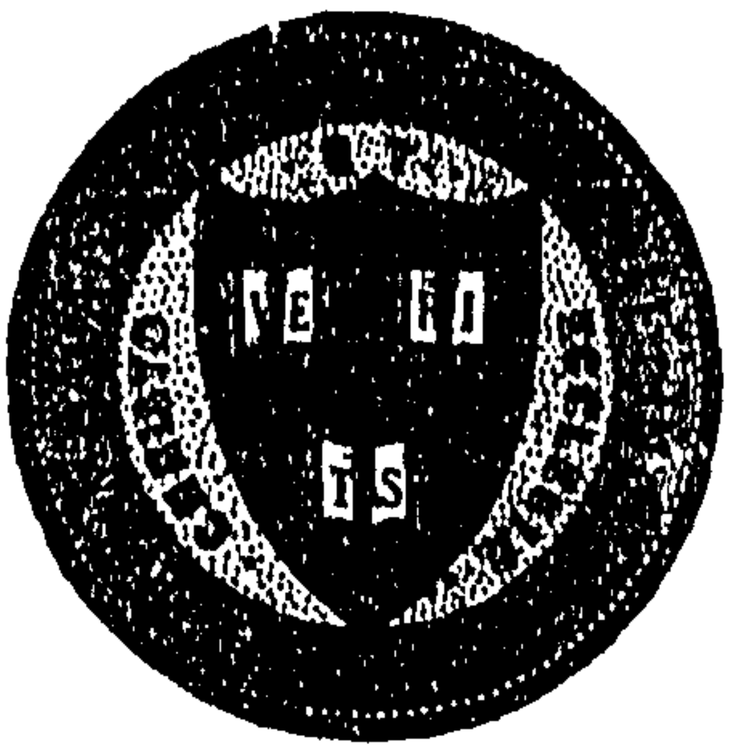
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THE LAW

OF

TRADE-MARKS AND TRADE-NAMES.

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A TREATISE

ON THE

LAW OF TRADE-MARKS

AND TRADE-NAMES,

INCLUDING

FOREIGN LAWS APPLICABLE TO BRITISH TRADE-MARKS.

BY

HENRY LUDLOW, M.A.,

LATE FELLOW OF ST. JOHN'S COLLEGE, CAMBRIDGE, AND OF LINCOLN'S INN, BARRISTER-AT-LAW;

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PREFACE.

The principal object of this work is to afford a practical treatise on a branch of law of continually increasing importance, and every effort has been made to adapt it for the use of the practitioner engaged in actual business. It will, the authors believe, be none the less serviceable to him, because it aims at taking a scientific view of the whole subject; and they hope that most of it will be understood by the beginner without difficulty, although there are parts relating to details of practice which are intended rather for the information of the practitioner than for the instruction of the student.

The English law of trade-marks is the parent of the law of Scotland and the United States. References have been made to American cases which furnish useful deductions or good illustrations. The purely Scotch cases are so very few that it has been thought well to note them in Chapter VIII. for the convenience of the Scotch practitioner.

The same Chapter contains an account of the various laws under which protection may be obtained abroad for trade-marks belonging to persons who carry on business in the United Kingdom. The actual text of these laws will generally be found in the Appendix. In this part of the work much assistance has been derived from the Reports on the foreign law of trade-marks issued from the Foreign Office. (Parl. Pap. 1872, C. 596 and 633.)

The Notes contain all the important cases published before March 1873.

LINCOLN'S INN,
Feb. 1873.

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Woollam *v.* Ratcliff, 62, 63, 76
Woodward *v.* Lazar, 62
Wotherspoon *v.* Currie, 56, 74, 76
Wotherspoon and Company *v.* Gray and Company, 80
Wright, Collen *v.*, 21
Wyatt, Johnson *v.*, 40

Young *v.* Macrae, 50

A TREATISE

ON THE

LAW OF TRADE-MARKS AND TRADE-NAMES.

CHAPTER I.

DEFINITION AND NATURE OF A TRADE-MARK.

EXACTLY to mark out by concise definition the space to be occupied by a treatise on a single branch of law is at all times difficult, and sometimes impossible. The entire field of law is, in fact, continuous, and any boundaries which are traced must therefore be to some extent arbitrary. This is especially true where, as in the case of Trade-Marks, the law has been gradually developed by a course of judicial decisions, giving authoritative sanction to practices current in the mercantile world.

A trade-mark may be said roughly to be any name or device adopted by a person to designate goods to be of his manufacture or to be his goods; but this is only a rough definition, as the name of a magazine (*a*), or the name and colour of an omnibus (*b*), are species of trade-marks.

In order to obtain a clear view of the law relating to trade-marks, it is necessary, first, to consider the pur-

(*a*) *Hogg* v. *Kirby*, 8 Ves. 215; *Maxwell* v. *Hogg*, L. R. 2 C. A. 307.
(*b*) *Knott* v. *Morgan*, 2 Keen, 213.

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poses for which they are in fact employed in the mercantile world, and then to determine the place which the law regulating the right to use them occupies in the general system of jurisprudence.

Function of trade-marks.

Trade-marks were probably in the first instance adopted as marks of origin; that is, in order to inform the public that the goods so marked were the work of a particular maker. But this is not the only function which they now discharge; and at present a trade-mark may signify no more than this, that the article to which it is affixed has passed into the market through the hands of the person entitled to use the mark, and finally may come to be regarded by the public as a mere guarantee of quality. Buyers may have found by experience that iron branded with a particular mark was specially free from brittleness, and the mark may have come to suggest this and no other conclusion. The quality may be derived from the process of manufacture, but the permanent value of the trade-mark will altogether depend upon the truthfulness with which it answers to its reputation. In such a case there is a strong motive inducing the owner of the mark to maintain its character, and if the goods marked with it be of known credit, and have an extensive sale, there will arise in the minds of buyers a well-grounded presumption that the owner, whoever he is, will take care to keep up its reputation. Neither the maker, who first used the mark as an indication of origin, nor the present owner, who now uses it merely as an indication of quality, is legally bound to satisfy the expectations to which it gives rise, but both are impelled to do so by the same motive. A successful trade-mark, it is obvious, always tends to become a mere mark of quality. It is clear, also, that in this there is no fraud upon the public,

who buy, not out of personal favour to the original maker, but because they believe that the goods will be of the quality and description which they require. Chap. I.

Thus much being premised, we must endeavour to assign to the law on the subject its proper place in the legal system, and this will be found to have an important practical bearing. How the right to use a trade-mark is acquired will hereafter be considered in detail; at present it is sufficient to say that, by certain means, a person may obtain the *right* to sell his *goods* under a given mark, and to prevent any one else from applying that mark to goods of the same description. But his right does not consist in the power of precluding others from *every* use of the mark. Thus, if a trader stamps his cloth with a lion, or with a figure of his own invention, he acquires no right to prevent another trader from stamping iron with this device; but the community at large are required to forbear from marking cloth resembling his with this device, or with any device likely to be confounded with it. So that the right consists not in the symbol itself, but in the application of the symbol to a particular description of goods. And it is a right, availing, not as a right founded on contract against this or that man, but against the world at large. In other words, the right to the use of a trade-mark is in the language of scientific jurisprudence, a *jus in rem* (c). If this form of expression be thoroughly understood, it will give increased facility in considering questions which have been much discussed in the Courts. Nature of the right to a trade-mark.

Right is a *jus in rem*.

(c) See Austin on Jurisprudence (1863), vol. ii. pp. 33 *et seq.*; vol. iii. pp. 157 *et seq.* Lord Cranworth's language, in *Farina* v. *Silverlock*, 6 De G. M. & G. 217, describes the right in perfect accordance with the analysis in the text. "It is in fact a right which can

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The characteristic of a *jus in rem* is that it corresponds to duties incumbent upon all men. The most familiar instance is afforded by the rights which are attached to the ownership of visible objects, such as land, houses, or ships; and such a collection of rights as the ownership of some material thing implies, is that which is most naturally suggested by the term "property." But instances are not wanting of rights *in rem* apart from any material subject. The right of a patentee consists only in the power of compelling every one else to abstain from making or selling the patented article. The right of the owner of a ferry consists only in the duty incumbent upon everyone else of doing nothing directly tending to draw away custom from the ferry. The right of personal security belongs to the same class of rights *in rem*. It is obvious that the right to a trade-mark agrees with such rights, in that it consists only in the right of compelling every one else to abstain from infringing it. It is therefore a *jus in rem* having no material subject.

The two classes of rights, rights availing against men in general and rights availing against determinate persons, exist in every system of law, but English law furnishes no terms universally accepted to denote this distinction. The phrases, rights founded on property and rights founded on contract, correspond most nearly with it; and the proposition that a trade-mark is property, if carefully examined, will probably be found to assert *ri termini* nothing

In what sense a trade-mark is property.

be said to exist only, and can be tested only, by its violation; it is the right which any person designating his wares or commodities by a particular trade-mark, as it is called, has to prevent others from selling wares which are not his marked with that trade-mark in order to mislead the public, and so incidentally to injure the person who is the owner of the trade-mark."

more than this, that the right to a trade-mark is a *jus in rem*, and with this qualification may safely be adopted. The rights attached to one *jus in rem* are not necessarily co-extensive with those attached to another, although both must be included under the English term property.

If indeed the conception of property be analysed in the case of a material thing such as a house or ship, it will be found to involve two distinct conceptions. A full owner has an indefinite power over the thing, a power of using or even destroying it, and he has also an indefinite power of excluding the world at large from the use of it. With certain limitations, which it is not here necessary to notice, a man may do what he pleases with his own, and may exclude everyone else from meddling with it in any way. Now, as it is in respect of the former power that a man is called *dominus*, so it is in respect of the latter that the thing is *proprium*. Etymologically, therefore, the word "property" seems peculiarly applicable to the right of a trade-mark owner. But it must not be imagined that by using this expression it is intended covertly to assume anything as to the general transferableness of a trade-mark or as to the remedy of a person whose right is infringed. Both these points will have to be considered hereafter.

Remedy for infringement of trade-mark not founded on fraud.

The view that the right of action against the infringer of a trade-mark rests upon property is opposed to the idea, which seems to have prevailed in the courts of common law, that it is founded upon the fraud of the infringer. But attention to the precise import of the terms will, it is submitted, show that the latter is an inaccurate mode of expression. Let it be for the present assumed that the action will lie only against a defendant

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who has knowingly affixed to his goods the plaintiff's trade-mark with the view of attracting to himself custom due to the reputation of the trade-mark or of injuring the plaintiff by depreciating its credit. Still it is not upon the plaintiff but upon some third person that fraud is practised, and this distinguishes the action from one founded on fraud (*d*). A comparison of a trade-mark with another *jus in rem* to which it bears a considerable analogy, the right of the owner of a ferry, will show the importance of this distinction. Each of these rights consists in nothing else than the duty incumbent upon the world at large of doing nothing directly tending to draw away customers. By the nature of things this can be done in the case of a trade-mark only through imposition upon the public, but the right of the owner of a ferry may be invaded by fraud or by violence. If a third person assaulted a customer going to the ferry, and so prevented him from making use of it, both the customer and the owner of the ferry would have a right of action against the wrong-doer. But these two rights of action would be perfectly distinct. The customer would sue for the assault, the owner of the ferry for damage to his right of ferry consequent upon the assault. Again, if customers were diverted from the ferry by a person spreading a false report that it was broken down, the owner of the ferry would have a right of action against the deceiver, not because he is deceived, but because he suffers damage consequent upon his customers being deceived. In exactly the same way it is not true to say, that the owner of a

(*d*) See *Behn* v. *Kemble*, 7 C. B. N. S. 260; *Gerhard* v. *Bates*, 2 E. & B. 476; *Bedford* v. *Bagshaw*, 4 H. & N. 548; *Burnes* v. *Pennell*, 2 H. of Lds. 497.

trade-mark is deceived or defrauded by the acts of an infringer, but he is injured by third persons being deceived or defrauded. So also the right as against third persons of a master in his servant may be disturbed by fraud upon the servant or by imprisoning him. But the master is no more defrauded in the one case than he is imprisoned in the other. On the whole, therefore, it is conceived that *jus in rem* or property is the only true basis for the action at law against the infringer, and this view will, it is believed, be confirmed by an attentive examination of the cases decided at law.

The language used in courts of equity was at first the same as that of the common law judges, but lately a different view has begun to prevail, and several equity judges following Lord Westbury have asserted that jurisdiction in cases of trade-marks depends not upon fraud but upon property.

Jurisdiction in cases of trade-mark founded on property.

Taking the word property with the qualification which we have already explained, it is submitted that this is the true view, and ought ultimately to prevail in courts of law as well as in courts of equity.

There is also another way of regarding a trade-mark which leads to the same result. A trade-mark evidently depends for its value upon the trade-reputation of its owner (*e*), or, to express the same idea in different words, it is a visible means of collecting the whole or some portion of the goodwill attaching to the trade-mark-owner. For this reason a trade-mark is not in practice sold, and probably cannot legally be sold, apart from the goodwill of the owner's business (*f*). And as it is settled

(*e*) See *Clark* v. *Clark*, 25 Barbour, S. C. 79 (Am.).
(*f*) See *Hall* v. *Barrows*, 33 L. J. Ch. 207.

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that goodwill is rightly termed "property" (*g*), it seems impossible to deny the appropriateness of the term when applied to a trade-mark.

(*g*) *Potter* v. *The Commissioners of Inland Revenue*, 11 Exch. 147. Trade-reputation and goodwill are clearly subjects of *jus in rem*, which will in some cases be protected by injunction. See *infra*.

CHAPTER II.

COMMON LAW REMEDY FOR INFRINGEMENT OF TRADE-MARKS.

Examination of cases at common law.

The ground on which the remedy for the infringement of a trade-mark was for a long time supposed to rest was, that the infringement is a fraud on the part of the infringer, in trying to pass off his manufacture as the manufacture of the owner of the trade-mark, and on this principle it came under the general jurisdiction which the courts exercise to protect innocent persons against fraud and misrepresentation.

Under that general jurisdiction an action lies against a person who falsely represents that another is to be trusted with goods (*a*), or that a company is prosperous so as to induce another to take shares in it (*b*).

And the Court of Chancery will restrain a person by injunction from publishing poems or a magazine which are represented to be those of another, or from representing himself to belong to a firm to which he does not belong (*c*).

Consequently it is not always easy to distinguish

(*a*) *Pasley* v. *Freeman*, 3 T. R. 51, 2 Smith's L. C. 70 (6th edit.).

(*b*) *Gerhard* v. *Bates*, 2 E. & B. 476.

(*c*) *Lord Byron* v. *Johnston*, 2 Mer. 29; *Hogg* v. *Kirby*, 8 Ves. 215; *Glenny* v. *Smith*, 2 Dr. & Sm. 476. See also *Spottiswoode* v. *Clarke*, 2 Ph. 154; *Hookham* v. *Poltage*, L. R. 8 Ch. 91.

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between the cases which relate strictly to trade-marks and those which relate to other cases of misrepresentation.

The first reported case of any real importance was decided by Lord Mansfield in 1783 (*d*). The plaintiff's father, and after his death the plaintiff, sold a medicine called "Dr. Johnson's yellow ointment," and the action was brought against the defendant for selling a medicine under the same name. Lord Mansfield said that if the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie. But here both the plaintiff and defendant used the name of the original inventor, and no evidence was given of the defendant having sold it as if prepared by the plaintiff. He accordingly held that the action would not lie.

The next case is *Sykes* v. *Sykes* (*e*), which was decided in 1824. The plaintiff in that case had acquired a reputation for powder-flasks and shot-belts, which he marked with the words "Sykes' patent," although the patent which was granted had been held invalid (*f*). The de-

(*d*) *Singleton* v. *Bolton*, 3 Douglas, 293. The first case usually cited is one in the time of Elizabeth, in which an action on the case for a deceit was held to lie against a clothier who put on his inferior cloths the trade-mark of a clothier who made superior cloths. The case is cited by Dodridge, J., in *Southerne* v. *Howe*, Pop. 143, 2 Rolle, 26, 2 Cro. 471. Popham's report states that the action was brought by the rival clothier, but Rolle remarks that Mr. Justice Dodridge did not say whether the action lay for the clothier or the vendee, but it seemed it lay for the vendee; and Croke's report states expressly the action was by him who bought the cloth. Whichever it was, the case, though frequently referred to, seems to have had no influence on subsequent decisions.

(*e*) 3 Barn. & Cres. 541, 5 Dowl. & Ry. 292.

(*f*) Probably this would now, in equity at all events, disentitle

fendant intending to appropriate the advantage of this reputation, marked his goods in the same way. At the trial it was proved that the dealers who bought the goods of the defendant knew by whom they were manufactured, but that the defendant sold them to the dealers for the purpose of being resold as goods of the plaintiff's manufacture. No evidence appears to have been given that any one was actually deceived, but a verdict in favour of the plaintiff was upheld by the Court in Banco.

In *Blofeld* v. *Payne* (1833) (*g*), the defendants had wrapped their hones in envelopes similar to the plaintiff's. The declaration did not allege fraud, and no evidence was adduced that any one was deceived. The jury found that the defendants' hones were not inferior to the plaintiff's, but under the direction of the judge they found a verdict for the plaintiff, with nominal damages. The ruling was upheld by the Court in Banco. "The act of the defendants," said Littledale, J., "was a fraud against the plaintiff; and if it occasioned him no specific damage, it was still, to a certain extent, an injury to his right."

In *Morison* v. *Salmon* (1841) (*h*), the plaintiffs sold a medicine which they called, "Morison's Universal Medicine," and the declaration alleged that the defendants "deceitfully and fraudulently" prepared and sold medicines under the same name, and in similar boxes and wrappers, "in order to denote that such medicine was

the plaintiff to relief. See *Flavel* v. *Harrison*, 10 Hare, 467; *Morgan* v. *McAdam*, 36 L. J. N. S. 228. But see *Ford* v. *Foster*, L. R. 7 C. A. 611.

(*g*) 4 Barn. & Ad. 410.

(*h*) 2 Man. & Gr. 385.

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the genuine medicine prepared and sold by the plaintiffs." A verdict was found for the plaintiffs, with nominal damages. The Court in Banco held that the declaration disclosed a good cause of action. The judge at nisi prius certified, under 3 & 4 Vict. c. 24, that the action was brought to try a right. The defendants contended the judge had no power to give the certificate. The Court decided that he had, and Maule, J., who had given the certificate, expressly said that the action *was* brought to try a right. "The right is of a well-known description: it is not a general right to carry on a particular trade, but a right to protection which a party has who uses certain marks, and to the use of which he may have as good a right as though he were a patentee."

In each of these four cases expressions occur indicating that some of the judges thought the action to be founded upon the defendant's fraud. But the view which we have endeavoured to explain that *jus in rem* is the true foundation, was not present to their minds, and in none of them was there any necessity for strict accuracy of expression. The decisions are quite reconcileable with Lord Westbury's statement, that "imposition on the public is the *test* of the property in the trade-mark having been invaded and injured" (*i*). In *Morison* v. *Salmon*, it was urged in argument, that the declaration contained no averment that any one was in fact deceived; but this objection was disregarded, and in several of the cases successful fraud upon any one does not appear to have been proved.

(*i*) *Leather Cloth Company* (*Limited*) v. *American Leather Cloth Company* (*Limited*), 33 L. J. N. S. Ch. 200.

The cases upon which the doctrine that fraud is the foundation of the action seems mainly to rest are *Crawshay* v. *Thompson* (*k*) and *Rodgers* v. *Nowill* (*l*).

Crawshay v. Thompson.

In the former, the declaration alleged that the defendants "knowingly and fraudulently" stamped their bars of iron with a stamp which they knew and intended to be in imitation of the plaintiff's, and "knowingly and fraudulently" sold the iron so marked as and for the plaintiff's iron. The case came on for trial before Lord Chief Justice Tindal. There was no evidence to show that any one had been actually deceived by the mark used by the defendants, and the Lord Chief Justice left it to the jury to say, first, whether they were satisfied that the defendants' mark bore such a close resemblance to the plaintiff's as in its own nature was calculated to deceive the unwary, or persons who were moderately skilled in the article, and to injure the sale of the plaintiff's goods; and, secondly, what was the intention of the defendants in using the mark complained of, because it seemed to him that unless there was a fraudulent intention existing (at least before notice), the defendants would not be liable. The jury having found for the defendants, there was a motion for a new trial, on the ground of misdirection; and the Court held that, having regard to the language of the declaration, the direction was right in both its branches. In other words, the Court held that an intention on the defendants' part to deceive buyers, added to a probability that buyers would be deceived, was a sufficient ground of action.

Rodgers v. Nowill.

In *Rodgers* v. *Nowill* (*m*), the declaration was similar

(*k*) 4 Man. & Gr. 357. (*l*) 5 C. B. 109.

(*m*) *Loc. cit.*

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to that in *Crawshay* v. *Thompson*, and the judge in summing up used language almost identical with C. J. Tindal's. The jury found for the plaintiff with nominal damages. A motion for a new trial and in arrest of judgment was unsuccessfully made, and the judgment in *Crawshay* v. *Thompson* was considered and approved. It should be noticed, that in the course of the argument the counsel for the defendants cited authorities relating to the action on the case for a deceit. Maude, J., thereupon asked, "Is this an action on the case for a deceit?" To which the answer was, "There is no other title under which such an action can be classed"—an answer which seems to have silenced the inquirer. This is an incident not without importance, since it shows that the action for infringing a trade-mark came to be classed amongst actions founded on fraud in consequence of the class of rights known as *jura in rem*, and the actions based upon them, not having any distinctive name in the English system (*n*).

These two cases of *Crawshay* v. *Thompson* and *Rodgers* v. *Nowill* bring out another point in which the action for the infringement of a trade-mark differs from an action truly based on fraud. In the former it is evident that an attempt to deceive may ground an action. In all other cases fraud gives no ground of action unless it is successful. One man has no right of action against another because the latter has tried to deceive him and has failed (*o*).

But although in the opinion of the authors the view that the action depends upon fraud is incorrect, still as it has long maintained its ground, and has never in

(*n*) With the cases cited, compare *Archbold* v. *Sweet*, 1 M. & R. 162.
(*o*) See *Attwood* v. *Small*, 6 Cl. & Fin. 448.

the common law courts been judicially abandoned, it is necessary for the practitioner to be acquainted with it.

Essentials in action at law.

"Fraud in law consists in knowingly asserting that which is false to the injury of another" (*p*).

According to the view which we are now considering, it becomes necessary, therefore, in an action for infringement of a trade-mark, to show :—

1. That the defendant asserted that which was false, as by selling his manufactures as and for the manufactures of the plaintiff.
2. That the defendant did this knowingly, that is, with the intention to pass them off as the plaintiff's manufactures.
3. That the plaintiff has been injured.

Taking these essentials for an action in their order,—

False representation.

(1.) It is obvious that putting a trade-mark on goods is only one mode of representing them to be the manufacture of the owner of the trade-mark, and this becomes important in considering what is a trade-mark. Moreover, the extent to which a trade-mark is known affects materially the question of representation.

Intention to deceive.

(2.) Every case of putting another's trade-mark on one's own goods is not actionable; it must be put on with the intention to deceive. Thus, if the defendant in an action has put on a trade-mark innocently, not knowing that it is the plaintiff's mark, and thinking that it is only descriptive of the quality of the goods, it seems that he would not be liable to pay damages (*q*). But even a remote intention is sufficient. For instance, if a defendant sells his own manufactures to a dealer who knows

(*p*) *Per* Cresswell, J., in *Rodgers* v. *Nowill*, 5 C. B. 109.

(*q*) *Crawshay* v. *Thompson*, 4 M. & G. 357; *Myers* v. *Baker*, 28 L. J. Ex. 90, 3 H. & N. 802; *Rodgers* v. *Nowill*, 5 C. B. 109.

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they are not the plaintiff's with the intention that the dealer should resell them to the public as the plaintiff's manufactures, this is a sufficiently fraudulent intention to maintain the action (*r*).

This intention to deceive is a question for the jury (*s*); but notice to a person who is using a trade-mark of the title of the real owner of the mark will not amount to proof of *mala fides*, unless it appears not only that the notice was true, but also that credence was given to it by the person to whom it was addressed (*t*).

Injury to plaintiff.

(3.) Injury to the plaintiff is essential to enable him to recover. This injury is twofold, (1,) to his reputation by reason of the defendant having sold inferior goods; and (2,) to his trade by drawing away his custom.

A possibility of injury is, however, sufficient, and it is not necessary to show special damage. For where (*u*) it was proved that the defendant's manufactures were not inferior to the plaintiff's, and no proof was given of the plaintiff having lost any custom, the plaintiff was held entitled to nominal damages, because, as Littledale, J., said, "the act of the defendant's was a fraud against the plaintiff, and if it occasioned him no specific damage it was still to a certain extent an injury to his right," and he might have been prevented from selling as much of his own manufactures. Of course on the theory that the action rests on *jus in rem*, this is readily intelligible and

(*r*) *Sykes* v. *Sykes*, 3 B. & C. 541.

(*s*) *Crawshay* v. *Thompson*, 4 M. & G. 357.

(*t*) *Rodgers* v. *Nowill*, 5 C. B. 109. See *Leather Cloth Company (Limited)* v. *American Leather Cloth Company (Limited)*, 1 H. & M. 271; *McAndrew* v. *Bassett*, 33 L. J. Ch. 564, 4 De G. J. & S. 380.

(*u*) *Blofield* v. *Payne*, 4 B. & Ad. 410, 1 Nev. & Man. 303. See also *Rodgers* v. *Nowill*, 5 C. B. 109; *Dent* v. *Turpin*, 30 L. J. Ch. 495, 2 J. & H. 139.

in analogy with actions for infringing a patent or copy- Chap. II.
right.

Where, however, there is no possibility of any injury to the plaintiff, as if he has never put out his trade-mark to the world or has not carried on business, he cannot recover (*x*).

On the question of the measure of damage in an action for the infringement of a trade-mark there is scarcely any authority. The plaintiff must make out by evidence any special damage which he has sustained, and his remedy in general consists much more in security for the future than in indemnity for the past (*y*). The matter was discussed in a case before Wood, V.-C., but no general rule was suggested, and the only result arrived at was, that in the absence of evidence it could not be assumed, that the amount of goods sold by the defendant under the trade-mark would have been sold by the plaintiffs, but for the defendant's unlawful use of the mark (*z*). Measure of Damages.

There are it seems some cases in which the owner of a trade-mark has a right of action not only against the person who actually sells spurious articles under his trade-mark, but also against a person who, by furnishing the means of effecting such sales, has made himself a party Aiders and abetters of infringer.

(*x*) In *Lawson* v. *Bank of London*, 18 C. B. 84, an action for using the name of plaintiff's bank, where the plaintiff did not allege that he had ever carried on the business of banking in that name, and was in a position to be damnified, Willes, J., said, "No action could, I apprehend, be maintained for the sale of goods branded or stamped with another manufacturer's mark, which mark had never been put forth to the world by the party complaining of the misuse of it." Compare also cases in equity on this point, cited *infra*.

(*y*) See Sedgwicke on Damages, 4th edit. p. 680.

(*z*) *Leather Cloth Company* v. *Hirschfield*, L. R. 1 Eq. 299. A similar difficulty exists in the case of patents. See *Penn* v. *Jack*, L. R. 5 Eq. 81.

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to the transaction. In *Farina* v. *Silverlock* (*a*) the plaintiff obtained a verdict against the defendant, who printed labels, fac-similes of those affixed by the plaintiff to his bottles of eau de Cologne, and supplied them to persons who to the defendant's knowledge intended to make an improper use of them. But it seems to be necessary that some of the spurious goods should have been actually sold (*b*). In this respect, the remedy in equity and by criminal proceedings is more extensive than by action at law. By statute (*c*) any one who with intent to defraud, or to enable another to defraud any person, forges or counterfeits a label or other trade-mark (*d*) is guilty of a misdemeanor, and forfeits the dies, stamps, and other instruments used in the production of the counterfeit trade-mark (*e*). The intent to defraud is sufficient, and therefore it is not necessary to show that any goods have been sold under the counterfeit mark (*f*). Persons aiding or abetting the making or using of counterfeited trade-marks are also guilty of a misdemeanor (*g*).

No change in the remedy at law.

The remedy at law appears to have been firmly established in 1783 by Lord Mansfield's dictum quoted above. For in the next reported case in 1824 the principle seems admitted, and the case was defended on the ground that the defendant had no intention to defraud, and on other

(*a*) 4 K. & J. 650. The circumstances which led to the action appear, from the reports of the case, in 6 De G. M. & G. 214, 1 K. & J. 509.

(*b*) The bill in *Farina* v. *Silverlock* contained an averment to this effect. See *Delondre* v. *Shaw*, 2 Sim. 237.

(*c*) 25 & 26 Vict. c. 88.

(*d*) See the definitions of "mark" and "trade-mark," sect. 1.

(*e*) This seems the effect of sect. 2.

(*f*) Sect. 12.

(*g*) Sect. 13.

collateral points, and the principle is only developed and confirmed by the subsequent cases (*h*).

Remedy in equity generally preferred.

Of the actions tried at law, several were brought in consequence of the Court of Chancery requiring the plaintiff to establish his right there as a condition precedent to giving him relief in equity. The remedy at law alone, which generally amounted to no more than a judgment for nominal damages, was of course much less efficient than the equitable remedy by injunction and account, and accordingly when the Court of Chancery was prohibited (*i*) from sending the plaintiff to law before granting him relief, the remedy by action fell into disuse.

Injunction at law.

The courts of law have now the power of awarding an injunction against a defendant who has infringed a trade-mark (*k*), but the procedure of the Court of Chancery still offers many advantages which an action at law practically fails to afford, and the remedy by bill is therefore still resorted to in almost every case.

Merchandise Marks Act, 1862.

"The Merchandise Marks Act, 1862" (*l*), was passed mainly with the view of rendering the infringers of trade-marks amenable to the criminal law, but it contains provisions applying to the ordinary remedies by action or suit. It is necessary in this place to notice section 11, under which a party or witness cannot refuse to answer on the ground of his being liable to criminal proceedings; section 21, under which the Court may order an article wrongfully bearing a trade-mark to be destroyed, may award an injunction, and may allow the plaintiff to have an inspection of the defendant's process, articles, and

Witness.

Destruction.

Injunction.

Inspection.

(*h*) See the cases *ante*, p. 10 *et seq.*
(*i*) By 25 & 26 Vict. c. 42, s. 1.
(*k*) 25 & 26 Vict. c. 88, s. 21, 17 & 18 Vict. c. 125, ss. 79—82.
(*l*) 25 & 26 Vict. c. 88.

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instruments; and section 22, under which *every person* (*m*) *aggrieved* by the forging or counterfeiting of a trade-mark, or by its wrongful use, may maintain an action or suit.

Importation forbidden.

By 35 & 36 Vict. c. 20, s. 4, it is forbidden to import inwards or in transit any articles of foreign manufacture, and any packages of such articles bearing any name, brand, or mark which states or implies that such articles were manufactured at any place in the United Kingdom. And any name, brand, or mark which states or implies that any such articles were manufactured at a town or place having the same name as a place in the United Kingdom, unless accompanied by the name of the country in which such place is situate, is to be deemed for the purposes of this section to state or imply that such articles were manufactured at a place in the United Kingdom.

Remedy of vendee.

It is clear that any one having been induced to purchase an article by a trade-mark which, to the vendor's knowledge, is improperly affixed to it, can by the common law maintain an action for the deceit against the vendor,

Measure of damages.

and he will be entitled to recover the difference between the actual value of the article and what would have been its value if the trade-mark had been properly affixed, together with damages for any loss which is the direct and natural consequence of his acting on the faith of the trade-mark being properly affixed (*n*). Thus if the vendee were proceeded against in Chancery by the owner of the trade-mark he would, no doubt, be entitled to

(*m*) See the definition of "person," sect. 1, in which aliens are included.

(*n*) *Mullett* v. *Mason*, L. R. 1 C. P. 559, Selgwicke, 338; *Clarke* v. *Dickson*, 6 C. B. N. S. 453.

recover from the vendor the costs of the Chancery suit (*o*), and if he sold the goods to a third party, would be entitled to recover any damages he might have to pay to such third party by reason of their spuriousness. The vendee may also, provided he can restore the article in the condition in which it was sold, elect to disaffirm the contract and recover back the price in an action for money had and received (*p*).

Implied warranty by vendor.

Now, by the "Merchandise Marks Act, 1862" (*q*), the vendor of an article bearing a trade-mark is to be deemed to warrant that the trade-mark is genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee. The remedy thus given is, it is conceived, in addition to the remedies previously open to the vendee.

Measure of damages for breach of warranty.

The general measure of damages in this case is the difference between the actual value of the article and what would be its value if it conformed to the warranty (*r*), but it is doubtful whether, in the absence of fraud, the plaintiff is also entitled to damages arising from his acting on the faith of the warranty being true (*s*).

Infringement by order.

A person who orders goods and directs them to be marked with a trade-mark which he knows he is not authorised to use, is liable to repay the person who

(*o*) *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537, 30 L. J. Q. B. 137; *Collen* v. *Wright*, 7 E. & B. 301, 26 L. J. Q. B. 147, in error, 8 E. & B. 647, 27 L. J. Q. B. 215.

(*p*) *Clarke* v. *Dickson*, 1 E. B. & E. 148.

(*q*) 25 & 26 Vict. c. 88, s. 19.

(*r*) See Sedgwicke on Damages, 325 (4th edit.); *Jones* v. *Just*, L. R. 3 Q. B. 197.

(*s*) See *Mullett* v. *Mason*, L. R. 1 C. P. 559.

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innocently executes the order, the costs he reasonably incurs in consequence of a suit being brought against him to restrain the infringement of the trade-mark (*t*).

Remedy by Indictment or Summary Proceeding.

Indictment by common law.

Counterfeiting a trade-mark, even if it is a signature, like an artist's signature on a picture, is not forgery at common law (*u*), but fraudulently putting a trade-mark (*x*) or a colourable imitation of one (*y*) on a spurious article to pass it off as genuine, and selling the article by means of the mark, is a cheat at common law (*z*), and under the statute as to false pretences (*a*).

Merchandise Marks Act, 1862.

By the Merchandise Marks Act, 1862 (*b*), the criminal remedy has been greatly extended. The protection of the Act extends only to marks lawfully used as trade-marks, and it is conceived that this excludes marks which contain false statements, or are otherwise calculated to deceive the public, as for instance a mark which falsely represents the article to be the subject of an existing patent (*c*).

Misdemeanors by statute.

The Act makes it a misdemeanor to do any of the following things with intent to defraud (see sec. 12):—

(*t*) *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537, 30 L. J. Q. B. 137. See, too, *Spedding* v. *Nevell*, L. R. 4 C. P. 212; *Godwin* v. *Francis*, L. R. 5 C. P. 295.

(*u*) *Reg.* v. *Closs*, Dearsley & B. 460, 27 L. J. M. C. 54; *Reg.* v. *Smith*, Dearsley & B. 566, 27 L. J. M. C. 225.

(*x*) See *Reg.* v. *Smith*, loc. cit.

(*y*) *Reg.* v *Dundas*, 6 Cox, C. C. 380; *Reg.* v. *Bryan*, 7 Cox, C. C. 312, Dearsley & B. 265.

(*z*) *Reg.* v. *Closs*, loc. cit.

(*a*) 24 & 25 Vict. c. 96, ss. 88—90, and see s. 1. As to preferring an indictment, see 22 & 23 Vict. c. 17, s. 1.

(*b*) 25 & 26 Vict. c. 88. Printed in full in the Appendix.

(*c*) See *infrà*.

To forge or counterfeit another's trade-mark (*d*), and a trade-mark fraudulently altered so as to resemble some other trade-mark is deemed a counterfeit of the latter (*e*):

Marks used for particular class of goods.

Wrongfully to apply a trade-mark, and this extends to the case where the trade-mark-owner denotes by a special mark a particular kind of goods, and the mark is applied to goods which though they are his are not of this particular kind (*f*).

A person convicted of a misdemeanor may be either fined or imprisoned for not more than two years, and that with or without hard labour, or punished in both ways (*g*), and he forfeits to the Crown all articles and all labels, reels, wrappers, &c., wrongfully marked, and all instruments for impressing or applying the marks, and the Court may order the forfeited things to be destroyed (*h*).

Aiders and abettors.

Persons aiding and abetting the commission of the before-mentioned misdemeanors are themselves guilty of a misdemeanor (*i*), and liable to the same punishment as the principals (*k*).

Selling goods wrongfully marked.

Knowingly to sell goods wrongfully marked is an offence for which the seller forfeits a sum equal to the value of the articles sold, and a further penalty not exceeding 5*l*., nor less than 10*s*. (*l*). The penalties may be recovered in a *qui tam* action (*m*), or summarily before justices at petty sessions (*n*) under 11 & 12 Vict. c. 43.

Any one who sells an article wrongfully marked may be compelled by an order of a justice to state when and from whom he obtained it. A refusal to comply with such

(*d*) Sect. 2.
(*e*) Sect. 5.
(*f*) Sections 2 & 3, and see *infrà*.
(*g*) Sect. 14.
(*h*) Sections 2 & 3.
(*i*) Sect. 13.
(*k*) Sect. 14.
(*l*) Sect. 4.
(*m*) See sections 15, 17, 18, 23.
(*n*) See sections 15 & 16.

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order exposes the party to a penalty of 5*l.*, and is *prima facie* evidence of guilty knowledge (*o*).

The Act does not affect any civil right or remedy, and its penalties do not exempt a person from giving evidence or discovery. But the answers of such a person cannot be used against him (*p*).

Exhibition medal.

An Exhibition medal is not a trade-mark, but false representations respecting the obtaining of a medal are penal (*q*).

(*o*) Sect. 6. (*p*) Sect. 11.
(*q*) *Batty* v. *Hill*, 1 H. & M. 264, 26 & 27 Vict. c. 110.

CHAPTER III.

REMEDY IN CHANCERY.

Refusal of interference.

THE Court of Chancery was later in giving a remedy for infringement of trade-marks than the courts of common law.

Lord Hardwicke refused (*a*) to restrain a defendant from imitating the plaintiff's mark on playing-cards, a mark granted by the Cardmakers' Company. His judgment was based, to a great extent, on the ground that the charter of the company was a monopoly and illegal. But he also said that there was no precedent for restraining one trader from using the same mark with another, and thought it would be of mischievous consequence to do so; and, further, that the objection that the plaintiff was prejudiced by his custom being taken away was of no weight. There appears to have been no case of interference by the Court of Chancery, with reference to an actual trade-mark, until 1833 (*b*), though for some years before that the law has been gradually tending in that direction by an extension of the analogous jurisdiction of the Court. The grant of injunctions to restrain infringements of patents and copyright books was a familiar exercise of the jurisdiction of the Court of Chancery.

(*a*) *Blanchard* v. *Hill* (1742), 2 Atk. 484.

(*b*) *In Gout* v. *Aleploglu*, 1 Chitty, General Practice (edit. 1837), 721, 6 Beav. 69, note.

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Commencement of jurisdiction.

In 1808 (c), however, Lord Eldon granted a temporary injunction to restrain the defendant from publishing a magazine, which was an imitation of, and had been sold as and for the magazine of the plaintiff; but directed the plaintiff to bring an action to try his right at law. This case is referred to as the authority for subsequent decisions. It appears to have rested on the general resemblance of the two magazines, constituting misrepresentation, and not on any right of the plaintiff to the title-page of his magazine as alone constituting a trade-mark. In *Longman* v. *Winchester* (*d*), Lord Eldon says, in reference to *Hogg* v. *Kirby*, "The defendant in that case published a number of a work as a continuation of the plaintiff's old work, taking the credit which had been acquired by that to his own, and that he was not permitted to do." And in 1813 (*e*) Sir Thomas Plumer, V.-C., refused to restrain the defendant from selling "Velno's Vegetable Syrup," because the plaintiff had no exclusive right to the medicine, and the defendant had not represented it to be of the plaintiff's manufacture (*f*).

Moreover, Eden on Injunctions (*g*) (1827) lays it down that where a person does not "assume the name

(*c*) *Hogg* v. *Kirby*, 8 Ves. 215. This case was argued as one of copyright, contract, and trust (the defendant having been plaintiff's publisher), but Lord Eldon appears to have set aside these arguments, and proceeded on the ground mentioned in the text.

(*d*) 16 Ves. 269, 271.

(*e*) *Canham* v. *Jones*, 2 V. & B. 218.

(*f*) In *Sedon* v. *Senate*, cited in *Canham* v. *Jones*, the injunction was granted on the ground of contract.

(*g*) Page 34, citing *Blanchard* v. *Hill*, and *Canham* v. *Jones*, he refers to an injunction granted in 1816 (*Day* v. *Day*) to restrain the use of labels for blacking similar to those used by plaintiff, but does not state the ground, whether contract or otherwise.

and character of another, he will not be prevented from selling another article under the same title."

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It was not until 1838 that the first clear case (*h*) of restraining the infringement of a trade-mark in the Court of Chancery was decided. That case went a good deal further than this rule of Eden, as the defendants were restrained from putting on watches, not merely the plaintiff's name, but the word "pessendede," the Turkish for "warranted" (*i*).

First case of injunction.

This case was followed by various others (*k*), in some of which the plaintiff was successful, in others not.

These cases are divided into two classes, which appear to be not quite reconcileable. The first class follow a supposed analogy to the case of an action based on personal fraud. The latter class tend to approximate more and more closely to the view that the right of the trade-mark-owner is *jus in rem* or property.

Two classes of cases not reconcileable.

In the first class of cases the right of the plaintiff to

First class:

(*h*) An attempt to restrain the issue of spurious labels in 1828 failed on technical grounds (*Delondre* v. *Shaw*, 2 Sim. 240). An *ex parte* injunction restraining the issue of blacking-labels similar to the plaintiff's was obtained in 1831, but on what grounds, and whether it was maintained or not, is not stated (*Day* v. *Benning*, C. P. Cooper, 489). See note above on *Day* v. *Day*.

(*i*) *Gout* v. *Aleploglu*, 1 Chitty's General Practice (edit. 1837), 721, 6 Bea. 69 note. This injunction was continued on the hearing of the cause.

(*k*) Particularly *Ransome* v. *Bentall* (1834), 3 L. J. (Ch.) 161; *Knott* v. *Morgan* (1836), 2 Keen, 213, the omnibus case; *Motley* v. *Downman* (1837), 3 My. & Cr. 1; *Millington* v. *Fox* (1838), 3 My. & Cr. 338; *Perry* v. *Truefitt* (1842), 6 Bea. 73; *Croft* v. *Day* (1843), 7 Bea. 84; *Franks* v. *Weaver* (1847), 10 Bea. 297; *Rodgers* v. *Nowill* (1846-8), 6 Hare, 325, 3 De G. M. & G. 614; *Pierce* v. *Franks* (1846), 15 L. J. (Ch.) 122; *Holloway* v. *Holloway* (1850), 13 Bea. 209; and other cases mentioned in subsequent notes.

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legal right, intentional deceit necessary.

relief against the defendant was held to be a legal right (*l*), and the interference of the Court of Chancery was considered as only ancillary to that legal right; consequently the rule applied that the Court of Chancery when exercising jurisdiction over legal rights, although in strong cases interfering at once by injunction, yet in general required the plaintiff to prove his right in an action at law; we find, therefore, that in some cases where the intentional fraud of the defendant was palpable the injunction was granted at once (*m*) on interlocutory motion; whether with or without requiring the plaintiff to bring an action is not in all cases quite clear. In other cases the plaintiff was required as a matter of course to prove his right at law (*n*).

Injunction refused because no intentional deceit.

In others, either the injunction has been refused on the ground that there was no fraud (*o*), or if the right of the plaintiff to the use of the mark as against the defendant was doubtful (*p*), or if he had been guilty of misrepresentation (*q*), or if he had delayed or not behaved quite fairly (*r*), or if there were circumstances rebutting the *primâ facie* inference of fraud arising from the use of

(*l*) *Motley* v. *Downman*, 3 My. & Cr. 1; *Collins Company* v. *Reeves*, 28 L. J. Ch. 56; *Rodyers* v. *Nowill*, 3 Hare, 625; *Hine* v. *Lart*, 10 Jur. 106.

(*m*) *Croft* v. *Day*, 7 Bea. 84; *Franks* v. *Weaver*, 10 Bea. 297; *Holloway* v. *Holloway*, 13 Bea. 209; *Burgess* v. *Burgess*, 3 De G. M. & G. 890; *Shrimpton* v. *Laight*, 18 Bea. 164; *Dent* v. *Turpin*, 2 J. & H. 139.

(*n*) Cases cited in note (*l*) above.

(*o*) *Burgess* v. *Burgess*, 3 De G. M. & G. 896, 22 L. J. Ch. 675.

(*p*) *Motley* v. *Downman*, 3 My. & Cr. 1; *Rodgers* v. *Nowill*, 5 C. B. 109.

(*q*) *Pidding* v. *Howe*, 8 Sim. 477; *Perry* v. *Truefitt*, 6 Bea. 66; *Flavel* v. *Harrison*, 10 Hare, 467.

(*r*) *Perry* v. *Truefitt*, 6 Bea. 66; *Flavel* v. *Harrison*, 10 Hare, 467; *Collins Company* v. *Reeves*, 28 L. J. Ch. 56.

similar marks (*s*), he was required to try his right by an action at law, either before he was held entitled to the injunction, or as a condition of his maintaining the injunction.

In this class of cases, the Court clearly granted relief on the same grounds only as would support an action, namely, intentional deceit of the defendant. The language of the judges, however, is not uniform. In the earlier cases the Court proceeded on the ground that the defendant had no right by any means (whether by using the name or trade-mark of the plaintiff, or by any other misrepresentation), to pass off his goods as the goods of the plaintiff to the injury of the latter. To do so was a fraud on the public and on the plaintiff, even though the name was the defendant's own name; though the Court did not interfere on behalf of the public (and indeed could not, except on the information of the Attorney-General), but on behalf of the injured trader.

Misrepresentation and intentional fraud, ground of jurisdiction.

In these cases it was clearly laid down that the ground of jurisdiction of the Court is intentional fraud (*t*); that the deceit of the defendant, as in other cases of misrepresentation (*u*), must be intentional, and it was expressly stated that the plaintiff had no exclusive right to—no property in—the trade-mark, but only a personal right to be protected against fraud (*x*).

(*s*) *Collins Company* v. *Reeves*, 28 L. J. Ch. 56; *Farina* v. *Silverlock*, 26 L. J. Ch. 11, 1 K. & J. 509, 6 De G. M. & G. 214.

(*t*) Fraud by itself is ambiguous, as the result of a man's act done in ignorance, may be deceptive, and so fraudulent.

(*u*) *Henderson* v. *Lacon*, L. R. 5 Eq. 249, see p. 262.

(*x*) *Perry* v. *Truefitt*, 6 Bea. 66; *Croft* v. *Day*, 7 Bea. 84; *Franks* v. *Weaver*, 10 Bea. 297; *Flavel* v. *Harrison*, 10 Hare, 467; *Edelsten* v. *Vick*, 11 Hare, 78; *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Collins Company* v. *Comen*, 3 K. & J. 428; *Knott* v. *Morgan*, 2 Keen, 213.

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But in the later cases a change is observable. It is admitted that the plaintiff has an exclusive right of using his trade-mark for a particular kind of goods, and dicta are found admitting the principle of the second class of cases. The principle also was stated in the form, that "no one may sell goods of his own marked with another's trade-mark, so as (or in order) to deceive the public;" an ambiguous expression which may refer to cases where the deceit is intentional or to cases where the result only is deceptive and the intention innocent (*y*).

If it refers to intentional deceit, it is hardly reconcileable with the second class of cases.

If it refers merely to a deceptive result, it is only reconcileable with the practice (followed in the very case where the expression occurs) of requiring the plaintiff to try his right at law by supposing that where the result is deceptive, intentional fraud on the part of the defendant may be presumed (*z*), a presumption, however, which was not made in *Millington* v. *Fox* (*a*).

The admission of the exclusive right, however, goes a long way to establish a right of property in the trade-mark, especially when coupled with the principle established by the second class of cases.

(*y*) *Farina* v. *Silverlock*, *ubi sup.*; *Collins Company* v. *Brown*, 3 K. & J. 423; Wood, V.-C., said, in *Welch* v. *Knott* (1858), 4 K. & J. 747, that *Millington* v. *Fox* showed that it was not a sufficient defence to allege ignorance. "How far the doctrine in that case was capable of being reconciled with cases at law in which the *scienter* had been held to be essential in order to enable the plaintiff to recover was not material." In that court the rule was clear, and he had so held in Bass's case. And see *Harrison* v. *Taylor*, 11 Jur. N. S. 408.

(*z*) *Collins Company* v. *Brown*, 3 K. & J. 423; *Edelsten* v. *Vick*, 11 Hare, 78.

(*a*) 3 My. & Cr. 338.

Trade-mark is property.

The practice, however, of requiring the plaintiff to bring an action is stopped by Rolt's Act (*b*), and since 1863 it has been clearly laid down in several cases (*c*) that the right to a trade-mark is a right to the exclusive use of it for the particular goods for which it is used; that it is therefore property, and will be protected by the Court as if it were property, that is to say, whether the infringement is intentional or not (*d*), as will be seen from the second class of cases which we now proceed to examine.

Millington v. Fox.

In these the right of the trade-mark-owner is rested on a broader basis. *Millington* v. *Fox* (*e*) is the first of such cases. There the plaintiffs and their predecessors in

(*b*) 25 & 26 Vict. c. 27. Frequently where the practice was to send the plaintiff to law, the case now is tried before a jury.

(*c*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Hall* v. *Barrows*, 33 L. J. Ch. 205; *Leather Cloth Company* (*Limited*) v. *American Leather Cloth Company* (*Limited*), 33 L. J. Ch. 199, 11 H. L. 523.

(*d*) Wood, V.-C., however, said (*Leather Cloth Company* (*Limited*) v. *American Leather Cloth Company* (*Limited*), 1 H. & M. 271), that the protection is founded on the jurisdiction of the Court to prevent fraud from one person on the right of another, and that where the defendant has acted ignorantly the Court restrains him because it thinks that if he continues that representation after he has been told what the nature of the plaintiff's right is, he will be committing a fraud. The same judge took a similar view in *McAndrew* v. *Bassett*, 33 L. J. Ch. 561, 4 De G. J. & S. 380, where he is reported to have said that this was the foundation of *Millington* v. *Fox*. This, however, is not the view that other judges (see *Perry* v. *Truefitt*, *Hall* v. *Barrows*, *ubi sup.*) have taken of that case, and the correctness of this report (33 L. J. Ch. 561) may be doubted, as it is not easy to reconcile with the decision of the same judge in *Welch* v. *Knott*, 4 K. & J. 747, *supra*, p. 30, note (*y*), and seems to have no ground in the rest of the report of the case, as it was argued for the defendants that no perpetual injunction could be granted against them, because they had (as stated in their answer) ceased to use the marks as soon as they knew the plaintiffs claimed them.

(*e*) 3 My. & Cr. 338.

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business had long been in the habit of branding their iron with the marks "Crowley," "Crowley Millington," and "I. H." The defendants had made use of these marks, believing them to be mere indications of quality, and as soon as they heard that the plaintiffs claimed them as trade-marks and before bill filed, they ceased to use them.

At the hearing, Lord Cottenham, although he acquitted the defendants of any intention to defraud, nevertheless, held that the plaintiffs were entitled to a perpetual injunction against them, but under all the circumstances of the case, he left each party to bear his own costs.

Millington v. *Fox* was followed by other cases in which the principle was acted upon, that relief would be granted although the defendants proved that they acted in ignorance of the plaintiff's rights (*f*).

When it was conceded that the right of the plaintiff did not depend upon the good or bad faith of the defendant, he was in this respect put upon the footing of an owner of ordinary property. Lord Westbury, however, was the first judge who fully and clearly enunciated the principle, that jurisdiction in cases of trade-mark, rests not upon *tort*, but upon property. This is in substance,

Lord Westbury's statement of the law.

(*f*) *Clement* v. *Maddick*, 5 Jur. (N. S.) 592, 1 Giff. 98, where the marginal note is incorrect; *Burgess* v. *Hateley*, 26 Beav. 249; *Burgess* v. *Hills*, 26 Beav. 244. See also *Collins Company* v. *Brown*, 3 K. & J. 423, 433. It is to be observed, however, that in all these cases the plaintiff's mark had been imitated; in none of them had two persons accidentally hit on the same mark. In *Dixon* v. *Fawcus* (1861), 30 L. J. Q. B. 137, 3 Ell. & Ell. 537, the Queen's Bench held that intention to deceive was not necessary to ground an injunction in the Court of Chancery. In France the law is the same. "Le fait matériel de la reproduction d'une marque de fabrique constitue la contrefaçon, indépendamment des circonstances tendant à établir la bonne ou la mauvaise foi de la partie contrevenante." Dalloz, Jur. Gen. 1868, Pt. ii. p. 233. So also in New York, *Dale* v. *Smithson*, 12 Ab. Pr. 238.

the same thing as saying that the right of the trade-mark-owner is a *jus in rem*, as has been already explained. In giving judgment in *Hall* v. *Barrows* (*g*), he made the following remarks:—"It has been pressed upon me on the part of the defendant, that there is no property in a trade-mark, and that the right to relief is merely personal, founded on the fraud that is committed when one man sells his own goods as the goods of another. It is true that the cases contain expressions by eminent judges that there is no property in a trade-mark, which must be understood to mean that there can be no right to the exclusive ownership of any symbol or mark universally, in the abstract. Thus, an ironfounder who uses a particular mark for his manufactures in iron could not restrain the use of the same mark when impressed upon cotton or woollen goods; for the property in a trade-mark consists in the exclusive right to the use of that mark as applied to some particular manufacture. Nor is it correct to say that the right to relief is founded on the fraud of the defendant, as appears from the case of *Millington* v. *Fox*, already referred to. Imposition on the public is indeed necessary for the plaintiff's title, but in this way only, that it is the test of the invasion by the defendant of the plaintiff's right of property; for there is no injury done to the plaintiff if the mark used by the defendant be not such as may be mistaken, or is likely to be mistaken, by the public for the mark of the plaintiff. But the true ground of the Court's jurisdiction is property."

The same principle was again maintained by Lord Westbury in *The Leather Cloth Company* (*Limited*) v. *American Leather Cloth Company* (*Limited*) (*h*), and was

(*g*) 33 L. J. Ch. 204.

(*h*) 33 L. J. Ch. 199.

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approved by the House of Lords (*i*) in the same case.

It is true that in *Hall* v. *Barrows* the question at issue was the nature of the right to a trade-mark for the purpose of transfer, and not for the purpose of relief against infringement, and the case of the Leather Cloth Company, which involved the question of the transferableness of a trade-mark, as well as the question of infringement, was decided by the Lord Chancellor on the ground of misrepresentation by the plaintiff, and by the House of Lords on that ground, and also on the ground of want of resemblance in the trade-marks. But the question of the right of transferring a trade-mark has a very important bearing on the nature of the protection which the Court gives it. And, after all, these cases only state more broadly the principle of *Millington* v. *Fox*, and carry it out so far as regards the right of transfer. And it seems now to be settled that although originally the Court proceeded on the equity of preventing one person from committing a fraud on the rights of another, it will now interfere to protect a trade-mark as if it were property, and not, as in other cases of misrepresentation, merely where there is intentional deceit on the part of the defendant (*k*), and that a person may be entitled to

(*i*) 11 H. L. 523.

(*k*) Wood, V.-C., said in *McAndrew* v. *Bassett*, 33 L. J. Ch. 561, 4 De G. Jo. & Sm. 380, 4 N. R. 12, 123, that "Lord Westbury's decision in *Hall* v. *Barrows* did not alter the law, and that whether the right to the trade-mark was property or not was merely a question of nomenclature." On the other hand, his language and decision in *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518, is rather against the view stated in the text. He says, "The use of the name of another manufacturer, whether done *scienter* or not, is an interference with his business, which this court will interpose to prevent, on the ground that the defendant is endeavouring to pass off the goods of his own or somebody else's manu-

the exclusive use of a trade-mark as applied to a particular description of goods.

Limit of right of property in trade-mark.

But although a trade-mark is property, it is not so for all purposes. The property is not in the mark, but in the application of the mark to particular goods; consequently, a person has not such an abstract right to the mark which he adopts, as to entitle him to have another person prevented from using the same mark for other goods, and it is even doubtful whether he has a right in all cases to prevent the use of it by another person for the same class of goods.

He must show, as in an action at law, that there has been in effect a false representation, that the acts of the defendants have misled or were calculated to mislead the public (*l*). For instance, it has been said that if the mark is applied without the consent of the owner to goods which are his, there is no misleading of the public, and that such use cannot be interfered with (*m*).

facture as the manufacture of the plaintiff." He considered there had been an unjustifiable use of the plaintiff's labels, but refused to interfere, because they were not so used as clearly to represent that the goods were the plaintiff's manufacture. But query, whether it is not still necessary to show intentional fraud in cases where the defendant has the same name as the plaintiff, see *Burgess* v. *Burgess*, 3 De G. M. & G. 897, 32 L. J. Ch., 675.

(*l*) *Welch* v. *Knott*, 4 K. & J. 747; *Burgess* v. *Burgess*, 3 De G. M. & G. 897.

(*m*) *Farina* v. *Silverlock*, 6 De G. M. & G. 214; Wood, V.-C. (4 K. & J. 50), doubted whether Lord Cranworth meant to say that the use of labels to renew worn-out labels might be legitimate, but his own decision in *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518, where the plaintiff was admitted to be injured, seems to support the view stated in the text. A case of *Guiness* v. *Sutton* (M. R. 28 July, 1853) is mentioned in the evidence before the Committee of the House of Commons on the Trade-Marks Bill of 1862 (H. C. Sessional Papers, 212, Qu. 2663); but, from the short-hand notes of the argument and judg-

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If the mark as denoting a given description of goods is property, it seems to follow that no one can use it for this purpose without the consent of the owner, for if the right is to an exclusive use of a given kind, any similar use is an infringement of the right; it is doubtful, therefore, whether an use such as in the case above mentioned would now be held to be legitimate. If the goods are really those of the owner of the mark, he could hardly object to consent to the renewal of worn-out labels, and his assent might fairly be presumed in the absence of an express stipulation to the contrary. But to allow this to be done without the consent of the owner, or to allow labels to be affixed to goods to which he has not thought fit to affix them, is clearly to open a wide door to fraud. Accordingly, the Merchandise Marks Act, 1862, makes it a misdemeanor to apply, with a fraudulent intent, a trade-mark to any chattel or article not being the particular or peculiar description of manufacture, workmanship, production, or merchandise denoted, or intended to be denoted, by such trade-mark (*n*). This would seem also to give a party injured a civil remedy (*o*). All pre-existing remedies are expressly saved.

Renewing old labels.

Fraudulent transfer of labels.

ment, it appears to have turned on special circumstances. The precise point arose in an American case of *Gillott* v. *Kettle*, 3 Duer, 624 (N. Y.), where the plaintiff, the eminent steel-pen maker of Birmingham, marked boxes of pens of the first quality with the number 303, while other boxes containing pens of an inferior quality were marked 753. The defendant removed the labels from the last-mentioned boxes, and put upon them labels numbered 303, closely resembling the genuine labels bearing that number. The defendant was restrained from so doing by injunction.

(*n*) 25 & 26 Vict. c. 88, s. 2.

(*o*) *Atkinson* v. *Newcastle and Gateshead Waterworks Company*, L. R. 6 Exch. 404; *Couch* v. *Steel*, 3 Ell. & Bl. 402, 23 L. J. Q. B. 121; but see *per* Lord Chelmsford in *Wilson* v. *Merry*, L. R. 1 H. of Lds. Sc. 326.

Injury to the plaintiff.

The tendency to mislead the public forms an important element in a matter which a plaintiff must prove in equity as well as at law, the injury to himself. If there is no probability of imposition on the public, the plaintiff has suffered no injury (*p*), though on the contrary there may be imposition on the public, and yet the plaintiff may not be entitled to maintain a suit, either because he is not injured pecuniarily (*q*), or because he has not acquired any property in his trade-mark.

Desirable to show actual imposition.

As a consequence of this necessity of showing injury, there is some practical difficulty in stopping a piracy in trade-marks, before goods have been actually sold with the pirated marks on them. For the defendant, if his mark has not misled any one, may in many cases fairly argue that it is not calculated to mislead. A plaintiff therefore generally (*r*) does best to wait until he can obtain evidence of persons having been actually misled, and if he gives the defendant notice of his claim to the mark, a reasonable delay for the purpose of getting such evidence will not prejudice him in an application for an interlocutory injunction (*s*).

(*p*) "Imposition on the public is necessary for the plaintiff's title, but in this way only, that it is the test of the invasion by the defendant of the plaintiff's right of property; for there is no injury done to the plaintiff if the defendant's mark is not such as may be mistaken, or is likely to be mistaken, by the public for the mark of the plaintiff." *Per* Westbury, C., in *Hall* v. *Barrows*, 33 L. J. Ch. 205. See also *Farina* v. *Silverlock*, 6 De G. M. & G. 217.

(*q*) *Clark* v. *Freeman*, 11 Beav. 112; *Welch* v. *Knott*, 4 K. & J. 747; *Leather Cloth Company* (*Limited*) v. *American Leather Cloth Company* (*Limited*), 33 L. J. Ch. 199. A possibility of injury, however, is enough as at law (*supra*, p. 16), *Dent* v. *Turpin*, 2 J. & H. 139; 30 L. J. Ch. 495.

(*r*) There may be exceptional cases. See *Chappell* v. *Sheard*, 2 K. & J. 117.

(*s*) *Lee* v. *Haley*, L. R. 5 Ch. 155.

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The result is, that of the three things said to be essentials in an action at law, false representation by the defendant, intentional deceit by the defendant, and injury to the plaintiff, the last is necessary to ground relief in equity, the second is not necessary, the first is necessary, at any rate so far as it is required to prove the injury.

Discovery of names of defendant's customers.

The defendant is frequently required by the plaintiff to discover the names of customers to whom he has sold goods stamped with a mark which the plaintiff claims as his, and the prices at which he sold them. After a decree directing an account or an inquiry as to damages, or before decree, if the plaintiff's right is not substantially disputed, the defendant must give such discovery (*t*). If he is unable to give precise information, he may then (but not otherwise) be required to disclose the names of all persons to whom he has sold any goods, which he will not positively swear were unstamped (*u*). Where, however, the Court sees reasonable ground for believing that the plaintiff's right to the mark in question is *bonâ fide* disputed, it will not compel the discovery of facts which will not aid the plaintiff in establishing his right, and may prove injurious to the defendant. In such a case, therefore, it will not in general compel the defendant to discover prices and the names of customers to a rival trader (*x*).

The answer of a defendant cannot be used against him

(*t*) *Howe* v. *McKernan*, 30 Beav. 547, and compare cases cited *infrâ*, note (*x*).

(*u*) *The Leather Cloth Company* (*Limited*) v. *Hirschfeld*, 1 H. & M. 295.

(*x*) *Carter* v. *Pinto Leite*, 20 W. R. 134. And see *Moore* v. *Craven*, W. N. 1870, p. 13, cited in *Thompson* v. *Dunn*, L. R. 5 Ch. 573; *Lockett* v. *Lockett*, L. R. 4 Ch. 336.

in any criminal proceedings, and he cannot, therefore, refuse to answer, on the ground that he will expose himself to penalties or forfeiture (*y*). Chap. III.

Inspection.

By the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88, s. 21), the Court is empowered to grant inspection in the three following cases:—

1. Of any manufacture or process of the defendant's, in which the plaintiff's trade-mark is alleged to be infringed:

2. Of any articles under the defendant's control, alleged to be so marked as to infringe the plaintiff's trade-mark:

3. Of any instruments under the defendant's control, capable of subserving such infringement.

No order seems yet to have been made under this section. In patent cases, inspection is sometimes granted before the trial or hearing, in order to enable the parties to establish their case (*z*). But in the case of trade-marks, public use is necessary to constitute infringement, and it seems, therefore, that there is no ground for granting inspection before the hearing (*a*).

Interlocutory injunction.

The plaintiff generally applies for an interlocutory injunction soon after filing his bill, and where there is reason to doubt the defendant's good faith, much less absolute proof of the plaintiff's title is required (*b*). In order to obtain one he must be prompt in coming to the Court (*c*),

(*y*) 25 & 26 Vict. c. 88, s. 11.

(*z*) *Morgan* v. *Seaward*, 1 Webster, 169; *Russell* v. *Cowley*, Ibid. 458; *Bovill* v. *Moore*, 2 Cooper C. C. 56, note.

(*a*) For form of order in a patent case, see *Davenport* v. *Jepson*, 1 N. R. 308.

(*b*) *Ruddle* v. *Norman*, L. R. 14 Eq. 348, 41 L. J. Ch. 525.

(*c*) *Flavel* v. *Harrison*, 10 Hare, 467; *Chappell* v. *Sheard*, 2 K. & J. 117; *Clubb* v. *Griffiths*, 35 Beav. 127.

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and in bringing on his motion (*d*). In *Isaacson* v. *Thompson* (*e*) an unexplained delay of about seven months was held to disentitle the plaintiff to an interlocutory injunction. But, as has been already observed, time will not begin to run against the plaintiff until the expiration of the period during which he might, with reasonable diligence, have obtained satisfactory evidence that the acts of the defendant do, in fact, mislead the public (*f*).

and acquiescence.

At the hearing, a defendant who sets up delay or acquiescence on the part of the plaintiff as a bar to an injunction, must show a much stronger case than suffices on an interlocutory application (*g*). In the case of trade-marks, if the only acts of which the plaintiff is entitled to complain occurred a considerable time before the filing of the bill, the presumption is that the defendant has discontinued his invasion of the plaintiff's rights, and the Court will, no doubt, be disinclined to encourage a stale complaint. But if the infringement is continued down to the time of bill filed, delay or acquiescence in order to be a bar to an injunction must amount almost to a licence (*h*) or to an abandonment of the plaintiff's rights in favour of the world at large (*i*). But delay or other circumstances not sufficient to deprive the plaintiff of his right to an injunction and costs of suit, may prevent him

(*d*) *Pickford* v. *Grand Junction Railway Company*, 3 Rail. Cases, 538.

(*e*) 20 W. R. 196.

(*f*) *Lee* v. *Haley*, L. R. 5 Ch. 160; *Isaacson* v. *Thompson*, loc. cit.

(*g*) *Johnson* v. *Wyatt*, 2 D. J. & S. 18; *Patching* v. *Dubbins*, Kay, 11; *Gordon* v. *Cheltenham Railway Company*, 5 Beav. 233.

(*h*) See *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Rodgers* v. *Nowill*, 3 De G. M. & G. 614; *Amoskeag Manufacturing Company* v. *Spear*, 2 Sandf. S. C. 605.

(*i*) See *Cocks* v. *Chandler*, L. R. 11 Eq. 446, 449. In *Baird* v. *Turner*, 13 L. T. N. S. 746, the observations of the Vice-Chancellor as to acquiescence refer only to the prayer for an account. See p. 750.

from having an account of profits (*j*), or induce the Court to give only a limited account (*k*).

Protest.

A mere protest, not followed up (*l*), is not enough to save the protester from the imputation of laches (*m*). But as to anything which at the time he knew to be intended, it will relieve him from the imputation of assenting or standing silently by (*n*). The issuing of advertisements cautioning the public against an improper use of marks identical with the advertiser's trade-mark or likely to be mistaken for it, is strong evidence of non-acquiescence in such use (*o*).

Decree.

The full measure of relief to which a plaintiff is entitled gives him compensation for past wrongs and security as to the future. Under the usual decree at the hearing, the defendant is perpetually enjoined from infringing the plaintiff's trade-mark (*p*). The plaintiff is also, in some cases, entitled to an account of profits, or, if he prefers it, an inquiry as to damages (*q*); but he cannot have both (*r*).

Account, damages.

(*j*) *Harrison* v. *Taylor*, 11 Jur. 408, where the delay was from Aug. 1863, to May, 1864; *Beard* v. *Turner*, loc. cit.

(*k*) *Ford* v. *Foster*, L. R. 7 Ch. 611.

(*l*) See *Coles* v. *Sims*, 5 De G. M. & G. 1.

(*m*) *Attorney-General* v. *Sheffield Gas Company*, 3 De G. M. & G. 304; *Clegg* v. *Edmondston*, 8 De G. M. & G. 810; *Birmingham Canal Company* v. *Lloyd*, 18 Ves. 515.

(*n*) *Motley* v. *Downman*, 3 My. & Cr. 1, 16; *Buxton* v. *James*, 5 De G. M. & G. 80, 84.

(*o*) *Kinahan* v. *Bolton*, 15 Ir. Ch. 75.

(*p*) For forms of decrees, see Seton on Decrees (3rd edit.), p. 905, No. 1, erroneously put under the head Copyrights, 914, and 938, No. 3.

(*q*) *The Leather Cloth Company (Limited)* v. *Hirschfeld*, L. R. 1 Eq. 299.

(*r*) 21 & 22 Vict. c. 27, s. 2; *Neilson* v. *Betts*, L. R. 5 Eng. & Ir. App. 1, 22, overruling *Betts* v. *De Vitre*, 34 L. J. Ch. 289.

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The practical difficulty both in taking the account (*s*) and in assessing the damages (*t*) is great, and the plaintiff often waives his right to either.

Extent of injunction.

The injunction awarded will be made as extensive as is necessary for the protection of the plaintiff's right, and will, as of course, prohibit the use of the plaintiff's very trade-mark, or "any other mark only colourably differing therefrom." But if it is only under particular circumstances that the use of a given name or mark is likely to mislead the public, the use of it under other circumstances will not be prohibited. Thus, where the plaintiffs carried on business in Pall Mall, London, under the style of "The Guinea Coal Company," the defendant, who had set up business in Pall Mall under the style of "The Pall Mall Guinea Coal Company," was restrained from using this title. But the Court being satisfied that a business carried on under it elsewhere than in Pall Mall would not be likely to be mistaken for the plaintiffs', confined the injunction to Pall Mall (*u*).

Motion to commit.

If an injunction has been granted restraining a defendant from using a trade-mark, it will be no defence to a motion to commit for breach of the injunction, that the plaintiff has acquiesced in the use of the trade-mark, unless the acquiescence amounts almost to a licence (*x*). But in *Cartier* v. *May* (*y*), Wood, V.-C., in a case in which there had been a breach of the injunction, refused to commit in respect of such breach on account of the

(*s*) As to the account, see *infra*.

(*t*) As to damages, see *The Leather Cloth Company (Limited)* v. *Hirschfeld*, loc. cit., and *supra*, p. 17.

(*u*) *Lee* v. *Haley*, L. R. 5 Ch. 155.

(*x*) *Rodgers* v. *Nowill*, 8 D. M. & G. 614.

(*y*) 12th July, 1861 (unreported), Reg. Lib. 1861, A. 1738.

plaintiff's delay in coming to the Court, but ordered the defendant to pay the costs of the motion.

Removal of marks.

It follows, from the terms of the injunction, that the defendant must remove the mark before parting with any of the goods to which it is wrongfully affixed (*z*). The Court may indeed order such goods to be destroyed (*a*), but it probably will only do this in an extreme case. The plaintiff is also entitled to a discovery upon oath of all labels improperly bearing his trade-mark which are in the possession or power of the defendant, and of all stamps, &c., used for impressing the trade-mark, and to have such labels, stamps, &c., cancelled and defaced at the defendant's expense (*b*).

Account.

A court of equity will not only grant an injunction to restrain the use of a trade-mark, but will also require a dishonest defendant to account for the profits which he has made by the improper use of it. In *Farina* v. *Silverlock* (*c*), it was argued that the injunction was ancillary to the account, and that if no account were asked for, no injunction could be granted; but this was not acceded to, and in very many cases an injunction has been obtained, though the account was waived. In *Delondre* v. *Shaw* (*d*), the same argument was used. There Delondre had employed a celebrated French chemist Pelletier, to make for him sulphate of quinine, which Delondre sold in England for his sole benefit. The bottles had on the cork a seal with the words—

(*z*) See *Ponsardin* v. *Peto*, 33 Beav. 642; *Upmann* v. *Elkan*, L. R. 12 Eq. 140, on appeal, L. R. 7 Ch. 130, 20 W. R. 137.

(*a*) 25 & 26 Vict. c. 88, s. 21.

(*b*) See the decree in *Emperor of Austria* v. *Day*, Seton, 938.

(*c*) 1 K. & J. 509.

(*d*) 2 Sim. 237.

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"Produits Chimiques de J. Pelletier. J. P."—and a label was pasted upon the bottles, inscribed—"Sulphate de Quinine, Auguste Delondre, negt., à Paris." The defendants engraved and printed seals and labels resembling these. It was held, that Pelletier having no interest in the account, was improperly joined as a co-plaintiff with Delondre in a bill seeking an injunction and account. It is conceived, however, that Pelletier might, according to the present practice, maintain a suit to restrain the wrongful use of his name, and have an inquiry as to damages.

The defendant will not be compelled to account for profits made by the use of the trade-mark, so long as he was unaware that it was a trade-mark at all (*e*). But the burden of proving this lies upon him, and it is not sufficient to show that he was ignorant of the rights, or even of the existence, of the plaintiff (*f*). The plaintiff is not entitled to the whole of the profits made upon the sale of goods wrongfully marked, but only to the extra profit arising from the use of the trade-mark (*g*). But upon the principle *omnia præsumuntur contra spoliatorem* (*h*), it is conceived, that it lies upon the wrongdoer to show that in the absence of the trade-mark, he would have made any profit at all (*i*). The account cannot be taken beyond six years before bill filed (*f*). A defendant ordered to account cannot be

(*e*) *Edelsten* v. *Edelsten*, 1 D. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578, 4 N. R. 86. The ground on which the judge distinguished this case from *Cartier* v. *Carlile* (loc. cit.) is omitted from Mr. Beavan's report.

(*f*) *Cartier* v. *Carlile*, 31 Beav. 292.

(*g*) *Cartier* v. *Carlile* (loc. cit.).

(*h*) *Armory* v. *Delamirie*, 1 Strange, 505.

(*i*) As to one of several co-owners of a trade-mark suing for an account, see *infrà*.

charged with bad debts as profits, but he is not entitled to charge the plaintiff with the cost of manufacturing the goods in respect of which the bad debts were incurred (*k*).

Injunction against printers, &c.

The owner of a trade-mark is entitled to an injunction against a person, such as a printer of labels or an engraver, who knowingly enables another to appropriate his trade-mark. The use of the labels or instruments for impressing the mark will be prohibited, and in general by an interlocutory injunction. At the hearing, the labels, or the stamps, dies, or other instruments, will be ordered to be cancelled and defaced, but the plaintiff is bound to show that the defendant threatens and intends to make an improper use of them (*l*).

Consignees.

An injunction may be obtained against a consignee, wharfinger, or other innocent person having in his hands or under his control goods wrongfully branded, restraining him from parting with them until the brand is removed. It is his duty as soon as he becomes aware of the wrongful use of the trade-mark, to give the owner of it all the information in his power, that may enable him to discover the guilty parties, or prevent the infringement of the trade-mark, and to undertake not to part with the goods until the brand has been removed, and to offer to give all facilities to the person injured, for the purpose. If, after this, the trade-mark-owner files a bill, in general the defendant will not have to pay costs, and

(*k*) *Edelsten* v. *Edelsten*, 10 L. T. N. S 780.

(*l*) *Farina* v. *Silverlock*, 1 K. & J. 509, 6 D. M. & G. 214, 4 K. & J. 650; *Emperor of Austria* v. *Day*, 3 D. F. & J. 217; *Gout* v. *Aleplogh*, 6 Beav. 79, note; *Delondre* v. *Shaw*, 2 Sim. 237, can hardly be considered an authority to the contrary.

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Action against wharfinger restrained.

Rights of third party.

the plaintiff may have to pay them (*m*). A wharfinger, who refused to deliver, though before an injunction against him was obtained, was held entitled upon a bill filed by him, to restrain an action for non-delivery (*n*). If a third person acquires rights over goods wrongfully branded, without notice that the trade-mark is improperly affixed to them, he can deal with the goods according to his rights, subject only to the obligation of removing the mark. Thus, if the dock warrants of such goods have been deposited with him as a security, he will be entitled to the possession of the goods after the mark is removed and after paying the wharfinger's charges. In *Ponsardin* v. *Peto* (*o*), which was a suit to restrain the wrongful use of a champagne brand, the innocent mortgagee, who was not a party, was allowed, but as it seems by consent (*p*), to intervene by motion, *pro interesse suo*, on paying the costs of all parties of the motion. Sir John Romilly, M.R., there held, that the charges upon the goods ranked as follow:—the charges of the dock company, including their costs of suit; the monies advanced by the intervening mortgagee, including the costs of the motion which he was ordered to pay in the first instance; the plaintiff's costs of suit (*q*).

Innocent intringer.

If the defendant has actually infringed the plaintiff's trade-mark, whether knowingly or not, the plaintiff is entitled to a perpetual injunction, and is not bound to rest satisfied with the defendant's promise to commit no

(*m*) *Upmann* v. *Elkan*, L. R. 12 Eq. 140, on appeal, 20 W. R. 134, L. R. 7 Ch. 130. As to costs, see further *infra*.

(*n*) *Hunt* v. *Maniere*, 34 Beav. 157.

(*o*) 33 Beav. 642, 33 L. J. Ch. 371, 3 N. R. 237.

(*p*) See 3 N. R. 238.

(*q*) 33 L. J. Ch. 371.

further infringement (*r*), but as against an innocent defendant, he is not entitled to an account or damages (*s*). Such a defendant, therefore, if he does not resist the injunction, should offer to appear and consent to a perpetual injunction on motion (*t*), and to pay all costs up to and including those of obtaining the injunction (*u*). If, after this, the plaintiff unnecessarily brings the cause to a hearing, he will not get any more costs than he would have got under the defendant's offer (*x*). Indeed, in *Millington* v. *Fox* (*y*), a plaintiff in such a position was refused costs altogether, notwithstanding he was held entitled to an injunction. But there were special circumstances, and the case has not been considered as laying down a general rule (*z*). Under the present practice, a suit can generally be brought on without any unnecessary expense, by motion for decree. The defendant, if he has done all that can be required of him, may himself move to stay proceedings (*a*), though he must pay the costs of the motion (*b*). But where the answer may be of use to the plaintiff in working out his

Staying proceedings.

(*r*) *Geary* v. *Norton*, 1 De G. & Sm. 9; *Burgess* v. *Hills*, 26 Beav. 244; *Burgess* v. *Hately*, ibid. 249; *Moet* v. *Couston*, 33 Beav. 578; but see *Upmann* v. *Elkan*, L. R. 7 Ch. 130, 12 Eq. 140, and *Nunn* v. *D'Albuquerque*, 34 Beav. 595.

(*s*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston* (loc. cit.).

(*t*) *Leaf* v. *Taylor*, Seton on Decrees (3rd edit.), 944; *Webb* v. *Thorpe*, ibid.

(*u*) *Collins Company* v. *Walker*, 7 W. R. 222; *Pierce* v. *Franks*, 15 L. J. Ch. 122.

(*x*) *Colburn* v. *Simms*, 2 Hare, 543; *Pierce* v. *Franks* (loc. cit.).

(*y*) 3 Mylne & Craig, 338.

(*z*) See *Colburn* v. *Simms*, 2 Hare, 561.

(*a*) *Wallis* v. *Wallis*, 4 Dr. 458.

(*b*) See *Hume* v. *Bach*, Seton on Decrees (3rd edit.), 944.

Chap. III. rights under the decree, as in the case of a decree to account, a defendant, required to answer, is not in a position to require proceedings to be stayed until he has put in a sufficient answer (*e*). In the case of a *mala fide* defendant, the plaintiff may both exact an answer, and in addition to an injunction, is entitled to an account or inquiry as to damages, and in some cases, as we have seen, to other relief. He may therefore, in general, bring the suit to a hearing, in order to obtain such additional relief. Even in this case, he is not at liberty to vex the defendant unnecessarily. If, therefore, the defendant offers to submit to a perpetual injunction with costs, and at the time of the offer, or subsequently on the answer coming in, it was clear that any relief beyond this, such as an account or inquiry as damages, would be barren; the plaintiff at the hearing will run the risk of getting no more costs than he would have got had he accepted and acted upon the offer (*d*).

Negotiations.

Except in cases of bad faith, negotiations antecedent to the suit cannot be taken notice of, unless they amount to a binding release of the cause of suit (*e*).

In a case where the plaintiffs failed because their mark contained a misrepresentation, but the Court did not approve of the defendant's conduct, the bill was dismissed without costs (*f*).

(*e*) *Kelly* v. *Hutton*, 1 Y. & C. C. C. 197; *Stephens* v. *Bratt*, 10 L. T. N. S. 231, 12 W. R. 572.

(*d*) *Colburn* v. *Simms*, 2 Hare, 543, 561.

(*e*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *McAndrew* v. *Bassett*, 4 N. R. 12. In *Williams* v. *Thomas*, 2 Dr. & Sm. 29, 37, the plaintiff was not entitled to an injunction.

(*f*) *Leather Cloth Company (Limited)* v. *American Leather Cloth Company (Limited)*, 33 L. J. Ch. 199, 203. See *Morgan* v. *McAdam*, 36 L. J. Ch. 228, 233.

CHAPTER IV.

WHAT IS A TRADE-MARK.

Chap. IV

Uncertainty of what is a trade-mark.

It is not easy to say what is a trade-mark, in consequence partly of its depending so much on circumstances and the mode of user, partly of the early decisions having proceeded on the ground of misrepresentation and negatived any exclusive right in the name. For instance, the plaintiff was held to have no exclusive right to the name "Velno's Vegetable Syrup," and the defendant was allowed to sell it, if he did not represent it to be of the plaintiff's manufacture (*a*). The general principle applicable to all cases of trade-marks and similar rights is, that no one is permitted to appropriate the benefit of another's reputation by adopting or closely imitating the insignia under which that other sells his goods or carries on his business. The term trade-mark was no doubt in the first instance applied to cases where a trader marked his goods with some arbitrary sign, such as a lion or an anchor, which became known in the market as his mark (*b*). But the law which was originally applied to simple cases of this kind has been extended to cases in which the term trade-mark would not generally be used in reference to the subject imitated. The name, colour, and general appearance of a line of

(*a*) *Canham* v. *Jones*, 2 Ves. & B. 218.

(*b*) See *Leather Cloth Company (Limited)* v. *American Leather Cloth Company (Limited)*, 11 H. of L. 538.

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omnibuses (*c*), or the title of a magazine (*d*), are instances of this.

This distinction, however, is not of much practical importance, and we shall use the term trade-mark, or some other word, so as to comply as nearly as may be with ordinary usage. But there is another division of trade-marks and similar insignia which will be found to be of some importance. They are either arbitrary and unmeaning, as a lion or anchor, or they contain a statement of fact. As trade-marks of the former kind any unmeaning device, letters, or combination of letters and numbers may be used (*e*).

Arbitrary trade-marks.

Fancy names.

So, also, any fancy name not before applied to the article in question may be adopted, as "Howqua's Mixture" (*f*), "Medicated Mexican Balm" (*g*), "Excelsior Soap" (*h*), but words in common use, indicating quality, as "superior," "superfine" (*h*), or the material of the manufacture, as "paraffin" (*i*), or even fancy names in common use in any particular trade (*k*) cannot be appropriated for purposes for which they are in common use. The word "pessendede," Turkish for warranted, was protected in the case of watches intended for the Turkish market, but possibly only in conjunction with the other words and devices (*l*).

(*c*) *Knott* v. *Morgan*, 2 Keen, 213.

(*d*) *Maxwell* v. *Hogg*, L. R. 2 Ch. App. 307.

(*e*) *Ransome* v. *Bentall*, 3 L. J. Ch. 161; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518.

(*f*) *Pidding* v. *Howe*, 8 Sim. 447.

(*g*) *Perry* v. *Truefitt*, 6 Beav. 73.

(*h*) *Braham* v. *Bustard*, 1 H. & M. 453; *Hirst* v. *Denham*, L. R. 14 Eq. 542.

(*i*) *Young* v. *Macrae*, 9 Jur. N. S. 322.

(*k*) *Williams* v. *Osborne*, 3 L. T. N. S. 498.

(*l*) *Gout* v. *Aleploglu*, 6 Beav. 69, note. See *Broadhurst* v. *Barlow*, W. N. 1872, p. 212.

Local Names.

The name of a country from whence the material for the goods comes cannot be adopted, if it is the only country from whence the goods come, or if it is required for, or is usually adopted as, a designation of the goods or the material for them, as "Burgundy" for the wine of that country. But otherwise a name of a country, as "Anatolia" (*m*) (the old name of Anadoli), or of a district, as "Seixo," may be used (*n*).

A local name may of course be used, when it is employed, not in its ordinary meaning, but in a metaphorical or purely arbitrary manner, as "Ethiopian" (*o*), applied to black stockings, or "Belgravia" (*p*), as the title of a magazine (*q*).

Names derived from persons.

Cases not unfrequently occur in which a new article, the manufacture of which is sometimes a secret, is brought into the market and designated by the name of the inventor, or by some other distinctive appellation. If the article is not protected by a patent, and there is no secret as to its composition, any one else may make and sell it. If there is a secret, any one who becomes possessed of it without fraud or breach of trust (*r*) may, unless restricted by agreement or on the ground of trust (*s*), make use of it. And in either case, if the

(*m*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561, 4 N. R. 12, 123, 4 De G. J. & S. 380.

(*n*) *Seixo* v. *Provezende*, L. R. 1 Ch. App. 192.

(*o*) *Hine* v. *Lart*, 10 Jur. 106.

(*p*) *Macrell* v. *Hogg*, L. R. 2 Ch. App. 307.

(*q*) Motions for injunction were unsuccessful in the following cases: *Colonial Life Assurance* v. *Home and Colonial Assurance Company (Limited)*, 33 Beav. 549, 33 L. J. Ch. 741; *London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Assurance Company*, 11 Jur. 938; *London Assurance* v. *London and Westminster Assurance Corporation (Limited)*, 32 L. J. Ch. 664.

(*r*) *James* v. *James*, L. R. 13 Eq. 421, 20 W. R. 434.

(*s*) *Morison* v. *Moat*, 9 Hare, 241.

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article is commonly known by the name which the introducer first gave it, though this will not make the name common property (*t*), yet any subsequent dealer may, it seems, use this name, provided he does not lead the public to believe that the article in which he deals has been made or sold by the original inventor or his trade-successors (*u*), and does not call his manufacture "the only genuine" article (*v*). Thus, in *Edelsten* v. *Vick* (*x*), a property was successfully asserted in the name of a particular description of solid-headed pins, called "Tayler's pins," but Wood, V.-C., thought that there would be no objection to such an announcement as this—"I, John Smith, manufacture and sell Tayler's solid-headed pins" (*y*). This is pretty nearly what happened in *Stokes* v. *Landgraff* (*z*), where the plaintiff, a glass manufacturer, invented and used certain peculiar names of quality, such as "Lake," "Cylinder," which came into common use among glass-manufacturers as designations of quality. It was held, that the defendant was entitled to sell his glass as "Landgraff's Lake," or "Landgraff's Cylinder." It seems that if an article is made according to a secret recipe, and the inventor gives it a fancy name, but through acquiescence or otherwise the right of property in the name ceases, he and his trade-successors having the recipe, are alone

(*t*) *Millington* v. *Fox*, 3 My. & Cr. 338.

(*u*) *Leather Cloth Company (Limited)* v. *American Leather Cloth Company (Limited)*, 11 H. of L. 539; *James* v. *James*, L. R. 13 Eq. 421; *Canham* v. *Jones*, 2 V. & B. 218; *Croft* v. *Rooke*, W. N. 1872, p. 49; *Liebig's Extract of Meat Company* v. *Hanbury*, 17 L. T. N. S. 298.

(*v*) *James* v. *James* (loc. cit.), but see *Seley* v. *Fisher*, 11 Sim. 581 *ad fin.*

(*x*) 11 Hare, 78.

(*y*) 11 Hare, 85.

(*z*) 17 Barbour, S. C. 609 (Am.).

entitled to use the word "original" in conjunction with the name (*a*). In a case where the article was called by the name of the inventor, the Master of the Rolls considered that any one who had honestly acquired a knowledge of the recipe might sell the article under this name *simpliciter* after the inventor's death (*b*). A name may be common property as between wholesale and retail dealers, but not common as between retail dealers and the public (*c*).

Trade-marks involving statement of fact.

The second division of trade-marks or insignia comprises those which contain some statement of fact. Thus, in some cases, the name of an article implies that it is protected by a patent, as "Patent Plumbago Crucibles" (*d*) or "Flavel's Patent Kitchener" (*e*). Of a similar character are labels on reels of cotton containing numbers expressing the quantity upon the reel, or the words "J. R. & C. P. Crocketts, Manufacturers" (*f*) as part of the stamp upon leather cloth.

Direct and formal statements are also frequently annexed to the article, as testimonials, directions for use (*g*), statements as to the composition of the article (*h*), or the origin of the recipe under which it is made (*i*).

(*a*) *Cocks* v. *Chandler*, L. R. 11 Eq. 446; *Lazenby* v. *White*, therein cited. But see *Browne* v. *Freeman*, 4 N. R. 476, 12 W. R. 305.

(*b*) *James* v. *James*, L. R. 13 Eq. 421, 20 W. R. 434.

(*c*) *Ford* v. *Foster*, L. R. 7 Ch. 611.

(*d*) *Morgan* v. *McAdam*, 36 L. J. Ch. 228.

(*e*) *Flavel* v. *Harrison*, 10 Hare, 467.

(*f*) *Leather Cloth Company (Limited)* v. *American Leather Cloth Company (Limited)*, 11 H. of Lds. 523.

(*g*) *Franks* v. *Weaver*, 10 Beav. 297; *Selon* v. *Senate*, cited 2 Ves. & Bea. 220; *Abbott* v. *Bakers' and Confectioners' Tea Association*, W. N. 1871, p. 207: 1872, p. 31.

(*h*) *Pidding* v. *How*, 8 Sim. 447.

(*i*) *Perry* v. *Truefitt*, 6 Beav. 73.

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protection is not afforded to distinctive insignia of this kind if they contain in themselves false statements, or are calculated to mislead the public as to material facts (*j*).

Thus, where a plaintiff issued false statements respecting the composition of "Howqua's Mixture" tea (*k*), and the origin of the recipe for "Medicated Mexican Balm" (*l*), he was left to bring his action and refused an injunction in the meantime; but on the other hand, extravagant representations respecting the value and effect of a plaintiff's medicine (*m*) did not deprive him of an immediate remedy, being, probably, looked upon as mere puffing; so also with the name of a fictitious person, as the editor of a magazine (*n*).

"Patent."

Where the word "patent" forms part of the trade-mark, and either no patent has ever been taken out (*o*), or the word is only adopted after a patent has expired (*p*), the trade-mark will be refused protection. Under the old practice, protection was refused until the plaintiff established his right by an action at law. Where a patent has been taken out, and the trade-mark becomes established during the existence of it, it is not quite clear whether the word patent may continue to be used after its expiration (*q*) or not. If it is desired to be so used,

(*j*) *Leather Cloth Company* (*Limited*) v. *American Leather Cloth Company* (*Limited*), 11 H. of Lds. 523, 543.

(*k*) *Pidding* v. *How*, 8 Sim. 477.

(*l*) *Perry* v. *Truefitt*, 6 Bea. 73, 418.

(*m*) *Holloway* v. *Holloway*, 13 Bea. 209.

(*n*) *Hogg* v. *Kirby*, 8 Ves. 215.

(*o*) *Flavel* v. *Harrison*, 10 Hare, 467.

(*p*) *Edelsten* v. *Vick*, 11 Hare, 78.

(*q*) It was said that it might by Wood, V.-C., in *Edelsten* v. *Vick*, 11 Hare, 78, but the decision has been questioned by Lord Kingsdown in *Leather Cloth Company* (*Limited*) v. *American Leather Cloth Company* (*Limited*), 11 H. L. 533; and Wood, V.-C., in a subsequent case of

the precaution should be taken of adding the date of the patent (*r*).

As since 1862 the Court of Chancery cannot retain a bill with liberty to bring an action, it is to be presumed that it will refuse to interfere altogether in cases where there is material misrepresentation by the plaintiff, or it may try the case before a jury.

In a case at law (*s*) the plaintiff having proved *mala fides* against the defendant, was allowed to recover, although his mark improperly contained the word "patent." But no objection seems to have been taken, on the ground that the use of the word "patent" was a fraud on the public, and the case, therefore, cannot be relied upon as an authority that the courts of law act, in such cases, upon different principles to the courts of equity.

Under the Merchandise Marks Act, 1862 (*t*), no person is liable to prosecution for counterfeiting a trade-mark which contains the word "patent" if that is a misrepresentation (*u*).

But fraud, in order to disentitle a plaintiff to protection in equity, must be embodied in the trade-mark, or the trade itself must be fraudulent. And in such a case the plaintiff cannot succeed at law. Mere collateral misrepresentations will not disentitle him to relief either at law or in equity (*x*).

Collateral misrepresentation.

Morgan v. *McAdam*, 36 L. J. Ch. 228, said that he only considered the word might continue to be used as part of the name of the article, as "patent pins."

(*r*) *Morgan* v. *McAdam*, 36 L. J. Ch. 228.

(*s*) *Sykes* v. *Sykes*, 3 Barn. & Cres. 541.

(*t*) 25 & 26 Vict. c. 88.

(*u*) *Morgan* v. *McAdam*, 36 L. J. Ch. 228.

(*x*) *Ford* v. *Foster*, L. R. 7 Ch. 711.

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Name, how far a trade-mark.

It is very common for a manufacturer to stamp his name on his goods, which in time becomes a trade-mark, and it is said by Wood, V.-C. (*y*) to be as strong an instance of trade-mark as can be suggested. But the simple use of the name causes great difficulty, because two traders may have the same name, and it is impossible to prevent a man from using his own name. The courts have, however, restrained persons from using their own names, even apart from a trade-mark, in such a manner as to represent their goods to be the goods of another, although that other was only the successor of the original maker, and had a different name (*z*). But they cannot go further, and such an injunction is not nearly so good a protection as an absolute one against all use. And it may be that stricter evidence of misrepresentation would be required in such a case, because the fact of misrepresentation does not necessarily follow from the sale under the given name, as it does where the seller has not the same name, or has imitated the mark (*a*). The name of a manufacturer, therefore, is not a trade-mark in quite the same sense as the mark of an anchor is.

By the French law for the registration of trade-marks, a name must be "Sous une forme distinctive."

The name of the place of manufacture may be adopted (*b*), and has this advantage, that where the name

(*y*) *Ainsworth* v. *Walmsley*, L. R. 1 Eq. Ca. 518.

(*z*) *Croft* v. *Day*, 7 Beav. 84; *Rodgers* v. *Nowill*, 6 De G. M. & G. 614; *Holloway* v. *Holloway*, 13 Beav. 209; *Churton* v. *Douglas*, Johns. 147; *James* v. *James*, L. R. 13 Eq. 421, 20 W. R. 434.

(*a*) See *Burgess* v. *Burgess*, L. J. Ch. 675; *Rodgers* v. *Nowill*, 6 Hare, 337; *Howe* v. *Howe Machine Company*, 50 Barbour, 236 (Am.)

(*b*) *Leather Cloth Company (Limited)* v. *American Leather Cloth Company (Limited)*, 11 H. L. 523; *Motley* v. *Downman*, 3 My. & Cr. 1; *Wotherspoon* v. *Currie*, L. R. 5 Eng. & Ir. App. 508.

of a place in the United Kingdom forms part of a trade name or mark, counterfeits will be stopped at the Custom House (*c*).

Unauthorised use of name of a physician.

In the cases to which we have referred, a man has employed his name to designate goods or his business, but whether the Court of Chancery can restrain the unauthorised use of a name in other cases has been the subject of doubt. In *Clark* v. *Freeman* (*d*) the eminent physician, Sir James Clark, applied for an injunction to restrain the defendant from selling a quack medicine under the name of "Sir James Clarke's Consumption Pills," and from representing it as sold on his behalf or under his sanction and approbation. The defendant issued handbills calculated to create the impression that the pills were sold by the defendant as agent of Sir James Clark, and under his direct authority; and there was evidence that this impression had been actually produced. Lord Langdale, however, refused to interfere, on the ground that, as Sir James Clark did not manufacture or sell pills, there was no damage to property. The decision seems to be approved of by Lord Westbury (*e*), but has been questioned by Lord Cairns (*f*) and Sir R. Malins, the latter of whom says, "It is perfectly clear to my mind, at all events, that a man has a sufficient property in his own name to prevent another from falsely passing off, injuriously to his reputation, medicines as personally prescribed by him, which might cause a total loss of his professional character" (*g*).

(*c*) 35 & 36 Vict. c. 20, s. 4, and 16 & 17 Vict. c. 107, s. 44.
(*d*) 11 Beav. 112.
(*e*) 33 L. J. Ch. 200.
(*f*) *Maxwell* v. *Hogg*, L. R. 2 Ch. 310.
(*g*) *Springhead Spinning Company* v. *Riley*, L. R. 6 Eq. 551. As to

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There can be no doubt that issuing quack medicines under the name of an eminent physician is an impudent fraud upon the public, and one that may do harm to the ignorant and inexperienced, and it is to be regretted that the criminal law does not afford summary redress against such impostors. In *Lord Byron* v. *Johnston* (*h*) the Court acted upon the principle that it had jurisdiction to restrain the defendant from publishing, as Lord Byron's, poems which were not his; but the case is very shortly reported (*i*).

A defendant may be restrained from representing himself as successor to a person, who, in fact, has not retired from business at all (*j*).

The nature of the *jus in rem*, or property, which a person has in his own name will be readily understood, and in many cases it is protected by the laws against forgery, or by other criminal sanctions (*k*). The question, which will be discussed hereafter, how far names of individuals can be subjects of transfer, is not without difficulty.

Definitions in Act of 1862.

The Merchandise Marks Act, 1862 (*l*), contains the following definitions for the purposes of the Act, of the terms "mark" and "trade-mark."

the nature of professional reputation, see Austin on Jurisprudence, table ii. note 3, C.b. p. 980 (3rd edit.).

(*h*) 2 Mer. 29.

(*i*) See also *Archbold* v. *Sweet*, 1 M. & R. 162, and *Prince Albert* v. *Strange*, 1 Mac. & Gor. 25, 40; *Routh* v. *Webster*, 10 Beav. 561; *Dixon* v. *Holden*, L. R. 7 Eq. 488; *Mulkern* v. *Ward*, L. R. 13 Eq. 619.

(*j*) *Harper* v. *Pearson*, 3 L. T. N. S. 547; and see *Edgington* v. *Edgington*, 11 L. T. N. S. 199; and *Christie* v. *Christie*, W. N. 1873, p. 7; and as to "Agent" see *Wheeler and Wilson Manufacturing Company* v. *Shakespear*, 39 L. J. Ch. 36.

(*k*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 566, 4 N. R. 14. See the last paragraph but one of the judgment.

(*l*) 25 & 26 Vict. c. 88, s. 1.

The word "mark" shall include any mame, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark of any deseription.

And the expression "trade-mark," "shall include any and every such mame, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark of any other deseription, lawfully used by any person to denote any chattel or, in Scotland, any article of trade, mamufacture, or merchandise, to be an article or thing of the mamufacture, workmanship, production, or merchandise of such person, or to be an article or thing of any peculiar or particular deseription, made or sold by such person, and shall also include any name, signature, word, letter, number, figure, mark, or sign, which in pursuance of any statute or statutes for the time being in force relating to registered designs, is to be put or placed upon or attached to any chattel or article during the existence or continuance of any copyright or other sole right acquired under the provisions of such statutes, or any of them." By section nine there is excepted from this definition "any name, word, or expression, generally used for indicating such chattel or article to be of some particular class or description of manufacture only."

Name of company.

No company can be registered in accordance with the Companies Act of 1862, under a name identical with that of a pre-existing company, or so nearly resembling it as to be likely to mislead the public (*m*).

Complex insignia.

Most of the cases of trade-marks or insignia with which we have hitherto had to deal, have been of a simple character, so far as regards external appearance.

(*m*) 25 & 26 Vict. c. 89, s. 20.

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But cases occur where they are of a more complex nature, and it will be useful to refer particularly to some peculiar instances of this sort.

Titles of periodicals.

The cases of magazines, newspapers, and other periodicals, are among the earliest instances in which property in a name or title was recognised and protected by the Court of Chancery. In *Hogg* v. *Kirby* (*a*), the plaintiff was the proprietor of a work published in monthly numbers, under the title of the "Wonderful Magazine." The defendant published the first five numbers by agreement with the plaintiff, after which the agreement was determined, and the defendant ceased to be the publisher. The fifth number was published in December 1802, and on the 1st of January 1803 the defendant published the first number of a monthly periodical, called "The Wonderful Magazine, New Series, Improved." This publication, though not exactly similar to the plaintiff's, was so contrived as to lead to the belief that it was in continuation of the plaintiff's publication. The device on the cover was the same, though not exactly similar in the execution. Kirby's number took up the same article in continuation which had been left unfinished in the middle of a sentence by the plaintiff's fifth number, and commenced with the word at the bottom of the last page. A description and a print of a remarkable character were introduced, which had been promised in the plaintiff's fifth number, as part of the contents of the sixth. The defendant's number also contained in a separate half-sheet, a short index of the contents of the plaintiff's first five numbers, under the name of an index to the first part. The execution of the two works was generally similar.

(*a*) 8 Ves. 215. See, too, *Mack* v. *Petter*, L. R. 14 Eq. 431.

Lord Eldon granted an injunction restraining the defendant, not only from publishing any copy of the plaintiff's work, but also "from printing, publishing, or exposing to sale, any other work or publication, as, or being, a continuation of the plaintiff's work." The ground of the decision as stated by Lord Eldon in the judgment, and as further explained in *Longman* v. *Winchester* (*o*), was that the defendant's publication had been "handed out to the world as the continuation of the plaintiff's work." In *Edmonds* v. *Benbow* (*p*), a similar injunction was granted in the case of a newspaper called "The Real John Bull;" and the proprietors of "Bell's Life in London and Sporting Chronicle," obtained an injunction against the publishers of the "Penny Bell's Life and Sporting News," restraining them from publishing a newspaper under any title, of which the words "Bell's Life" formed part (*q*).

Fraudulent publication of old edition.

The publication of an old edition in which the copyright is expired, as a later edition in which there is a subsisting copyright, will be restrained, but an advertisement stating that any additional matter contained in the later edition, is spurious and of no value, is no subject for an injunction, although, if untrue, it may found an action for libel (*r*).

(*o*) 16 Ves. 269, 271. See, too, *Cadwell* v. *Lye*, 17 Ves. 335, 342.

(*p*) 20 Feb. 1821, A. 572; Seton on Decrees (3rd edit.), 905.

(*q*) *Clement* v. *Maddick*, 1 Giff. 98: better reported 5 Jur. N. S. 594; *Prowett* v. *Mortimer*, 2 Jur. N. S. 414. Injunctions were refused in *Spottiswoode* v. *Clarke*, 2 Ph. 154; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Bradbury* v. *Beeton*, 39 L. J. Ch. 57; and in *Noah* v. *Snowden*, Hopkins. 347 (Am.). See, too, *Keene* v. *Harris*, cited 17 Ves. 338; and as to degree of resemblance, *Ingram* v. *Stiff*, 5 Jur. N. S. 947; and as to transfer of title of a newspaper, see *infra*.

(*r*) *Seeley* v. *Fisher*, 11 Sim. 581.

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Name, &c., of song.

Music publishers who had adopted original words to an old American air, which was re-arranged for them, and had given to the song so composed, the name of "Minnie," and procured it to be sung by a popular singer in London, by which means it became a popular song, published it with a title page containing a picture of the singer and the words "Minnie, sung by Madame A. T. and Miss D., at Jullien's concerts, written by George Linley," &c. It was held that they had acquired a property in the name, title, and title-page of the song which a rival music publisher would be restrained from invading (*s*).

Name and sign of hotel.

Property of the kind which we are considering, exists in the name and sign of an hotel. Thus, the proprietor of an hotel, which he opened as "Irving House," but which became generally known as "Irving Hotel," was held to have a property in both names (*t*). In *Knott* v. *Morgan* (*u*), the plaintiffs and defendant both ran omnibuses between Paddington and the Bank. The defendant was restrained from running omnibuses having upon them such names, words, and devices as to form a colourable imitation of the names, words, and devices on the omnibuses of the plaintiffs. In an American case of *Marsh* v. *Billings* (*v*), the plaintiffs agreed with the proprietor of an hotel in Boston, called "Revere House," to provide coaches at a railway station to convey customers to the hotel, and the proprietor authorised them to put upon their coaches and the caps of the attendants, as a

Of an omnibus.

(*s*) *Chappell* v. *Sheard*, 2 K. & J. 117; *Chappell* v. *Davidson*, ibid. 123; 8 De G. M. & G. 1.

(*t*) *Howard* v. *Henriques*, 3 Sandf. S. C. 727 (Am.); *Woodward* v. *Lazar*, 21 California Rep. 449 (Am.).

(*u*) 2 Keen, 213. See the observations of Wood, V.-C., on this case in *Woollam* v. *Ratcliff*, 1 H. & M. 261.

(*v*) 7 Cushing, 322.

badge, the words "Revere House." The defendant also ran coaches from the station to the hotel, and he put the words "Revere House" upon them, and upon the caps of his attendants. It was held, that the plaintiffs were entitled to recover damages against the defendant, for using these words, so as to lead passengers to believe that he had the patronage of the hotel for the conveyance of passengers. A trader who has adopted a peculiar and distinctive mode of making up or packing his goods, is entitled to restrain an exact or colourable imitation of it (*y*).

Mode of packing.

A foreign State has a property in the credit of its currency, and can therefore obtain from the Court of Chancery an injunction restraining the issue of spurious notes, which purport to be, and are likely to be taken to be, issued by the public authority of the State (*z*). This right is in most cases protected by the criminal law, and consequently it is only in an exceptional case that the Court of Chancery is appealed to. The Crown, it is conceived, has similar rights in respect of the currency of this country, but no case has arisen in which they have been vindicated through the civil tribunals.

Currency of a foreign state.

(*y*) *Woollam* v. *Ratcliff*, 1 H. & M. 259; *Abbott* v. *Bakers' and Confectioners' Tea Association*, W. N. 1871, p. 207: 1872, p. 31.

(*z*) *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217.

CHAPTER V.

ACQUISITION AND TRANSFER OF TRADE-MARKS.

Trade-mark, how far property.

A TRADE-MARK has been established, as before stated, to be property, but it is not property for all purposes. It is merely the exclusive right of applying a particular mark to particular goods, and the owner of such right has no interest in the mark independently of such application. It has been compared to a singer's voice (*a*), a copyright, or a patent (*b*). It differs from a copyright and patent, as in those cases the author or inventor has benefited the public by the invention of something new, to the reproduction of which he has an exclusive right. A trade-mark is primarily for the benefit of the trader alone, is not new, and may be used for other manufactures.

Different from patent.

In some cases it has been argued that a trade-mark, if it is property, must be a monopoly like a patent, but a patent excludes other persons from making the same article, and improvements on the same article. A trade-mark excludes no one from making the same article, but only from using the same mark or designation for it. Even if a man has a right to the name of the article, as, for instance, some particular medicine, there is nothing to prevent any one making the same medicine, or an im-

(*a*) *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 525.
(*b*) See 11 Ho. of Lds. 533.

provement of the same medicine, and selling it as equal to, or better than the original medicine (*c*), only he must do so honestly, and not print the "equal to," in very small letters and the name of the original medicine in very large letters (*d*).

The object of a patent is to secure to an inventor the pecuniary benefit of his invention; the object of a trade-mark is to secure to a trader the benefit of his reputation and to protect the public from fraud or deception on the part of a rival trader.

Acquisition of trade-mark by use.

A trade-mark is therefore more like the goodwill of a trade, and is acquired not by invention but by use and the knowledge of such use in the market. Thus, it has been said that a person has no right to prevent even the use of his own name, unless with reference to the same class of goods as are actually manufactured by him (*e*). The reason given is that pecuniary injury to the plaintiff is necessary to ground any relief at law or equity, and unless there is actual known user in the market, there can be no pecuniary injury to the plaintiff by the use of his name or mark by another.

Long use is not required; it is only necessary that the article should have been brought into the market under the trade-mark (*f*). And, indeed, the fact that a person finds it worth his while to imitate a trade-mark is sufficient to show that it is known in the market (*g*).

(*c*) *Edelsten* v. *Vick*, 11 Hare, 85.

(*d*) *Day* v. *Binning*, C. P. Cooper, 89.

(*e*) *Clark* v. *Freeman*, 12 Beav. 112; *Leather Cloth Company (Limited)* v. *American Leather Cloth Company (Limited)*, 33 L. J. Ch. 200.

(*f*) *Hall* v. *Barrows*, 33 L. J. Ch. 548. See *Purser* v. *Brain*, 17 L. J. Ch. 141; *Collins Company* v. *Brown*, 3 K. & J. 425.

(*g*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561, 568, 4 De G. J. & S. 380. See *Hine* v. *Lart*, 10 Jur. 106.

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But mere advertisement prior to use is not sufficient (*h*).

Trade-marks, titles of periodicals, etc., have sometimes been registered under the Copyright Act (*i*), but it is clear that no right is obtained by this means, and the proceeding seems quite useless (*k*).

Proof of use.

As a trade-mark is acquired by use, it is necessary for the plaintiff, in all suits for infringement, to show that he or his predecessors used the mark before the defendant, and that it was known in the market to be so used, a proof which frequently causes some trouble and expense. For although the Courts are inclined to presume from the fact of imitation that it was so well known as to be worth imitating, there are cases where the mark is alleged to be common property as the name of a particular quality of goods (*l*).

Duration of right.

A person who has acquired a right to a trade-mark retains that right only while he continues to use the mark; if he discontinues the use, he loses the right of preventing others from using it. The proper test of this having happened is, that the use of the trade-mark by other persons has ceased to deceive the public as to the maker of the article, and the exclusive right to the use of a fancy name as a trade-mark is not lost by the inventor habitually using it in conjunction with his own name as maker of the article (*m*).

Origin of

Trade-marks may be acquired both by design and ac-

(*h*) *Maxwell* v. *Hogg*, L. R. 2 Ch. 307.

(*i*) 5 & 6 Vict. c. 45.

(*k*) *Maxwell* v. *Hogg*, L. R. 2 C. A. 307; *Kelly* v. *Hutton*, L. R. 3 Ch. 708.

(*l*) *Millington* v. *Fox*, 3 My. & Cr. 338.

(*m*) *Ford* v. *Foster*, L. R. 7 Ch. 611.

cidentally. For instance, in *Edelsten* v. *Edelsten* (*n*) the plaintiff having used designedly an anchor as a trade-mark for his wire, his wire consequently became known as "anchor wire," or "anchor brand wire." And he was held to have a trade-mark in these names which had grown up accidentally, as well as in the anchor (*o*).

In a great number of the cases where persons have complained of infringements of their trade-marks, they were not the original owners of the trade-marks, but the successors in business of the original owners. No question was ever raised to their right on this ground, but this may partly have been owing to their having themselves in all cases used the trade-mark.

It is, however, now established, that a trade-mark in the more limited sense of the term, that is to say, a mere arbitrary device or name, involving no statement of fact, may in all cases be transferred together with the goodwill or business to which it belongs (*p*). Indeed this principle was admitted as early as 1805, when it was decided in *Longman* v. *Tripp* (*q*) that the right to publish a newspaper under a given title was goods and chattels within the Bankruptcy Acts, and passed accordingly by the assignment of the bankrupt's property by the commissioners under the old law. For, as is observed by Wood, L. J., "There is nothing analagous to copyright in the name of a newspaper, but the proprietor

(*n*) 1 De G. Jo. & Sm. 185, 201.

(*o*) See, too, *Howard* v. *Henriques*, 3 Sandf. S. C. 727 (Am.).

(*p*) *Hine* v. *Last* (1846), 10 Jur. 106; *Hall* v. *Barrows* (1863), 33 L. J. Ch. 205, overruling 32 L. J. Ch. 548; *Leather Cloth Company (Limited)* v. *American Leather Cloth Company (Limited)*, 33 L. J. Ch. 199, 11 H. of Lds. 523.

(*q*) 2 Bos. & Pull. N. R. 67.

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has a right to prevent any other person from adopting the same name for any similar publication, and this right is a chattel interest capable of assignment" (*r*).

As to trade-marks, or insignia involving statements of fact, it is often said that they cannot be transferred, if the transfer would be a fraud upon the public. Such insignia, however, cannot be used even by the original inventor, if they are, or when they become untruthful (*s*), and of course a transferee takes them under a similar limitation. So that, as suggested by L. J. Turner (*t*), the restriction "applies rather to the use of the mark assigned than to the power of assigning it." Thus, the purchaser of a business is in general entitled to carry it on under the name or firm under which the vendor carried it on. If, however, the vendor's trade-mark were such as to imply that he personally took part in the business, it could not be used by the purchaser without modification. "The question in every such case must be whether the purchaser, in continuing the use of the original trade-mark would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade-mark" (*u*).

Use of firm by transferee, or trade-successor.

So the use of the words "J. R. & C. P. Crockett, Manufacturers," as part of a stamp upon American cloth, by a company who had purchased part of the business established by J. R. and C. P. Crockett, was, under the circumstances, held to represent that the Crocketts per-

(*r*) L. R. 3 Ch. 708, and see *Ex parte Foss*, 2 De G. & Jo. 230; *Platt* v. *Walter*, 17 L. T. N. S. 157.

(*s*) *Ante*, p. 54.

(*t*) *Bury* v. *Bedford*, 33 L. J. Ch. 465, 469.

(*u*) 11 H. of Lds. 534. See *Bloss* v. *Bloomer*, 23 Barbour, 609 (Am.)

sonally were concerned in the manufacture of the goods, and thus to deprive the stamp of the right to protection (*v*). Again, a person like an artist, whose name is of value, as showing personal skill, cannot allow another to use it (*x*). There are, however, many cases in which a successor to a business, though he would not be at liberty to use *simpliciter* the name of a person identified with it, would still be entitled to denominate himself as successor to that person (*y*), and to prevent any one else from so describing himself (*z*). And a trade-mark which originally had a personal reference may eventually come to be a mere arbitrary trade-mark, passing in the market as nothing more than an indication of quality (*a*).

On the whole, therefore, it appears that by the usages of trade, a trade-mark, even if it consists of the name of one or more of a firm, will, in general, pass to the successors in business of the firm, although they bear a different name, because no one supposes that the members of a firm have necessarily the same name as a firm. If a member of a firm for valuable consideration releases to his co-partners, who continue to carry on the business, his interest in the name of the firm, he will be restrained from setting up a business under that name or otherwise inducing the public to believe that his business is identical with the business of the firm. In *Churton* v. *Douglas* (*b*), the defendant, John Douglas, was, under such circumstances, restrained

Release of interest in trade-name by co-partner.

(*v*) *Leather Cloth Company (Limited)* v. *American Leather Cloth Company (Limited)*, loc. cit.

(*x*) 11 H. of Lds. 545.

(*y*) *Hall* v. *Barrows*, 33 L. J. Ch. 204, 207.

(*z*) *Churton* v. *Douglas*, Johns. 174, 190.

(*a*) 33 L. J. Ch. 207.

(*b*) Johns. 174. See *Burrows* v. *Foster*, 1 N. R. 156.

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Trade-name, partnership assets.

from carrying on business under the firm of "John Douglas & Co.," though he really had partners (*c*). If a partnership is dissolved and the assets have to be sold, the trade-mark and the name and style of the firm must be included in the sale (*d*), and a partner, unless he has purchased them, will, after the sale, be excluded from further use of them (*e*); except that, if the name of one of the partners constituted the style of the firm, that partner will not be prevented from carrying on business in his own name, but he will not be at liberty to add anything to lead the public to the belief that his business is the same as the business of the late firm (*f*). But if the partners agree to divide the assets, each will have a right to use the trade-mark, even though the mark is the name of the firm, and one partner has the same name and the other partner a different one (*g*).

Trade-mark incident to certain works.

In *Motley* v. *Downman* (*h*), Lord Cottenham thought that the mark "M. C." on tin plates, having been always used by owners of particular works, had become attached to the works, and would, as a matter of course, be used by a lessee.

It was at one time considered that the assignment of a trade-mark was nothing more than a licence to the assignee to use it, and that, consequently, the assignor might continue to use it, unless he had contracted not to

(*c*) As to a stranger pretending to be "successor" to a subsisting firm, see *Harper* v. *Pearson*, 3 L. T. N. S. 547, and *ante*, p. 58.

(*d*) *Hall* v. *Barrows*, loc. cit.; *Bradbury* v. *Dickens*, 27 Beav. 53; but see *Lewis* v. *Langdon*, 7 Sim. 421, *et quære*; *Hookham* v. *Pottage*, L. R. 8 Ch. 910.

(*e*) *Hine* v. *Lart*, 10 Jur. 106.

(*f*) See *Labouchere* v. *Dawson*, L. R. 13 Eq. 322; *Johnson* v. *Helleley*, 34 Beav. 63, 2 D. J. & S. 446.

(*g*) *Banks* v. *Gibson*, 34 L. J. Ch. 592, 34 Beav. 566.

(*h*) 3 My. & Cr. 1.

do so (*i*). But it is now established that the trade-mark passes as property by the assignment, and the seller will be restrained from using it himself (*k*); and he could not, therefore, ordinarily assign it to more than one person. But if a man has two places of business and one trade-mark, as he could devise so he could probably assign each business and the trade-mark to two separate persons.

Two owners of one trade-mark.

That he can devise it, was decided by Wood, V.-C., in the case of Mr. Dent, the clockmaker (*l*). There the devisee of each business was held entitled to sue separately against the infringer of their common trade-mark, for an injunction, an account of profits, and payment to the plaintiff of so much of the profits as he was entitled to. But there would obviously be great difficulty in ascertaining this proportion, and it seems that the devisees might, if they pleased, have sued jointly (*m*).

But many persons cannot be entitled to the same trade-mark, and partly on this ground it was held that there was no trade-mark in a prize medal (*n*).

Alien owner of trade-mark.

Questions have sometimes been raised as to the right of an alien to have his trade-mark protected, and it is now clearly settled that he has this right. The scientific division of rights into *jura in rem* and *jura in personam* must not be confounded with the old division of actions under English law into real and personal. As applied to an action, the word "personal" is used with some

(*i*) See 1 H. & M. 285.

(*k*) *Bury* v. *Bedford*, 33 L. J. Ch. 565. As to assignment by assignees in bankruptcy, see *Hudson* v. *Osborn*, 39 L. J. Ch. 79.

(*l*) *Dent* v. *Turpin*, 2 J. & H. 139, 30 L. J. Ch. 495; acc. *Southorn* v. *Reynolds*, 12 L. T. N. S. 75.

(*m*) 2 J. & H. 149.

(*n*) *Batty* v. *Hill*, 1 H. & M. 264.

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variety of meaning. Most frequently it designates an action which does not concern land or real estate. And a personal action of this kind for the violation, in this kingdom, of a right recognised by common law, may, in general, be maintained by an alien, though resident abroad, as well as by a subject (*o*). So that the action may be maintainable, although the right violated is a *jus in rem*, or partakes of the nature of property (*p*). An alien, therefore, though he does not carry on business here, and his goods are not sold here, may maintain an action or suit against any one who violates his trade-mark in this country, on the same principle as permits him to bring an action for libel or slander (*q*). In cases coming within the Merchandise Marks Act, 1862, the right of the alien is secured by statute (*r*).

(*o*) *Pisani* v. *Lawson*, 6 Bing. N. C. 90.

(*p*) See and consider *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217; and *Jefferys* v. *Boosey*, 4 Ho. of L. 885.

(*q*) *Collins Company* v. *Brown*, 3 K. & J. 425; *Collins Company* v. *Cowen*, ibid. 428; *Collins Company* v. *Reeves*, 28 L. J. Ch. 56. The rule is the same in the American Courts; *Coats* v. *Holbrook*, 2 Sandf. N. Y. 586; *Taylor* v. *Carpenter*, 2 Sandf. N. Y. 603, 11 Paige (N. Y.), 297; *Taylor* v. *Carpenter* (Massachusetts), 3 Story, 458; 2 Wood & Min. 7. As to alien enemy, see *Collins Company* v. Brown (loc. cit.).

(*r*) 25 & 26 Vict. c. 88, s. 22, and see definition of "person" in sect. 1.

CHAPTER VI.

Infringement.

The right of the owner of a trade-mark is, as we have seen, a *jus in rem*, that is to say, it springs from a command which is addressed by the State to its subjects in general, and, taking a simple case as a type, requires them to abstain from selling articles of the description to which the owner applies the mark under that mark, or under any other mark or device likely to be mistaken for it by ordinary observers. According to English law, a person who in fact violates a right of this kind in most cases renders himself liable to an action, although he may have had no intention of violating it, and may even have been unaware of its existence. Instances of this occur in the cases of trespass, and of infringement of patents or copyrights. But even in English law the rule is not universal, and it seems to have no place in the Roman system (*a*). It must not therefore be imagined that the right of a trade-mark-owner is anything else than a *jus in rem* or proprietary right, because cases may occur in which unlawful intention is a necessary element of infringement.

Trade-mark actually copied.

The cases in which names or arbitrary marks are appropriated without alteration by persons who have no right

(*a*) Dig. vi. tit. 1, l. 60; Dig. ix. tit. ii. l. 5, § 2, l. 7, § 2, l. 30, § 3; Dig. xxvi. tit. 7, l. ult.

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to use them, do not call for any further remark. Here, as we have seen, the *bona fides* of the defendant is in equity at all events no bar to the plaintiff's right to an injunction.

It happens, however, in far the larger number of cases that the infringement is intentional, and perpetrated with the view of defrauding the public. A court of justice, when this is established, naturally gives the wrong-doer the credit of doing something which had a tendency to effect the object he had in view, and seldom, if ever, stops to inquire whether the imitation is so clumsy as to be likely to mislead no one. So that very often the question of infringement practically resolves itself into a question of the defendant's intention. This is especially true where the imitation is not exact, but differences are introduced which the trade-mark-owner alleges to be colourable only and insufficient for his protection (*b*). In *Croft* v. *Day* (*c*) the defendant was charged with imitating the labels on the plaintiffs' blacking-bottles. The plaintiffs carried on business under the firm of Day and Martin, at 97, High Holborn; the defendant sold his blacking as of the manufacture of Day and Martin, 90½, Holborn Hill. In giving judgment, Lord Langdale observed:

Imitation with colourable variation.

"It is perfectly manifest that two things are required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; and, secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which

(*b*) *Wotherspoon* v. *Currie*, L. R. 5 Eng. & Ir. App. 508.
(*c*) 7 Beav. 83.

the general resemblance is calculated to produce. To have a copy of the thing would not do, for though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold."

It has clearly been laid down that to avoid infringement there must be such distinction between the two marks as will prevent the deception of an ordinary purchaser buying the goods over the counter, and not merely of a manufacturer or of a person who carefully inspects the two marks (*d*); but further than this it is impossible to give any definition of what degree of resemblance is necessary.

The difficulty of determining whether resemblance amounts to infringement is increased where that which the plaintiff claims as his peculiar mode of denotation consists of a combination of circumstances, such as method of packing, shape and colour of labels or wrappers, and the like, some of which are undoubtedly in general use in a particular trade. Here the plaintiff must point out some distinctive thing which the defendant has imitated, and in all the cases which have hitherto occurred the Court was satisfied that the plaintiffs' insignia had been intentionally imitated. This is analogous to what happens in the case of a book, such as a directory, a gazetteer, or a table of logarithms, compiled from open sources. The plaintiff in such a case must prove not only identity between his work and the defendant's, but also an *animus furandi* on the part of the latter (*e*).

(*d*) *Rodgers* v. *Nowill*, 6 Hare, 325; *Shrimpton* v. *Laight*, 18 Beav. 164; *Seixo* v. *Provezende*, L. R. 2 Ch. 196.

(*e*) *Cary* v. *Kearsley*, 4 Esp. 168; *Lewis* v. *Fullarton*, 2 Beav. 6; *Jarrold* v. *Houlston*, 3 K. & J. 708; *Kelly* v. *Morris*, L. R. 1 Eq. 697.

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As each case turns very much upon its own particular circumstances, and the decisions often depend on the union of several similarities, there is no advantage in referring to them in greater detail (*f*).

(*f*) The similarity has been discussed in the following cases:—*Hogg* v. *Kirby*, 8 Ves. 215 (magazine); *Spottiswoode* v. *Clarke*, 2 Ph. 154 (almanack); *Chappell* v. *Davidson*, 8 De G. M. & G. 1 (song set to music). The following relate to wrappers, stamps, &c.:—*Edelsten* v. *Vick*, 11 Hare, 78; *Shrimpton* v. *Laight*, 18 Beav. 164; *Franks* v. *Weaver*, 10 Beav. 297; *Woollam* v. *Ratcliffe*, 1 H. & M. 259 (a peculiar case); *Leather Cloth Company (Limited)* v. *American Leather Cloth Company (Limited)*, 11 H. of Lds. 523; *Blackwell* v. *Crabbe*, 36 L. J. Ch. 504; *Foot* v. *Lea*, 13 Ir. Eq. 490; *Edelsten* v. *Edelsten*, 1 De G. Jo. & Sm. 185; *Wotherspoon* v. *Currie*, L. R. 5 Eng. & Ir. App. 508; *Taylor* v. *Taylor*, 23 L. J. Ch. 255 (name and labels); *London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Insurance Company*, 11 Jur. 938 (name).

CHAPTER VII.

SPECIAL TRADE-MARKS.

Hallamshire Acts as to cutlers.

THERE are several Acts (*a*) relating to persons in Hallamshire, and within six miles' compass of the same, who make knives, blades, scissors, shears, sickles, cutlery, and all other wares of iron and steel. And by the last Act the Acts are extended to persons exercising the trade of manufacturers of steel, of saws and edge tools and other articles of steel and iron combined having a cutting edge.

The Acts incorporate the persons exercising the above trades as the masters, wardens, searchers, assistants, and commonalty of the company of cutlers of Hallamshire, and provide for the election of a governing body and the regulation of apprentices and their admission as freemen.

Formerly a person not a freeman of this company could not carry on any of the above trades in Hallamshire, or within six miles of it, except by licence of the company. This was repealed in 1814, and by the last Act any person may become a freeman of the company on payment of 20*l*.

One of the privileges of a freeman of the company was

(*a*) 21 Jac. 1, c. 21; 31 Geo. 3, c. 58; 41 Geo. 3, c. lxvii.; 54 Geo. 3, c. cxix.; 23 Vict. c. xliii.

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that he could have a mark granted him by the company. This mark was not to be the property of another freeman, or to consist of a surname. It was made personal property, and, subject to the life-interest of the owner's widow, which was indefensible, could be devised by will, and would pass to the next of kin. A mark rent of 6*d.* a year was to be paid, and if the executors did not "claim and pay the mark rent for such mark," it was to be deemed surrendered to the company.

In 1814 it was enacted that any one, whether a freeman or not, might take out a mark on payment of 40*s.* fee, with an additional fee of 3*l.* if the mark had ever been assigned to some one else and since surrendered. This mark was to be personal property, as in the case of a freeman's mark, but not more than one member of a family was to have a right to use it at the same time.

At the same time the mark rent was repealed, and it was also provided that no mark used in common amongst the manufacturers of the above-mentioned goods in Hallamshire should be granted.

A trade-mark granted to a freeman is said to be incapable of assignment. However this may be, one granted to a non-freeman is capable of assignment, though whether it will pass to the assignees in bankruptcy is doubtful (*b*).

The Acts contain penalties for the infringement in Hallamshire, or within six miles' compass, of the trade-marks granted under them.

Cutlery Trade Act, 59 Geo. 3, c. 7.

A General Act of 1819 authorises manufacturers of knives and articles with cutting edges to stamp the form of a hammer on the goods, if they are forged by hammer, and prohibits that mark if they are not so forged.

(*b*) *Bury* v. *Bedford*, 4 N. R. 180, 33 L. J. Ch. 465.

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The Act also forbids the stamping on the above-mentioned articles words indicating other than the true quality thereof, and forbids the use of the words "London" or "London made," except for goods made in the city of London, or within twenty miles of it.

Linen.

By 13 Geo. 1, c. 26, s. 30, persons counterfeiting the mark or name of a linen manufacturer in Scotland are liable to forfeit 100*l.* to the manufacturer, to be recovered before two or more justices of the peace, or any magistrate or magistrates within any borough.

Patent.

By 5 & 6 Wm. 4, c. 83, s. 7, any one who improperly uses the name of a patentee, or designates his article as patent, is liable to a penalty of 50*l.*, to be recovered in a *qui tam* action.

Hops.

An Act relating to the hop trade contains some special provisions relating to trade-marks upon hops (*e*).

Gun-barrels and hall-marks.

Counterfeiting the proof-marks upon gun-barrels and the hall-marks upon gold and silver plate are made penal by statute (*d*).

(*e*) 29 & 30 Vict. c. 37.

(*d*) The former by 53 Geo. 3, c. 115, s. 9; the latter by 7 & 8 Vict. c. 22.

CHAPTER VIII.

PROTECTION AFFORDED TO BRITISH TRADE-MARKS IN FOREIGN COUNTRIES.

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IN this chapter it is intended to give some account of foreign law as to trade-marks, and to point out how far, under the provisions of treaties or otherwise, British subjects, carrying on business in the British dominions, can obtain protection for their trade-marks abroad.

Scotland.

The law as to trade-marks in Scotland is substantially identical with that of England, and the authorities cited in reference to such cases in the Scotch Courts are almost entirely English. Three cases only, all turning on points of practice, are to be found in the Scotch law reports, and they are here noted for the convenience of the Scotch practitioner.

In *Wotherspoon and Co.* v. *Gray and Co.* (*a*), the Court was of opinion, upon inspection of the labels and wrappers of the plaintiffs and defendants, that they were essentially different, and refused to send the question to a jury.

In *Green* v. *Shepherd* (*b*), the question was considered whether, in an action for damages for infringement of a trade-mark concluding also for an interdict, the plaintiff could, in any case, move for an *interim* interdict.

(*a*) 2 Macph. 38, 36 Jur. (Sc.) 24.
(*b*) 4 Macph. 1028, 38 Jur. (Sc.) 523.

In *Dixon* v. *Jackson* (*c*), an *interim* interdict was granted, under the circumstances, on the ground of balance of convenience.

United States.

The American law, so far as it is independent of statute, is based upon the English authorities. A collection of the most important American cases has been recently published by Mr. Rowland Cox (*d*).

We have already noticed that under the decisions of the American courts a foreigner, resident and carrying on business out of the United States, is entitled to have his trade-mark protected by the American courts (*e*).

A statute consolidating the law as to patents, copyrights and trade-marks was passed by Congress, and approved July 8, 1870. The part relating to trade-marks will be found in the Appendix. It is expressly enacted that it shall not "prevent, lessen, impeach or void any remedy at law or in equity, which any party, aggrieved by any wrongful use of any trade-mark might have had if the Act had not been passed."

The provisions of the United States statute apply (*f*) to subjects of any foreign power between whom and the United States reciprocity is established by treaty. As there is no treaty between the United States and Great Britain to this effect, and the privileges of subjects of the United States in Great Britain depend upon the general law, it seems that British subjects are not within the statute.

Treaties.

Under treaties between Great Britain and Austria (*g*),

(*c*) 5 Macph. 326.

(*d*) Cincinnati, Robert Clarke & Company, 1871.

(*e*) *Ante*, p. 72, note (*q*).

(*f*) Sect. 77.

(*g*) 16th Dec. 1865, Art. 9. Hertzlet's Commercial Treaties, vol xii. 174. This treaty extends to Leichtenstein, ibid. 175.

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Belgium (*h*), Columbia (*i*), France (*k*), Germany (*l*), Italy (*m*), Russia (*n*), and Prussia and the Zollverein (*o*), British subjects enjoy the same rights as natural born subjects in respect of trade-marks. British subjects who claim the benefit of treaties or laws of foreign countries must of course comply with all laws as to registration, deposit, or other matters which are in force in the foreign country, and in the declaration between England and Russia (*p*) this is expressly provided.

The treaties already referred to, except those with France and Columbia, contain the usual clause giving British subjects the same privileges as the subjects of the most favoured nation, so that if a mode and place of registration is provided for the subjects of *any* foreign country, registration in that mode and place will give British subjects the benefit of the treaty, if there are no provisions expressly applicable to them.

There are no treaties directly referring to trade-marks between Great Britain and Greece, Portugal, Spain, Sweden or Norway, Switzerland, Turkey, or the United States, but by express legislation or custom British sub-

(*h*) 23rd July, 1862, Arts. 16 & 17, 11 Hertz. 70.

(*i*) 16th Feb. 1866, Art. 12, 12 Hertz. 372.

(*k*) 23rd Jan. 1860, Art. 12, 11 Hertz. 169, and Art. 16 of the treaty of 5th Nov. 1872, which will supersede the former if ratified.

(*l*) 1st April, 1869.

(*m*) 6th Aug. 1863, Art. 12, 11 Hertz. 1115.

(*n*) 31st Dec. 1858, Art. 20, 10 Hertz. 1063; Declaration of 11th July, 1871, Parl. Pap. 1871 [C. 412]. See App.

(*o*) 30th May, 1865, Art. 6, 12 Hertz. 763, but this only extends to the name or firm; see *infrà*. The articles referred to in the above notes will also be found in Parl. Pap. 1872 [C. 633].

(*p*) 11 h July, 1871, Parl. Pap. 1871 [C. 412].

jects enjoy the same privileges as natives in Turkey (*q*) and the following Swiss cantons:—Appenzell (Rhodes Extérieures), Berne, Fribourg, Geneva, Lucerne, Neufchatel, St. Gall, Schaffhausen, Soleure, Tessin, Valais, Vaud, Zurich (*r*).

In Denmark, according to an opinion given at the Ministry of Justice, foreigners may claim the benefit of the provisions of the Criminal Code of 1866 as to trade-marks. Under section 278, if the mark be affixed to articles inferior to the genuine, the infringer is liable to imprisonment for a term varying from five days to two years; if the articles are not inferior, the infringer is liable to a fine of 100 rix-dollars, and ultimately to higher fines and imprisonment (*s*).

Under the project of the Portuguese Penal Code, articles 296 and 297, the violation of a foreign trade-mark is punishable with a fine of from 10,000 reis (£2 4*s*. 5*d*.) to 100,000 reis (£22 4*s*. 2*d*.). It does not seem clear from Sir Charles Murray's report whether this code has been promulgated (*t*).

Commercial treaties between Great Britain and Denmark (*u*) and Spain (*v*) contain a clause securing to British subjects the same privileges as are or may be granted to the most favoured nation. By treaty subjects of Belgium, Italy, and Austria enjoy in respect of trade-marks the protection of the Spanish laws. It is

(*q*) Reports on Foreign Trade-Mark Legislation, Parl. Pap. 1872 [C. 596], p. 76.

(*r*) Ibid. p. 72.

(*s*) Ibid. p. 25.

(*t*) Reports on Foreign Trade-Mark Legislation, Parl. Pap. 1872 C. 596], p. 56.

(*u*) 12th July, 1670, Art. 40, 1 Hertz. 201.

(*v*) $\frac{13}{23}$ May, 1667, Art. 38, 2 Hertz. 155.

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therefore conceived that British subjects are entitled to similar protection.

In the commercial treaty with the Netherlands there is a most favoured nations clause, somewhat less full in its terms (*w*). French subjects are by their commercial treaty entitled to protection for their trade-marks (*x*), on depositing two fac-similes at the Registry of the Tribunal d'Arrondissement of Amsterdam (*x*).

The procedure of most, if not all, Continental countries gives the person whose trade-mark is invaded a summary mode of obtaining redress by criminal proceedings, and in some cases by confiscation of the articles and award of damages.

The French law on the subject may be taken as a type of the laws of most Continental states. It is contained in a Law of 27 June, 1857, which is printed in the Appendix. An abstract of its principal provisions will be useful.

French law.

A French subject, or a foreigner having an establishment in France, can obtain exclusive property in a trade-mark by depositing two fac-similes at the office of the Tribunal of Commerce of his domicile. The deposit must be renewed every fifteen years. Names in a distinctive form, *e. g.*, the fac-simile of an autograph, can be deposited as trade-marks. In consequence of the reciprocity clauses of the commercial treaty between France and Great Britain, British subjects and companies (*y*) not having establishments in France, on depositing their trade-marks at the office of the Tribunal of Com-

(*w*) 27th Oct. 1837, Art. 1, 5 Hertz. 338.

(*x*) See Reports on Foreign Trade-Mark Legislation, Parl. Pap. 1872 [C. 596], p. 54.

(*y*) Dalloz, Jur. Gen. (1866) Pt. I. p. 191.

merce of the department of the Seine, enjoy the same benefits as French subjects. Foreigners having establishments in France are considered, for the purpose of the law, as French subjects. Chap VIII.

The following persons are liable to fine or imprisonment, or both, as specified in the law:—Those who have forged a trade-mark, or made use of a forged trade-mark; those who have fraudulently applied to their goods a trade-mark belonging to another; those who have knowingly sold, or offered for sale, one or more articles bearing a forged or fraudulent trade-mark; those who have made a fraudulent imitation of a trade-mark calculated to deceive, or have made use of such an imitation, or have knowingly sold, or offered for sale, one or more articles bearing such an imitation.

Complaints of the infringement of a trade-mark may be made before a Civil or Correctional court. A complainant can, before commencing his suit, obtain, *ex parte*, a detailed description by a proper officer, and upon giving security, if required by the judge, a seizure and detention of goods alleged to be wrongfully marked. But if he fails to commence a suit within a limited time he is liable in damages for these acts.

The Court of Cassation decided that where the name or mark of a British subject had, before the treaty of 1860, been commonly used in France, so as to become public property, it could not again be made individual property by registration under the treaty (*z*). But in each of the cases in which this was decided, the Court found as a fact that the name had been so long current

(*z*) Dalloz, Jur. Gen., (1864), Pt. I. p. 452; ibid. (1865), Pt. I. p. 197.

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as a mere name of quality, that no one buying an article so denoted would imagine he was buying the manufacture of a particular maker.

It will be observed that the terms of the German laws given in the Appendix apply only to the unauthorised use of a name or firm. Property in trade-marks in the strict sense, *i. e.*, mere arbitrary devices, is not in general recognised in the German empire, nor can the imitation of them be made a ground of action or criminal proceedings (*a*). There exist, however, in certain parts of the empire, special laws affording conditional protection to such trade-marks; as, for instance, in the Prussian Rhine Provinces and Westphalia the Law for the Protection of Trade-marks on Iron and Steel Products (August, 1847, and Law of April 24, 1854, amending the same).

The Appendix contains the enactments applicable to British subjects of the most important civilized countries.

(*a*) Letter of Mr. Malcolm, Assistant Secretary to the Board of Trade, to the Chairman of the Association of Chambers of Commerce of 5th October, 1872.

APPENDIX.

25 & 26 VICT. c. 88.

An Act to amend the Law relating to the fraudulent marking of Merchandise. [7th August, 1862.]

WHEREAS it is expedient to amend the laws relating to the fraudulent marking of merchandise, and to the sale of merchandise falsely marked for the purpose of fraud: Be it therefore 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:

Construction of words.

1. In the construction of this Act the word "person" shall include any person, whether a subject of Her Majesty or not, and any body corporate or body of the like nature, whether constituted according to the law of this country or of any of Her Majesty's Colonies or Dominions, or according to the law of any foreign country, and also any company, association, or society of persons, whether the members thereof be subjects of Her Majesty or not, or some of such persons subjects of Her Majesty and some of them not, and whether such body corporate, body of the like nature, company, association, or society be established or carry on business within Her Majesty's dominions or elsewhere, or partly within Her Majesty's dominions and partly elsewhere; the word "mark" shall include any name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark of any other description; and the expression "trade-mark" shall include any and every such name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark as aforesaid lawfully used by any person to denote any chattel, or (in *Scotland*) any article of trade, manufacture, or merchandise, to be an article or thing of the manufacture, workmanship, production, or merchandise of such person, or to be an article or thing

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of any peculiar or particular description made or sold by such person, and shall also include any name, signature, word, letter, number, figure, mark, or sign which in pursuance of any statute or statutes for the time being in force relating to registered designs is to be put or placed upon or attached to any chattel or article during the existence or continuance of any copyright or other sole right acquired under the provisions of such statutes or any of them; the word "misdemeanor" shall include crime and offence in Scotland; and the word "court" shall include any sheriff or sheriff substitute in Scotland.

Forging a trade-mark, or falsely applying any trade-mark with intent to defraud, a misdemeanor.

2. Every person who, with intent to defraud, or to enable another to defraud, any person, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any trade-mark, or shall apply, or cause or procure to be applied, any trade-mark or any forged or counterfeited trade-mark to any chattel or article not being the manufacture, workmanship, production, or merchandise of any person denoted or intended to be denoted by such trade-mark, or denoted or intended to be denoted by such forged or counterfeited trade-mark, or not being the manufacture, workmanship, production, or merchandise of any person whose trade-mark shall be so forged or counterfeited, or shall apply, or cause or procure to be applied, any trade-mark or any forged or counterfeited trade-mark to any chattel or article, not being the particular or peculiar description of manufacture, workmanship, production, or merchandise denoted or intended to be denoted by such trade-mark or by such forged or counterfeited trade-mark, shall be guilty of a misdemeanor, and every person so committing a misdemeanor shall also forfeit to Her Majesty every chattel and article belonging to such person to which he shall have so unlawfully applied, or caused or procured to be applied, any such trade-mark or forged or counterfeited trade-mark as aforesaid, and every instrument in the possession or power of such person, and by means of which any such trade-mark or forged or counterfeited trade-mark as aforesaid shall have been so applied, and every instrument in the possession or power of such person for applying any such trade-mark or forged or counterfeited trade-mark as aforesaid, shall be forfeited to Her Majesty; and the court before which any such misdemeanor shall be tried may order such forfeited articles as aforesaid to be destroyed or otherwise disposed of as such court shall think fit.

Applying a forged trade-mark to any vessel, case,

3. Every person who, with intent to defraud, or to enable another to defraud, any person, shall apply or cause or procure to be applied any trade-mark or any forged or counterfeited trade-mark to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, on, or with which any chattel or

article shall be intended to be sold or shall be sold or uttered or exposed for sale, or intended for any purpose of trade or manufacture, or shall enclose or place any chattel or article, or cause or procure any chattel or article to be enclosed or placed in, upon, under, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing to which any trade-mark shall have been falsely applied, or to which any forged or counterfeited trade-mark shall have been applied, or shall apply or attach or cause or procure to be applied or attached to any chattel or article any case, cover, reel, ticket, label, or other thing to which any trade-mark shall have been falsely applied, or to which any forged or counterfeited trade-mark shall have been applied, or shall enclose, place, or attach any chattel or article, or cause or procure any chattel or article to be enclosed, placed, or attached, in, upon, under, with, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing having thereon any trade-mark of any other person, shall be guilty of a misdemeanor, and every person so committing a misdemeanor shall also forfeit to Her Majesty every such chattel and article, and also every such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid in the possession or power of such person; and every other similar cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing made to be used in like manner as aforesaid, and every instrument in the possession or power of such person, and by means of which any such trade-mark or forged or counterfeited trade-mark as aforesaid shall have been applied, and also every instrument in the possession or power of such person for applying any such trade-mark or forged or counterfeit trade-mark as aforesaid, shall be forfeited to Her Majesty, and the court before which any such misdemeanor shall be tried may order such forfeited articles as aforesaid to be destroyed or otherwise disposed of as such court shall think fit.

wrapper, &c. in or with which any article is sold or intended to be sold, a misdemeanor.

4. Every person who, after the Thirty-first day of December, One thousand eight hundred and sixty-three, shall sell, utter, or expose either for sale or for any purpose of trade or manufacture, or cause or procure to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade-mark, which he shall know to be forged or counterfeited, or together with the trade-mark of any other person applied or used falsely or wrongfully or without lawful authority or excuse, knowing such trade-mark of another person to have been so applied or used as aforesaid, and that whether any such trade-mark or forged or counterfeited trade-mark as aforesaid, together with which any such chattel or article shall be sold, uttered, or exposed for sale or other purpose

Selling articles with forged or false trade-marks after 31st December, 1863, penalty equal to value of article sold, and a sum not

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exceeding 5*l.* nor less than 10*s.*

as aforesaid, shall be in, upon, about, or with such chattel or article, or in, upon, about, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, upon, about, or with which such chattel or article shall be so sold or uttered or exposed for sale or other purpose as aforesaid, shall for every such offence forfeit and pay to Her Majesty a sum of money equal to the value of the chattel or article so sold, uttered, offered, or exposed for sale or other purpose as aforesaid, and a further sum not exceeding Five Pounds and not less than Ten Shillings.

Additions to and alterations of trade-marks made with intent to defraud to be deemed forgeries.

5. Every addition to and every alteration of and also every imitation of any trade-mark which shall be made, applied, or used with intent to defraud or to enable any other person to defraud, or which shall cause a trade-mark with such alteration or addition, or shall cause such imitation of a trade-mark to resemble any genuine trade-mark so or in such manner as to be calculated or likely to deceive, shall be and be deemed to be a false, forged, and counterfeited trade-mark within the meaning of this Act; and every act of making, applying, or otherwise using any such addition to or alteration of a trade-mark or any such imitation of a trade-mark as aforesaid done by any person with intent to defraud, or to enable any other person to defraud, shall be and be deemed to be forging and counterfeiting a trade-mark within the meaning of this Act.

Any person who, after 31st December, 1863, shall have sold an article having a false trade-mark to be bound to give information where he procured it.

6. Where any person who, at any time after the Thirty-first day of December, One thousand eight hundred and sixty-three, shall have sold, uttered, or exposed for sale or other purpose as aforesaid, or shall have caused or procured to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade-mark, or together with the trade-mark of any other person used without lawful authority or excuse as aforesaid, and that whether any such trade-mark, or such forged or counterfeited trade-mark as aforesaid, be in, upon, about, or with such chattel or article, or in, upon, about, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, upon, about, or with which such chattel or article shall have been sold or exposed for sale, such person shall be bound, upon demand in writing delivered to him or left for him at his last known dwelling-house or at the place of sale or exposure for sale by or on the behalf of any person whose trade-mark shall have been so forged or counterfeited, or used without lawful authority or excuse as aforesaid, to give to the person requiring the same or his attorney or agent, within forty-eight hours after such demand, full information in writing of the name and address of the person from whom he shall have purchased or obtained such chattel or article, and of the time when he obtained the same; and it shall be lawful for any

justice of the peace, on information on oath of such demand and refusal, to summon before him the party refusing, and on being satisfied that such demand ought to be complied with to order such information to be given within a certain time to be appointed by him; and any such party who shall refuse or neglect to comply with such order shall for every such offence forfeit and pay to Her Majesty the sum of Five Pounds, and such refusal or neglect shall be *prima facie* evidence that the person so refusing or neglecting had full knowledge that the trade-mark together with which such chattel or article was sold, uttered, or exposed for sale or other purpose as aforesaid at the time of such selling, uttering, or exposing was a forged, counterfeited, and false trade-mark, or was the trade-mark of a person which had been used without lawful authority or excuse, as the case may be.

Power to justices to summon parties refusing to give information.

Penalty for refusal, 5l.

7. Every person who, with intent to defraud or to enable another to defraud, shall put or cause or procure to be put upon any chattel or article, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, together with which any chattel or article shall be intended to be or shall be sold or uttered or exposed for sale, or for any purpose of trade or manufacture, or upon any case, frame, or other thing in or by means of which any chattel or article shall be intended to be or shall be exposed for sale, any false description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or any part thereof, or of the place or country in which such chattel or article shall have been made, manufactured, or produced, or shall put or cause or procure to be put upon any such chattel or article, cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or thing as aforesaid, any word, letter, figure, signature, or mark for the purpose of falsely indicating such chattel or article, or the mode of manufacturing or producing the same, or the ornamentation, shape, or configuration thereof, to be the subject of any existing patent, privilege, or copyright, shall for every such offence forfeit and pay to Her Majesty a sum of money equal to the value of the chattel or article so sold or uttered or exposed for sale, and a further sum not exceeding Five Pounds and not less than Ten Shillings.

Marking any false indication of quantity, &c. upon an article with intent to defraud, penalty a sum equal to the value of the article and the further sum not exceeding 5l. and not less than 10s.

8. Every person who, after the Thirty-first day of December, One thousand eight hundred and sixty-three, shall sell, utter, or expose for sale or for any purpose of trade or manufacture, or shall cause or procure to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article upon which shall have been, to his knowledge, put, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, together with which

Selling or exposing for sale after the 31st December, 1863, articles

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with false statement of quantities, &c., penalty not more than 5*l.* nor less than 5*s.*

such chattel or article shall be sold or uttered or exposed for sale or other purpose as aforesaid, shall have been so put, or upon any case, frame, or other thing used or employed to expose or exhibit such chattel or article for sale shall have been so put, any false description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article or any part thereof, or the place or country in which such chattel or article shall have been made, manufactured, or produced, shall for every such offence forfeit and pay to Her Majesty a sum not exceeding Five Pounds and not less than Five Shillings.

Proviso that it shall not be an offence to apply names or words known to be used for indicating particular classes of manufactures.

9. Provided always, that the provisions of this Act shall not be construed so as to make it any offence for any person to apply to any chattel or article, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing with which such chattel or article shall be sold or intended to be sold, any name, word, or expression generally used for indicating such chattel or article to be of some particular class or description of manufacture only, or so as to make it any offence for any person to sell, utter, or offer or expose for sale any chattel or article to which, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing sold therewith, any such generally used name, word, or expression as aforesaid shall have been applied.

Description of trade-marks and forged trade-marks in indictments, &c.

10. In every indictment, pleading, proceeding, and document whatsoever in which any trade-mark shall be intended to be mentioned it shall be sufficient to mention or state the same to be a trade-mark, without further or otherwise describing such trade-mark, or setting forth any copy or fac-simile thereof; and in every indictment, pleading, proceeding, and document whatsoever in which it shall be intended to mention any forged or counterfeit trade-mark it shall be sufficient to mention or state the same to be a forged or counterfeit trade-mark, without further or otherwise describing such forged or counterfeit trade-mark, or setting forth any copy or fac-simile thereof.

Conviction not to affect any right or civil remedy.

11. The provisions in this Act contained of or concerning any Act or any proceeding, judgment, or conviction for any Act hereby declared to be a misdemeanor or offence, shall not nor shall any of them take away, diminish, or prejudicially affect any suit, process, proceeding, right, or remedy which any person aggrieved by such Act may be entitled to at law, in equity, or otherwise, and shall not nor shall any of them exempt or excuse any person from answering or making discovery upon examination as a witness or upon interrogatories or otherwise in any suit or other civil proceeding: Provided always, that no evidence, statement, or discovery which any person shall be compelled to give or make shall be admissible in

evidence against such person in support of any indictment for a misdemeanor at common law or otherwise, or of any proceeding under the provisions of this Act.

Intent to defraud, &c. any particular person need not be alleged in an indictment, &c., or proved.

12. In every indictment, information, conviction, pleading, and proceeding against any person for any misdemeanor or other offence against the provisions of this Act in which it shall be necessary to allege or mention an intent to defraud, or to enable another to defraud, it shall be sufficient to allege or mention that the person accused of having done any act which is hereby made a misdemeanor or other offence did such act with intent to defraud, or with intent to enable some other person to defraud, without alleging or mentioning an intent to defraud any particular person; and on the trial of any such indictment or information for any such misdemeanor, and on the hearing of any information or charge of or for any such other offence as aforesaid, and on the trial of any action against any person to recover a penalty for any such other offence as aforesaid, it shall not be necessary to prove an intent to defraud any particular person, or an intent to enable any particular person to defraud any particular person, but it shall be sufficient to prove with respect to every such misdemeanor and offence that the person accused did the act charged with intent to defraud, or with intent to enable some other person to defraud, or with the intent that any other person might be enabled to defraud.

Persons who aid in the commission of a misdemeanor to be also guilty.

13. Every person who shall aid, abet, counsel, or procure the commission of any offence which is by this Act made a misdemeanor shall also be guilty of a misdemeanor.

Punishment for misdemeanor under this Act.

14. Every person who shall be convicted or found guilty of any offence which is by this Act made a misdemeanor shall be liable, at the discretion of the court and as the court shall award, to suffer such punishment by imprisonment for not more than two years, with or without hard labour, or by fine, or both by imprisonment with or without hard labour and fine, and also by imprisonment until the fine (if any) shall have been paid and satisfied.

Recovery of penalties.

15. In every case in which any person shall have committed or done any offence or act whereby he shall have forfeited or become liable to pay to Her Majesty any of the penalties or sums of money mentioned in the provisions of this Act, every such penalty or sum of money shall or may be recovered in England, Wales, or Ireland in an action of debt, which any person may as plaintiff for and on behalf of Her Majesty commence and prosecute to judgment in any court of record, and the amount of every such penalty or sum of money to be recovered in any such action shall or may be determined by the jury (if any) sworn to try any issue in such action, and if there shall be no such jury then by the court or some other jury,

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as the Court shall think fit, or instead of any such action being commenced such penalty or sum of money shall or may in England or Wales be recovered by a summary proceeding before two justices of the peace having jurisdiction in the county or place where the party offending shall reside or have any place of business, or in the county or place in which the offence shall have been committed; and shall or may in Ireland be recovered in like manner by civil bill in the Civil Bill Court of the county or place in which the offence was committed, or in which the offender shall reside or have any place of business; and shall or may in Scotland be recovered by action before the Court of Session in ordinary form or by summary action before the sheriff of the county where the offence shall have been committed or the offender may reside or have any place of business, which sheriff, upon proof of the offence, either by the confession of the person offending or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable in the penalty or penalties aforesaid as also in expenses; and it shall be lawful for the sheriff in pronouncing such judgment for the penalty or penalties and costs to insert in such judgment a warrant in the event of such penalty or penalties and costs not being paid to levy and recover the amount of the same by poinding: Provided always, that it shall be lawful to the sheriff, in the event of his dismissing the action and assoilzing the defender, to find the complainer liable in expenses, and any judgment so to be pronounced by the sheriff in such summary action shall be final and conclusive, and not subject to review by advocation, suspension, reduction, or otherwise.

Summary proceedings before justices to be within 11 & 12 Vict. c. 43.

16. In every case in which any such penalty or sum of money forfeited to Her Majesty as hereinbefore mentioned shall be sought to be recovered by a summary proceeding before two justices of the peace, the offence or act by the committing or doing or which such penalty or sum of money shall have been so forfeited shall be and be deemed to be an offence and act within the meaning of a statute passed in the twelfth year of the reign of Her present Majesty, intituled "An Act to Facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with Respect to Summary Convictions and Orders"; and the information, conviction of the offender, and other proceedings for the recovery of the penalty or sum so forfeited shall be had according to the provisions of the said Act.

In actions penalties to be accounted for in like

17. In every case in which judgment shall be obtained in any such action as aforesaid for the amount of any such penalty or sum of money forfeited to Her Majesty, the amount thereof shall be paid by the defendant to the sheriff or the officer of the court, who shall

account for the same in like manner as other monies payable to Her Majesty, and, if it be not paid, may be recovered, or the amount thereof levied, or the payment thereof enforced, by execution or other proper proceeding, as money due to Her Majesty: and the plaintiff suing on behalf of Her Majesty, upon obtaining judgment, shall be entitled to recover and have execution for all his costs of suit, which shall include a full indemnity for all costs and charges which he shall or may have expended or incurred in, about, or for the purposes of the action, unless the court, or a judge thereof, shall direct that costs of the ordinary amount only shall be allowed.

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manner as other monies payable to the crown, and plaintiffs to recover full costs of suit.

18. No person shall commence any action or proceeding for the recovery of any penalty, or procuring the conviction of any offender in manner hereinbefore provided, after the expiration of three years next after the committing of the offence, or one year next after the first discovery thereof by the person proceeding.

Limitations of actions, &c.

19. In every case in which at any time after the Thirty-first day of December, One thousand eight hundred and sixty-three, any person shall sell or contract to sell (whether by writing or not) to any other person any chattel or article with any trade-mark thereon, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or contracted to be sold, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that every trade-mark upon such chattel or article, or upon any such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid, was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

After 31st December, 1863, vendor of an article with a trade-mark to be deemed to contract that the mark is genuine.

20. In every case in which at any time after the Thirty-first day of December, One thousand eight hundred and sixty-three, any person shall sell or contract to sell (whether by writing or not) to any other person any chattel or article upon which, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or contracted to be sold, any description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or the place or county in which such chattel or article shall have been made, manufactured, or produced, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that no such description, statement, or other indication was in any material respect false or untrue, unless the contrary shall be expressed in

After 31st December, 1863, vendor of an article with description upon it of its quantity to be deemed to contract that the description was true.

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some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

In suits at law or in equity against persons for using forged trade-marks court may order article to be destroyed and may award injunction, &c.

21. In every case in any suit at law or in equity against any person for forging or counterfeiting any trade-mark, or for fraudulently applying any trade-mark to any chattel or article, or for selling, exposing for sale, or uttering any chattel or article with any trade-mark falsely or wrongfully applied thereto, or with any forged or counterfeit trade-mark applied thereto, or for preventing the repetition or continuance of any such wrongful act, or the committal of any similar act, in which the plaintiff shall obtain a judgment or decree against the defendant, the court shall have power to direct every such chattel and article to be destroyed or otherwise disposed of; and in every such suit in a court of law the court shall or may upon giving judgment for the plaintiff award a writ of injunction or injunctions to the defendant, commanding him to forbear from committing and not by himself or otherwise to repeat or commit any offence or wrongful act of the like nature as that of which he shall or may have been convicted by such judgment, and any disobedience of any such writ of injunction or injunctions shall be punished as a contempt of court; and in every such suit at law or in equity it shall be lawful for the court or a judge thereof to make such order as such court or judge shall think fit for the inspection of every or any manufacture or process carried on by the defendant in which any such forged or counterfeit trade-mark, or any such trade-mark as aforesaid, shall be alleged to be used or applied as aforesaid, and of every or any chattel, article, and thing in the possession or power of the defendant alleged to have thereon or in any way attached thereto any forged or counterfeit trade-mark, or any trade-mark falsely or wrongfully applied, and every or any instrument in the possession or power of the defendant used or intended to be or capable of being used for producing or making any forged or counterfeit trade-mark, or trade-mark alleged to be forged or counterfeit or for falsely or wrongfully applying any trade-mark; and any person who shall refuse or neglect to obey any such order shall be guilty of a contempt of court.

Persons aggrieved by forgeries may recover damages against the guilty parties.

22. In every case in which any person shall do or cause to be done any of the wrongful acts following; (that is to say,) shall forge or counterfeit any trade-mark; or for the purpose of sale, or for the purpose of any manufacture or trade, shall apply any forged or counterfeit trade-mark to any chattel or article, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or thing in or with which any chattel or article shall be intended to be sold or shall be sold or uttered or exposed for sale, or for any purpose of trade or manufacture; or shall inclose or place any chattel or article in, upon,

under, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing to which any trade-mark shall have been falsely applied, or to which any forged or counterfeit trade-mark shall have been applied; or shall apply or attach to any chattel or article any case, cover, reel, wrapper, band, ticket, label, or other thing to which any trade-mark shall have been falsely applied, or to which any forged or counterfeit trade-mark shall have been applied; or shall inclose, place, or attach any chattel or article in, upon, under, with, or to any cask, bottle, stopper, vessel, case, cover, reel, wrapper, band, ticket, label, or other thing having thereon any trade-mark of any other person; every person aggrieved by any such wrongful act shall be entitled to maintain an action or suit for damages in respect thereof against the person who shall be guilty of having done such act or causing or procuring the same to be done, and for preventing the repetition or continuance of the wrongful act, and the committal of any similar act.

Defendant obtaining a verdict to have full indemnity for costs.

23. In every action which any person shall, under the provisions of this Act, commence as plaintiff for or on behalf of her Majesty for recovering any penalty or sum of money, if the defendant shall obtain judgment, he shall be entitled to recover his costs of suit, which shall include a full indemnity for all the costs, charges, and expenses by him expended or incurred in, about, or for the purposes of the action, unless the court or a judge thereof shall direct that costs of the ordinary amount only shall be allowed.

A plaintiff suing for a penalty may be compelled to give security for costs.

24. In any action which any person shall, under the provisions of this Act, commence as plaintiff for or on behalf of Her Majesty for recovering any penalty or sum of money, if it shall be shown to the satisfaction of the court, or a judge thereof, that the person suing as plaintiff for or on behalf of Her Majesty has no ground for alleging that he has been aggrieved by the committing of the alleged offence in respect of which the penalty or sum of money is alleged to have become payable, and also that the person so suing as plaintiff is not resident within the jurisdiction of the court or not a person of sufficient property to be able to pay any costs which the defendant may recover in the action, the court or judge shall or may order that the plaintiff shall give security by the bond or recognizance of himself and a surety, or by the deposit of a sum of money, or otherwise, as the court or judge shall think fit, for the payment to the defendant of any costs which he may be entitled to recover in the action.

Act not to affect the corporation of cutlers of Hallam-

25. Nothing in this Act contained shall be construed to affect the rights and privileges of the Corporation of Cutlers of the Liberty of Hallamshire in the county of York, nor shall anything in this Act contained be construed in any way to repeal or make void any of the provisions contained in the fifty-ninth George Third, chapter

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shire, not to repeal 59 G. 3, c. 7. Short title.

seven, intituled, "An Act to Regulate the Cutlery Trade in England."

20. The expression "The Merchandise Marks Act, 1862," shall be a sufficient description of this Act (*a*).

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35 & 36 Vict. c. 20.

An Act to grant certain Duties of Customs and Inland Revenue, and to alter other Duties.

Short title.

§ 1. This Act may be cited as the Customs and Inland Revenue Act, 1872.

Extension of 16 & 17 Vict. c. 107, s. 44, to articles of foreign manufacture purporting to be manufactured in United Kingdom.

4. There shall be included among goods absolutely prohibited to be imported inwards, or in transit, any articles of foreign manufacture, and any packages of such articles, bearing any name, brand, or mark, which states or implies that such articles were manufactured at any place in the United Kingdom.

Any name, brand, or mark which states or implies that any such articles were manufactured at a town or place having the same name as a place in the United Kingdom, shall, unless accompanied by the name of the country in which such place is situate, be deemed for the purpose of this section to state or imply that such articles were manufactured at a place in the United Kingdom.

Foreign Laws as to Trade-marks applicable for the protection of British subjects.

Austria.

[Parl. Pap. 1872, C. 596.]

Law for the Protection of Trade Marks and other Denotations.

I.—*General Provisions.*

§ 1. In this law marks are understood to be those special signs which serve to distinguish the productions and goods of one tradesman intended for the commercial market, from those of any other tradesmen (devices, ciphers, vignettes, and the like).

§ 2. A tradesman who wishes to secure to himself the sole right to the use of a mark, must have it registered according to the provisions of the next division.

§ 3. No exclusive right can be acquired in marks which consist of such signs as are commonly used in the trade in particular kinds of

(*a*) As to an artist's signature see now 25 & 26 Vict. c. 68, s. 7.

goods, nor in such as consist merely of letters, words, or numbers, or of the arms of states and countries.

§ 4. The exclusive right to a mark precludes the use thereof by other tradesman only in regard to that kind of goods to which the productions or commercial articles of the trade for which the protected mark is intended belong.

§ 5. The right in marks continues with the trade-undertaking for which the marks are intended; it expires therewith, and changes owners therewith.

In the latter case, however, unless the business be carried on by the widow or an heir under age, or on account of inheritors or creditors, the new owner must have the mark transferred to his name within three months; otherwise the right in them expires.

§ 6. No one must arbitrarily appropriate to himself the name, style, arms, or designation of the establishment of another inland trader or producer, for the denotation of goods.

§ 7. All that is said in this law about the denotation of goods, also applies to the denotations affixed to the packing, the receptacles, wrappers, &c.

§ 8. The present law makes no alteration in the existing regulations respecting the special distinguishing marks prescribed for certain goods, particularly the stamping regulations.

II.—*Registration of the Marks.*

§ 9. The mark for which a trader wishes to secure to himself the exclusive right of use (§ 2) must be delivered in two copies to the Chamber of Commerce and Industry in the district whereof the industrial undertaking is situated, wherein use is to be made of it; one copy is to be inserted in the Register of Marks, which is to be kept by the Chamber of Commerce and Industry; the other is to be returned to the party, with the certification directed in the following section.

§ 10. The appointed functionary of the Chamber of Commerce and Industry is to set down on each copy—

(*a.*) The running number of the register.

(*b.*) The day and hour of delivery.

(*c.*) The name in which the mark has been registered.

(*d.*) The designation of the industrial enterprise for which it is intended.

And he is to sign this notification, and to affix the official seal thereto.

§ 11. The registration is subject to a duty of 5 fl., which goes into the chest of the Chamber of Commerce.

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§ 12. With the day and the hour of the delivery of the mark at the Chamber of Commerce and Industry, the sole right to the use of the mark begins for the depositor, and the priority of the claim will be adjudged according thereto, if the same mark should be deposited by several tradesmen at the same or at different Chambers of Commerce and Industry.

§ 13. To transfer the right to a mark, as mentioned in § 5, the applicant must produce proof of the acquisition of the industrial undertaking concerned.

The transfer is subject to the same duty as the first registration.

§ 14. The registers of marks are to be open to every one's inspection at the Chambers of Commerce and Industry.

III.—*Encroachments, Infringements, and Penalties.*

§ 15. Every encroachment on the right to a mark, whether by the illegal appropriation or imitation of a mark, or by the consumption of goods thus illegally marked, gives the injured party the right to insist on the stoppage of the further use of the illegal mark and on the removal thereof from the goods marked therewith, so far as they are intended for sale. He may also demand that the tools and apparatus exclusively or especially used for this purpose be made unserviceable.

Claims by the injured party for compensation for the injury suffered through the encroachment on his right in a mark, are to be decided according to the civil law.

§ 16. It is to be considered an imitation if the marks in question cannot be distinguished without more than the ordinary attention.

§ 17. The provisions contained in § 15, are also applicable to any one who—

(*a*) Illegally appropriates the name, style, arms, or the special designation of another inland trader or producer or the denotation of goods intended for sale;

(*b*) Introduces into commerce productions or articles for sale which are furnished with an unauthorized denotation of this kind.

§ 18. If the encroachment (§§ 15 and 17) has been knowingly committed, a fine of from 25 to 500 fl. is to be imposed on the offender, besides any punishment incurred according to the general penal law.

§ 19. The punishment may be doubled on a repetition.

On a further repetition the offender is to be imprisoned for from a week to three months, besides the fine.

§ 20. If the fine should seriously affect the circumstances or the means of subsistence of the delinquent or his family, or prevent him

from making the compensation due for the criminal act, it is to be converted into one day's imprisonment for every 5 fl.

§ 21. The punishing authority can also direct that the sentence be published.

§ 22. The amounts of the fines go to the Poor Fund of the place where the transgression has been committed.

IV.—*Authorities and Proceedings.*

§ 23. The procedure and decision respecting encroachments (§§ 15 and 17), as well as the investigation and punishment of the transgressions described in §§ 18 and 19, belong to the political administrative authorities of first instance, according to the existing regulations for the proceedings and the course from Court to Court in industrial disturbances and industrial transgressions.

The political authority also decides disputes respecting the right in marks, the priority and transfer thereof, and respecting the question of identity of marks.

But the decision of the claims for compensation mentioned in § 15 belongs to the Civil Judge.

§ 24. Criminal proceedings on account of the transgressions of law described in this law can only be commenced on the application of the injured party, unless there be a criminal act involved, which, according to the general criminal law, must be officially prosecuted by the Criminal Court.

If, however, the injured party withdraws his application for punishment before the official decision is made known to the defendant, then he has, without prejudice to his private claims to compensation, also to relinquish the demand for any punishment, as well as any further investigation for the purpose of punishment.

§ 25. Whenever the question of an encroachment rests on the comparison of two marks, the authority is to obtain a report from unprejudiced professional persons.

At the reception of the report the parties are also to be present and to be heard with their explanations and objections of any kind.

A report can only be opposed on account of objections against the professional persons, or on account of want of form. If it is deficient or indistinct, its completion may be insisted upon.

An inspection is not allowed.

§ 26. The injured party is entitled, even before the decision of his complaint, to require the seizure or other custody of the goods marked contrary to the provisions of this law, and the tools used for the purpose.

The political authority is immediately to order the same on

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production of the copy of the mark issued and attested according to § 10.

It is left, however, to the judgment of the said authority to require a preliminary security for the affront and damages to the defendant.

V.—*Transitory Provisions.*

§ 27. Even the traders who at present use a mark can only acquire the exclusive right to it on the conditions of this law.

§ 28. For this purpose the interval to the end of the month of June 1859 is granted to them, to the effect that by the registration of the mark during this interval the right is secured to every one of maintaining the priority of his mark used before the appearance of this law, even against any one who may have anticipated him in the registration of the said mark, but has not actually made use of it up to the introduction of this law.

§ 29. If, however, before the operation of this law, several have used the same mark, then of those who have this mark registered within the interval fixed in § 28, he acquires the exclusive right in the mark who proves that he has used it earlier than the rest. Any dispute is to be decided by the police authorities, after hearing the contending parties, on the evidence of the proofs brought forward by them as to the earlier commencement of the previous use of the mark.

In those provinces where mark-registers (sign-rolls, &c.) were kept with public attestation before the appearance of this law, the contents thereof, where no objection prevails to the contrary, are to settle the question.

If, however, none of the contending parties can produce proof of the longer use of such a mark than the rest, then the question must be decided by lot.

§ 30. With regard to marks that are first brought for registration after the 30th of June, 1859, no claim of priority can be derived from any application of them before the appearance of this law.

BELGIUM.

The laws at present in force are of a remote date and incomplete. It is under consideration to revise them. See Reports on Foreign Trade-mark Legislation, Parl. Pap. 1872 [c. 596], p. 8.

DENMARK.

(See ante, p. 83.)

Loi sur les Marques de Fabrique et de Commerce, du 23 Juin, 1857.

Titre I.—*Du Droit de Propriété des Marques.*

Article I.—La marque de fabrique ou de commerce est facultative.

Toutefois, des décrets, rendus en la forme des règlements d'administration publique, peuvent exceptionnellement la déclarer obligatoire pour les produits qu'ils déterminent.

Sont considérés comme marques de fabrique et de commerce les noms sous forme distinctive, les dénominations, emblèmes, empreintes, timbres, cachets, vignettes, reliefs, lettres, chiffres, enveloppes, et tous autres signes servant à distinguer les produits d'une fabrique ou les objets d'un commerce.

Art. 2. Nul ne peut revendiquer la propriété exclusive d'une marque, s'il n'a déposé deux exemplaires du modèle de cette marque au greffe du Tribunal de Commerce de son domicile.

Art. 3. Le dépôt n'a d'effet que pour quinze années.

La propriété de la marque peut toujours être conservée pour un nouveau terme de quinze années au moyen d'un nouveau dépôt.

Art. 4. Il est perçu un droit fixe d'un franc pour la rédaction du procès-verbal de dépôt de chaque marque et pour le coût de l'expédition, non compris les frais de timbre et d'enregistrement.

Titre II.—*Dispositions relatives aux Etrangers.*

Art. 5. Les étrangers qui possèdent en France des établissements d'industrie ou de commerce jouissent, pour les produits de leurs établissements, du bénéfice de la présente Loi, en remplissant les formalités qu'elle prescrit.

Art. 6. Les étrangers et les Français dont les établissements sont situés hors de France jouissent également du bénéfice de la présente Loi, pour les produits de ces établissements, si, dans les pays où ils sont situés, des Conventions diplomatiques ont établi la réciprocité pour les marques Françaises.

Dans ce cas, le dépôt des marques étrangères a lieu au greffe du Tribunal de Commerce du Département de la Seine.

Titre III.—*Pénalités.*

Art. 7. Sont punis d'une amende de cinquante francs à trois mille francs et d'un emprisonnement de trois mois à trois ans, ou de l'une de ces peines seulement :

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1. Ceux qui ont contrefait une marque ou fait usage d'une marque contrefaite ;

2. Ceux qui ont frauduleusement apposé sur leurs produits ou les objets de leur commerce une marque appartenant à autrui ;

3. Ceux qui ont sciemment vendu ou mis en vente un ou plusieurs produits revêtus d'une marque contrefaite ou frauduleusement apposée.

Art. 8. Sont punis d'une amende de cinquante francs à deux mille francs et d'un emprisonnement d'un mois à un an, ou de l'une des ces peines seulement :

1. Ceux qui, sans contrefaire une marque, en ont fait une imitation frauduleuse de nature à tromper l'acheteur, ou ont fait usage d'une marque frauduleusement imitée ;

2. Ceux qui ont fait usage d'une marque portant des indications propres à tromper l'acheteur sur la nature du produit ;

3. Ceux qui ont sciemment vendu ou mis en vente un ou plusieurs produits revêtus d'une marque frauduleusement imitée ou portant des indications propres à tromper l'acheteur sur la nature du produit.

Art. 9. Sont punis d'une amende de cinquante francs à mille francs et d'un emprisonnement de quinze jours à six mois, ou de l'une de ces peines seulement :

1. Ceux qui n'ont pas apposé sur leurs produits une marque déclarée obligatoire ;

2. Ceux qui ont vendu ou mis en vente un ou plusieurs produits ne portant pas la marque déclarée obligatoire pour cette espèce de produits ;

3. Ceux qui ont contrevenu aux dispositions des décrets rendus en exécution de l'Article 1 de la présente Loi.

Art. 10. Les peines établies par la présente Loi ne peuvent être cumulées.

La peine la plus forte est seule prononcée pour tous les faits antérieurs au premier acte de poursuite.

Art. 11. Les peines portées aux Articles 7, 8, et 9 peuvent être élevée au double en cas de récidive.

Il y a récidive lorsqu'il a été prononcé contre le prévenu, dans les cinq années antérieures, une condamnation pour un des délits prévus par la présente Loi.

Art. 12. L'Article 463 du Code Pénal peut être appliqué aux délits prévus par la présente Loi.

Art. 13. Les délinquants peuvent, en outre, être privés du droit de participer aux élections des Tribunaux et des Chambres de Commerce, des Chambres Consultatives des Arts et Manufactures, et des Conseils de Prud'hommes, pendant un temps qui n'excédera pas dix ans.

Le tribunal peut ordonner l'affiche du jugement dans les lieux qu'il détermine, et son insertion intégrale ou par extrait dans les journaux qu'il désigne, le tout aux frais du condamné.

Art. 14. La confiscation des produits dont la marque serait reconnue contraire aux dispositions des Articles 7 et 8 peut, même en cas d'acquittement, être prononcée par le tribunal, ainsi que celle des instruments et ustensiles ayant spécialement servi à commettre le délit.

Le tribunal peut ordonner que les produits confisqués soient remis au propriétaire de la marque contrefaite ou frauduleusement apposée ou imitée, indépendamment de plus amples dommages-intérêts, s'il y a lieu.

Il prescrit, dans tous les cas, la destruction des marques reconnues contraires aux dispositions des Articles 7 et 8.

Art. 15. Dans le cas prévu par les deux premiers paragraphes de l'Article 9, le tribunal prescrit toujours que les marques déclarées obligatoires soient apposées sur les produits qui y sont assujettis.

Le tribunal peut prononcer la confiscation des produits, si le prévenu a encouru, dans les cinq années antérieures, une condamnation pour un des délits prévus par les deux premiers paragraphes de l'Article 9.

Titre IV.—*Juridictions.*

Art. 16. Les actions civiles relatives aux marques sont portées devant les tribunaux civils et jugées comme matières sommaires.

En cas d'action intentée par la voie correctionnelle, si le prévenu soulève pour sa défense des questions relatives à la propriété de la marque, le tribunal de police correctionnelle statue sur l'exception.

Art. 17. Le propriétaire d'une marque peut faire procéder par tous huissiers à la description détaillée, avec ou sans saisie, des produits qu'il prétend marqués à son préjudice en contravention aux dispositions de la présente Loi, en vertu d'une ordonnance du Président du Tribunal Civil de première instance, ou du juge de paix du canton, à défaut de tribunal dans le lieu où se trouvent les produits à décrire ou à saisir.

L'ordonnance est rendue sur simple requête et sur la présentation du procès-verbal constatant le dépôt de la marque. Elle contient, s'il y a lieu, la nomination d'un expert, pour aider l'huissier dans sa description.

Lorsque la saisie est requise, le juge peut exiger du requérant un cautionnement, qu'il est tenu de consigner avant de faire procéder à la saisie.

Il est laissé copie aux détenteurs des objets décrits ou saisis, de

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l'ordonnance et de l'acte constatant le dépôt du cautionnement, le cas échéant ; le tout à peine de nullité et de dommages-intérêts contre l'huissier.

Art. 18. A défaut par le requérant de s'être pourvu, soit par la voie civile, soit par la voie correctionnelle, dans le délai de quinzaine, outre un jour par cinq myriamètres de distance entre le lieu où se trouvent les objets décrits ou saisis et le domicile de la partie contre laquelle l'action doit être dirigée, la description ou saisie est nulle de plein droit, sans préjudice des dommages-intérêts qui peuvent être réclamés, s'il y a lieu.

Titre V.—*Dispositions Générales ou Transitoires.*

Art. 19. Tous produits étrangers portant soit la marque, soit le nom d'un fabricant résidant en France, soit l'indication du nom ou du lieu d'une fabrique Français, sont prohibés à l'entrée et exclus du transit et de l'entrepôt, et peuvent être saisis, en quelque lieu que ce soit, soit à la diligence de l'administration des douanes, soit à la requête du ministère public ou de la partie lésée.

Dans le cas où la saisie est faite à la diligence de l'administration des douanes, le procès-verbal de saisie est immédiatement adressé au ministère public.

Le délai dans lequel l'action prévue par l'Article 18 devra être intentée, sous peine de nullité de la saisie, soit par la partie lésée ; soit par le ministère public, est porté à deux mois.

Les dispositions de l'Article 14 sont applicables aux produits saisis en vertu du présent Article.

Art. 20. Toutes les dispositions de la présente Loi sont applicables aux vins, eaux-de-vie et autres boissons, aux bestiaux, grains, farines, et généralement à tous les produits de l'agriculture.

Art. 21. Tout dépôt de marques opéré au greffe du Tribunal de Commerce antérieurement à la présente Loi aura effet pour quinze années, à dater de l'époque où la dite Loi sera exécutoire.

Art. 22. La présente Loi ne sera exécutoire que six mois après sa promulgation. Un règlement d'administration publique déterminera les formalités à remplir pour le dépôt et la publicité des marques, et toutes les autres mesures nécessaires pour l'exécution de la Loi.

Art. 23. Il n'est pas dérogé aux dispositions antérieures qui n'ont rien de contraire à la présente Loi.

THE GERMAN EMPIRE.

[Parl. Pap., 1872, C. 590.]

Art. 287 of the Imperial Penal Code of May 15, 1871.

Whoever fraudulently marks goods, or the covers in which they are packed, with the name or firm of a native manufacturer, producer, or merchant, or knowingly traffieks in goods so fraudulently marked, incurs a fine of from 50 to 1000 th., or imprisonment not exceeding six months.

A similar penalty is incurred when the Act is directed against the native of a foreign State, in which reciprocity is guaranteed either by public treaties or by law.

The penalty is not evaded if, in marking the goods, the name or firm is reproduced, with such slight alterations as to require particular attention to perceive them.

Art. 27 of the Commercial Code of 1869.

Whoever is injured by the unauthorised use of the name of his firm can demand from the person using it that he shall cease to do so, and claim damages therefor.

The Tribunal of Commerce decides according to its free judgment upon the question of infringement and on the amount of damages.

The Tribunal of Commerce can cause the decision to be published at the expense of the party cast in damages.

NETHERLANDS.

(See ante, p. 84.)

PORTUGAL.

[Parl. Pap., 1872, C. 596.]

(See ante, p. 83.)

Project of Portuguese Penal Code, volume 2, page 103, book 2, part 1, chapter 6 of title 2, only section, articles 296, 297, and 298.—The counterfeiting, usurping, or imitation of manufacturers' or trade-marks, and of manufacturers' designs or models.

Article 296. The counterfeiting, imitation, or use of any national or foreign mark, either imitated, or belonging to another person,

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with respect to commercial products or articles of trade, and the selling or holding up for sale of any product, or article, with a mark, either imitated, or belonging to another person, shall be punished with a fine from 10,000 reis (2*l.* 4*s.* 5*d.*) to 100,000 reis (22*l.* 4*s.* 2*d.*)

§ Manufacturers' or trade-marks are signs used for the purpose of distinguishing the products of a manufactory, or the articles of a certain trade, whether they be names under a distinguishing form, emblems, stamps, vignettes, letters, or anything else that may be intended to distinguish, or may really distinguish, in accordance with the customs of places, and the usages of any manufactory, or of trade, any product whatsoever, as well as the particular place whence it came.

Article 207. The imitation of a mark belonging to another person, but without counterfeiting the same, so that the purchaser may be deceived as to the origin of the product, or of the place whence it came from, the use of an imitated mark, and the selling or holding up for sale any products with imitated marks upon them, shall be punished with a fine from 10,000 reis (2*l.* 4*s.* 5*d.*) to 100,000 reis (22*l.* 4*s.* 2*d.*)

Art. 208. The counterfeiting, using, selling, or holding up for sale of any manufacturer's counterfeited designs or models belonging to others, either national or foreign, shall be punishable in accordance with the rule laid down in the 204th Article.

§ 1. A manufacturer's design is any invention of the mind or of taste, for the purpose of being reproduced in the manufacture by means of texture, printing, &c.

§ 2. A manufacturer's model is any invention of the mind or of taste, for the purpose of being reproduced in the manufacture by moulding, sculpture, chiseling, &c.

RUSSIA.

Declaration respecting Protection to British and Russian Trade-Marks.

Signed at St. Petersburgh, July 11, 1871.

The Government of her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and the Government of his Majesty the Emperor of all the Russias, having recognised the necessity of defining and rendering more efficacious the stipulations contained in Article 20 of the Treaty of Commerce and Navigation between Great Britain and Russia, signed on the 12th January, 1859, the

undersigned, duly authorised to that effect, have agreed upon the following arrangements :—

Article 1. The offering for sale or the placing in circulation of goods bearing counterfeit British or Russian trade-marks, wherever fabricated, shall be considered as a fraudulent operation prohibited within the territory of the two States, and shall be liable in England to the penalties prescribed by the Act of Parliament of 1862, and in Russia to the penalties prescribed by Articles 173—176 and 181, inflicted by Judges of the Peace, and by Articles 1665—1669 and 1671—1675 of the Penal Code (edition 1861).

Such fraudulent operation shall give the right before the Tribunals, and according to the laws of the country where it shall have been proved, to an action for damages, at the suit of the injured party, against those who may have been guilty thereof.

Art. 2. British subjects who may desire to secure to themselves in Russia the proprietorship of their trade-marks, shall be bound to register them at St. Petersburgh at the Department of Commerce and Manufactures.

In case trade-marks should hereafter become subject to registration in England, the same rules shall be applied to Russian as to English trade-marks.

Art. 3. The present articles, which shall come immediately into operation, shall be considered as forming an integral part of the Treaty of the 12th January, 1859, and shall have the same force and duration as the said Treaty.

In witness, &c.

[Parl. Pap., 1872, C. 596].

Penalties under the Law of Russia referred to in the above Declaration. (*a*)

I. Under the Statute of Punishments inflicted by Justices of the Peace :—

§ 173. For giving false weight or measure in the sale, purchase, or barter of goods or other chattels, and likewise for other deceptions in the quality or quantity of goods, or in cash settlements, or in changing money, the guilty parties shall be condemned, if the value of the goods shall not exceed 300 r., to imprisonment for a term of one to three months.

§ 174. The punishment specified in § 173 shall also be inflicted on the following, viz. :—

1. On whoever shall exchange for other things intrusted to him for safekeeping, for carriage, transport, or any other means of delivery.

2. On whoever shall induce another person to make over to him

(*a*) Presented to Parliament on the 24th July, 1871.

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money or things by the communication of false intelligence, or by holding out the prospect of profitable enterprise by pretended expenses in any business, by obtaining donations for pretended benevolent purposes, or in any other fraudulent manner.

3. On whoever, having received payment, shall not return the promissory note, bill of exchange, or the account signed by the purchaser, or shall not acknowledge on the same the receipt of the money due thereon, with the intention of again claiming payment.

4. On whoever, after receiving payment in full of a debt, shall not return the security (or pledge) given by the borrower in respect of such debt, and

5. On whoever, not being fully empowered for the purpose, shall lend or give to others the gratuitous usufruct of moveable property, not belonging to himself, with the intention of benefiting by the money due for such loan, or with the intention of obtaining any other illegal advantage from such transaction.

§ 175. The punishment under § 173 may be increased to six months' imprisonment in the following cases:—

1. When the offence shall have been committed by a person who shall once before have been found guilty of robbery or fraud.

2. When the fraud shall have been committed by concert of several persons.

3. When, for the purpose of committing the fraud, certain special preparations shall have been made.

4. When the offender shall have inspired special confidence by his social condition, his occupation, or by the nature of his relations towards the defrauded party.

5. When the person defrauded shall have been a minor, or aged, blind, or deaf.

6. When superstitious rites shall have been employed in the commission of the fraud.

7. When the guilty party shall have represented himself to be the attorney or servant of any person, or when he shall have assumed a false name.

§ 176. The punishments under §§ 173-175, may be reduced by one-half when the offences enumerated therein shall have been accompanied by the circumstances indicated in § 171 (*b*). In the case of an attempt at fraud, or of participation in it, the rule laid down in § 172 shall be observed (*c*).

(*b*) The circumstances enumerated in § 171 are:—

1. Voluntary restitution.
2. Commission of the offence from absolute destitution or want of work.
3. When the value of the thing stolen, &c., does not exceed 50 copecks.

(*c*) Attempts at robbery or fraud, as well as participation in the same, are

§ 181. Punishment for robbery, fraud, or appropriation or dissipation of property, belonging to another person, shall be imposed by the superior tribunal in the following cases, viz. :—

1. When the criminal act shall have been committed by a person of the noble or ecclesiastical class, by a person belonging to the monkhood, or by an honorary citizen, in all cases without exception.

2. When the same shall have been committed by persons belonging to any other class for the third time; or, if only for the first and second time, when the value of the property stolen, etc., shall exceed the sum of 300 r.; or again, under the circumstances specified in §§ 254—262, 263 (part 2), 366, 268, 2,222—2,234, 2,240, 2,244, 2,253, (part 2), 2,254, 2,259, 2,260, and 2,263 of the Statutes of Punishments.

II. Under the Statute of Criminal and Correctional Punishments :

§ 1,665. Every abstraction of things, moneys, or other moveables belonging to other parties by means of any kind of deception, shall be considered as fraud.

§ 1,666. The punishment in cases of deception and fraud enumerated in §§ 173-176 of the Statute of Punishments inflicted by Justices of the Peace shall, when the value of the property exceeds 300 r., be as follows :—

1. For the first offence, deprivation of all special rights and privileges, whether personal or acquired by service, and deportation to Siberia, or imprisonment in a convict correctional establishment, in the 5th degree of § 31 of the Statute (*d*).

2. For the second offence, imprisonment in a convict correctional establishment in the 4th degree of § 31 (*e*).

3. For the third offence, in a convict correctional establishment in the 1st degree of § 31 (§ 698) (*f*).

§ 1,667. For the frauds and deceptions specified under §§ 173—176 of the Statute of Punishments inflicted by Justices of the Peace, when the value does not exceed 300 r.; and when the offender belongs to the noble or ecclesiastical class, to the monkhood, or if he be an honorary citizen, the punishment shall be deprivation of all special rights and privileges, whether personal or acquired by service and punishment on the basis of the foregoing sections of the said Statute (§ 698).

punishable with the same severity as robbery or fraud actually committed, but the magistrate may reduce the punishment by one-half, according to the importance of the guilt of the parties.—Translator.

(*d*) Viz., deportation to the province of Tomsk or Tobolsk, or hard labour for 12 to 18 months.—Translator.

(*e*) Viz., deportation to Tomsk or Tobolsk for 1 or 2 years, or hard labour for 1½ to 2½ years.

(*f*) Viz., 3½ to 4 years' hard labour.—Translator.

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§ 1,558. If the person guilty of a fraud shall, for the purpose of committing the same, have represented himself as acting on behalf of any Government office, Court, or authority, or shall have assumed a rank to which he is not entitled, he shall be deprived of all special rights and privileges, whether personal or derived from his social condition, and be deported to Siberia; or he shall be imprisoned in a convict correctional establishment under the 5th degree of § 31 of the Statute of Punishments.

§ 1,569. If the person guilty of fraud shall, in representing himself to be an agent of the Government, or an officer of the Imperial or Municipal Service, and for the purpose of committing the fraud, have put on the uniform or any badge of distinction appertaining to the office which he shall have assumed, he shall be sentenced under the rules relating to cumulative crime (§§ 152, 189).

§ 1,671. The punishment to which a person guilty of fraud shall be liable may, at the discretion of the Court, be increased by one degree in the following cases.

(Here follow the cases specified under § 175 of this Statute of Punishments inflicted by Justices of the Peace.)

§ 1,672. For the commission, for the third time, of a crime recognised by law as a fraud, the guilty party shall be sentenced to a deprivation of all special rights and privileges, whether personal or acquired by service, and shall be deported to Siberia, or he shall be imprisoned in a convict correctional establishment under the 3rd degree of § 31 of the present Statute.

§ 1,673. Persons convicted of fraud more than three times shall be sentenced to a deprivation of all the rights and privileges appertaining to their social condition, and be deported to Siberia as colonists.

§ 1,674. The punishment to which a person found guilty of fraud shall be liable may, at the discretion of the Court, be mitigated not only by one or two degrees, but even by three degrees, if the crime shall have been accompanied by the circumstances specified in § 1,663 (*g*).

§ 1,675. Persons found guilty of fraud shall be bound to restore all that which they shall have fraudulently acquired, and shall pay damages, on the basis of § 1,664.

Observations.—Cases of fraud between parents and children, or between man and wife, can only be prosecuted at the suit of the person who shall have suffered loss by the commission of the crime.

(*g*) Identical with § 171 of the Statute of Punishments inflicted by Justices of the Peace.—Translator.

[Parl. Pap. 1872, C. 596].

(See ante, p. 83).

Royal Decree of November 20, 1850, laying down the Rules to which Manufacturers must conform in order to make legal the use of and Proprietary Right to the Trade Marks adopted by them with a view to distinguish their Manufactures.

Article 1. In order that manufacturers may make the usurpers of the trade-marks and distinctive signs of their goods responsible, they will in the first place apply to the several Governors of their provinces for a certificate of mark.

Art. 2. The petition of the manufacturer must be accompanied by an explanatory statement clearly setting forth in detail the class of stamp adopted, the figures and signs which it contains, the material of which it is made, the substance on which it is printed, and the name of its proprietor.

Art. 3. Should the manner of applying the mark be a secret, and the parties interested anxious that it should so remain, this must be stated in their petition, placing a statement of the procedure in a sealed cover, which will only be opened in the event of litigation.

Art. 4. The Provincial Governors will forward to the petitioners the certificates of presentation of their petitions, and within the period of six days, and on their responsibility, will forward them to the Ministry of Commerce, Instruction, and Public Works, together with all the documents sent in.

Art. 5. After a report from the Director of the "Conservatorio de Artes" as to whether the mark has already been used on articles of the same class, the manufacturer will receive a certificate, showing that he has presented and made good his claim to a distinctive mark, its form together with all other circumstances being mentioned minutely.

Art. 6. Within the period of three months, to count from the date of the presentation of the petition to the Governor of the province, the parties interested will pay the sum of 100 reals (*h*) to the Depositary of the University of Madrid, omitting which the certificate will not be forwarded to them. The Director-General of Agriculture, Industry, and Commerce, will sign this document, and a note shall be made thereof in the "Contabilidad" of the University.

(*h*) At present the same sum is paid, but in "papel de reintegro" which must be presented at the Ministry of Fomento.

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Art. 7. Manufacturers are at liberty to adopt any distinctive mark for their manufactures which they may deem proper, with the following exceptions:—

Firstly. The Spanish Royal Arms and Orders and Decorations, without they be duly authorised so to do.

Secondly. The distinctive marks which others may have obtained by a prior certificate.

Art. 8. Those manufacturers who are not provided with the certificate to which Article 1 refers, will not be able to prosecute those who make use of the distinctive mark employed by them in their manufactures; but should they have obtained it, not only will they be authorised to make reclamation before the law courts against the usurpers for the infraction of the penalty laid down in Article 217 of the Penal Code, but likewise to demand indemnification for all the damages and injuries done to them. With regard to this right the same rules are to be observed as with respect to movable property.

Art. 9. A mark will alone be considered in use for the effects of the present decree, of the existence of which the corresponding certificate has been obtained.

Art. 10. The authorised and recognised marks, of which certificates have been furnished to the parties interested, will be deposited in the "Conservatorio de Artes," those that have been granted in each quarter being published in the "Gazette" within the same period, and at the end of the year a general statement of all that have been granted in the course thereof.

Art. 11. In the event of litigation before the competent judge, a sketch of the mark, together with an attested copy of the statement mentioned in Article 2, will be brought forward.

Art. 12. Refers to rules of a transitory nature, the use of which expired on November 20, 1851.

TURKEY.

[Parl. Pap. 1872, C. 596].

Regulation concerning the Trade-mark of Manufactured Goods and Articles of Commerce.

Chapter I.—*Rights of Proprietors of Trade-marks.*

Article 1. THE names, seals, signs, letters, numbers, wrapping, and other things stamped or impressed upon manufactured goods and upon merchandise, for the purpose of publishing the place or name

of the manufacture, or the name of the manufacturer and address of the trader who sells them; in fact, all the sign and stamp marks intended for the purpose of distinction and speciality are named trade-marks.

Art. 2. There is no obligation to adopt trade-marks for manufactured goods and merchandize.

Still, the Government may, when necessary, order the adoption of trade-marks for any manufacture.

Art. 3. No one shall have the right of prosecuting any person for forging of the mark which he may describe as his exclusive property if previously he does not deliver and place two samples of the mark he may have adopted at the Civil Court of the principal district within which he resides, as is prescribed in the second chapter.

Art. 4. The marks officially placed and delivered, as mentioned in the 3rd Article, can only have a duration of fifteen years. The exclusive right of the mark, however, will be renewed if the samples of the marks are renewed every fifteen years.

Art. 5. A fee of one medjidié gold shall be charged for the certificate, to be delivered to the proprietors of the marks deposited. This fee shall be remitted to the local municipal fund.

Art. 6. Foreigners exercising any art or trade in the Ottoman Empire may avail themselves of the benefits and securities contained in the present regulation by adopting a special mark for their manufacture or their articles of commerce, provided they observe the present regulation; and any case arising out of this subject shall be tried by the local tribunals, in accordance with the Article II. of this Regulation.

Chapter II.—*Respecting the Formalities Required for the Deposit of Trade-marks.*

Art. 7. Any person desiring, as stated in the Article 3, to deposit his trade-mark at the Central Civil Court of his province may, if his mark can be stamped as a seal or a stamp mark, deposit two specimens of it; and if the mark is of a different nature, he must deposit two samples of it, exactly similar to the original, with the necessary explanations signed and noted by himself, or his attorney.

He must, moreover, remit to the Council himself or through his attorney, officially and properly named, any power of attorney or other document to be there kept.

Art. 8. The chief clerk of the Council shall enter one of the two samples in a sheet of a special book kept for that purpose, and shall register the day and hour of the deposit, the name of the attorney of

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the proprietor of the mark, if he has any, the profession and address of the proprietor of the mark, and the nature of productions or goods upon which the mark is to be used; he shall also number consecutively the said sheets. This registration will be sealed or signed by the President and the chief clerk of the Court, and by the proprietor of the mark, or his attorney.

The other sample shall be gummed to another sheet of paper upon which all the aforesaid registrations and numbers shall be transcribed, and the bottom of the sheet shall be signed and sealed by the aforementioned persons for transmission to the Supreme Council of Justice.

Art. 9. After the above-stated formalities shall have been executed, a provisional certificate, sealed by the Governor of the province, the President and chief clerk of the Council, shall be delivered to the proprietor of the trade-mark on payment of one medjidié gold fee, which certificate will remain in his hands until the arrival of the certificate which shall be forwarded from the Supreme Council of Justice.

Art. 10. A copy of the sample and of the registration to be sent to the Supreme Council of Justice, as stated in the eighth article, shall be forwarded (to the Supreme Council) by the Governor of the place by the first mail; the copy of the samples and registration shall be kept and registered in the Supreme Council of Justice, and a printed certificate shall be forwarded to the original place within one month.

Chapter III.—*Respecting Legal Procedure.*

Art. 11. All litigations arising with respect to trade-marks shall be forthwith tried before the judicial councils of the provinces or the central civil courts; criminal cases having connection with the trade-marks shall be tried at the criminal branches of the judicial councils of the provinces or the central civil courts.

But if in the course of the trying the defendant sets up a pretension respecting the property of the trade-mark in question, such a pretension shall also be decided by the criminal court before which the parties appear.

Art. 12. The proprietor of the trade-mark may ask for and obtain the registration of the nature, form, and quantity of the goods upon which he pretended that his own mark has been placed in contravention to the present regulation. He may also, if necessary, obtain an order for the seizure of the said goods.

Such an order may be granted on the petition of the plaintiff,

and on his exhibiting to the authorities the certificate of deposit of his mark.

Arbitrators may also be appointed, if necessary, to assist the officers of the Court.

When the seizure of the goods is applied for, the Court may, if it thinks proper, require a security in money from the proprietor of the mark.

The order of the Court and copies of the certificates made out for the delivery of the security money must be given to the party in whose possession the seized goods were found.

If a defect exists in this formality, viz., if the said copies have not been delivered, the steps already taken shall be null and void, and damages resulting in this case shall be charged upon the messenger who may have committed the mistake.

Art. 13. The distance between the domicile of the defendant and the place where the goods may have been registered or seized, shall be calculated (by hours) at the rate of one day for every six hours. If no action is brought within fifteen days beyond the time so calculated, the registration or seizure of the goods are considered null and void.

Any action for damages may, however, be brought on.

Chapter IV.—*Respecting Penalties for Forgery of Trade Marks, the samples of which may have been officially deposited.*

Art. 14. A fine of from one to fifty gold medjidiés shall be levied, or an imprisonment from one to six months, or both of these penalties, according to the degree of his culpability, shall be inflicted upon any person having forged the trade-marks of which the stamp samples or the printed likeness may have been deposited according to the present regulation, or upon any person having used such forged marks.

Secondly, upon those who may have fraudulently placed on their own goods the marks belonging to others.

Thirdly, upon any persons who may have sold or offered to sell the forged marks, or those who may have knowingly sold one or several sorts of manufactured goods or articles of commerce upon which the mark of some other person is fraudulently placed.

Art. 15. Shall be liable to a fine from two to thirty gold medjidiés and an imprisonment from one week to two months, or of both of these penalties

1. Any person having fraudulently changed the form of a mark, and all persons using such a mark :

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2. Any person having placed a mark appropriated to a certain quality of goods upon another quality with the object of cheating the buyer or the quality of the articles :

3. All persons knowingly selling or offering for sale such goods.

Art. 16. Shall be liable to a fine from one to ten gold medjidiés, or an imprisonment from twenty-four hours to one week, or to both of these punishments.

Any person who shall not place the trade-mark upon all kinds of manufactured goods or merchandize indicated by the Government, as stated in the 2nd Article, and all persons selling or offering to sell such goods not bearing the official mark.

Art. 17. If any person is under the charge of several of the crimes mentioned in the Article, the heaviest penalty applicable in any of the violated Articles shall be inflicted.

Art. 18. A second conviction shall be punished by double the penalty provided for a first offence. Any person being convicted of one of the crimes herein mentioned shall be considered as having been previously convicted under this regulation if in the course of five years from the date of his condemnation he again commits one of the said crimes.

Art. 19. As has been explained in the 14th and 15th Articles, the manufactured goods and the merchandize bearing forged marks, and the implements employed in making them shall be confiscated by order of the Court, even in case the party accused is convicted and punished. The forged marks or the goods seized as bearing marks adopted by other parties may be given to the proprietors of the genuine marks, or may also be taken on account of the indemnity allowed. All marks contrary to the purports of the Articles 14 and 15 may be abolished.

Art. 20. If goods on which it is obligatory to affix marks are found without any marks, those who sell or offer to sell such goods are to be dealt with as prescribed by the 16th Article, and, moreover, the placing of marks upon such goods is ordered.

Art. 21. If this crime is repeated in the course of five years from the date of the former judgment, or the name of the place where they have been manufactured is forged, or indicated by transposition of letters, all persons knowingly selling or offering to sell such goods may be liable to a fine of from two to fifty gold medjidiés, or to an imprisonment from one to six months, or may be condemned to both of these punishments, according to the degree of culpability.

Art. 22. All cases arising from the circumstances mentioned in the 21st Article shall be tried, as prescribed by this regulation respecting the trial of cases.

Special Article.

Art. 23. When according to the purport of the 21st Article goods bearing the name of a place of the Ottoman Empire, different from that of the place where they have been manufactured, or showing the same name by transposition of letters, and all goods of importation or exportation of this category, may be seized by the Customs authorities on their arrival.

The Report drawn out by the Customs authorities on this subject is, without delay, to be sent to the Civil Court, and an action forthwith brought.

Such actions must be brought within the time prescribed in the 4th chapter; the prescriptions of the 19th Article are also adapted to the goods seized, according to the tenor of the present Article.

Art. 24. The present regulation shall be in vigour six months after the date of its promulgation.

11*th Djemazil Evel*, 1287 (*October* 6, 1870).

UNITED STATES.

THE statute law relating to trade-marks is here given, but it does not seem clear that it is in the present state of things applicable to British subjects. They are, however, entitled to the protection of the common law of the several States. See ante, p. 72.

The United States Statute concerning trade-marks (approved July 10, 1870.)
41st Congress, Sess. 2, c. 230.

§ 77. And be it further enacted, that any person or firm domiciled in the United States, and any corporation created by the authority of the United States, or of any State or Territory thereof, and any person, firm, or corporation resident of or located in any foreign country which, by treaty or convention, affords similar privileges to citizens of the United States, and who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark, for exclusive use within the United States, may obtain protection for such lawful trade-mark by complying with the following requirements, to wit:—

First. By causing to be recorded in the Patent Office, the names of the parties and their residences and place of business, who desire the protection of the trade-mark.

Second. The class of merchandise and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated.

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Third. A description of the trade-mark itself with fac-similes thereof, and the mode in which it has been or is intended to be applied and used.

Fourth. The length of time, if any, during which the trade-mark has been used.

Fifth. The payment of a fee of 25 dols., in the same manner and for the same purpose as the fee required for patents.

Sixth. The compliance with such regulations as may be prescribed by the Commissioner of Patents.

Seventh. The filing of a declaration, under the oath of the person or of some member of the firm or officer of the corporation, to the effect that the party claiming protection for the trade-mark, has a right to the use of the same, and that no other person, firm, or corporation, has the right to such use, either in the identical form or having such near resemblance thereto as might be calculated to deceive, and that the description and fac-similes presented for record are true copies of the trade-mark sought to be protected.

§ 78. And be it further enacted, that such trade-mark shall remain in force for thirty years from the date of such registration, except in cases where such trade-mark is claimed for and applied to articles not manufactured in this country, and in which it receives protection under the laws of any foreign country for a shorter period, in which case it shall cease to have any force in this country by virtue of this Act, at the same time that it becomes of no effect elsewhere, and during the period that it remains in force it shall entitle the person firm, or corporation registering the name to the exclusive use thereof, so far as regards the description of goods to which it is appropriated in the statement filed under oath as aforesaid, and no other person shall lawfully use the same trade-mark, or substantially the same, or so nearly resembling it as to be calculated to deceive upon substantially the same description of goods: Provided that six months prior to the expiration of the said term of thirty years, application may be made for a renewal of such registration, under regulations to be prescribed by the Commissioner of Patents, and the fee for such renewal shall be the same as for the original registration, certificate of such renewal shall be issued in the same manner as for the original registration, and such trade-mark shall remain in force for a further term of thirty years: And provided further, that nothing in this section shall be construed by any Court as abridging or in any manner affecting unfavourably the claim of any person, firm, corporation, or company to any trade-mark after the expiration of the term for which such trade-mark was registered.

§ 79. And be it further enacted, that any person or corporation who shall reproduce, copy, counterfeit, or imitate any such recorded

trade-mark, and affix the same to goods of substantially the same description, properties, and qualities as those referred to in the registration, shall be liable to an action on the case for damages for such unlawful use of said trade-mark at the suit of the owner thereof in any Court of competent jurisdiction in the United States, and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of his trade-mark, and to recover compensation therefor in any Court having jurisdiction over the person guilty of such wrongful use. The Commissioner of Patents shall not receive and record any proposed trade-mark which is not and cannot become a lawful trade-mark or which is merely the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the same name where used by other persons, or which is identical with a trade-mark appropriated to the same class of merchandise and belonging to a different owner and already registered or received for registration, or which so nearly resembles such last mentioned trade-mark as to be likely to deceive the public: Provided, that this section shall not prevent the registry of any lawful trade-mark rightfully used at the time of the passage of this Act.

§ 80. And be it further enacted, that the time of the receipt of any trade-mark at the Patent Office for registration, shall be noted and recorded, and copies of the trade-mark and of the date of the receipt thereof, and of the statement filed therewith under the seal of the Patent Office, certified by the Commissioner, shall be evidence in any suit in which such trade-mark shall be brought in controversy.

§ 81. And be it further enacted, that the Commissioner of Patents is authorised to make rules and regulations and to prescribe forms for the transfer of the right to use such trade-marks, conforming as nearly as practicable to the requirements of the law respecting the transfer and transmission of copyrights.

§ 82. And be it further enacted, that any person who shall procure the registry of any trade-mark, or of himself as the owner thereof, or an entry respecting a trade-mark in the Patent Office, under this Act by making any false or fraudulent representations or declarations verbally or in writing, or by any fraudulent means, shall be liable to pay damages in consequence of any such registry or entry to the person injured thereby, to be recovered in an action on the case in any court of competent jurisdiction within the United States.

§ 83. And be it further enacted, that nothing in this Act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if this Act had not been passed.

§ 84. And be it further enacted, that no action shall be maintained

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under the provisions of this Act by any person claiming the exclusive right to any trade-mark which is used or claimed in any unlawful business, or upon any article which is injurious in itself, or upon any trade-mark which has been fraudulently obtained, or which has been formed and used with the design of deceiving the public in the purchase or use of any article of merchandise.

ITALY.

Legge concernente i Marchi ed i Segni distintivi di fabbrica.

30 *agosto*, 1868.

Vittorio Emanuele II., per grazia di Dio e per volontà della Nazione Re D'Italia.

Il Senato e la Camera dei Deputati hanno approvato; Noi abbiamo sanzionato e promulghiamo quanto segue:

Art. 1.

CHIUNQUE adotta un marchio, o altro segno, per distinguere i prodotti della sua industria, le mercanzie del suo commercio, e gli animali di una razza a lui appartenente, ne avrà l'uso esclusivo, purchè adempia il deposito in questa Legge prescritto.

Il marchio, o segno distintivo deve esser diverso da quelli già legalmente usati da altri, e deve indicare il luogo di origine, la fabbrica ed il commercio, in modo da constatare il nome della persona, la *ditta* della società e la denominazione dello Stabilimento, da cui provengono i prodotti e mercanzie; trattandosi di animali e di piccoli oggetti, sarà proposta ed approvata una sigla speciale o un segno equivalente.

La firma di carattere del produttore, commerciante o proprietario, incisa sui prodotti o riprodotta mediante suggello o qualunque altro mezzo durevole, ovvero anche scritta a mano, può costituire un marchio o segno distintivo.

Art. 2.

L'avente causa, o il successore industriale o commerciale, che vorrà conservare il marchio del suo autore, dovrà farne in carta bollata, da lire una, l'immediata dichiarazione.

Art. 3.

Il commerciante non può sopprimere il marchio, o segno distintivo, del produttore delle sue mercanzie senza espresso consentimento di lui; può bensì aggiungere separatamente il proprio marchio, o il segno distintivo del suo commercio.

Art. 4.

I marchi o segni distintivi, già legalmente usati all' estero sopra prodotti o mercanzie di fabbriche o commerci stranieri, che si spacciano nello Stato, o sopra animali di razze straniere diramate nel Regno, sono riconosciuti e garantiti, purchè si osservino, a riguardo di tali marchi o segni, le prescrizioni stabilite pei nazionali.

Art. 5.

Ferma stante la generale proibizione di usurpare il nome o la firma di una Società o di un individuo, è anche proibito di appropriarsi la *ditta* commerciale, ovvero l'insegna del negozio, l'emblema caratteristico, la denominazione o titolo di una Associazione o di un Corpo morale, sieno stranieri, sieno nazionali, ed apporli sopra botteghe, sopra oggetti d'industria o di commercio, o sopra disegni, incisioni od altre opere d'arte ; anche quando la *ditta*, l'insegna, l'emblema, la denominazione o titolo anzidetto non facciano parte di un marchio o segno distintivo, o trovinsi comunque trascritti in conformità della presente Legge.

Art. 6.

L'Amministrazione finanziaria dello stato può adottare marchi o segni, per assicurare i prodotti delle sue manifatture e lo spaccio dei generi di privativa, uniformandosi alle prescrizioni della presente Legge ; e ciò senza pregiudizio delle disposizioni vigenti, per l'Amministrazione dello Stato, nella Legge che riguarda la produzione e la specie di tali prodotti.

Art. 7.

Chi vuole assicurare a se medesimo l'uso esclusivo di un marchio, o segno distintivo, nel senso previsto agli articoli precedenti, deve presentare ad una delle Prefetture del Regno :

(A.) Due esemplare del marchio o segno distintivo che intende adottare ;

(B.) Dichiarazione in duplice originale, in cui, espressa la volontà di riservarsi i diritti che gli competono, sia indicata la specie degli oggetti su cui si vuole apporre il marchio o segno, annotando se il marchio o segno distintivo saranno apposti sopra oggetti prodotti dal dichiarante o sopra mercanzie del suo commercio ;

(C.) Descrizione in duplice originale del marchio o segno distintivo ;

(D.) Quietanza del Ricevitore demaniale locale, dalla quale apparisca essersi pagate lire quaranta, a titolo di tassa e spese, per ciascun segno o marchio distintivo. I successori, o aventi causa, pagheranno la tassa di lire due per la trascrizione della dichiarazione prescritta nell' articolo 2.

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Art. 8.

Sulla riconosciuta rigolarità della parte estrinseca degli esibiti documenti, l'Ufficio di Prefettura inscrive, sulla dichiarazione anzidetta, l'annotazione del giorno e dell'ora in cui vennero esibiti.

La Prefettura trasmette ogni cosa, nel termine non eccedente i cinque giorni, al Ministero di Agricoltura e Commercio, il quale, trascritti i documenti stessi sopra registri pubblici, rilascia, se ne è il caso, l'attestato di trascrizione.

Il Ministro, allorquando le formalità sono compiute, rinvia uno degli esemplari del marchio, o segno distintivo alla Prefettura *affinchè sia custodito* o presso di essa, o presso una Camera di commercio, e reso ostensibile al pubblico anche nella Provincia ove fu iniziata la concessione.

Art. 9.

L'attestato non guarantisce l'importanza o l'autorità del marchio o segno distintivo, o la bontà o la provenienza dei prodotti, o l'esistenza delle altre condizioni richieste perchè l'attestato sia valido ed efficace.

Art. 10.

Dalla data dell' annotazione fatta dall' Ufficio di Prefettura, comincia a competere, a favore del dichiarante, il diritto a fare uso esclusivo del marchio o segno distintivo. Ma, per gli effetti delle multe e dei danni, dovrà essere immediatamente pubblicata, nella Gazzetta ufficiale, la concessione dell' attestato di privativa.

Art. 11.

Le azioni civili, riguardanti la proprietà dei marchi ed altri segni distintivi, saranno esercitate dinanzi ai Tribunali civili e la causa sarà estruita e giudicata in via sommaria.

Le *azioni penali* sono esercitate dinanzi al Tribunale competente. A promuovere l'azione penale non è necessaria l'istanza privata.

Art. 12.

Sarà punita con multa estensibile a L. 2000 (duemila) anche quando non siavi danno del terzo :

1° Chi avrà contraffatto un marchio o segno distintivo, o chi ne avrà fatto uso scientemente ;

2° Chi avrà scientemente messo in circolazione, venduto o introdotto dall' estero, e per uso di commercio, prodotti con marchi o segni contraffatti ;

3° Chi avrà contravvenuto al disposto degli articoli 3, 5 e 6 della presente Legge ;

4° Chi senza aver propriamente contraffatto un marchio o segno distintivo, ne avrà fatto una fraudolenta imitazione, o chi avrà fatto uso scientemente di marchio o segno fraudolentemente imitati ;

5° Chi avrà scientemente posto in circolazione, venduto o introdotto dall' estero, o per uso di commercio, prodotti con marchio o segno fraudolentemente imitati ;

6° Chi avrà fatto uso scientemente di marchio o segno, insegna od emblema portante indicazione atta a trarre in inganno il compratore sulla natura del prodotti, o chi avrà venduti prodotti muniti di tali marchi o segni o emblemi.

Nel caso di recidiva, la multa sarà estensibile a lire 4000 (quattromila).

I marchi o segni contraffatti, gl' istrumenti che hanno servito alla frode, non che i prodotti e oggetti accreditati con tale contraffazione, saranno confiscati.

I marchi o segni, insegne od emblemi alterati saranno reintegrati a spese del delinquente.

Queste pene sono applicabili senza pregiudizio del risarcimento dei danni a chi di ragione, e di quelle maggiori, che sieno stabilito dal Codice penale nel caso di falsità.

Art. 13.

È abrogata qualunque Legge o Decreto contrario alle presenti disposizioni, che avranno effetto anche nelle Provincie Venete e Mantovana.

Art. 14.

Un Regolamento approvato con Decreto Reale provvederà più specialmente agli ordinamenti speciali, alla pubblicazione sommaria degli attestati rilasciati dal Governo, ed a quant' altro occorra per la esecuzione della presente Legge.

Ordiniamo che la presente, munita del sigillo dello Stato, sia inserta nella raccolta ufficiale delle leggi e dei Decreti del Regno d'Italia, mandando a chiunque spetti di osservarla e di farla osservare come Legge dello stato.

Dato a Torino addì 30 Agosto, 1868.

VITTORIO EMANUELE.

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