by the Hall Marking of Foreign Plate Act, 1904 (4 Edw. 7, c. 6), and the Order in Council of May 11th, 1906 (Statutory Rules and Orders, 1906, No. 386), made under that Act, and printed below, p. 180. *See* also as to the procedure to be followed, sec. 10 of the Revenue Act, 1883 (46 & 47 Vict. c. 55).

Penalties for counterfeiting assay marks and connected offences are provided by 7 & 8 Vict. c. 22.

The importation of clocks and watches, or any other article of metal impressed with any mark or stamp, representing or in imitation of any legal British assay mark or stamp, or purporting by any mark or appearance to be of the manufacture of the United Kingdom, is forbidden (39 & 40 Vict. c. 36, s. 42).

Watch cases of foreign manufacture brought for assay to any assay office in the United Kingdom are to be marked as directed by the Order in Council of the 7th of May, 1907, made under the Merchandise Marks Act, 1887, s. 8.

Gold and silver watch cases, forming parts of finished watches imported into the United Kingdom from abroad are gold and silver plate within the meaning of the Customs Act, 1842: *Goldsmith Co.* v. *Wyatt*, [1907] 1 K. B. 95. In 1907 an Act (7 Edw. 7, c. 8) was passed exempting existing stocks of such goods.

Plated Goods.]—Makers of plated goods in Sheffield, or within 100 miles thereof, are authorised to strike on their goods their surnames, or the names of their firm, with a mark (not being an imitation of an assay mark) which is approved by the guardians of the assay office and registered (24 Geo. 3, sess. 2, c. 20, ss. 2 and 3).

Silver.]—*See* "Plate."

Stores (Public).]—The marks enumerated below to denote that stores to which they are affixed are his Majesty's property; the marks not to be applied by unauthorised persons[1]; obliterating the marks with intent to conceal his Majesty's property in the stores is a felony; regimental necessaries, &c., issued to soldiers, militiamen, or volunteers are excepted from the Act (38 & 39 Vict. c. 25; 44 & 45 Vict. c. 58, s. 156).

Stores.	Marks.
Hempen cordage and wire rope . .	White, black, or coloured worsted threads laid up with the yarns and wire respectively.
Canvas, fearnought, hammocks, and seamen's bags.	A blue line in a serpentine form.
Bunting	A double tape in the warp.
Candles	Blue or red cotton threads in each wick, or wicks of red cotton.
Timber or metal. Any stores not before enumerated, whether similar to the above or not.	The name of her Majesty (Queen Victoria), her predecessors, her heirs or successors, or of any public department or any branch thereof, or the broad arrow, or a crown, or her Majesty's arms, whether such broad arrow, crown, or arms be alone or be in combination with any such name as aforesaid, or with any letters denoting any such name.

Tobacco.]—Cavendish and negro-head tobacco to be delivered for home consumption in separate packets not exceeding 1 lb. or less than 1 oz. in weight, and wrapped in a wrapper and label approved by the Commissioners of Customs; not to be sold, or had in possession, except wrapped and labelled as aforesaid; penalties for forging labels (26 & 27 Vict. c. 7, ss. 3—8).

Weights and Measures.]—To be marked with proper indicating marks: see the Weights and Measures Acts, 1878 to 1904, 41 & 42 Vict. c. 49; 52 & 53 Vict. c. 21; 4 Edw. 7, c. 28.

Yarn.]—Penalty for reeling short lengths of yarn, 17 Geo. 3, c. 11 (ss. 17—19, 24, in part repealed by the S. L. Rev. Act, 1861; ss. 12, 22, repealed in part; ss. 20, 23, repealed by 47 & 48 Vict. c. 43, s. 4; and s. 24 by 56 & 57 Vict. c. 61, s. 2).

[1] See 28 & 29 Vict. c. 89, s. 45 (Greenwich Hospital Mark), and 38 & 39 Vict. c. 25, s. 17.

APPENDIX VIII.

PATENTS AND DESIGNS ACT, 1907.

91.—(1) If his Majesty is pleased to make any arrangement with the government of any foreign State for mutual protection of inventions, or designs, or trade marks, then any person who has applied for protection for any invention, design, or trade mark, in that State shall be entitled to a patent for his invention or to registration of his design or trade mark, under this Act or the Trade Marks Act, 1905, in priority to other applicants, and the patent or registration shall have the same date as the date of the application in the foreign State,

Provided that :—

(a) The application is made in the case of a patent within twelve months, and in the case of a design or trade mark within four months, from the application for protection in the foreign State ; and

(b) Nothing in this section shall entitle the patentee or proprietor of the design or trade mark to recover damages for infringements happening prior to the actual date on which his complete specification is accepted, or his design or trade mark is registered in this country.

(2) The patent granted for the invention or the registration of a design or trade mark shall not be invalidated—

(a) In the case of a patent, by reason only of the publication of a description of, or use of, the invention ; or

(b) In the case of a design, by reason only of the exhibition or use of, or the publication of a description or representation of, the design ; or

(c) in the case of a trade mark, by reason only of the use of the trade mark ;

in the United Kingdom or the Isle of Man during the period specified in this section as that within which the application may be made.

(3) The application for the grant of a patent or the registration of a design, or the registration of a trade mark, under this section, must be made in the same manner as an ordinary application under this Act or the Trade Marks Act, 1905 :

Provided that—

(a) In the case of patents the application shall be accompanied by a complete specification, which, if it is not accepted within the twelve months from the application for protection in the foreign State, shall with the drawings (if any) be open to public inspection at the expiration of that period ; and

(b) In the case of trade marks any trade mark the registration of

which has been duly applied for in the country of origin may be registered under the Trade Marks Act, 1905.

(4) The provisions of this section shall apply only in the case of those foreign States with respect to which his Majesty by Order in Council declares them to be applicable, and so long only in the case of each State as the Order in Council continues in force with respect to that State.

(5) Where it is made to appear to his Majesty that the legislature of any British Possession has made satisfactory provision for the protection of inventions, designs, and trade marks, patented or registered in this country, it shall be lawful for his Majesty, by Order in Council, to apply the provisions of this section to that Possession, with such variations or additions, if any, as may be stated in the order.

ORDERS IN COUNCIL APPLYING THE PROVISIONS AS TO INTERNATIONAL AND COLONIAL ARRANGEMENTS TO FOREIGN STATES AND BRITISH POSSESSIONS.[1]

Colonial Arrangements.

Colony.	Date of Order in Council.	Statutory Rules and Orders.
Ceylon	7 Aug., 1903	1903, p. 268, No. 933.
Commonwealth of Australia	26 March, 1907	1907, p. 773, No. 263.
Queensland[2]	17 Sept., 1885	Vol. 5, p. 141.
New Zealand	8 Feb., 1890	1890, p. 887.
Tasmania[2]	30 April, 1894	1894, p. 54, No. 123.
Trinidad and Tobago ...	12 Aug., 1907	1907, p. 777, No. 652.
Western Australia[2] ...	11 May, 1895	1895, p. 587, No. 245.

International Arrangements.[3]

Foreign State.	Date of Order in Council.	Statutory Rules and Orders.
Austria-Hungary	17 May, 1909	No. 585 of 1909.
Belgium	26 June, 1884	Vol. 5, p. 142.
Brazil	26 June, 1884	Vol. 5, p. 142.
Cuba...	12 Jan., 1905	1905, p. 270, No. 10.
Denmark (including the Faroë Islands)	20 Nov., 1894	1894, p. 56, No. 542.
Dominican Republic ...	21 Oct., 1890	1890, p. 887.

[1] Sec. 103 and 104 of the Patents, &c. Act, 1883. Now replaced by sec. 91 of the Patents and Designs Act, 1907.

[2] Consequent on the Order in Council applying the section to the Commonwealth of Australia, the Orders in Council relating to Queensland and Western Australia were revoked on March 26th, 1907, and that relating to Tasmania on August 12th, 1907.

[3] As to Guatemala, Salvador, and Ecuador, see p. 159. Those countries, &c., marked * (including Ecuador) are not parties to the International Convention, but similar arrangements exist between them and Great Britain for the mutual protection of trade marks.

INTERNATIONAL ARRANGEMENTS[1]—*continued.*

Foreign State.	Date of Order in Council.	Statutory Rules and Orders.
*Ecuador	16 May, 1893	1893, p. 65.
France (with Algeria and Colonies)	26 June, 1884	Vol. 5, p. 142.
Germany	9 Oct., 1903	1903, p. 1170, No. 867.
*Greece	15 Oct., 1894	1894, p. 57, No. 234.
*Honduras	26 Sept., 1901	1901, p. 320, No. 799.
Italy	26 June, 1884	Vol. 5, p. 142.
Japan	7 Oct., 1899	1899, p. 964, No. 759.
Mexico	28 May, 1889	Vol. 5, p. 146.
Netherlands	26 June, 1884	Vol. 5, p. 142.
Netherlands (East Indian Colonies)	17 Nov., 1888	Vol. 5, p. 145.
Netherlands (Curaçoa and Surinam)	17 May, 1890	1890, p. 886.
Norway	See Sweden.	
*Paraguay	24 Sept., 1886	Vol. 5, p. 144.
Portugal (with the Azores and Madeira)	26 June, 1884	Vol. 5, p. 142.
*Roumania	5 Aug., 1892	1892, p. 650.
Servia	26 June, 1884	Vol. 5, p. 142.
Spain	26 June, 1884	Vol. 5, p. 142.
Sweden	9 July, 1885	Vol. 5, p. 143.
Switzerland...	26 June, 1884	Vol. 5, p. 142.
Tunis	26 June, 1884	Vol. 5, p. 142.
United States	12 July, 1887	Vol. 5, p. 145.
*Uruguay	24 Sept., 1886	Vol. 5, p. 144.

PLACES UNDER BRITISH JURISDICTION.

Penalties on British subjects committing offences against the Patents, &c. Acts, 1883 to 1888.[2]

Places.	Date of Order in Council.	Statutory Rules and Orders
Africa— (*a*) *Continent and adjacent Islands* (excluding certain of the territories to which the Order noted infra, under (*b*), and Orders dealing with other parts[3] apply).	15 Oct., 1889, Art. 55 ...	Vol. 3, pp. 259, 273.
(*b*) *East Africa*	7 July, 1897, Art. 17 ...	1897, pp. 134, 141, No. 575.

[1] See note (3), previous page.

[2] Orders in Council issued under 41 & 42 Vict. c. 67, now replaced by 53 & 54 Vict. c. 37. The Patents, &c. Acts, 1883 to 1888, are now repealed, and their provisions creating offences are replaced by secs. 66 and 67 of the Trade Marks Act, 1905, and secs. 89 and 90 of the Patents and Designs Act, 1907. Sec. 98 of the last-mentioned Act contains a saving as to Orders in Council made under the repealed Acts.

[3] See the Index to the Statutory Rules and Orders in force on December 31st, 1903, and subsequent volumes.

PLACES UNDER BRITISH JURISDICTION—*continued.*

Places.	Date of Order in Council.	Statutory Rules and Orders.
Brunei	22 Nov., 1890, Art. 40 ...	1890, p. 677.[1]
China and Corea	11 Feb., 1907, Art. 3 ...	1907, p. 185, No. 107.
Egypt	8 Aug., 1899, Art. 57 ...	1899, pp. 643, 662, No. 595.[2]
Morocco	28 Nov., 1889, Art. 112...	Vol. 3, pp. 524, 558.
Ottoman Empire (and see Egypt, supra)	8 Aug., 1899, Art. 57 ...	1899, pp. 643, 662, No. 595.
Persia	13 Dec., 1889, Art. 292...	Vol. 3, pp. 698, 766.
Persian Coast and Islands...	13 Dec., 1889, Art. 50 ...	Vol. 3, pp. 796, 815.
Siam	4 April, 1906, Art. 59 ...	1906, p. 227, No. 282.
Somaliland	7 Oct., 1899, Art. 12 ...	1899, pp. 705, 711, No. 758.
Turkey. See Ottoman Empire.	... ...	... ...
Zanzibar	7 July, 1897, Art. 17 ...	1897, pp. 159, 165, No. 576.

[1] The Brunei Order, 1901, No. 588, does not appear to affect the above-mentioned Order, so far as relates to patents, &c.

[2] This Order (the Ottoman Order in Council, 1899) is (Art. 12) suspended as regards matters within the jurisdiction of the Egyptian Courts established with his Majesty's concurrence, and the limits of the Order as respects Egypt do not extend to any place south of the 22nd parallel of north latitude.

APPENDIX IX.

THE INTERNATIONAL CONVENTION.[1]

INTERNATIONAL CONVENTION BETWEEN THE GOVERNMENTS OF BELGIUM, BRAZIL, SPAIN, FRANCE, GUATEMALA,[2] ITALY, NETHERLANDS, PORTUGAL, SALVADOR,[2] SERVIA, AND SWITZERLAND, FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

Signed at Paris, March 20th, 1883.

[*Ratifications exchanged at Paris, June 6th*, 1884.]

[Translation.]

ART. I. THE Governments of Belgium, Brazil, Spain, France, Guatemala,[2] Italy, Holland, Portugal, Salvador,[2] Servia, and Switzerland constitute themselves into a Union for the protection of Industrial Property.

ART. II. The subjects or citizens of each of the Contracting States shall, in all the other States of the Union, as regards patents, industrial designs or models, trade marks and trade names, enjoy the advantages that their respective laws now grant, or shall hereafter grant, to their own subjects or citizens.

Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided they observe the formalities and conditions imposed on subjects or citizens by the internal legislation of each State.

ART. III. Subjects or citizens of States not forming part of the Union, who are domiciled, or have *real or effective* industrial or commercial establishments in the territory of any of the States of the Union, shall be assimilated to the subjects or citizens of the Contracting States.

The italicised words were added by the Brussels Act.

ART. IV. Any person who has duly applied for a patent, industrial design or model, or trade mark in one of the Contracting States, shall

[1] Further articles were agreed upon at the Conference at Rome in 1886 (see Parliamentary Paper, C.—4837), but were never ratified. The articles printed below, p. 160, were agreed upon at the Conference at Madrid in 1891, and they have been duly ratified by Great Britain, Spain, France, Switzerland, and Tunis. The articles printed below, p. 161, were not ratified by Great Britain. Amendments of the Convention were made by the Brussels Act of December 14th, 1900. These are italicised or are referred to in the notes. Servia and the Dominican Republic have not ratified the Brussels Act. Further notes on the articles of the Convention will be found—Kerly, 3rd ed., p. 743.

[2] Salvador withdrew from this Convention by notice dated September 6th, 1886; Guatemala by notice dated November 27th, 1894, taking effect on November 8th, 1895.

enjoy, as regards registration in the other States, and reserving the rights of third parties, a right of priority during the periods hereinafter stated.

Consequently, subsequent registration in any of the other States of the Union before expiry of these periods shall not be invalidated through any acts accomplished in the interval, either, for instance, by another registration, by publication of the invention, or by the working of it [by a third party] by the sale of copies of the design or model, or by use of the trade mark.

The above-mentioned terms of priority shall be six months for patents and three months for industrial designs and models and trade marks. A month longer is allowed for countries beyond sea.

The Brussels Act substitutes "twelve" and "four" for "six" and "three" and omits the other bracketed words. Art. IV. as amended provides a period of four months during which the mark may be registered in all the Contracting States, and the efficacy of the registration cannot be affected by Acts which have been accomplished in the interval and in particular by another registration or the use of the mark.

[Art. IVB. Added by the Brussels Act relates only to Patents.]

ART. V. The introduction by the patentee into the country where the patent has been granted of objects manufactured in any of the States of the Union shall not entail forfeiture.

Nevertheless, the patentee shall remain bound to work his patent in conformity with the laws of the country into which he introduces the patented objects.

Cf. Section 27 of the Patents and Designs Act, 1907.

ART. VI. Every trade mark duly registered in the country of origin shall be admitted for registration, and protected in the form originally registered in all the other countries of the Union.

That country shall be deemed the country of origin where the applicant has his chief seat of business.

If this chief seat of business is not situated in one of the countries of the Union, the country to which the applicant belongs shall be deemed the country of origin.

Registration may be refused if the object for which it is solicited is considered contrary to morality or public order.

ART. VII. The nature of the goods on which the trade mark is to be used can, in no case, be an obstacle to the registration of the trade mark.

ART. VIII. A trade name shall be protected in all the countries of the Union, without necessity of registration, whether it form part or not of a trade mark.

ART. IX. All goods illegally bearing a trade mark or trade name may be seized on importation into those States of the Union where this mark or name has a right to legal protection.

The Act of Brussels adds: "*In those States of which the legislation does not admit of the seizure on importation, this seizure may be replaced by an injunction against importation. The authorities are not obliged to effect a seizure in case of transit.*"

Arts. IX. and X. are applied in English law by the provisions of the M. M. A., 1887, which go much further than, and therefore satisfy, the provisions of the

Convention. This article was a great benefit to the States which made liberal provision in regard to the marks. But this benefit gradually diminished owing to the tendency of all the States of the Union to adopt a broader conception of marks.

The seizure shall be effected at the request of either the proper public department or of the interested party, pursuant to the internal legislation of each country.

ART. X. The provisions of the preceding article shall apply to all goods falsely bearing the name of any locality as indication of the place of origin, when such indication is associated with a trade name of a fictitious character or assumed with a fraudulent intention.

Any producer of, or trader in, such goods, established either in the locality falsely designated as the place of origin or *in the region in which such locality is situated* shall be deemed an interested party.

See note to Art. IX.

ART. XIB. *Persons resorting to the countries referred to in the Convention* (Arts. II. and III.) *shall enjoy in all States of the Union the protection accorded to natives against dishonest competition.*

ART. XI. The high contracting parties agree to grant *in conformity with the legislation of each country* temporary protection to patentable inventions, to industrial designs or models, and trade marks, for articles exhibited at official or officially recognised international exhibitions *held in the territory of one of them.*

This article is carried out as regards patents and designs by secs. 45 and 59 of the Patents and Trade Marks Act, 1907. No analogous provision was required as regards trade marks, as the right to a trade mark in England is acquired not by priority of registration, but by priority of user.

ART. XII. Each of the high contracting parties agrees to establish a special government department for industrial property, and a central office for communication to the public of patents, industrial designs or models, and trade marks.

ART. XIII. An international office shall be organised under the name of "Bureau International de l'Union pour la Protection de la Propriété Industrielle" (International Office of the Union for the Protection of Industrial Property).

This office, the expense of which shall be defrayed by the Governments of all the contracting States, shall be placed under the high authority of the central administration of the Swiss Confederation, and shall work under its supervision. Its functions shall be determined by agreement between the States of the Union.

ART. XIV. The present Convention shall be submitted to periodical revisions, with a view to introducing improvements calculated to perfect the system of the Union.

To this end conferences shall be successively held in one of the Contracting States by delegates of the said States. The next meeting shall take place in 1885 at Rome.

ART. XV. It is agreed that the high contracting parties respectively reserve to themselves the right to make separately, as between themselves, special arrangements for the protection of industrial property, in so far as such arrangements do not contravene the provisions of the present Convention.

ART. XVI. States which have not taken part in the present Convention shall be permitted to adhere to it at their request.

Such adhesion shall be notified officially through the diplomatic channel to the Government of the Swiss Confederation, and by the latter to all the others. It shall imply complete accession to all the clauses and admission to all the advantages stipulated by the present Convention, *and shall take effect one month after the despatch of the notification made by the Swiss Government to the other States of the Union, unless a later date is indicated by the acceding State.*

ART. XVII. The execution of the reciprocal engagements contained in the present Convention is subordinated, in so far as necessary, to the observance of the formalities and rules established by the constitutional laws of those of the high contracting parties who are bound to procure the application of the same, which they engage to do with as little delay as possible.

ART. XVIII. The present Convention shall come into operation one month after the exchange of ratifications, and shall remain in force for an unlimited time, till the expiry of one year from the date of its denunciation. This denunciation shall be addressed to the Government commissioned to receive adhesions. It shall only affect the denouncing State, the Convention remaining in operation as regards the other contracting parties.

[*Here follow the Signatures.*]

Final Protocol.

On proceeding to the signature of the Convention concluded this day between the Governments of Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Servia, and Switzerland, for the protection of industrial property, the undersigned plenipotentiaries have agreed as follows :—

1. The words "industrial property" are to be understood in their broadest sense ; they are not to apply simply to industrial products properly so called, but also to agricultural products (wines, corn, fruits, cattle, &c.), and to mineral products employed in commerce (mineral waters, &c.).

2. Under the word "patents" are comprised the various kinds of industrial patents recognised by the legislation of each of the Contracting States, such as importation patents, improvement patents, &c.

3. The last paragraph of Article II. does not affect the legislation of each of the Contracting States as regards the procedure to be followed before the tribunals, and the competence of those tribunals.[1]

4. Paragraph I. of Article VI. is to be understood as meaning that no trade mark shall be excluded from protection in any State of the Union from the fact alone that it does not satisfy, in regard to the signs composing it, the conditions of the legislation of that State ; provided that on this point it comply with the legislation of the country of origin, and that it had been properly registered in said country of origin. With

[1] Article 3 B relates to compulsory working of patents.

this exception, which relates only to the form of the mark,[1] and under reserve of the provisions of the other Articles of the Convention, the internal legislation of each State remains in force.

To avoid misconstruction, it is agreed that the use of public armorial bearings and decorations may be considered as being contrary to public order in the sense of the last paragraph of Article VI.

5. The organisation of the special department for industrial property mentioned in Article XII. shall comprise, so far as possible, the publication in each State of a periodical official paper.

6. The common expenses of the International office, instituted by virtue of Article XIII., are in no case to exceed for a single year a total sum representing an average of 2,000fr. for each Contracting State.

To determine the part which each State should contribute to this total of expenses, the Contracting States, and those which may afterwards join the Union, shall be divided into six classes, each contributing in the proportion of a certain number of units, namely :—

1st class	... ...	25 units.
2nd „	... ...	20 „
3rd „	... ...	15 „
4th „	... ...	10 „
5th „	... ...	5 „
6th „	... ...	3 „

These coefficients will be multiplied by the number of States in each class, and the sum of the result thus obtained will supply the number of units by which the total expense has to be divided. The quotient will give the amount of the unit of expense.

The Contracting States are classed as follows, with regard to the division of expense :—

1st Class	...	France, Italy.
2nd „	...	Spain.
3rd „	...	Belgium, Brazil, Portugal, Switzerland.
4th „	...	Holland.
5th „	...	Servia.
6th „	...	Guatemala, Salvador.

The Swiss Government will superintend the expenses of the International Office, advance the necessary funds, and render an annual account, which will be communicated to all the other Administrations.

The International Office will centralise information of every kind relating to the protection of industrial property, and will bring it together in the form of a general statistical statement, which will be distributed to all the Administrations. It will interest itself in all matters of common utility to the Union, and will edit, with the help of the documents supplied to it by the various Administrations, a periodical paper in the French language dealing with questions regarding the object of the Union.

The numbers of this paper, as well as all the documents published by

[1] The expressions "in regard to the signs composing it" and "only to the form of the mark" were, no doubt, used because special attention was directed to name marks, which at that time were not considered as marks in a certain number of States.

the International Office, will be circulated among the Administrations of the States of the Union in the proportion of the number of contributing units as mentioned above. Such further copies as may be desired, either by the said Administrations or by societies or private persons, will be paid for separately.

The International Office shall at all times hold itself at the service of members of the Union, in order to supply them with any special information they may need on questions relating to the international system of industrial property.

The Administration of the country in which the next Conference is to be held will make preparation for the transactions of that Conference, with the assistance of the International Office.

The Director of the International Office will be present at the meetings of the Conferences, and will take part in the discussions, but without the privilege of voting.

He will furnish an annual report upon his administration of the office, which shall be communicated to all the members of the Union.

The official language of the International Office will be French.

7. The present final protocol, which shall be ratified together with the Convention concluded this day, shall be considered as forming an integral part of, and shall have the same force, validity, and duration as the said Convention.

[Here follow the signatures.]

Accessions and Withdrawals.[1]

Australia acceded August 5, 1907.
Austria-Hungary acceded January 1, 1909.[2]
Cuba acceded September 22, 1904.
Denmark (including the Faroë Islands) acceded October 1, 1894.
Dominican Republic acceded December 8, 1884.
Ecuador acceded December 21, 1883, but withdrew February 27, 1886.
Germany acceded May 1, 1903.
Greece, declaration October 15, 1894.
Guatemala withdrew by notice dated November 27, 1894, taking effect November 8, 1895.
Japan acceded by notice dated April 15, 1899, taking effect July 15, 1899.
Salvador, a signatory party, withdrew September 6, 1886.
Sweden acceded June 18, 1885.
Trinidad and Tobago acceded in May 14, 1908.
United States acceded May 30, 1887.

[1] See the list printed at pp. 151, 152, where the list of British Possessions to which the Convention is now applicable will also be found.

[2] See the Law of December 29th, 1908.

ARRANGEMENT BETWEEN GREAT BRITAIN, SPAIN, FRANCE, SWITZERLAND, AND TUNIS, FOR THE PREVENTION OF FALSE INDICATIONS OF ORIGIN OF GOODS.[1]

Signed at Madrid, April 14, 1891.

[*Ratifications exchanged at Madrid, June* 15, 1892.]

[Translation.]

THE undersigned Plenipotentiaries of the States hereinafter enumerated,

In view of Article XV. of the International Convention of the 20th March, 1883, for the protection of industrial property,

Have mutually concluded the following arrangement, subject to ratification :—

ART. I. All goods bearing a false indication of origin, in which one of the Contracting States, or a place situated therein, shall be directly or indirectly indicated as being the country or place of origin, shall be seized on importation into any of the said States.

The seizure may also take place either in the State where the false indication of origin has been applied, or in that into which the goods bearing the false indication may have been imported.

If the law of any State does not permit seizure on importation, such seizure shall be replaced by prohibition of importation.

If the law of any State does not permit seizure in the interior, such seizure shall be replaced by the remedies assured in such case to natives by the law of such State.

ART. II. The seizure shall take place at the request either of the proper government department, or of an interested party, whether individual or society, in conformity with the domestic law of each State.

The authorities are not bound to effect the seizure of goods in transit.

ART. III. The present stipulations are not intended to prevent the vendor from indicating his name or address upon goods coming from a country other than that where the sale takes place ; but in such case the address or the name must be accompanied by a clear indication in legible characters of the country or place of manufacture or production.

ART. IV. The tribunals of each country will decide what appellations, on account of their generic character, do not fall within the provisions of the present arrangement, regional appellations concerning the origin of products of the vine being, however, not comprised in the reserve provided for by the present article.

It has been suggested that, instead of the courts of law being left to deal with the question *pro re nata*, either the Contracting States or the competent authorities in every country should be required to determine beforehand what local names in their territory are to be considered as generic. (*Trans. Int. Ass. Prot. Ind. Prop.*, Vol. 1. (1897).) There would, however, be great difficulty in carrying out either suggestion. In some cases the law of the country might not permit the Executive to trespass in this way on the domain of the Courts. Names that ought to find a place in the generic lists would be omitted. Who would decide as to translated names and names of countries?—as in the case of "Russia leather," which in German (*Russisches leder*) means leather from Russia, while in England and in France (*cuir de Russie*) it means a peculiar kind of leather called in Germany *guchtenleder*. (*Ib.* pp. 179, 180, and n. 120.)

[1] Parliamentary Paper, Treaty Series, No. 13 (1892),

ART. V. States which are parties to the Union for the Protection of Industrial Property, and who have not adhered to the present arrangement, shall be allowed to accede on demand in the manner prescribed by Article XVI. of the Convention of the 20th March, 1883, for the Protection of Industrial Property.

ART. VI. The present arrangement shall be ratified, and the ratifications shall be exchanged at Madrid within six months at the latest.

It shall come into force one month after the exchange of ratifications, and have the same force and duration as the Convention of the 20th March, 1883.

In witness whereof the plenipotentiaries of the States hereinafter enumerated have signed the present arrangement at Madrid, 14th April, 1891.

[Signed on behalf of Brazil, Spain, France and Tunis, Great Britain, Guatemala, Portugal, and Switzerland, but Brazil, Guatemala, and Portugal did not ratify.]

ARRANGEMENT RELATING TO THE INTERNATIONAL REGISTRATION OF TRADE MARKS.[1]

ART. I. The subjects or citizens of each of the Contracting States may ensure in all the other States the protection of their trade marks accepted for registration in the country of origin by applying for the said marks at the International Office at Berne, through the agency of the administration of the said country of origin.

ART. II. The subjects or citizens of States which have not adhered to the present arrangement who satisfy the conditions of Article III. of the Convention shall be assimilated to the subjects or citizens of the Contracting States.

ART. III. The International Office shall immediately register marks applied for, in accordance with Article I. It shall notify such registration to the Contracting States. The marks registered shall be published in a supplement to the journal of the International Office, by means of a drawing or a description in the French language provided by the applicant.

With a view to provide the necessary publicity in the various States for marks so registered, each administration shall receive gratis from the International Office such a number of copies of the said publication as it shall think fit to demand.

ART. IV. From the date of registration so made at the International Office, the protection in each of the Contracting States shall be the same as if the mark had been directly registered there.

ART. V. In the countries where their law authorises them to do so, the administrations to which the International Office gives notice of the

[1] This translation is by Mr. J. F. Iselin (*Trans. Int. Ass. Prot. Ind. Prop.*, Vol. I. (1897), p. 111). The restricted Union includes the following States:—Austria, Belgium, Brazil, France, Italy, the Netherlands, Portugal, Spain, Switzerland, and Tunis. It applies also to the respective colonies of the Contracting States mentioned as forming part of the General Union of 1883. Great Britain did not sign, see above, p. 151.

registration of a mark shall have power to declare that protection cannot be granted to such mark in their territory. They shall exercise such power within a year of the notice prescribed by Article III.

Such a declaration so notified to the International Office shall be transmitted by it without delay to the administration of the country of origin and to the owner of the mark. The person interested shall have the same remedies as if the mark had been directly registered by him in the country where the protection is refused.

ART. VI. The protection resulting from registration at the International Office shall last for twenty years from such registration, but cannot be invoked in favour of a mark which no longer enjoys legal protection in its country of origin.

ART. VII. Registration may always be renewed in accordance with the provisions of Articles I. and III.

Six months before the expiry of the period of protection, the International Office shall give official notice to the administration of the country of origin and to the owner of the mark.

ART. VIII. The administration of the country of origin shall fix at its pleasure, and shall raise for its own profit, a fee which it may demand from the owner of the mark for which international registration is applied for.

To this fee shall be added an international duty of 100 francs, the annual produce of which shall be divided equally amongst the Contracting States, after deducting the cost occasioned by the execution of this arrangement.

ART. IX. The administration of the country of origin shall give notice to the International Office of the annulments, erasures, disclaimers, transfers, and other changes which shall take place in the ownership of the mark.

The International Office shall register these changes, give notice of them to the contracting administrations, and immediately publish them in its journal.

ART. X. The administrations shall regulate by agreement the details relating to the execution of the present agreement.

ART. XI. The States of the Union for the Protection of Industrial Property which have not taken part in the present arrangement shall be permitted to adhere to it upon their demand, and in the form prescribed by Article XVI. of the Convention of the 20th March, 1883, for the Protection of Industrial Property.

As soon as the International Office shall be informed that a State has adhered to the present arrangement, it shall send to the administration of that State, in accordance with Article III., a general notice of the marks which at that time enjoy international protection.

ART. XII. The present arrangement shall be ratified, and the ratifications shall be exchanged at Madrid within six months at the latest. It shall come into force one month after the exchange of ratifications, and shall have the same force and duration as the Convention of the 20th March, 1883.

Final Protocol.

Upon proceeding to the signature of the arrangement relating to the International Registration of Trade Marks, concluded this day, the

Plenipotentiaries of the States which have adhered to the said arrangement have agreed as follows :—Doubts having arisen as to the scope of Article V., it is understood that the power of refusal which this Article leaves to the administrations does not affect the provisions of Article VI. of the Convention of the 20th March, 1883, or of paragraph 4 of the accompanying final protocol, these provisions being applicable to marks registered at the International Bureau, as they are, and shall still continue to be, applicable to those directly registered in any of the Contracting States. The present protocol shall have the same force and duration as the arrangement to which it relates.

This exchange of ratifications took place on June 15th, 1892.

APPENDIX X.

COLONIAL AND FOREIGN LAWS AS TO MERCHANDISE MARKS.

I. The Colonies.

[See as to places where exterritorial jurisdiction is regulated under the Foreign Jurisdiction Acts, p. 152.]

AUSTRALIA.]—The Commonwealth Trade Marks Act, 1905 (No. 20 of 1905), is fully set out in Kerly on Trade Marks, p. 761 *et seq.* Part IX. of the Act relates to the Protection of Trade Marks, and is as follows:—

PART IX.—PROTECTION OF TRADE MARKS.

Forgery or false application of trade marks.

Cf. 50 & 51 Vict. c. 28, s. 2 (1).

86. Whoever—

(a) forges a registered trade mark; or

(b) falsely applies a registered trade mark to any goods; or

(c) makes any die, block, machine, or instrument for the purpose of forging or of being used for forging a registered trade mark; or

(d) disposes of or has in his possession any die, block, machine, or instrument for the purpose of forging or of being used for forging a registered trade mark,

shall, unless he proves that he acted without intent to defraud, be guilty of an indictable offence, and liable to imprisonment for any term not exceeding three years.

Selling, &c., goods with false marks.

Ib., s. 2 (2).

87. Whoever sells or exposes for sale, or has in his possession for sale or for any purpose of trade or manufacture, any goods to which any forgery of a registered trade mark is applied or to which any registered trade mark is falsely applied, shall be guilty of an offence against this Act, unless he proves—

(a) that he acted without intent to defraud; or

(b) that the goods were manufactured in or imported into Australia and the trade mark was applied to them before the commencement of this Act, and were held by him *bonâ fide* and without intent to defraud.

Penalty: One hundred pounds.

Importing goods with false marks.

88. Whoever imports into Australia any goods to which any forgery of a registered trade mark is applied or to which a registered trade mark is falsely applied, shall, unless he proves that he did not knowingly import the goods in contravention of this Act, be guilty of an offence against this Act.

Penalty: One hundred pounds.

Aiding and abetting offences.

Ib., s. 11.

89. Whoever aids, abets, counsels, or procures, or is in any way knowingly directly or indirectly concerned in or privy to—

(a) the commission of any offence against this Act; or

(b) the commission of any act outside Australia which if committed in Australia would be an offence against this Act,

shall be guilty of an offence against this Act.

Penalty: One hundred pounds.

Prohibition of importation of fraudulently marked goods.

Ib., s. 16.

90.—(1.) The following goods are prohibited to be imported, and, if imported, may be seized as forfeited to the King:—

(a) all goods to which any forgery of a registered trade mark is applied; or to which any registered trade mark is falsely applied; and

(b) all goods manufactured at any place outside Australia and having applied to them any trade mark being the registered trade mark of any manufacturer, dealer or trader in Australia, unless the trade mark is accompanied by a definite indication of the country in which the goods were made or produced.

(2.) Subject to the regulations, the Comptroller-General, or on appeal from him the Minister, may, if in his opinion the contravention has not occurred either knowingly or negligently, permit any goods which are liable to be or have been seized as forfeited under this section to be delivered to the owner or importer upon security being given to the satisfaction of the Comptroller-General that the improper marks will be effectually removed from the goods or that the goods will be forthwith exported.

(3.) All imported goods liable to be seized under this section may be seized by any officer of Customs.

(4.) The provisions of the Customs Act, 1901, shall apply to the seizure and forfeiture of goods under this section to the same extent as if they were prohibited imports under that Act.

(5.) Before taking any action under this section or permitting any officer of Customs to act thereunder, the Collector of Customs for the State may require any person requesting any action on the part of the Customs to give security in accordance with the regulations, but the Collector of Customs may act under this section without any request.

What deemed forgery of trade mark.

50 & 51 Vict. c. 28, s. 4.

91. A person shall be deemed to forge a registered trade mark who either—

(a) without the assent of the proprietor of the trade mark or the authority of this Act, makes it or a mark so nearly resembling it as to be likely to deceive; or

(b) falsifies any registered trade mark, whether by alteration, addition, effacement, or otherwise.

When trade mark deemed applied.

Ib., s. 5 (2).

When trade mark deemed applied to goods.

Ib., s. 5 (1).

92.—(1.) A trade mark shall be deemed to be applied to any thing if it is woven in, impressed on, worked into, or annexed or affixed to, the thing.

(2.) A trade mark shall be deemed to be applied to goods if—

(a) it is applied to the goods themselves; or

(b) it is applied to any covering, label, reel, or thing in or with which the goods are sold or exposed or had in possession for any purpose of trade or manufacture; or

(c) it is used in any manner likely to lead to the belief that it refers to or describes or designates the goods.

(3.) "Covering" includes any stopper, glass, bottle, vessel, box, capsule, case, frame, or wrapper; and "label" includes any band or ticket.

What deemed false application of a trade mark.

Ib., s. 5 (3).

(4.) A trade mark shall be deemed to be falsely applied to goods if, without the assent of the proprietor of the trade mark or the authority of this Act, it or a mark so nearly resembling it as to be likely to deceive is applied to the goods.

Trade mark, how described in pleading.

50 & 51 Vict. c. 28, s. 9.

93. In any indictment, information, pleading, or proceeding in relation to a registered trade mark, it shall not be necessary to set out a copy or fac-simile of the trade mark or a description of it, but the trade mark may be referred to as a registered trade mark.

BAHAMA ISLANDS.]—The Trade Marks Act, 1906 (May 29th), contains provisions (secs. 60 to 66) making the forgery or false application of a mark an offence, which are substantially similar to those relating to these matters contained in secs. 1 to 5 of the M. M. A. 1887. There are no provisions as to false trade descriptions. An offence is punishable by fine and forfeiture.

BARBADOS (No. 28 of 1888—89; No. 7 of 1896; No. 16 of 1897).]—The Act is closely modelled on the M. M. A. 1887. There are provisions as to watch cases (No. 28 of 1888—9, s. 7), Customs regulations (sec. 13), implied warranty on the sale of marked goods (sec. 14), and conventional descriptions (sec. 15). No. 7 of 1896 deals with the registration of marks; it is amended on a point of detail by No. 16 of 1897.

BERMUDA (No. 17 of 1889).]—The Act is closely modelled on the M. M. A. 1887. It has been continued in force to the end of 1913 by No. 12 of 1904.

BRITISH GUIANA (No. 2 of 1888).]—Practically a transcript of the M. M. A. 1887.

BRITISH HONDURAS (No. 3 of 1888).]—Practically a transcript of the M. M. A. 1887.

BRITISH INDIA (No. 4 of 1889).]—Closely modelled on the M. M. A. 1887. Piece goods, such as are ordinarily sold by length or by the piece, which have been manufactured in premises which are a factory under the Indian Factories Act, 1881, are not to be removed from those premises without having conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece (sec. 12 (1)). The penalty for contravention of this provision, besides forfeiture of the piece, is a maximum fine of 1,000 rupees (sec. 12 (2)).[1]

BRITISH NEW GUINEA.]—No statutory law as to merchandise marks exists.

BRITISH NORTH BORNEO (No. 9 of 1891; No. 6 of 1893).]—Practically the same as the M. M. A. 1887.

CANADA (51 Vict. c. 41; Crim. Code, 1892, Pt. 33, ss. 443—455).]—Closely modelled on the M. M. A. 1887. There are special provisions as to the fraudulent marking of bottles (51 Vict. c. 41, s. 7, and Crim. Code, 1892, s. 449), but a new section has been substituted for sec. 449 by the Criminal Code Amendment Act, 1900: words or marks on watch cases (sec. 11, and Crim. Code, 1892, s. 444); prohibiting the

[1] See further, on Indian Marks, p. 176.

importation of specified goods (sec. 22, and Crim. Code, 1892, s. 452); and as to implied warranty on sale of marked goods (sec. 18).

CAPE OF GOOD HOPE (No. 12 of 1888; No. 14 of 1889).]—Practically a transcript of the M. M. A. 1887.

CEYLON (No. 13 of 1888, and No. 14 of 1892).]—Practically a transcript of the M. M. A. 1887. No. 14 of 1892 enacts provisions as to piece goods similar to those noted supra under BRITISH INDIA.

CYPRUS (No. 12 of 1892).]—Practically a transcript of the M. M. A. 1887.

FALKLAND ISLANDS (No. 1 of 1889; No. 14 of 1889).]—Practically a transcript of the M. M. A. 1887.

FIJI ISLANDS (No. 12 of 1889; No. 2 of 1890).]—Practically a transcript of the M. M. A. 1887.

GAMBIA (No. 11 of 1888).]—Practically a transcript of the M. M. A. 1887.

GIBRALTAR (No. 4 of 1888).]—Practically a transcript of the M. M. A. 1887.

GOLD COAST COLONY (No. 4 of 1888; No. 16 of 1888).]—Practically a transcript of the M. M. A. 1887. Sec. 308 (8) of the Criminal Code (No. 12 of 1892) applies the provisions of that Code as to forgery to the forgery of trade marks. Folded woven goods are partly exempted from the provisions of No. 4 of 1888 (No. 2 of 1894, s. 16).

GRENADA (No. 9 of 1889).]—Practically a transcript of the M. M. A. 1887.

HONG KONG (No. 15 of 1890).]—Practically a transcript of the M. M. A. 1887. And see Regulations made by Governor in Council, 13th July, 1891 ("Gazette," 1st August, 1891).

ISLE OF MAN.]—Merchandise Marks Act, 1898, closely modelled on the M. M. A. 1887. Sec. 17 imposes penalties on any person who falsely represents that any goods are made by a person holding a royal warrant, or for the service of His Majesty or of any of the Royal Family, or any Government department.

JAMAICA (Nos. 18 and 22 of 1888).]—Practically a transcript of the M. M. A. 1887.

LABUAN[1] (No. 3 of 1891).]—Practically a transcript of the M. M. A. 1887.

LAGOS (No. 8 of 1888, and No. 13 of 1889).]—Practically a transcript of the M. M. A. 1887. Folded woven goods are partly exempted from No. 8 of 1888. (No. 5 of 1893, s. 17.)

LEEWARD ISLANDS (No. 34 of 1887; No. 10 of 1890).]—No. 34 of 1887 is practically a transcript of the M. M. A. 1887. No. 10 of 18. / prohibits the importation of goods unless marked with the name of the country in which they were made (sec. 1 (1)), and provides that goods marked with the name or imitation of the name of a place in the United Kingdom, or the colony, or any British possession, unless the name of the country is given, are to be treated as if such place were in British territory (sect. 1 (4)).

MAURITIUS (No. 13 of 1888; No. 6 of 1896).]—No. 13 of 1888

[1] It was notified in September, 1903, that the ordinance of 1891 would be repealed on the incorporation of Labuan with Straits Settlements.

is practically a transcript of the M. M. A. 1887. No. 6 of 1896 deals with a minor point of evidence on Customs prosecutions.

NATAL (No. 22 of 1888; No. 11 of 1889).]—Practically a transcript of the M. M. A. 1887.

NEW ZEALAND (No. 12 of 1889).]—Secs. 89—105 deal with merchandise marks and are practically a transcript of the M. M. A. 1887.

NEWFOUNDLAND (c. 31 of 1888).]—Practically a transcript of the M. M. A. 1887. C. 12 of 1891 is a minor amending Act.

ST. LUCIA (*No. 106, Laws of St. Lucia (1888)*).]—Practically a transcript of the M. M. A. 1887. And see the Crim. Code, 1888 (No. 101, Laws of St. Lucia), ss. 112, 113.

ST. VINCENT (No. 8 of 1885).]—Practically a transcript of the M. M. A. 1887.

SIERRA LEONE (Nos. 7 and 12 of 1889).]—Practically a transcript of the M. M. A. 1887. Folded woven goods are partly exempted from the operation of these Ordinances (No. 1 of 1894, s. 15).

STRAITS SETTLEMENTS (No. 3 of 1888).]—Practically a transcript of the M. M. A. 1887.

TASMANIA (No. 6 of 1893).—Secs. 90—105 deal with merchandise marks and are practically a transcript of the M. M. A. 1887.

TRINIDAD and TOBAGO (No. 7 of 1888).]—Practically a transcript of the M. M. A. 1887. The Customs (Amendment) Ordinance No. 19 of 1888 corresponds to sec. 16 of M. M. A. 1887.

TRANSVAAL.]—The Merchandise Marks Act of 1903 is substantially the same as the M. M. A. 1887.

II. Foreign Law.

Provisions as to False Marking.[1]

AUSTRIA-HUNGARY (Law of 1890).[2]

Sec. 23. Whoever introduces into commerce goods for sale, well knowing that the same are illegally provided with a mark in which another person possesses the sole right, or whoever designedly imitates a mark, shall be guilty of a misdemeanour and be fined with a sum not less than 500 florins, and not exceeding 2,000 florins, or be punished with imprisonment for a term of from three months to one year, to which may be also added a fine of a sum not exceeding 2,000 florins.

Besides this, the application of the more rigid stipulations of the general penal code, especially those referring to the crime of fraud, is not excluded (sec. 197, &c.).

Sec. 24. The provision of sec. 23 is also applied against any person who introduces into commerce goods, well knowing that the same have been illegally marked with the name, the firm, the arms, or the business description of the undertaking of a producer or a trader, and also

[1] The summary is, except as to Japan and the United States, condensed from the *Reports of Her Majesty's Representatives Abroad on Trade Marks Laws and Regulations*, Part 1900.

[2] The Law of 1890 has been amended by the Law of July 30th, 1895, but the amendments do not affect the sections quoted in the text. See Kerly on Trade Marks, 3rd ed., p. 782. Under a law of December 29th, 1908, Austria-Hungary acceded on January 1st, 1909, to the International Convention.

against the person who designedly manufactures the said marks for this purpose.

Sec. 25. The punishment of the acts mentioned in secs. 23 and 24 is also imposed in cases where the mark, the name, the firm, the arms, or the business description of the undertaking are reproduced with such slight alterations that the difference can only be distinguished by the purchaser of those goods with more than ordinary attention.

Sec. 26. The procedure and decision of the transgressions described in secs. 23 and 24 belong to the common courts of law.

Prosecution only takes place at the application of the injured party.

Sec. 27. At the demand of the injured party it must be decreed that the tools and apparatus which have been exclusively or especially used for the imitation or illegal denotations be made unserviceable, that the stock then in hand of imitated marks and illegally manufactured descriptions be destroyed, and that the illegally fixed marks and descriptions on goods in the possession of the convicted person be removed therefrom, and from the wrappers, even if this would lead to the destruction of the goods.

The verdict may be published by the injured party at the expense of the convicted person, and must contain, in accordance with the suggestions of the injured party, stipulations how and when this publication is to take place.

In place of the compensation due to the injured party, according to common law, the Criminal Court may decree that, in addition to the punishment, the convicted must pay to the injured party a sum not exceeding 5,000 florins. All persons condemned to pay a fine are liable jointly and separately for the payment of the same. The stipulations of this paragraph are also to be put into practice if the punishment takes place in accordance with a more rigid stipulation of the penal code.

Sec. 28. The injured party is entitled to demand the seizure, or at least the taking in safe custody, of the articles mentioned in sec. 27, para. 1, as also that the necessary measures be carried out to prevent a repetition of the criminal act, even before the judgment is pronounced.

The Criminal Court must at once decide with reference to this demand, and may decree the seizure or the custody of the articles in question, against security to be found by the injured party.

Sec. 29. In case the injured party demands the adjudgment of damages in civil law for one of the offences mentioned in secs. 23 and 24, the judge has to decide with reference to the existence as also to the extent of the injury, according to his unbiassed judgment, taking all the facts disclosed into consideration.

Sec. 30. The Minister of Commerce decides as to the sole right vested in a mark, as to the priority and transfer of the same, and also whether a registered mark may be used by a third person for a different kind of goods (sec. 7).

Should it appear during the criminal proceedings in one of the cases mentioned in sec. 23, that the decision depends on a preliminary question, which, according to the first part, is to be settled by the Minister of Commerce, the Criminal Court is bound to apply to the said minister for such decision, to forward to him all the required documents, and to await his decision.

APPENDIX X.

SEC. 31. Infringements of the stipulations mentioned in sec. 6 are to be punished by the political authorities in accordance with the stipulations of the Trade Law, whereby always the seizure of the goods is to be decreed.

FRANCE.

(Law of June 23rd, 1857.)

ART. VII., Sec. 1. The following persons are liable to a fine of from 50 francs to 3,000 francs, and to imprisonment for from three months to three years, or to one of such penalties only :—

1. Those who have counterfeited or made use of a counterfeit mark ;
2. Those who have fraudulently affixed to their goods, or the articles in which they trade, a mark belonging to others ;
3. Those who have knowingly sold or displayed for sale one or more articles bearing a counterfeit mark, or to which a mark has been fraudulently affixed.

ART. VIII. The following are liable to a fine of from 50 francs to 2,000 francs and to imprisonment for from one month to one year, or to one of such penalties only :—

1. Those who, without having counterfeited a mark, have fraudulently imitated it in a way calculated to deceive a purchaser, or who have made use of a mark fraudulently imitated ;
2. Those who have made use of a mark having characteristics (*indications*) apt to deceive a purchaser as to the nature of the goods ;
3. Those who have knowingly sold or exposed for sale one or more articles bearing a mark fraudulently imitated, or having characteristics (*indications*) apt to deceive a purchaser in relation to the nature of the goods.

ART. IX. The following are liable to a fine of from 50 francs to 1,000 francs, or to imprisonment for from a fortnight to six months, or to one of such penalties only :—

1. Those who have not affixed to their goods a mark which is compulsory ;
2. Those who have sold or offered for sale articles not bearing a mark compulsory for such articles ;
3. Those who have infringed the provisions of the decrees issued pursuant to Article 1 of the present law.

ART. X. The penalties provided by the present law cannot be cumulated.

The highest penalty only is inflicted for all acts done before the commencement of proceedings.

ART. XI. The penalties inflicted by Articles 7, 8, and 9 may be doubled in case of a fresh offence. A sentence for any offence under this Act delivered within the next preceding five years makes the accused an old offender for the purposes of this Act.

ART. XII. Article 463 of the Penal Code is applicable to offences provided for in the present Act.

ART. XIII., Sec. 1. Offenders, moreover, may be deprived of the right of voting at the elections for Tribunals and Chambers of

Commerce, for the Consultative Chambers of Arts and Manufactures, and for the *Conseils de Prud'hommes*, for a period not exceeding ten years.

Sec. 2. The Court may order the publication of the sentence in such places as it may deem fit, as well as its insertion wholly or partially in such newspapers as it may appoint at the expense of the person against whom such sentence is delivered.

Art. XIV., Sec. 1. The Court may even on acquittal order the confiscation of goods bearing marks contrary to the provisions of Articles 7 and 8, as well as of the instruments and tools which have been specially employed for the commission of the offence.

Sec. 2. The Court may order delivery of the confiscated objects to the owner of the infringed mark, irrespectively of further damages where such owner is entitled to them.

Sec. 3. It shall in every case order the destruction of marks found to be an infringement of the provisions of Articles 7 and 8.

Art. XV., Sec. 1. In the case provided for by the first two paragraphs of Article 9, the Court shall order that marks be affixed to articles for which they are obligatory by law.

Sec. 2. The Court may order the confiscation of such articles where the defendant has been convicted within the next preceding five years of an offence provided against in the first two paragraphs of Article 9.

Art. XIX., Sec. 1. All foreign articles bearing either the trade mark or the name of a manufacturer residing in France, or the name or place of a French manufactory, are prohibited from entering or passing through France, or being warehoused there, and may be seized wherever found, either by the customs authorities or at the instance of the Public Procurator or of the person whose rights are infringed.

Sec. 2. Where the seizure is made at the instance of the Customs authorities, a minute of the seizure shall at once be transmitted to the Public Procurator.

Sec. 4. The provisions of Article 14 are applicable to goods seized pursuant to the present article.

Art. XX. All the provisions of the present Act are applicable to wines, alcohols, and all other drinks; to cattle, grain, flour, and generally to all agricultural products.

Art. XXII., Sec. 1. The present Act shall not come into force until six months after its promulgation.

Sec. 2. An administrative order shall specify the formalities to be observed in regard to registration, and publication of trade marks, and any other measures requisite for the enforcement of the law.

Art. XXIII. Subject to the provisions of this Act, previous enactments shall remain in force.

(Law of November 26th, 1873.)

ACT to Establish a Stamp or Special Mark to be Affixed to Trade and Merchandise Marks.

Art. I. On written application by the owner of a trade mark registered in accordance with the Act of June 23rd, 1857, whether the said trade

mark be marked upon labels, bands, or envelopes of paper, or upon plaques of metal, the Government shall apply a special stamp or puncheon for the purpose of guaranteeing the authenticity of such trade mark. The puncheon may be applied to the trade mark forming part of the article itself, if the authorities think it fit to receive such application.

ART. II. A fee, varying from one centime to one franc, shall be paid to the State for every affixing of the stamp. The fee shall be not less than five centimes and not exceed five francs for every application of the puncheon to the articles themselves.

ART. III., Sec. 1. The amount of the fees payable to the Treasury shall be proportionate to the value of the articles to which the labels are to be attached, whether in paper or in metal, and to the difficulty of applying the puncheon to the marks affixed to the articles themselves.

Sec. 2. An administrative order shall determine such proportion; it shall also specify the metals to which the puncheon may be applied, the conditions to be complied with for obtaining the application of a stamp or puncheon, the place where such application shall be effected, and other measures for carrying out the present Act.

ART. IV. The sale by the owner of the trade mark of the articles protected thereby at a higher price than that corresponding to the proportion of the stamp or puncheon shall be punishable for each offence by a penalty of 100 francs to 5,000 francs. Such offences shall be published in every place open to the public by the officials authorised to report offences relating to stamps and indirect taxes, and by post office and custom house officials in case of exportation. These officials shall receive one-fourth of the penalty recovered. The offences shall be reported and the prosecution shall take place :—(1) as in stamp matters, where the stamp has been affixed to labels, bands, or wrappers in paper; (2) as in matters of indirect taxes, where a stamp has been applied by puncheon.

ART. V. French consuls abroad are qualified (*auront qualité*) to draw up reports concerning the fraudulent use of trade marks, and to forward the same to the competent authorities.

ART. VI. Any person who shall counterfeit or forge the stamps or puncheons instituted by this Act, and who shall make use of counterfeit or forged stamps or puncheons, shall be punished according to the provisions of Article 140 of the Penal Code, irrespectively of civil damages. Any other fraudulent use of such stamps or puncheons, or of labels, bands, wrappers, or plaques, stamped therewith, shall be punished according to the provisions of Article 142 of the said Code. Article 463 of the Penal Code is applicable thereto.

ART. VII. The stamp or puncheon of the State applied to a trade mark shall form an integral part of the said mark. If the State should fail to prosecute, in France or abroad, the counterfeiting or forgery of such stamp or puncheon, the owner of the mark may himself prosecute.

ART. VIII. The present Act shall be applicable in the French colonies and in Algeria.

ART. IX. The provisions of other laws in force relating to trade names, merchandise and trade marks, designs and models shall be applicable in favour of foreigners, if the laws of their country or international treaties insure the same protection to Frenchmen.

(Law of November 26th, 1873.)

ART. IX. The provisions of other laws in force relating to trade names and merchandise marks (*nom commercial*), . . . shall be applicable in favour of foreigners, if in their country the laws (*la législation*) or international treaties insure the same protection to Frenchmen.

(Law of July 28th, 1824.)

Merchandise Marks and Trade Names.

ART. I., Sec. 1. Any person who shall affix or by adding, shortening, or any other alteration, shall cause to appear on manufactured goods the name of any manufacturer but their real manufacturer, or the name of any manufactory but that at which the goods were manufactured, or the name of any place but that of manufacture, will be liable to the penalties prescribed by Article 423 of the Penal Code, and to damages where a right to them exists.

Sec. 2. Every merchant, commission agent, or tradesman will be liable to prosecution who knowingly exhibits for sale or sells goods marked with pretended or altered names.

ART. II. The above-mentioned offence will consequently cease, in spite of Article 17 of the Law of April 12, 1803 (22 Germinal, year XI.), to be assimilated to the counterfeiting of special marks provided for by Articles 142 and 143 of the Penal Code.

GERMANY.

(*Law of May 12th*, 1894.)

Sec. 14. Any person who knowingly, or through gross negligence, wrongfully applies to goods, their packings or coverings, advertisements, price lists, business letters, circulars, or the like, the name or firm of another party or a trade mark registered according to the provisions of this Act, or puts goods so marked on the market, or offers same for sale, is bound to indemnify the injured party.

If he has knowingly made use of the mark he will be further punished by a fine of 150 to 5,000 marks (7*l.* 10*s.* to 250*l.*), or by imprisonment not exceeding six months. The prosecution is only instituted on petition. The petition can be withdrawn.

Sec. 15. Any person who, for the purpose of fraudulent trading, applies to goods or their packings or coverings, or advertisements, price lists, business letters, circulars, invoices, or the like, a design used in the trades concerned for distinguishing another person's similar goods, without the permission of such person; or any person who, for the same purpose, puts on to the market or offers for sale goods so marked, is bound to indemnify the injured party, and will be punished by a fine of 100 to 3,000 marks (5*l.* to 150*l.*), or by imprisonment not exceeding

three months. The prosecution is only instituted on petition. The petition can be withdrawn.

Sec. 16. Any person who wrongfully applies to goods or their wrappers or packings, or to advertisements, price lists, business letters, circulars, bills, or the like, a State coat-of-arms, or the name or coat-of-arms of a district, of a municipal or corporate body, for the purpose of creating confusion as regards the nature and value of the goods; or any person who offers goods bearing such mark for sale, will be punished by a fine of 150 to 5,000 marks (7*l.* 10*s.* to 250*l.*), or by imprisonment not exceeding six months.

The employment of names which, according to trade custom, serve to designate certain products on the market without being destined to show their origin, is not subject to these prescriptions.

Sec. 17. Foreign products which wrongfully bear the name and locality of a German firm, or which wrongfully bear a registered trade mark, on entering Germany as imports or for transit through the country, are liable to seizure and confiscation, if the injured party files a petition to that effect, and gives security. The seizure is effected by the custom house authorities, and the confiscation is decided according to the Penal Code of the Department of Administration (sec. 459 of the Criminal Code).

Sec. 18. In lieu of all damages arising according to the present Act, an amercement not exceeding 10,000 marks (500*l.*), in addition to the penalty, may be adjudged to the injured party if he so demands.

The condemned are liable for this amercement as joint debtors.

Such acknowledged amercement precludes all further rights to claim damages.

Sec. 19. If verdict is given on the basis of secs. 14, 15, 16, and 18, the sentence must provide that the illegal mark on the goods found in the possession of the condemned party be removed, or, when it is not possible to remove the mark in any other way, that the goods bearing such mark be destroyed.

If verdict is given in the criminal procedure in the instance of secs. 14 and 15, the injured party shall have the right to publish the sentence at the expense of the condemned party. The kind of publication and the term for making same is to be fixed in the verdict.

Sec. 20. The application of the prescriptions of this Act is not excluded from taking effect in the case of variations in the reproduction of foreign names, firms, designs, coats-of-arms, and other designations for goods, if, in spite of such variations, there is any danger of confusion arising in the trade.

Sec. 22. If German goods must bear a certain mark or signification on being imported into, or for transit through, a foreign country, to show that they are of German origin, or if such goods are not so favourably treated at the custom house in respect of trade marks as the goods of other countries, the Federal Council is empowered to subject goods imported into Germany from such foreign countries, or for transit through the country, to the same obligations; and to order that, in case of violation of this regulation, the goods shall be seized and confiscated. The seizure is effected by the custom house authorities, and the confiscation will be decided by verdict of the Department of Administration. (Sec. 459 of the Regulations of the Criminal Law.)

Japan.

The Trade Marks Law of July 1st, 1899, contains provisions (secs. 16 and 17) making it a punishable offence knowingly to imitate a registered trade mark or knowingly to sell goods to which a registered trade mark has been wrongfully affixed, or to mark a registered or unregistered trade mark. The law is more fully referred to in Kerly, p. 798.

United States.

The trade mark law is contained in the Trade Marks Act, 1905, which came into force on April 1st, 1905, and the amending Acts of May 4th, 1906, and March 2nd, 1907. These will be found fully set out in Kerly, p. 754 et seq. Sec. 27 of the Act of 1905 deals with importation of goods bearing descriptive marks, and is as follows :—

"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 fac-similes 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."

APPENDIX XI.

TRADE MARKS (INDIA).

THE extract from a letter of the Government of India of January 28th, 1891, and copy of a notification dated November 13th, 1891 (which are printed below), state the Indian law and executive orders now in force for the protection of trade marks and descriptions. Though there is no law requiring the registration of trade-marks in India, they can be, and sometimes are, registered under Act III. of 1877 ("The Indian Registration Act").

The use of a false trade mark is an offence punishable in India under sec. 480 of the Indian Penal Code, and protection of trade marks and descriptions is also provided by the Merchandise Marks Act, 1889.[1]

Extract of Letter from Government of India, No. 25 (*Statistics and Commerce*), *dated January* 28*th*, 1891.

Trade marks are defined by sec. 3 of the Indian Merchandise Marks Act (amending the Indian Penal Code, sec. 478) to include those which are registered in England and those which, whether with or without registration, are protected in any British Possession or foreign State to which the British law is by Order in Council made applicable. There is no law requiring the registration of trade marks in this country, nor is it the usual practice to register them here. No condition is required precedent to action by either the customs authorities or the criminal courts; the former can act either on their own motion or on information, the latter only on information and formal complaint; but to ensure seizure and detention the information must be followed by satisfactory proof of fraud.

Notification (*Home Department*), *dated November* 13*th*, 1891.

In the exercise of the power conferred by sec. 16 of the Indian Merchandise Marks Act, IV. of 1889, and in supersession of all existing orders on the subject, the Governor-General in Council is pleased to direct that criminal courts, in giving effect to the provisions of the Act in respect of trade descriptions of quantity, measure, or weight

[1] From information supplied to the author by the courtesy of the India Office.

of the goods specified hereunder, shall observe the following instructions :—

I. A trade description of length stamped on *grey*, *white*, or *coloured cotton piece goods* shall not be deemed to be false in a material respect unless,—

(a) where a single length is stamped, the description exceeds the actual length by more than—

4 inches in pieces stamped as 10 yards long and under;
5 inches in pieces stamped as above 10 yards and up to 23 yards long;
7 inches in pieces stamped as above 23 yards and up to 36 yards long;
9 inches in pieces stamped as above 36 yards and up to 47 yards long;
18 inches in pieces stamped as above 47 yards long:

provided that the average length of the goods in question shall not be less than the stamped length;

(b) where a maximum and minimum length are stamped, the described maximum length is greater than the actual length by more than—

9 inches in piece goods under 35 yards long;
18 inches in piece goods 35 yards and up to 47 yards long;
36 inches in piece goods above 47 yards long;

provided that no such piece shall measure less than the minimum stamped length.

II. A trade description of width stamped on *grey*, *white*, or *coloured cotton piece goods* shall not be deemed to be false in a material respect unless the description exceeds the actual width by—

half an inch, in pieces stamped as 40 inches or less in width;
three-quarters of an inch, in pieces stamped as over 40 inches or under 59 inches in width;
one inch, in pieces stamped as 59 inches or more in width;

provided that the average width of the goods in question shall not be less than the stamped width.

III. A trade description of count or number, length or weight, applied to *grey* or *bleached cotton yarn* shall not be deemed to be false in a material respect unless—

(a) the described count or number is greater or less than the actual count or number by more than 5 per cent., provided that the average count of the whole of the yarn in question is not greater or less than the described count; or

(b) the average length of the whole number of hanks in a bundle is less than 840 yards; or

(c) in a bundle of yarn of any count under 50, described as being 10 pounds in weight, the number of knots of 20 hanks each is not half of, the number of knots of 10 hanks each is not the same as, and the number of knots of 5 hanks is not double, the described count or number of the yarn; or

(d) in a bundle of yarn of any count under 50, described as being 5 pounds in weight, the number of knots of 20 hanks each is not a quarter of the described count or number of the yarn; or

(e) in a bundle of yarn of any count from 50 upwards, the number of knots of 20 hanks each is not half, or the number of knots of 40 hanks each is not a quarter, when the described weight is 10 pounds, and is not a quarter or an eighth, as the case may be, when the described weight is 5 pounds, of the count or number of the yarn; or

(f) in the case of *bleached yarn*, the described weight exceeds the actual weight by more than—

7½ per cent. in counts from 1 to 8;
5 per cent. in counts from above 8 to 18;
4 per cent. in counts from above 18 to 30;
2½ per cent. in counts from above 30 to 80.

IV. A trade description of count or number applied to a bundle of *dyed cotton yarn* shall be accepted as indicating length only, the hank being taken to measure 840 yards, and it shall be deemed to be false in a material respect if the average length of the hanks in a bundle is less than 819 yards.

V. A trade description of length applied to *thread of any kind* (of cotton, wool, flax, or silk) shall not be deemed to be false in a material respect unless it exceeds the actual length by more than 1 per cent.

VI. The dimensions of goods on which their length or width is stamped shall be determined by measurement in imperial yards of 36 inches.

C. J. LYALL,
Secretary to the Government of India.

Instructions (Executive) for the guidance of Customs Officers in the administration of the India Merchandise Marks Act, IV. of 1889.

1. Labels or tickets applied to boxes, cartons, parcels or other packages, which are manifestly intended only for the purpose of identifying articles for the convenience of dealers and shopkeepers, and are not specially intended to attract the eye of the purchaser, should not be treated as trade descriptions. *Examples:*—On bundles of hosiery, "Hose, brown merino, size 10"; on shoes, "Enamelled leather, men's, No. 6"; on hats, "Brown felt, hard, No. 7."

NOTE.—This rule does not apply to a mark or description on the goods themselves, or to a description of quality, or one containing the name of a place, country, manufacturer or trader, or to a trade mark.

2. Goods manufactured on the Continent of Europe should be detained if the manufacturer's name and the trade description are expressed in English, unless the name and description are accompanied by the name of the country of manufacture.

3. Customs officers should detain, on their own motion and without requiring information, any goods produced or manufactured beyond the limits of the United Kingdom or of British India which are marked with British or British Indian names or trade marks, or so described as to indicate that the goods were produced or made in the United Kingdom or British India, unless such description is accompanied with the name, in conspicuous letters, of the country of manufacture.

A description in such cases which indicates a particular class or method of manufacture, and includes the name of a place in or a part of the United Kingdom, and is thereby likely or calculated to mislead, includes such terms as "Kidderminster carpets," "Windsor soap," "Ballbriggan" on hosiery, "Shetland" on shawls and the like; for though these terms may be held to be merely indicative of methods of manufacture, they are likely to mislead as to the place of origin.

4. A report on the proceedings of the Collector should be submitted annually to the Local Government, for transmission to the Government of India. The report should show the number of cases in which (1) detention was ordered; (2) detention was followed by confiscation; (3) detention was followed by release with or without a fine; (4) detention was ordered on information received; (5) detention was ordered without information. Under the first head should be specified the section of the Act under which action was taken.

APPENDIX XII.

PLATE.

ORDER IN COUNCIL FIXING DISTINCTIVE MARK ON FOREIGN PLATE AND PRESCRIBING FORM OF STATEMENT WHEN PLATE IS BROUGHT TO BE ASSAYED.

(Statutory Rules and Orders, 1906, No. 386.)

At the Court at Buckingham Palace, the 11th day of May, 1906.

PRESENT:

The King's Most Excellent Majesty in Council.

Whereas by the Hall Marking of Foreign Plate Act, 1904 (4 Edw. 7, c. 6), it is provided that—

1.—(1) Where for the purpose of complying with sections fifty-nine and sixty of the Customs Act, 1842, or section ten of the Revenue Act, 1883, any plate has to be assayed, stamped, and marked, or where for any other purpose any plate or article imported from a foreign part is brought to an assay office in the United Kingdom to be assayed, stamped, or marked, the plate or article shall be marked in such manner as His Majesty may determine by Order in Council so as readily to distinguish whether the plate or other article was wrought or made in England, Scotland, or Ireland, or was imported from foreign parts, and such mark or marks shall be deemed to be a compliance with the said Acts.

(2) Any person who, after a date fixed by His Majesty by Order in Council, brings or causes to be brought any plate or other article to be assayed, stamped, and marked at an assay office, shall state in writing, in manner provided by His Majesty by Order in Council, whether the plate or article was wrought or made in England, Scotland, or Ireland, or was imported from foreign parts, but it shall not be necessary to make such statement in writing where any plate or other article is brought to an assay office in charge of an Officer of Customs under the provisions of the Revenue Act, 1883, for the purpose of being assayed, stamped, or marked as having been imported from foreign parts.

(3) Where any person, who, after the date fixed as aforesaid, brings or causes to be brought any plate or other article to be assayed, stamped, and marked at an assay office, does not know, and is not able to state, whether the plate or other article was wrought or made in England, Scotland, or Ireland, or was imported from foreign parts, such person shall make a statement in writing to that effect in the manner prescribed in this section, and the plate or other article referred to in the said statement shall be stamped and marked as if it were imported from foreign parts.

(4) If any person knowingly makes a false statement under this section he shall be liable, on summary conviction, under the Summary Jurisdiction Acts, to a fine not exceeding five pounds for every article in respect of which the false statement is made.

(5) The Customs Act, 1842, shall apply as if a reference to the mode of marking under this Act were substituted for a reference to the mode of marking under that Act.

(6) His Majesty may, by Order in Council, revoke, vary, or add to any Order in Council made under this Act.

And whereas by Order in Council dated the 24th day of October, 1904, His Majesty did determine the mark or marks to be stamped or marked upon any plate or article imported from foreign parts brought to an assay office in the United Kingdom to be assayed, stamped, or marked at an assay office and did determine the form of the statement in writing to be made by any person other than an Officer of Customs bringing or causing to be brought any plate or article to be assayed, stamped, and marked at an assay office:

And whereas it has been found expedient (i) to vary the said Order in Council of the 24th day of October, 1904, by altering the particular marks to be used by the assay authorities of London, Sheffield, Glasgow and Dublin, and (ii) to alter the form of the statement in writing set out in Part II. of the Schedule to the said Order and to effect these alterations, it has been determined to revoke the said Order in Council of the 24th day of October, 1904:

Now, therefore, His Majesty, by and with the consent of His Privy Council and in exercise of the powers vested in Him by the above recited provisions, doth as from the dates hereinafter respectively specified Revoke the said Order in Council of the 24th day of October, 1904, and doth Determine that as from the said dates respectively:—

(1) The mark or marks to be stamped or marked upon any plate or article imported from foreign parts brought to an assay office in the United Kingdom to be assayed, stamped, or marked shall be the mark or marks described in the first part of the Schedule hereto, and the following authorities, that is to say,

The Wardens and Commonalty of the Mystery of Goldsmiths of the City of London,

The Guardians of the Standard of Wrought Plate, Birmingham,

The Company of Goldsmiths of the City of Chester,

The Guardians of the Standard of Wrought Plate, Sheffield,

The Incorporation of Goldsmiths of the City of Edinburgh,

The Goldsmiths' Company of the City of Glasgow,

The Fraternity or Company of Goldsmiths of the City of Dublin, shall respectively cause to be stamped or marked upon any plate or article imported from foreign parts and brought to an assay office in the United Kingdom to be assayed, stamped, or marked the respective mark or marks described in the first part of the Schedule hereto.

(2) The statement in writing to be made by any person other than an Officer of Customs who brings or causes to be brought any plate or article to be assayed, stamped, and marked at an assay office shall be in the form and signed in the manner set out in the second part of the Schedule hereto.

This Order shall come into operation and take effect as from and after the 29th May, 1906, except so far as regards the Assay Offices of Sheffield and Glasgow, and as regards those offices this Order shall come into operation and take effect as from and after the 1st July, 1906.

A. W. FITZROY.

SCHEDULE.

PART I.

ON FOREIGN GOLD PLATE OR ARTICLES.

The Hall Mark particular to each Assay Office as shown in Figure 1 of the Appendix hereto : the carat value of the gold, together with the decimal equivalent of the carat value, as shown in Figure 2 of the Appendix.

ON FOREIGN SILVER PLATE OR ARTICLES.

The Hall Mark particular to each Assay Office, as shown in Figure 1 of the Appendix hereto, together with the decimal equivalent of the standard value of the silver, as shown in Figure 2 of the Appendix.

The mark for the annual date letter is to be added by each Assay Authority after the mark for the particular Hall and the mark for standard.

APPENDIX.

This contains the Particular Mark for each Assay Authority and the Representation of the Standard Marks.

PART II.

I hereby certify and declare [on behalf of and as authorised by (*here insert the name of the authorising party*)] that all the above-mentioned articles were

(*Here set out whether wrought or made in England, Scotland or Ireland or whether imported from foreign parts*) or,

I hereby certify and declare [on behalf of and as authorised by (*here insert the name of the authorising party*)] that it is not known to me [or to the said (*insert the name of the authorising party*)] whether the above-mentioned articles were wrought or made in England, Scotland or Ireland, or were imported from foreign parts.

To be signed

(1) in the case of a sole trader by such trader and in the case of a private Firm by a member of the Firm or in either case by some other person duly authorised in writing and approved by the Assay Authority.

(2) in the case of a Company by a Director or the Secretary.

APPENDIX XIII.

MERCHANDISE MARKS (IRELAND) BILL.[1]

A BILL INTITULED AN ACT TO ENABLE THE DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION FOR IRELAND TO UNDERTAKE PROSECUTIONS IN CERTAIN CASES UNDER THE MERCHANDISE MARKS ACT, 1887.

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Official prosecutions under 50 & 51 Vict. c. 28.

1.—(1) The Department of Agriculture and Technical Instruction for Ireland (in this Act referred to as "the Department") may, with the concurrence of the Lord Chancellor of Ireland and of the Board of Trade, make regulations providing that in cases which appear to the Department to relate to Irish agricultural produce, or to the produce of any other Irish rural industry, and to affect the general interests of the country, or of a section of the community, or of a trade, the prosecution in Ireland of offences under the Merchandise Marks Act, 1887, shall be undertaken by the Department, and prescribing the conditions on which such prosecutions are to be so undertaken. 50 & 51 Vict. c. 28.

(2) All regulations made under this section shall be laid before Parliament within three weeks after they are made if Parliament is then sitting, and if Parliament is not then sitting within three weeks after the beginning of the next session of Parliament, and shall have effect as if enacted by this Act.

(3) Nothing in this Act shall affect the power of any person or authority to undertake prosecutions otherwise than under the said regulations.

(4) In this section the expression "rural industries" means the rural industries mentioned in sub-section one of section thirty of the Agriculture and Technical Instruction (Ireland) Act, 1890. 62 & 63 Vict. c. 50.

(5) The expenses of prosecutions undertaken by the Department in pursuance of this section shall be paid out of moneys provided by Parliament.

Extent and short title.

2. This Act shall apply to Ireland only, and may be cited as the Merchandise Marks (Ireland) Act, 1909.

[1] See Preface, p. iv.

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