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A

DIGEST OF CASES

OF

TRADE MARK, TRADE NAME, TRADE SECRET, GOODWILL, &c.

DECIDED

IN THE COURTS OF

THE UNITED KINGDOM, INDIA, THE COLONIES

AND

THE UNITED STATES OF AMERICA.

BY

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OF LINCOLN'S INN, BARRISTER-AT-LAW, AUTHOR OF "THE LAW OF TRADE MARKS, ETC."

LONDON:

STEVENS AND SONS, 119, CHANCERY LANE,

Law Publishers and Booksellers.

1879.

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945
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LONDON:
STEVENS AND RICHARDSON, PRINTERS, 5, GREAT QUEEN STREET,
LINCOLN'S INN FIELDS, W.C.

Rec. Oct. 8, 1879

TO

THE HON. SIR EDWARD FRY,

ONE OF THE JUDGES OF HER MAJESTY'S HIGH COURT OF JUSTICE

(CHANCERY DIVISION),

This Work

IS

(BY HIS LORDSHIP'S PERMISSION)

INSCRIBED WITH MUCH RESPECT

BY

THE AUTHOR.

PREFACE.

THIS work completes the design with which the author undertook his treatise on "The Law of Trade Marks, &c."

The object aimed at in the present compilation has been to present a concise statement of the facts and decisions in all cases connected with the law of Trade Marks and kindred topics, as ascertained by a careful comparison of all the various reports in which each case appears. It has been decided to arrange this collection of cases in chronological order, supplementing the body of the work with a full index, in preference to digesting the matter under heads, because, where the latter form of arrangement is adopted, one of two things must happen—either the bare decision on each point is given without the facts necessary to enable it to be rightly appreciated, or else the facts have to be repeated on each mention of the case; besides which, the connexion between the points decided in the case is obscured, and points on which the case is only incidentally useful escape notice altogether. It is hoped that the Index may supply a sufficient guide to the contents of the book.

The present volume contains cases decided in the Courts of all the English-speaking countries. But it has not been thought advisable to extend the scope of the book so as to include decisions of the Courts of other countries, since, apart from the difference in language, the principles by which the

Courts of France, Germany, &c., are governed are entirely independent of those recognised in the Courts of the United Kingdom and the United States.

A number of cases hitherto unreported, decided principally under the recent Registration Acts, are contained in this volume, taken sometimes from the *Times* or the author's own notes, but generally from the shorthand notes, for the use of which the author desires to express his thanks to the authorities at the Trade Marks Registry Office. In a few instances the existing reports have been supplemented from the same sources. All the places in which each case is reported, so far as could be ascertained, are given. The English cases are brought down to the Easter Vacation, 1879, the cases from other Courts as nearly to that date as was practicable. It should be mentioned that a few of the more recent decisions are under appeal.

In some instances statements of the law on various points by learned judges, intended to be of general application, are appended to the cases in which they were made, and it is hoped that these extracts may be found useful.

L. B. S.

2, New Square, Lincoln's Inn,
May, 1879.

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TABLE OF ABBREVIATIONS.

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A. J.	Australian Jurist.
Abb. Pr.	Abbott's Practice Reports (New York).
Act. Comm.	Acting Commissioner.
Ad. & E.	Adolphus and Ellis.
Alb. L. J.	Albany (New York) Law Journal.
Allen	Allen (Massachusetts).
Am. L. Reg.	American Law Register.
Am. L. Rev.	American Law Review.
Am. L. T.	American Law Times.
Amer. Rep.	American Reports.
App. Cas.	Appeal Cases.
Asst. Comm.	Assistant Commissioner.
Atk.	Atkins.
B. & Ad.	Barnewall and Adolphus.
B. & Cr.	Barnewall and Cresswell.
Barb. Ch.	Barbour's Chancery Reports (New York).
Barb. S. C. or Barb.	Barbour's Supreme Court Reports (New York).
Beav.	Beavan.
Beng. L. R. App.	Bengal Law Reports, Appendix.
Biss.	Bissell (U. S. Circuit Court).
Bl. C. C.	Blatchford (U. S. Circuit Court).
Bos.	Bosworth (New York).
Bos. & P., N. S.	Bosanquet and Puller New Reports.
Brews.	Brewster (Pennsylvania).
Browne	Browne (Massachusetts).
Bush	Bush (Kentucky).
C. B.	Common Bench.
C. C. C.	Central Criminal Court.
C. C. C. Sess. Pap.	Central Criminal Court Sessions Papers.
C. C. R.	Court of Crown Cases Reserved.
C. & P.	Carrington and Payne.
C. P.	Common Pleas.
C. P. Div.	Common Pleas Division.
Cal.	California.
Ch. D.	Chancery Division.
Chitty Gen. Pr.	Chitty's General Practice.
Cinc.	Cincinnati.
Codd. Dig.	Coddington's American Digest of Trade Mark Cases.
Comm.	Commissioner.
Comm. of App.	Commission of Appeals (New York).

Conn.	Connecticut.
Coop.	Cooper.
C. P. Coop.	C. P. Cooper.
Cor.	Coryton (Bengal).
Cox	Cox's Criminal Cases.
R. Cox	R. Cox's American Trade Mark Cases.
Cro.	Croke.
Ct. of App.	Court of Appeal.
Ct. of Sess. Cas.	Court of Sessions Cases (Scotch).
Cush.	Cushing (Massachusetts).
D. & B.	Dearsley and Bell.
D. & R.	Dowling and Rylands.
Daly	Daly (New York).
Deady	Deady (U. S. Circuit Court).
De G. F. & J.	De Gex, Fisher and Jones.
De G. & J.	De Gex and Jones.
De G. J. & S.	De Gex, Jones and Smith.
De G. M. & G.	De Gex, Macnaghten and Gordon.
De G. & Sm.	De Gex and Smale.
Dill.	Dillon (U. S. Circuit Court).
Doug.	Douglas.
Drew.	Drewry.
Drew. & Sm.	Drewry and Smale.
Duer	Duer (New York).
E. & B.	Ellis and Blackburn.
Ell. & Ell.	Ellis and Ellis.
Eq. Rep.	Equity Reports.
Esp. N. P. C.	Espinasse, Nisi Prius Cases.
Ex.	Exchequer.
Ga.	Georgia.
Giff.	Giffard.
H. L. C.	House of Lords Cases.
H. of L.	House of Lords.
H. & M.	Hemming and Miller.
H. & N.	Hurlstone and Norman.
H. & Tw.	Hall and Twells.
H. & W.	Harrison and Wollaston.
Hand	Hand (New York).
Hilt.	Hilton (New York).
Hoff.	Hoffman (New York).
Holmes	Holmes (U. S. Circuit Court).
Hopk.	Hopkins (New York).
How. App. Cas.	Howard's Appeal Cases (New York).
How. Pr.	Howard's Practice Cases (New York).
Hughes	Hughes (U. S. Circuit Court).
Hun	Hun (New York).
Ill.	Illinois.
Ind.	Indiana.
Ir. Ch.	Irish Chancery.
Ir. Eq.	Irish Equity.
Ir. Jur.	Irish Jurist.
J. & H.	Johnson and Hemming.
J. & S.	Jones and Spencer (New York).
Jac.	Jacob.
Jac. & W.	Jacob and Walker.
Johns.	Johnson.

Journ. of Jurisp.	Journal of Jurisprudence (Scotch).
Jur.	Jurist.
K. & J.	Kay and Johnson.
Keyes	Keyes (New York).
Ky.	Kentucky.
L. J. Bkptcy.	Law Journal, Bankruptcy.
L. J. Ch.	Law Journal, Chancery.
L. J. C. P.	Law Journal, Common Pleas.
L. J. Ex.	Law Journal, Exchequer.
L. J. K. B.	Law Journal, King's Bench.
L. J. M. C.	Law Journal, Magistrates' Cases.
L. J. Notes of Cas.	Law Journal, Notes of Cases.
L. J. P. C.	Law Journal, Privy Council.
L. J. Q. B.	Law Journal, Queen's Bench.
L. R. Ch.	Law Reports, Chancery Appeals.
L. R. C. P.	Law Reports, Common Pleas.
L. R. Eq.	Law Reports, Equity.
L. R. H. L.	Law Reports, House of Lords (English and Irish).
L. R. P. C.	Law Reports, Privy Council.
L. T.	Law Times.
La. Ann.	Louisiana Annual Reports.
Lans.	Lansing (New York).
Lathrop	Lathrop (Massachusetts).
Leg. Obs.	Legal Observer.
M. M. A.	Merchandise Marks Act, 1862.
M. & Rob.	Moody and Robinson.
Mac. & G.	Macnaghten and Gordon.
McLean	McLean (U. S. Circuit Court).
Madd.	Maddock.
Man. & G.	Manning and Granger.
Mass.	Massachusetts.
Md.	Maryland.
Me.	Maine.
Mer.	Merivale.
Mich. C. C.	Michigan Circuit Court.
Mich. N. P.	Michigan Nisi Prius.
Mo.	Missouri.
Mod.	Modern Reports.
Mont. D. & De G.	Montague, Deacon and De Gex.
Monthly L. R.	Monthly Law Reports.
Moo. P. C.	Moore's Privy Council Cases.
My. & Cr.	Mylne and Craig.
N. Car.	North Carolina.
N. P.	Nisi Prius.
N. R.	New Reports.
N. S.	New Series.
N. Y.	New York.
N. & M.	Neville and Manning.
N. & P.	Neville and Perry.
Neb.	Nebraska.
Paige	Paige (New York).
Pemb.	Pemberton on Judgments.
Penn. St.	Pennsylvania State Reports.
Penn. L. J.	Pennsylvania Law Journal.
Ph.	Phillips.

Phila.	Philadelphia.
Pick.	Pickering (Massachusetts).
Post	Post (Missouri).
R. I.	Rhode Island.
Robertson	Robertson (New York).
Russ.	Russell.
S. & S.	Simons and Stuart.
Sandf. Ch.	Sandford's Chancery Reports (New York).
Sandf. S. C.	Sandford's Supreme Court Reports (New York).
Sawyer	Sawyer (U. S. Circuit Court).
Scot. L. Rep.	Scottish Law Reporter.
Scott, N. R.	Scott's New Reports.
Seton	Seton on Decrees.
Sickles	Sickles (New York).
Sim.	Simons.
E. D. Smith	E. D. Smith (New York).
Story	Story (U. S. Circuit Court).
Sup. Ct.	Supreme Court.
Super. Ct.	Superior Court.
Swanst.	Swanston.
T. M. A.	Trade Marks Registration Act.
Thomp. & C.	Thompson and Cook (New York).
Trade Marks	British and Foreign Journal of Commerce, Trade Marks, and International Exhibitions.
Trans. App.	Transcript Appeals (New York).
U. S. C. C., Dt. of—	United States Circuit Court, District of—.
U. S. Pat. Comm. Decis.	Decisions of the U. S. Commissioner of Patents.
U. S. Pat. Gaz.	United States Official Patent Gazette.
U. S. Rep.	United States Supreme Court Reports.
U. S. Sup. Ct.	United States Supreme Court.
V. & B.	Vesey and Beames.
V. R. Eq.	Victoria Reports (First Series) Equity.
Va.	Virginia.
Ves.	Vesey.
Vict. L. R. Eq.	Victoria Law Reports (New Series) Equity.
W. N.	Weekly Notes.
W. R.	Weekly Reporter.
W. Va.	West Virginia.
W. & W. (I. E. & M.)	Wyatt and Webb's Victoria Reports (Insolvency, Ecclesiastical and Matrimonial).
W. W. & A'B. Eq.	Wyatt, Webb and A'Beckett's Victoria Reports (Equity).
W. A'B. & W. Eq.	Webb, A'Beckett and Williams' Victoria Reports (Equity).
Wallace	Wallace (United States Supreme Court).
Wall. Jr.	Wallace, Junior, (U. S. Circuit Court).
West. L. J.	Western Law Journal.
Wils.	Wilson.
Wilson (Ind.)	Wilson's Indianapolis Reports.
Wisc.	Wisconsin.
Wood. & M.	Woodbury and Minot (U. S. Circuit Court).
Y. & C. Ch.	Younge and Collyer's Chancery Reports.

DIGEST

OF

CASES OF TRADE MARK, &c.

SOUTHERN *v.* HOW. 1.

Temp. Jac. 1.

[*Common Pleas*——*Popham* 144 ; *Cro. Jac.* 471 ; 2 *Rolle* 28.]

Action on the case for deceit.

Doderidge, J., cited a case in which it was held by the Court of Common Pleas, in the reign of Queen Elizabeth, that an action on the case for deceit would lie against a clothier who had applied another's mark to his own inferior cloth. Popham says the action was brought by the defrauded clothier; Croke, by the purchaser; but Rolle states that this was not mentioned, but conjectures that it was by the purchaser.

BLANCHARD *v.* HILL. 2.

Dec. 18*th*, 1742.

[*Lord Hardwicke, C.*——2 *Atk.* 484.]

Motion for injunction to restrain the use of the Great Mogul stamp on cards, refused.

"Every particular trader has some particular mark or stamp ; but I do not know of any instance of granting an injunction here to restrain one trader from using the same mark with another, and I think it would be of mischievous consequence to do it. Mr. Attorney-General has mentioned a case where an action at law was brought

by a clothworker against another of the same trade for using the same mark, and a judgment was given that the action would lie. But it was not the single act of making use of the mark that was sufficient to maintain the action, but doing it with a fraudulent design, to put off bad cloths by this means, or to draw away customers from the other clothier; and there is no difference between a tradesman's putting up the same sign, and making use of the same mark, with another of the same trade." "An objection has been made that the defendant, in using this mark, prejudices the plaintiff by taking away his customers. But there is no more weight in this than there would be in an objection to one innkeeper setting up the same sign with another."

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3. **GIBBLETT** *v.* **READ.**

17 *Geo.* 2.

[*Lord Hardwicke, C.*——9 *Mod.* 459.]

Suit by the children of the proprietor of nineteen out of twenty shares in the *St. James' Evening Post* newspaper.

Held, that such shares belonged to the personal estate of the deceased proprietor, and must be accounted for by his widow and executrix accordingly.

"The case was put of physical secrets or nostrums, where everything was carried on by the materials purchased after the testator's death, and yet the nostrum is part of the personal estate of the testator. This has been resembled to the case of a shoemaker; and, in that case, suppose the dealing has been extensive, and carried on in partnership, and with the father's stock, the son, who is executor, would be accountable. Suppose the house were a house of great trade, he must account for the value of what is called the goodwill of it." "In the case of Tipping, if anybody had thought of his nostrum, as he had no patent, any discoverer might have sold it."

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4. **SINGLETON** *v.* **BOLTON.**

1783.

[*King's Bench*——3 *Doug.* 293.]

The plaintiff manufacturing and selling, in succession to his father, a medical preparation under the name of "Dr.

Johnson's Yellow Ointment," and the defendant having begun to sell a medicine under the same name, plaintiff nonsuited in an action; and a rule which had been obtained for a new trial, discharged.

Per Lord Mansfield, C.J. "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 use the name of the original inventor, and no evidence was given of the defendant having sold it as if prepared by the plaintiff. The only other ground on which the action could be maintained was that of property in the plaintiff, which was not pretended, there being no patent, nor any letters of administration."

COOPER *v.* WATSON. 5.

1784.

[*King's Bench*——3 *Doug.* 413.]

Action of covenant on articles of partnership in a brewing business, by which it was covenanted that the partnership should continue for eleven years, with a proviso that either partner should be at liberty to quit the trade and mystery of a brewer, on giving six months' notice to the other, and that the party to whom such notice should be given might be at liberty to continue the trade on his own account.

The defendant continuing to trade as a brewer on his own account, after giving the six months' notice,

Held, that, on the construction of the covenant, the defendant must quit the business altogether.

WORRAL *v.* HAND. 6.

1791.

[*Lord Kenyon, C.J., at N.P.*——*Peake*, 105.]

Action of assumpsit for goods sold and delivered, the defendant being the administratrix of a publican, and

having sold the goodwill of the pubiic-house for a sum of money.

Held, that the sum which she had received was assets in her hands, though she was tenant at will after the death of the intestate.

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7. **WEBSTER** *v.* **WEBSTER.**

May 19*th*, 1791.

[*Lord Thurlow, C.*——3 *Swanst.* 490.]

Motion by one of three executors of a deceased person for an injunction to restrain the other two executors, whose partner the deceased had been, from continuing to use the name of their deceased partner in their business, refused, on the ground that no liability could thereby be thrown upon the deceased partner's estate, and that the possible fraud upon the public gave the executor no claim against the defendants.

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8. **JENDWINE** *v.* **SLADE.**

July 12*th*, 1797.

[*Lord Kenyon, C.J. at N.P.*——2 *Esp. N. P. C.* 572.]

Action to recover damages on the sale of two pictures, copied respectively from Claude Lorraine and Teniers, but sold under a catalogue which described them as by those artists.

Held, that the description did not amount to a warranty.

"It was impossible to make this the case of a warranty. The pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. The catalogue only expressed the opinion of the vendor, but left the determination to the buyer's own judgment."

HAMMOND *v.* DOUGLAS. 9.

July 31*st*, 1800.

[*Lord Loughborough, C.*——5 *Ves.* 539.]

On exceptions to the Master's report, which stated the purchase money of the goodwill of a partnership business to belong to the joint estate of the partners, one of whom was dead,

Held, that the sum belonged to the survivor.

The Lord Chancellor was "clearly of opinion that upon a partnership without articles the goodwill survives; and a sale of it cannot be compelled by the representative of the deceased partner, being the right of the survivor, which the law gives him to carry on the trade: it is not partnership stock, of which the executor may compel a division."

HOGG *v.* KIRBY. 10.

March 15*th*, 1803.

[*Lord Eldon, C.*——8 *Ves.* 215.]

The plaintiff being the proprietor of a magazine called The Wonderful Magazine," the defendant began to ng out an extremely similar publication, which he described as a "New Series, Improved."

Injunction granted to restrain the wrongful acts of the defendant, and *Held*, that the fact that the plaintiff's work was incorrectly stated to be "by William Granger, Esq.," did not disentitle the plaintiff to his injunction, but should be left to form an ingredient in the action for damages.

It is competent to any person, perceiving the success of a literary work, "to set about a similar work, *bonâ fide* his own. But it must be in substance a new and original work, and must be handed out to the world as such."—"I shall state the question to be, not whether this work is the same, but, in a question between these parties, whether the defendant has not represented it to be the same; and whether the injury to the plaintiff is not as great, and the loss accruing ought not to be regarded in equity upon the same principles between them as if it was, in fact, the same work."

11. **BUNN *v.* GUY.**

Nov. 7th, 1803.

[*King's Bench*——4 *East* 190.]

Case sent from Chancery.

Held, that a contract entered into by a practising attorney to relinquish his business and recommend his clients to two other attorneys for a valuable consideration, and that he would not himself practise in such business within certain limits, and would permit them to use his name in their firm for a certain time, but without his interference, &c., was good in law.

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12. **LONGMAN *v.* TRIPP.**

Nov. 21*st*, 1805.

[*Common Pleas*——2 *Bos. & P. N. R.* 67.]

Action of assumpsit.

Held, that the right of printing and publishing the *Bristol Mercury* newspaper passed, on the bankruptcy of the printer and publisher, to his assignees in bankruptcy, as being goods and chattels within 21 Jac. I., c. 19, s. 11, notwithstanding an assignment thereof as a security previously made to a creditor, but not made public.

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13. **SHACKLE *v.* BAKER.**

Feb. 6th, 1808.

[*Lord Eldon, C.*——14 *Ves.* 468.]

Motion for an injunction to restrain the defendants from proceeding at law under a judgment, the plaintiff alleging that the defendants, the goodwill of whose business he had bought, were carrying on business in com-

petition with him, after they had persuaded him to omit a covenant against so doing in the agreement for sale, on the ground that it was unnecessary for him to have more than their word, refused.

"I cannot see my way to grant an injunction in this case. If it had been nothing more than a purchase of the goodwill of this trade, the vendor would be at liberty to set up the same trade in any other situation. Against that the purchaser has the choice of several securities. He may rest upon the assurance of the vendor; he may require a covenant; but resting upon a covenant, he can have nothing more than an action for damages, and the observation that such an action is an extremely imperfect remedy has been repeatedly made. The parties may, therefore, proceed to ascertain for themselves what shall be the damages from time to time, and, unless they are so awkward as to put that in the shape of penalty, instead of liquidated damages, there is a perfect and absolute remedy."

CRAWSHAY *v.* **COLLINS.** **14.**

July 26th, 1808.
[*Lord Eldon, C.*——15 *Ves.* 218.]

Partnership suit.

P. 27. The Lord Chancellor agreed with the doubt expressed by Sir Samuel Romilly upon the decision in *Hammond* v. *Douglas*, that the goodwill of a partnership business survived to the surviving partner.

LONGMAN *v.* **WINCHESTER.** **15.**

Nov. 23rd, 1809.
[*Lord Eldon, C.*——16 *Ves.* 269.]

Motion to dissolve an injunction which had been granted to restrain the pirating of a Court Calendar, refused.

"In the case of *Hogg* v. *Kirby* there was no doubt that any person might publish a work of that description which was the subject of

that injunction. Each party might publish his own collection, and the articles might happen to be the same, but the one could not excite the public curiosity by copying into his work from that of the other. The defendant in that case had not done that; but he 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."

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16. **FEATHERSTONHAUGH *v.* FENWICK.**

April 18*th*, 1810.

[*Grant, M.R.*——17 *Ves.* 298.]

Partnership suit.

Held, that the consequence of the dissolution of a partnership, where there were no articles prescribing the terms, was a general sale and account of the joint property; and that some of the partners could not, therefore, insist on taking the share of another partner at a valuation, nor that he should remove his property from the premises, so as to deprive him of his share in the goodwill, nor retain the benefit of a clandestine renewal to them of the lease of the partnership premises, since that would be to give them the whole benefit of the goodwill, but that such renewed lease must be included in the valuation of the partnership property.

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17. **CRUTTWELL *v.* LYE.**

Nov. 21*st*, 1810.

[*Lord Eldon, C.*——17 *Ves.* 335; 1 *Rose* 123.]

The plaintiff having bought from the defendant's assignees in bankruptcy the goodwill of his principal carrying business, and a subordinate business of the same kind having been bought back for the defendant at the same time, the latter recommenced business in such a manner as to render a mistake between the two businesses possible.

Motion for an injunction to restrain the defendant from so doing, refused, on the ground that the defendant was entitled to carry on a similar business, if he did not hold it out as being the same.

"There can be no doubt that this Court would interpose against that sort of fraud which has been attempted by setting up the same trade in the same place, under the same sign or name, the party giving himself out as the same person."

"I cannot say that any of those interests which a bankrupt is supposed to have by the effect of the certificate, or in the surplus of his estate after payment of his debts, form a principle upon which he should not be permitted to engage again in the like trade, which in this sort of case is materially distinguished from the same trade. In *Hogg* v. *Kirby* the defendant's magazine, being published as a continuation of the plaintiff's, was the same."

"The goodwill, which has been the subject of sale, is nothing more than the probability that the old customers will resort to the old place."

SEDON *v.* **SENATE.** **18.**

1811.

[*Grant, M.R.*——*Cited* 2 *V. & B.* 220.]

The defendant, having sold a medicine to the plaintiff, began to sell another under a similar description, and to put forth advertisements containing verses which had before been used on the original medicine.

Injunction granted to restrain the defendant from continuing so to do, though the plaintiff had no patent for the medicine.

CANHAM *v.* **JONES.** **19.**

June 23*rd*, 1813.

[*Plumer, V.C. of E.*——2 *V. & B.* 218.]

The plaintiff being the proprietor of a secret medicine called "Velno's Vegetable Syrup," the defendant, who had been in the plaintiff's service, and had there become

acquainted with a part of the secret, began to make and sell a spurious preparation under the same name.

Demurrer to a bill for an injunction to restrain him from so doing, allowed, on the ground that there was no exclusive right in a medicine, not protected by patent, such as to prevent the sale of a medicine under the same title by another person, the latter not assuming the name and character of the original maker.

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20. **SCOTT *v.* MACKINTOSH.**

May 8th, 1813.

[*Lord Eldon, C.*——1 *V. & B.* 503.]

Motion to revive an injunction to restrain the defendant from proceeding at law, refused.

"Where a man sells the goodwill of a trade and covenants to make it as profitable as he can, the actual profit made is not that which the vendee is bound to take; but he will have an action of covenant, if he can establish his title to more through the default of the vendor."

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21. **DAY *v.* DAY.**

1816.

[*Chancery*——*Eden on Inj.* (*Ed. of* 1821) 314.]

The defendant having placed on his blacking certain labels in imitation of those used by the plaintiff on his, injunction granted to restrain the infringement.

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22. **BOZON *v.* FARLOW.**

July 29th, 1816.

[*Grant, M.R.*——1 *Mer.* 459.]

Bill by the vendor, for the specific performance of an agreement for the sale of an attorney's practice, dismissed,

on the ground that the agreement contained no express stipulations enabling the Court to carry it into effect on the vendor's part, in return for the purchase money, and that there were no conditions so generally applicable to such transactions as to be capable of being inserted by way of "usual clauses." And *Held*, that it was doubtful whether such an agreement was in its nature valid, either on the ground of morality or of public policy; and further, whether, if legally valid, it was of such a nature as to be capable of being enforced in equity.

LORD BYRON *v.* **JOHNSTON.** **23.**

Nov. 28th, 1816.

[*Lord Eldon, C.*——2 *Mer.* 29.]

The defendant having advertised for sale certain poems of which he represented the plaintiff to be the author, on motion on behalf of the plaintiff (he being absent abroad), and upon affidavits by his agents of circumstances leading to the belief that the poems were not his work, and the defendant refusing to swear to his belief that they were so, injunction granted, to restrain the defendant, until answer or further order, from publishing such poems in the plaintiff's name, or as his work.

NEWBERY *v.* **JAMES.** **24.**

March 27th, 1817.

[*Lord Eldon, C.*——2 *Mer.* 446.]

On motion by the defendants, injunction which had been granted to restrain them from violating an agreement not to divulge the secret of a medical preparation, dissolved, on the ground that if there were a real secret in question, the Court would have no means of interfering to enforce its order.

25. **HARRISON** *v.* **GARDNER.**

July 23*rd*, 1817.

[*Plumer, V. C. of E.*——2 *Madd.* 198.]

The defendant having been partner with the plaintiff, and having, on his retirement from the firm, accepted a sum awarded to him by arbitrators in respect of his share of the goodwill, and calculated by them upon the understanding that he would not set up the same trade in the same street or its vicinity, injunction granted to restrain him from setting up the same trade in the same street or its vicinity.

P. 219. "What is the 'goodwill' of a retail shop in a populous neighbourhood? 'Goodwill' is defined by Lord Eldon to be 'the probability that the old customers will resort to the old place.' (*Cruttwell v. Lye*, 17 Ves. 346.) A person, not a lawyer, would not imagine that when the goodwill and trade of a retail shop were sold, the vendor might the next day set up a shop within a few doors, and draw off all the customers. The goodwill of such a shop, in good faith and honest understanding, must mean all the benefit of the trade, and not merely a benefit of which the vendor might the next day deprive the vendee. The authorities, however, are strong to show that the sale of a goodwill does not impart restraint, and that a person selling the goodwill of a business, for however large a consideration, is not prevented from setting up the trade. In *Shackle v. Baker*, 14 Ves. 468, it was held that the sale of a goodwill leaves the vendor at liberty to set up the same trade in *any other situation*. But here the trade is carried on in the *same* situation."

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26. **WILLIAMS** *v.* **WILLIAMS** (1).

Aug. 6*th*, 1817.

[*Lord Eldon, C.*——3 *Mer.* 157.]

On motion by the defendant, injunction which had been granted to restrain the defendant (among other things) from divulging a secret in respect of a medicine, dissolved, on the affidavit of the defendant denying the truth of the

facts as stated upon the plaintiff's affidavit, and on the ground that there was no secret. And *Held* that it was doubtful whether a Court of Equity, in its jurisdiction to decree specific performance of an agreement, could interfere by injunction in such a case.

"I do not think that the Court ought to struggle to protect this sort of secrets in medicine."

KENNEDY *v.* **LEE.** 27.

Nov. 17*th*, 1817.

[*Lord Eldon, C.*——3 *Mer.* 441.]

Partnership suit.

Held, that an agreement to buy up his partner's share in a nursery gardener's business did not bind the purchasing partner to pay for the outgoing partner's share in the goodwill. And *Held*, that, unless there were some provisions in the agreement with respect to the goodwill, and preventing the outgoing partner from carrying on business in a specified locality, the latter would be at liberty to carry on the same trade "where, and when, and with whom he pleased."

FARR *v.* **PEARCE.** 28.

Feb. 10*th*, 1818.

[*Leach, V. C. of E.*——3 *Madd.* 74.]

Suit by the personal representative of A., who had entered into articles of partnership with the defendant, in his surgeon's practice, and had paid a premium.

The defendant having sold the goodwill of the practice, after the death of A.; *Held*, upon the construction of the articles, that A.'s representative was not entitled to a share of the money produced by the sale of the goodwill.

"In this case the articles define the interest which the representatives of a deceased partner are to take, and there is no provision which gives them the benefit of the goodwill of the concern. But if the general question had arisen here, I think it would have been difficult to maintain that where a partnership is formed between professional persons, as surgeons, and one dies, the other is obliged to give up his business and sell the connexion for the joint benefit of himself and the estate of his deceased partner. When such partnerships determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions; and where the determination is by the death of one, the right of the survivor cannot be affected. Such partnerships are very different from commercial partnerships."

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29. **WILLIAMS** *v.* **WILLIAMS (2).**

June 10*th*, 1818.

[*Lord Eldon, C.*——2 *Swanst.* 253; 1 *Wils.* 473.]

The plaintiffs having bought up the interest of the defendant, one of the partners in their coaching business, and the defendant having undertaken not to be concerned in any coach running a specified route, or prejudicial to the partnership business, but having subsequently begun to run a coach in violation of the agreement, injunction granted to restrain him from so doing.

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30. **GEE** *v.* **PRITCHARD.**

July 17*th*. 1818.

[*Lord Eldon, C.*——2 *Swanst.* 402.]

Injunction granted to restrain the publication of private letters.

P. 413. "The publication of a libel is a crime, and I have no jurisdiction to prevent the commission of crimes, except, of course, such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime—an exception arising from that peculiar jurisdiction of this Court."

YOVATT *v.* WINYARD. **31.**

May 15*th*, 1820.
[*Lord Eldon, C.*——1 *Jac. & W.* 394.]

The plaintiff, being the proprietor of the secret recipes for certain veterinary medicines, having taken the defendant into his employ under an agreement by which he was to have a salary and be instructed in the business generally, but was not to be taught the secrets, the defendant secretly acquainted himself with the secrets, and, setting up for himself, made up the medicines and sold them with directions for use copied from the plaintiff's.

On motion by the plaintiff, injunction granted to restrain the defendant from using or communicating the secret recipes, except as to the treatment of animals then in his care, and from printing and publishing the directions, on the ground that the defendant had become acquainted with the secrets by breach of trust.

BAXTER *v.* CONOLLY. **32.**

July 13*th*, 1820.
[*Lord Eldon, C.*——1 *Jac. & W.* 576.]

Motion for an injunction to restrain an action at law brought to recover an annual payment due by way of purchase money for goodwill, refused.

P. 580. "The Court certainly will not execute a contract for the sale of a goodwill, at the same time it will not enjoin against any proceeding at law under such an agreement—suppose, for instance, there is a contract for the goodwill of a shop; it cannot be conveyed, and the Court would say—'Go and make what you can of it at law; if you can recover, very well, we won't prevent you; if you cannot, very well again, we won't assist you.'"

33. **EDMONDS *v.* BENBOW.**

Feb. 20th, 1821.

[*Leach, V.C. of E.*——*Seton*, 3*rd ed.*, 905 ; 4*th ed.*, 238.]

The plaintiff being the proprietor and publisher of a newspaper called *The Real John Bull*, injunction granted to restrain the publication by the defendants of a newspaper called *The Real John Bull*, or *The Old Real John Bull*, and of any other newspaper as a continuation of the plaintiff's newspaper.

[34.] **IN RE THE EDINBURGH CORRESPONDENT NEWSPAPER.**

May, 1822.

[*Ct. of Session.*——*Ct. of Sess. Cas.*, 1*st Ser. I.* (*New ed.*) 407*n.*]

The plaintiffs being the proprietors of a newspaper entitled *The Edinburgh Correspondent*, interdict granted to restrain the publication of a new paper under that name.

Per Lord Balgray. "The partners under the existing firm, as publishers of the former paper, have a right to prevent any paper from being published under such title or firm as may mislead the public into a belief that it is the former paper."

[35.] **M'CORMICK *v.* M'CUBBIN.**

July 4th, 1822.

[*Ct. of Session.*——*Ct. of Sess. Cas.*, 1*st Ser. I.*, 541 (*New ed.*, 496).]

On the death of a person entitled to one half of the copyright and goodwill of a newspaper called *The Ayr Advertiser*, bill of suspension and interdict presented by

the persons entitled to the other half (who had themselves refused to purchase the share of the deceased proprietor) to restrain the latter's executors from offering the half share for sale, refused, on the ground that the copyright and goodwill of a newspaper were a species of property capable of transmission by the proprietor to his representatives, and that the latter were entitled to the benefit to be derived from a sale of the share.

BRYSON *v.* **WHITEHEAD.** **36.**

Nov. 25th, 1822.

[*Leach, V.C. of E.*——1 *S. & S.* 74; 1 *L. J., Ch.* 42.]

In a suit by the vendor of the goodwill of his dyeing business, with the exclusive use of a secret mode of dyeing, specific performance of the agreement between the vendor and purchaser, granted.

"Although the policy of the law will not permit a general restraint of trade, yet a trader may sell a secret of business, and restrain himself generally from using that secret. Let the Master, in settling the deed which is to give effect to this agreement, introduce a general covenant to restrain the use of the secret for twenty years, and a covenant limited in point of locality, as to carrying on the ordinary business of a dyer, both parties being willing that the agreement should be so modified."

COOK *v.* **COLLINGRIDGE.** **37.**

Jan. 27th, 1823.

[*Lord Eldon, C.*——*Jac.* 607; 1 *L. J., Ch.* 74; *Collyer on Partnership* (*2nd ed.*) 215.]

Partnership suit.

On petition in this cause (see Collyer, *ubi sup.*) subsequent to the decision of the above date,

Held that, the partnership having expired by mere effluxion of time, the former copartners were under no obligation, after the sale of the business, to refrain from

carrying on the same kind of business, or uniting in a new partnership with any other persons, and that notice of this must be inserted in the particulars of sale of the partnership property and effects.

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38. **GREEN *v.* FOLGHAM.**

June 10th, 1823.

[*Leach, V.C. of E.*——1 *S. & S.* 398; 1 *L. J., Ch.* 203.]

The secret recipe of a medical preparation, called "Dr. Johnson's Ointment for the Eyes," having been settled upon the parents of the parties in the suit, and after the death of the survivor of them, to be sold for the benefit of the plaintiffs and defendant, the mother, being the surviving parent, communicated the secret to the defendant for the benefit of himself and the plaintiffs, his younger brothers and sisters.

In a suit by the younger brothers and sisters, after the mother's death,

Held, that the defendant held the secret upon the trusts of the settlement, and must account for the profits since his mother's death (an allowance being made him for his trouble), and that an issue must be directed to ascertain the value of the secret.

"If this secret could be made a subject of sale, the plaintiffs would be next entitled to ask from the Court that a sale should be directed accordingly. But inasmuch as the Court has no possible means either to communicate this secret to a purchaser with certainty, or to protect him in the enjoyment of it, a sale becomes impracticable. But although the Court cannot direct a sale, it has the power of taking a course which, in point of advantage, will be equivalent to the plaintiffs. It can inquire what would be the value of this secret to sell, provided it could be made the subject of sale; and the annual profits which have actually been made by the sale of the ointment from the death of the mother will be a fair criterion by which that value may be estimated."

CONSTABLE & Co. *v.* BREWSTER. [39.]

July 6th, 1824.

[*Ct. of Session*——*Ct. of Sess. Cas.* 1*st Ser. III.*, 215 (*New ed.* 152).]

The plaintiffs having employed the defendant for five years as one of the editors of *The Edinburgh Philosophical Journal*, which was described on the title page as "conducted by Dr. Brewster and Professor Jameson," and the defendant having, at the end of the five years, separated from the plaintiffs and announced the publication of "No. 1 of the New Series of the *Edinburgh Philosophical Journal*, conducted by Dr. Brewster," interdict granted to restrain the publication of a work under that title.

SYKES *v.* SYKES. 40.

Nov. 11*th*, 1824.

[*King's Bench*——3 *B. & Cr.* 541; 5 *D. & R.* 292; 3 *L. J., K. B.* 46.]

The plaintiff having been in the habit of marking his shot-belts, powder-flasks, &c., with the words "Sykes' Patent" (though the patent which had been taken out had been held to be invalid), the defendants copied this mark on their own goods.

Action on the case.

Held, by Bayley, J., at the trial, and afterwards by the Court of K. B., that the defendants had no right to mark their goods "as and for" the plaintiff's goods, and that the fact that the immediate purchasers knew who was the maker made no difference.

Per Abbott, C.J.—"It was established most clearly that the defendants marked the goods manufactured by them with the words 'Sykes' Patent,' in order to denote that they were of the genuine manufacture of the plaintiff; and although they did not themselves sell them as goods of the plaintiff's manufacture, yet they sold them to retail dealers for the express purpose of being resold as goods of the plaintiff's manufacture. I think that is substantially the same thing."

[41.] **SNOWDEN** *v.* **NOAH.**

Jan., 1825.

[*N. Y. Chancery*; *Sandford, C.*} ——*Hopk.* 347; *R. Cox*, 1.]

Motion by a person who had purchased the right to publish a newspaper called *The National Advocate* in the city of New York, for an injunction to restrain the vendor from starting a paper in that city called *The New York National Advocate*, refused, on the ground that the names were sufficiently distinct to prevent deception.

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42. **COSLAKE** *v.* **TILL.**

Aug. 4th, 1826.

[*Lord Gifford, M.R.*——1 *Russ.* 376.]

Suit by the purchaser for the specific performance of an agreement by a tenant at will of a public-house for the sale of the possession, trade, and goodwill of the house at a fixed sum, and of the stock and furniture at a valuation, one of the terms being that possession should be taken and the money paid on a given day.

Held (1), that time was of the essence of the contract, and that the plaintiff not having been ready with the purchase money till the day after the given day, specific performance could not be granted; (2) that it was doubtful whether a Court of Equity would enforce the performance of a contract for the purchase of a subject matter, of which the goodwill of a public-house, unconnected with any fixed interest in the premises, formed the principal part.

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43. **DAKIN** *v.* **COPE.**

June 1*st*, 1826; *April*, 1827.

[*Plumer M.R.*; *Lord Gifford, M.R.*; *Lord Eldon, C.*} ——2 *Russ.* 170.]

In a suit by the executors of a publican, with whom the defendant had entered into an agreement for the pur-

hase of the leasehold public-house and the goodwill and cences connected therewith, specific performance of the greement granted.

DELONDRE *v.* **SHAW.** 44.

April 16*th*, 1828.

[*Shadwell, V.C. of E.*——2 *Sim.*, 237.]

Suit commenced jointly by Delondre, the inventor, and Pelletier, the compounder, by agreement with Delondre, of "Sulphate of Quinine," to restrain the imitation of the labels and seals used on the bottles of quinine.

Demurrer allowed, on the ground that the parties who asked joint relief were not entitled to joint relief, Pelletier not being shown to have any interest in the labels and seals in question.

CHISSUM *v.* **DEWES.** 45.

July 21*st*, 1828.

[*Leach, M.R.*——5 *Russ.* 29.]

The unexpired term in a house; and the goodwill of the business there carried on, having been sold in a creditor's suit, with the consent of an equitable mortgagee, and having brought a price less in amount than the debt due to the equitable mortgagee;

Held, that the equitable mortgagee was entitled to the whole of the purchase-money, whether arising from the value of the goodwill, or from the value of the lease apart from the goodwill.

"The goodwill of the business is nothing more than an advantage attached to the possession of the house; and the mortgagee, being entitled to the possession of the house, is entitled to the whole of that advantage. I cannot separate the goodwill from the lease."

46. **SPICER** *v.* **JAMES.**

Nov., 1830.

[*Leach, M.R.*——*Collyer on Partnership, 2nd ed.* 104.]

The administrator of an attorney having carried on the business of the intestate until the latter's son came of age, upon which he transferred the business to the latter, the latter afterwards became insolvent.

Suit by one of the creditors against the administrator for an account of the profits of the business while managed by him, and insisting that he was indebted to the intestate's estate in respect of the goodwill of the business, dismissed, on the ground that the goodwill of a trade of a personal nature, as that of an attorney, was not a subject of administration.

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47. **DAY** *v.* **BINNING.**

Jan. 21*st*, 1831.

[*Shadwell, V.C. of E.*——*C. P. Coop.* 489 ; 1 *Leg. Obs.* 205.]

The plaintiffs being manufacturers of blacking, which they sold in bottles labelled, among other things, with the words "Manufactured by Day & Martin," the defendants began to sell other blacking in similar bottles, bearing similar labels, except that for the words "Manufactured by Day & Martin" were substituted the words "Equal to Day & Martin's," "equal to" being in very small letters.

On motion by the plaintiffs, injunction granted to restrain the defendants from using labels imitated from the plaintiffs'.

HENRY *v.* PRICE. 48.

March 29th, 1831.

[*Shadwell, V.C. of E.*——1 *Leg. Obs.* 364.]

The plaintiff preparing calcined magnesia, in succession to his father, and selling it in bottles of a special shape, labelled "Henry's Calcined Magnesia, Manchester," the defendant began to prepare magnesia, and to sell it in similar bottles, similarly labelled.

On motion by the plaintiff, injunction granted to restrain the defendant from continuing to infringe the plaintiff's rights.

ARCHBOLD *v.* SWEET. 49.

Feb. 9th, 1832.

[*Lord Tenterden, C.J., at N. P.*——1 *M. & Rob.* 162; 5 *C. & P.* 219.]

The publisher of a legal work issued an inaccurate edition of the work, falsely purporting to have been prepared by the author.

Action on the case by the author.

Held, that he was entitled to recover damages for the injury done to his reputation by the defendant's conduct, notwithstanding that the defendant was the owner of the copyright.

"The question is for the jury, whether the third edition, in the form in which it is put forth, would be understood by purchasers to be by the plaintiff: if purchasers who paid reasonable attention to its contents would not so understand it, the verdict must be for the defendant; if they would, for the plaintiff.

"The nearest resemblance to the present case seems to me to be furnished by those cases in which a person, having a reputation for the manufacture of a particular commodity, but not protected by a patent, brings an action against another for selling an inferior article in his name. The cases are not exactly alike; there the sale of the commodity is affected, here the character of the author; but they bear a close analogy to each other."

50. **BLOFELD** *v.* **PAYNE.**

Jan. 12*th*, 1833.

[*King's Bench.*——4 *B. & Ad.* 410; 1 *N. & M.* 353; 2 *L. J., K. B., N. S.* 68.]

The plaintiff being a manufacturer of metallic hones, which he sold in certain special envelopes containing directions for use, &c., the defendants sold other hones in similar envelopes.

Action on the case.

Held, that, although no specific damage was proved, and the jury found the defendant's articles to be equal to the plaintiff's, the plaintiff was still entitled to some damages for the invasion of his right.

Lord Denman, C.J., told the jury at the trial that "even if the defendant's hones were not inferior, the plaintiff was entitled to some damages, inasmuch as his right had been invaded by the fraudulent act of the defendants."

Per Littledale, J.—"The act of the defendant 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."

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51. **GOUT** *v.* **ALEPLOGLU.**

April 15*th*, 1833.

[*Shadwell, V.C. of E.*——6 *Bear.* 69*n.*; 5 *Leg. Obs.* 495; *Chitty, Gen. Pr.* 721.]

The plaintiff having long manufactured watches for the Turkish and Levantine market, and marked them with his name, the Turkish word "Pessendede" (meaning "warranted"), a sprig, &c., the defendants began to manufacture and export watches similarly marked.

On motion by the plaintiff,

Held, that the plaintiff had acquired, by long previous usage, the exclusive right to designate his watches by

that Turkish word in Turkish characters, and that an injunction must be granted to restrain the defendants from infringing the plaintiff's rights.

MARTIN *v.* **WRIGHT.** 52.

Aug. 9th, 1833.

[*Shadwell, V.C. of E.*——6 *Sim.* 237.]

The defendant exhibited as a diorama a large painting, which he represented to be a copy of a picture by the plaintiff.

Suit for an injunction and account.

Held, that equitable relief could not be granted until the plaintiff's right had been established at law.

"With respect to the defendant representing his copy as Martin's picture, it must be either better or worse; if it is better, Martin has the benefit of it; if worse, then the misrepresentation is only a sort of libel, and this Court will not prevent the publication of a libel. If Martin had exhibited his picture as a diorama, then he might have been entitled to an injunction."

RANSOME *v.* **BENTALL.** 53.

Dec. 11*th*, 1833.

[*Shadwell, V.C. of E.*——3 *L. J., Ch., N. S.* 161.]

The plaintiffs having been in the habit of marking their patent ploughshares with the words "Ransome's Patent," and the letters "H. H.," and also with a number denoting size, as "6," the defendant began to sell ordinary ploughshares stamped with a similar mark.

Injunction granted to restrain the defendant from continuing to infringe.

"If the defendant had been in the habit of marking his ploughs with only 'H. H. 6,' and if I could see the marks so placed that no person could be deceived in purchasing the ploughs, then I might refuse the injunction as to that part of the prayer. But here the defendant wants me to decide *ab ante* that no possible use of 'H. H. 6' may have the effect of misleading persons, and therefore the whole prayer must be granted."

54. **R. *v.* OGDEN.**

Nov. 29th, 1834.

[*C. C. C.*—*Bolland, B., & Park, J.*}——6 *C. & P.* 631.]

On an indictment under 13 Geo. III. c. 52, s. 14, and 38 Geo. III. c. 69, s. 7, for unlawfully transposing the Hall mark of the lion passant from one gold ring to another,

Held, that the language of the Act being express, the prisoner must be convicted, notwithstanding that both rings were genuine, and that the prisoner had acted without any fraudulent intention. A pardon was subsequently granted.

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55. **LEWIS *v.* LANGDON.**

May 30th, 1835.

[*Shadwell, V.C. of E.*——7 *Sim.* 421 ; 4 *L. J., Ch., N. S.* 258.]

After the dissolution of the firm of "Brookman & Langdon" (makers of lead pencils, which they stamped with their name) by the death of one of the partners, the surviving partner, J. Lewis, took a new partner, and began to carry on business as "James Lewis & Co., successors to Brookman & Langdon," and the defendant, one of the executors of the deceased partner, subsequently began to carry on business as "Brookman & Langdon."

On motion by the surviving partner in the old firm and his new partner, injunction granted to restrain the defendant from carrying on business as "Brookman & Langdon" until after the trial of an action at law.

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56. **POWER *v.* BARHAM.**

Nov. 26th, 1835 ; *Jan. 14th*, 1836.

[*Coleridge, J., at N. P.*——7 *C. & P.* 356 ; 1 *M. & Rob.* 507. *King's Bench*——4 *Ad. & E.* 473 ; 6 *N. & M.* 62 ; 1 *H. & W.* 683 ; 5 *L. J., K. B., N. S.* 88.]

The plaintiff bought from the defendant certain pictures which he said were by Canaletto, and which were described

in the bill of parcels as "four pictures, views in Venice—*Canaletto*," but which turned out not to be by that painter.

Action of assumpsit.

Held, that it was for the jury to say what was the effect of the words in the bill of parcels, and whether they implied a warranty of genuineness, or conveyed only a description or an expression of opinion.

KNOTT *v.* **MORGAN.** **57.**

July 27th; Aug. 19th, 1836.

[*Lord Langdale, M.R.*; *Lord Cottenham, C.* } ——2 *Keen* 213.]

The omnibuses of the London Conveyance Company being painted, and their servants clothed, in a special and distinctive manner, the defendant began to run omnibuses similarly painted, with servants similarly clothed.

On motion by the plaintiffs, injunction granted to restrain the defendant from imitating the plaintiffs' line of omnibuses.

Per Lord Langdale, M.R. "It is not to be said that the plaintiffs have any exclusive right to the words 'Conveyance Company,' or 'London Conveyance Company,' or any other words; but they have a right to call upon this Court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages, really the defendant's, belong to and are under the management of the plaintiffs."

[In *Woollam* v. *Ratcliff*, 1 H. & M. 259—61, Wood, V.C., remarking upon the above case, said that there "the words 'Conveyance Company,' the green omnibus, &c., were held sufficient together to entitle the plaintiffs to an injunction. The defendant might have had those words painted on a yellow omnibus without objection, and so of the other resemblances; the wrong lay in their accumulation, not in any one of them alone."]

58. **HITCHCOCK** *v.* **COKER.**

Feb. 6*th*, 1837.

[*Exch. Ch.*——6 *Ad. & E.* 438—54; 1 *N. & P.* 796—814; 2 *H. & W.* 464—71; 6 *L. J., Ex., N. S.* 266—69.]

Action of assumpsit.

Per Tindal, C.J. "The goodwill of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader."

[59.] **THOMSON** *v.* **WINCHESTER.**

March, 1837.

[*Mass. Sup. Ct.*——19 *Pick.* 214; *R. Cox* 7.]

The plaintiff selling certain medicines of his own preparation under the name of "Thomsonian Medicines," the defendant began to sell inferior medicines under the same name.

Action on the case.

Held, (1) that a plaintiff who sold medicines under a certain name was entitled to recover at least nominal damages from another person who had sold other medicines under that name, or had sold them, or placed them in the hands of others to be sold, "as and for" the plaintiff's medicines; (2) but that there was no exclusive right to compound and sell an unpatented medicine; (3) that there was no exclusive right in the name, if it had become generic and descriptive of a class of medicines; (4) that the sale of inferior medicines under a name which had become generic and descriptive gave no right to another person selling medicines under the same name to recover damages, though his medicines had become discredited by the inferiority of the medicines sold under the same name; (5) that a new trial must be granted.

Per Shaw, C.J. "The right to make and to sell is common to all, if no deceit is practised by one, in falsely assuming the name and credit of another."

PIDDING *v.* HOW. 60.

June 21*st*, 1837.

[*Shadwell, V.C. of E.*——8 *Sim.* 477 ; 6 *L. J., Ch., N. S.* 345.]

The plaintiff having sold tea under the name of "Howqua's Mixture," and in packages marked in a special manner, the defendant began to sell tea under the same name, in similar packages.

On motion by the defendant to dissolve an injunction, which had been granted *ex parte* to restrain him from infringing the plaintiff's rights,

Held, that the plaintiff was *primâ facie* entitled to an injunction, but that the plaintiff having in his advertisements made a number of false representations to the public, with respect to the origin, composition, and value of his tea, the injunction ought not to have been granted until he had established his right at law, and must be dissolved, liberty being given to bring an action.

"It is a clear rule, laid down by Courts of Equity, not to extend their protection to persons whose case is not founded in truth."

MOTLEY *v.* DOWNMAN. 61.

July 5*th*, 1837.

[*Lord Cottenham, C.*——3 *My. & Cr.* 1 ; 6 *L. J., Ch., N. S.* 308.]

The plaintiff having been in the habit, while lessee of certain works at Carmarthen, of marking the boxes of tin plates there made with the letters "M. C.," and having afterwards removed his establishment forty miles off, where he continued to use the same mark, the defendants, subsequent lessees of the Carmarthen works, began to

mark their boxes with the letters "M. C.," and to call themselves "The 'M. C.' Tin Plate Company."

Injunction, which had been granted on motion by the plaintiff, to restrain the defendants from the use of the initials and name, dissolved, liberty being given to bring an action, on the ground that there was at least a substantial question whether the plaintiff had not obtained the use of the mark only as a tenant of the works at Carmarthen, to which locality it was really attached, and that in all such cases the Court of Equity would not act otherwise than as ancillary to the Court of Law, the question being one of a legal right.

[62.] **VICKERY** *v.* **WELCH.**

Oct., 1837.

[*Mass. Sup. Ct.* ——19 *Pick.* 523.]

The defendant, having entered into a bond with the plaintiff to convey to him his chocolate mill, together with his exclusive right or secret of manufacture, subsequently declined to communicate the secret to the plaintiff, or to covenant not to communicate it to others.

Action of debt on the bond.

Held, that the defendant ought to have conveyed the exclusive right, with covenants to communicate the secret to the plaintiff, and not to others, and that the defendant's refusal had constituted a breach of the bond.

"It was contended for the defendant that this obligation was void as being in restraint of trade. But we cannot suppose that the case comes within that doctrine. The defendant claims to operate by a secret art. The public are not prejudiced by the transfer of it to the plaintiff. If it were worth anything, the defendant would use the art and keep it secret; and it is of no consequence to the public whether the secret art be used by the plaintiff or by the defendant."

MILLINGTON *v.* FOX. 63.

March 24th, 1838.

[*Lord Cottenham, C.*——3 *My. & Cr.* 338.]

The plaintiffs and their predecessors in business having for many years carried on business as manufacturers of steel, which they stamped with the names and letters "Crowley," "Crowley Millington," "J. H.," the defendants marked other steel with the same marks and sold it so marked.

Injunction granted to restrain the defendants from continuing to use those marks, though they had acted without any fraudulent intention: but *Held*, that no costs could be given, since the plaintiffs had persevered with the suit after the defendants had offered to give them all to which they were entitled.

"I see no reason to believe that there has, in this case, been a fraudulent use of the plaintiffs' marks. It is positively denied by the answer, and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs, as a company manufacturing steel. . . . . In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names."

DOUGHERTY *v.* VAN NOSTRAND. [64.]

July 15th, 1839.

[*N. Y. Chancery; Hoffman, A. V. C.* } ——*Hoff.* 68.]

Partnership suit.

Held, that the goodwill of the business and lease of the partnership premises did not survive to the surviving partners, but were partnership property.

"Upon a sale of the lease of trading premises, the goodwill of course enters into the value of the lease, and enhances the purchase money. In truth, in a lease of a trading establishment it constitutes a large part of the value."

[65.] **BELL *v.* LOCKE.**

Jan. 1840.

[*N. Y. Chancery.—Walworth, C.*}——8 *Paige* 75; *R. Cox.* 11.]

The plaintiffs being the proprietors and publishers of a newspaper called *The Democratic Republican New Era*, the defendant began to publish another paper under the name of *The New Era*.

Injunction to restrain the defendant from publishing his newspaper under that name, refused, on the ground that there was no real probability of deception.

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66. **WHITTAKER *v.* HOWE.**

Jan 18*th*, 1841.

[*Lord Langdale, M.R.*——3 *Beav.* 383.]

The defendant, a solicitor, having sold his practice to the plaintiff, and agreed not to practise as a solicitor in Great Britain for twenty years, nevertheless continued to practise as such.

On motion by the plaintiff,

Held, that the agreement was not invalid, and that an injunction must be granted to restrain the defendant from practising in any part of Great Britain, and from endeavouring to induce the clients of the firm to cease to employ the firm.

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67. **SEELEY *v.* FISHER.**

Feb. 5*th*, 1841.

[*Lord Cottenham, C.*——11 *Sim.* 581; 10 *L. J., Ch., N. S.* 274; 21 *Leg. Obs.* 474.]

The plaintiff being the owner of the copyright of Mr. Scott's Commentary on the Bible, and having brought out a fifth edition of the work, after the author's death, with his last improvements and corrections, the defendants

reprinted the fourth edition, and in their advertisements reflected on the plaintiff's work as not containing the work of the author while still vigorous.

Injunction, which had been granted on motion by the plaintiff, dissolved, on the ground that the statements made by the defendants did not represent their work to contain any matter which was the plaintiff's exclusive property, and that, so far as they disparaged the plaintiff's work, they merely amounted, if untrue, to a libel, for which the proper remedy was an action at law.

MORISON *v.* **SALMON.** 68.

Jan. 14th, 30th, 1841.

[*Common Pleas.*——2 *Man. & G.* 385 ; 2 *Scott, N. R.*, 449 ; 10 *L. J., C. P.* 91.]

The plaintiffs being the proprietors and compounders of "Morison's Universal Medicines," which they sold in boxes, enclosed in wrappers bearing those words ; the defendants sold other medicines in similar wrappers.

Action on the case.

A verdict having been found for the plaintiff, with one farthing damages, and the judge having certified for costs ;

On motion for a new trial,

Held (1), that the allegation that the defendant had used wrappers similar to those used by the plaintiffs for the purpose of causing his medicines to be mistaken for the plaintiffs', disclosed a sufficient cause of action ; (2) and that, inasmuch as a right was in question, the judge had power at the trial to certify for costs, although the jury gave only one farthing damages.

Per Erskine, J.—"The ground of action is not that the defendant prepared and sold medicine in imitation of 'Morison's Universal Medicine,' but that he prepared and sold it under a false representa-

tion that it was the article prepared and sold by the plaintiffs, whereby the plaintiffs were prevented from selling large quantities of their medicine. That is a good cause of action."

Per Maule, J.—"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 which he may have as good a right as though he were a patentee.'

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69. **EX PARTE THOMAS.**

July 21*st*, 1841.

[*Court of Review in Bankruptcy*—*Sir J. Cross.* ——2 *Mont. D. & De G.* 294; 10 *L. J., Bkptcy.* 75; 5 *Jur.* 967.]

On petition in the bankruptcy of hotel keepers,

Held, that the goodwill of a bankrupt's trade, so far as it was personal, remained with the bankrupt; so far as it was local, passed to the assignees in bankruptcy, and that, in the case in question, owing to the special circumstances, the assignees had not acquired any interest in the goodwill.

"It is easy to conceive there to be such a thing as local goodwill, arising from the habit which customers have been in of frequenting the same place. There is another kind of goodwill which may be called personal, and this has been said to be incapable of sale. But there may be a goodwill, like that in the present case, which is partly personal and partly local."

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70. **WILLETT** *v.* **BLANFORD.**

Jan. 12*th*, 1842.

[*Wigram, V.C.*——1 *Hare*, 253; 11 *L. J., Ch.* 182; 6 *Jur.* 274.]

Partnership suit.

Held, that in ascertaining the interest to which the estate of a deceased partner was entitled in the profits of the business after his death, his capital not having been taken out, a variety of considerations must be regarded, but that where the business consisted substantially of good-

will, the interest would usually be determined by the shares in the business.

P. 270. "The whole, or the substantial part, of a trade may consist in goodwill, leading to renewals of contracts with old connexions. In such a case it is the identical source of profit which operates both before and after dissolution; and this appears to me to be the groundwork of Lord Eldon's reasoning in *Cook* v. *Collingridge*."

THORNBURY *v.* **BEVILL.** 71.

May 2nd, 1842.

[*Knight Bruce, V.C.*——1 *Y. & C. Ch.* 554; 6 *Jur.* 407.]

Specific performance of an agreement between two solicitors, refused, on the ground of want of acceptance by the plaintiff.

P. 564. "This is not quite a case of dissolution of partnership, but something between a dissolution of the partnership and a purchase of the business; and notwithstanding the case of *Bunn* v. *Guy*, from which I do not mean to express dissent, decided as it was by judges of high authority, I am not prepared to say that it is fit that a Court of Equity should enforce an agreement between two solicitors, that one on retiring from the business shall permit the other to carry on business in his name. Whether such an agreement be or be not within the strict policy of the law, it may be doubtful whether this Court ought to assist it."

CRAWSHAY *v.* **THOMPSON.** 72.

May 26th, 1842.

[*Common Pleas.*——4 *Man. & G.* 357; 5 *Scott, N. R.* 562; 11 *L. J., C. P.* 301.]

The plaintiff, an ironmaster, marking his iron with the letters "W. C." in an oval, the defendants, also ironmasters and merchants, sold other iron marked with the letters "W. O." in an oval.

Action on the case.

A verdict having been found for the defendants,

On motion for a new trial—

Held (1), that it was necessary for the plaintiff to prove fraudulent intention, and that the only evidence of this being the alleged resemblance, it had been properly left to the jury to say, first, whether there was such a resemblance as to deceive an ordinary purchaser, and injure the plaintiff, and second, whether there was fraudulent intention on the part of the defendants; (2) that notice which had been given to the defendants by the plaintiff, that they were using a mark calculated to deceive, was evidence for the jury to consider with regard to the defendants' intention, but could not of itself alter the legal rights of the parties, since it only informed the defendants of what was the plaintiff's opinion

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73. **PERRY** *v.* **TRUEFITT.**

Dec. 9th, 1842.

[*Lord Langdale, M. R.*——6 *Beav.* 66; 1 *L. T.* 384.]

The plaintiff being the compounder of "Perry's Medicated Mexican Balm," the defendant began to make up and sell another compound under the name of "Truefitt's Medicated Mexican Balm."

Motion by the plaintiff for an injunction to restrain the defendant from infringing his rights, refused, with liberty to the plaintiff to bring an action, on the ground of misrepresentations contained in the plaintiff's show-cards as to the origin and substance of his composition.

"I think that the principle on which both the Courts of Law and of Equity proceed, in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manu-

facture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark."

ENGLAND *v.* DOWNS. **74.**

Dec. 17*th*, 1842.

[*Lord Langdale, M.R.*——6 *Beav.* 269; 12 *L. J., Ch.* 85; 6 *Jur.* 1075.]

The widow of a licensed victualler, who was carrying on the business, assigned her household goods, stock-in-trade, &c., prior to a second marriage, to trustees, upon trusts for herself and her daughters, excluding the second husband.

Suit by the daughters, after their mother's death, for the execution of the trusts of the settlement.

Held that, under the circumstances of the case, the goodwill passed to the trustees of the deed, and not to the husband; as being incident to the stock and licence, and not to the premises on which the business was carried on.

"This, in one way of looking at it, is the goodwill. It is the chance or probability that custom will be had at a certain place of business, in consequence of the way in which that business has been previously carried on."

ENGLAND *v.* CURLING. **75.**

July 20*th*, 1843; *July* 15*th*, 1844.

[*Lord Langdale, M.R.*——8 *Beav.* 129.]

Partnership suit.

Injunction granted, to restrain the defendant Curling, between whom, the plaintiff, and another, there was a subsisting agreement for a partnership for a certain term, from carrying on business with the other defendants under

the old firm name of "Goodwin, Curling, & Co.," and from opening letters, &c., addressed to or intended for the old firm, and from publishing notices of the dissolution of the existing partnership until the expiration of the term for which it was to last.

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76. **CROFT** *v.* **DAY** (1).

Dec. 18*th*, 1843.

[*Lord Langdale, M.R.*——7 *Beav.* 84.]

The plaintiffs being the executors of the surviving partner in the firm of "Day & Martin," of 97, High Holborn, blacking manufacturers, who sold their blacking in bottles labelled with the name and address of the firm, the defendant obtained the authority of a man named Martin to use his name, and began to sell blacking in bottles labelled with the name and address "Day & Martin, 90½ Holborn Hill," in imitation of the genuine labels.

On motion by the plaintiffs, injunction granted to restrain the defendant from using labels or show cards calculated to produce deception.

"It has been very correctly said that the principle in these cases is this—that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colours, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud."

"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 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. For the accomplishment of such a fraud it is necessary, in the first instance, to mislead the public, and in the next place, to secure a benefit to the party practising the deception, by preserving his own individuality."

CROFT *v.* DAY (2). **77.**

July, 1844.

[*Lord Langdale, M.R.*——28 *Leg. Obs.* 378.]

On motion to commit the defendant in *Croft* v. *Day* (1), for breach of the injunction, it appearing that the plaintiffs had taken no notice of a form of label suggested by the defendant, which he proposed to adopt in place of the one against the use of which the injunction had been granted, and the plaintiffs alleging that the suggested alterations were merely colourable;

Held, that if the defendant was willing to make a proper distinction, and the plaintiffs refused to attend to his proposal, the Court would itself determine whether the proposed distinction was sufficient.

TAYLOR *v.* CARPENTER (1). [78.]

October, 1844.

[*U. S. C. C. Dt. of Mass.*—*Story and Sprague, J.J.*——3 *Story*, 458; *R. Cox* 14.]

The plaintiffs being English manufacturers of thread, which they sold on spools, labelled on the top with the words "Taylor's Persian Thread," and on the bottom with the name "J. & W. Taylor, Leicester," the defendant, an American citizen, made up similar spools of inferior thread and sold them similarly labelled.

Injunction granted to restrain the defendant from

infringing the plaintiffs' rights, notwithstanding their alienage.

Per Story, J.—"It is suggested that the plaintiffs are aliens. Be it so. But in the courts of the United States, under the constitution and laws, they are entitled, being alien friends, to the same protection of their rights as citizens. There is no pretence to say that if a similar false imitation and use of the labels of a citizen, put upon his own manufactured articles, had been designedly and fraudulently perpetrated and acted upon, it would not have been an invasion of his rights, for which our law would have granted ample redress. There is no difference between the case of a citizen and that of an alien friend, where his rights are openly violated."

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79. **COATS** *v.* **HOLBROOK.**

July, 1845.

[*N. Y. Chancery.—Sandford, A. V.C.*] ——2 *Sandf. Ch.* 586; 3 *N. Y. Leg. Obs.* 404; *R. Cox* 20.]

The plaintiffs being Scotch thread manufacturers, who sold their thread on spools, labelled (among other things) with the words "J. & P. Coats' Best Six Cord," the defendants, American commission merchants, made up inferior thread in a similar manner and similarly labelled.

Suit for an injunction.

Held (1), that the conduct of the defendants was intended and calculated to deceive; (2) that the fact that the plaintiffs were aliens did not deprive them of their right to an injunction; (3) that it was no defence to say that the purchasers from the defendants were informed that their article was spurious, since the statement did not pass to subsequent purchasers; (4) that the injunction must, therefore, be granted; (5) that with respect to the costs up to bill filed, the defendants must pay them, there being no necessity for the plaintiffs to have given them notice before filing their bill, and that the defendants must also pay the subsequent costs, an offer of submission by them having been imperfect.

HINE *v.* LART. 80.

Jan. 12*th*, 1846.

[*Shadwell, V.C. of E.*——10 *Jur.* 106 ; 7 *L. T.* 41.]

The plaintiffs being hosiers, who sold a special kind of black stockings, made on purpose for them, and marked with the word "Ethiopian" and six white lines, the defendants, also hosiers, began to sell stockings similarly marked.

Motion to dissolve an injunction which had been granted to restrain the infringement of the plaintiffs' marks, refused, and *Held* that, although persons other than the plaintiffs, viz. the personal representatives of a deceased partner in the plaintiffs' firm, might have some interest in the marks, yet the plaintiffs had a sufficient interest in them to be entitled to sue.

PIERCE *v.* FRANKS. 81.

Jan. 13*th*, 1846.

[*Knight Bruce, V.C.*——15 *L. J., Ch.* 122 ; 10 *Jur.* 25.]

The plaintiff dealing in certain kinds of brushes, which he stamped with the name and address, "Smyth's, Bond Street," the defendant sold other brushes similarly marked.

Suit for an injunction.

Held (1), that the injunction must be granted ; (2) that the plaintiff had not exceeded his right in filing his bill without previous communication with the defendant, and that the plaintiff was entitled to the costs of the suit, notwithstanding that the defendant said he would have submitted if application had been made to him ; (3) but that the defendant was entitled to whatever costs were occasioned by a particular unfounded allegation in the bill as to private marks.

82. **RODGERS *v.* NOWILL.**

June 30*th*, 1846; *Nov.* 2*nd*, 1847; *Dec.* 9*th*, 1847.

[*Wigram, V.C.*——6 *Hare*, 325.]

[*Common Pleas.*——5 *C. B.* 109; 17 *L. J., C. P.* 52; 11 *Jur.* 1039; 10 *L. T.* 88.]

The plaintiffs being cutlers, who stamped their cutlery with the name, "J. Rodgers & Sons," with a crown and "V. R.," the defendants began to sell cutlery stamped with the same marks and the word "Sheffield."

Suit for an injunction.

Held, that the bill must be retained for a year, leave being given to bring an action, the defendants claiming the name as their own firm name.

Action on the case.

A verdict having been found for the plaintiffs, with forty shillings damages,

On motion for a new trial,

Held, that the Judge at the trial was right in directing the jury that the action was brought to try a right, and not to recover substantial damages, and also in leaving to them the following questions:—(1) Whether the mark as used by the defendants was calculated to deceive ordinary persons; (2) whether they had adopted the particular form of deceit charged; (3) whether they had acted with fraudulent intention;—and that no allegation of special damage was required, and that the motion for a new trial must be refused.

On motion by the plaintiffs, injunction granted to restrain further infringements, with the costs of the proceedings at law and in equity, except the costs of the evidence in equity.

TAYLOR *v.* **CARPENTER** (2). [83.]

Oct., 1846.

[*U. S. C. C., Dt. of Mass.*—*Woodbury and Sprague, J.J.*] ——2 *Wood. & M.* 1; *R. Cox* 32; 9 *L. T.* 514.]

The plaintiffs, an English firm of thread-manufacturers, marking their thread in a special manner, the defendant, an American citizen, sold other thread marked in imitation of the plaintiffs'.

Action on the case.

A verdict having been returned for the plaintiffs, with substantial damages,

On motion for a new trial,

Held (1), that the existence of a foreign custom to infringe American trade marks, if established, would not debar an American Court from protecting foreign trade marks; (2) that it was no defence that the defendant's goods were equal in quality to the plaintiffs'; (3) that it was no defence for the defendant to say that he had informed the immediate purchasers that the mark on the goods was not genuine; (4) that it was no defence to plead that the plaintiffs had delayed, unless the delay amounted to a licence to use the marks, or an abandonment to the public; (5) that actual damage having been suffered by loss of sales by the plaintiffs, they were entitled to recover more than nominal damages; (6) but that exemplary damages should not be given in an action for infringement of trade mark.

TAYLOR *v.* **CARPENTER** (3). [84.]

Dec., 1846.

[*N. Y. Chancery*—*Sandford, C.* *N. Y. Ct. of Errors.*] ——2 *Sandf. Ch.* 603; 11 *Paige*, 292; *R. Cox* 45.]

The defendant, an American citizen, sold spurious thread in America, labelled with the same marks as those used

by the plaintiffs, English thread manufacturers, on their "Taylor's Persian Thread."

Injunction to restrain the defendant's infringement granted, and affirmed,

And *Held* (1), that the trade mark of an alien would be protected in the American Courts; (2) that the quality of the thread on which the spurious marks were placed was immaterial; (3) that it was no defence for the defendant to say that he had informed the immediate purchaser that the marks were spurious.

Per Lott, Senator.—"The object of the complainants' bill is to prevent the commission of a fraud, not only on them and to the prejudice of their rights, but on the public, by the sale of an article with an imitation of their trade mark thereon, in such a manner as to deceive purchasers, and through the false representations thus held out, to deprive the owners thereof of the profits of their skill and enterprise."

Per Spencer, Senator.—"The right claimed by the complainants does not partake in any considerable, if in any degree, of the nature and character of a patent or copyright. . . . The defendant is at full liberty to manufacture and vend the same kind of thread to any extent he pleases, and whenever he chooses. He is only required to depend for success upon his own character and fame. . . He is only required not to pirate upon the rights of others."

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85. **SPOTTISWOODE** *v.* **CLARKE.**

Dec. 11*th*, 1846.

[*Lord Cottenham, C.*——2 *Ph.* 154; 1 *Coop.* 254; 10 *Jur.* 1043; 8 *L. T.* 230—271.]

The plaintiff being the proprietor and publisher of "The Pictorial Almanack," the defendant published another almanack in a very similar wrapper, under the name of "Old Moore's Pictorial Almanack."

Injunction, which had been granted by the V.C. of E. to restrain the defendant from the publication of his almanack, dissolved, the defendant keeping an account, and the plaintiff having liberty to bring an action, on the

ground that the Court was dealing with a legal right, and that the consequences of an erroneous view of the legal right would be very serious to the defendant.

1 Coop. 264.—The possibility of acquiring an exclusive right in a general word, such as "Pictorial," "Illustrated," denied.

2 Ph. 157.—"Take a piece of steel: the mark of the manufacturer *from whom it comes is the only indication to the* eye of the customer of the quality of the article. So it is of blacking, or any other article of manufacture, the particular quality of which is not discernible by the eye. But these cases are quite different from the present case, in which, if you are deceived at all, it is not by the eye."

ROUTH *v.* **WEBSTER.** **86.**

Jan. 28*th*, 1847.

[*Lord Langdale, M.R.*——10 *Beav.* 561; 11 *Jur.* 701; 9 *L. T.* 491.]

The defendants, being the provisional directors of a joint-stock company, called "The Economic Conveyance Company," published a prospectus in which the plaintiff's name appeared as a trustee of the company, without his authority.

On motion by the plaintiff, injunction granted to restrain the defendants from using the plaintiff's name, without his authority, in their prospectus, or so as to identify him with the company.

FRANKS *v.* **WEAVER.** **87.**

March 10*th*, 1847.

[*Lord Langdale, M.R.*——10 *Beav.* 297; 8 *L. T.* 510.]

The plaintiff being the inventor and compounder of "Franks' Specific Solution of Copaiba," which he sold in wrappers containing that title, directions for use, testimonials, &c., the defendant began to sell another preparation, which he called "Chemical Solution of Copaiba," and placed in wrappers in which he made use of the plaintiff's

name and testimonials in such a manner as to lead, *primâ facie*, to the belief that they were applicable to the defendant's preparation, though on a close examination it appeared that they were used by him in praise of the genuine article, with which his own was compared.

On motion by the plaintiff, injunction granted to restrain the defendant from acting so as to deceive.

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88. **THE LONDON AND PROVINCIAL LAW ASSURANCE SOCIETY *v.* THE LONDON AND PROVINCIAL JOINT STOCK LIFE ASSURANCE COMPANY.**

Nov. 11*th*, 1847.

[*Shadwell, V.C. of E.*——17 *L. J., Ch.* 37 ; 11 *Jur.* 938 ; 10 *L. T.* 127.]

Motion for an injunction to restrain the defendants from using the first three words of the title of their company, refused, and an action directed to be brought, on the ground that no deception or damage was probable, and that there was a doubt as to a sufficient length of user by the plaintiffs.

"The principles, I apprehend, are clear, that the Court will always have regard to this, whether there has been such an exclusive right to a name on the part of the plaintiffs as to justify the Court in interfering in a summary way against the defendants ; and the Court will consider whether, taking all the names together, it is or is not apparent that there is such a deceptive quality as is likely to produce the injury complained of."

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89. **GUINNESS *v.* ULLMER.**

Nov. 11*th*, 1847.

[*Shadwell, V.C. of E.*——10 *L. T.* 127.]

The plaintiffs being porter brewers at Dublin, the defendants, who were engravers, engraved blocks or plates

in imitation of those from which the labels placed on the plaintiffs' porter were printed.

On motion by the plaintiffs, injunction granted to restrain the defendants from making or disposing of any such blocks or plates.

"If a thing contains twenty-five parts, and one only is taken, such an imitation will be sufficient to contribute to a deception, and the law will hold those responsible who have contributed to the fraud."

FOWLE *v.* SPEAR. [90.]

Nov., 1847.

[*U. S. C. C.; E. Dt. of Penn.—Kane, J.*} ——7 *Penn. L. J.* 176; *R. Cox* 67.]

Motion for injunction to restrain the use of wrappers, labels, and bottles, similar to those in which a quack medicine called "Wistar's Balsam of Wild Cherry" was contained, refused, on the ground of misrepresentations by the plaintiff as to the quality and properties of his medicine.

PARTRIDGE *v.* MENCK. [91.]

Jan., 1848.

[*N. Y. Chancery—Sandford, V.C.; Walworth, C.* / *N. Y. Ct. of App.*} ——2 *Sandf. Ch.* 622; 2 *Barb. Ch.* 101; 1 *How. App. Cas.* 558; *R. Cox* 72.]

Order dissolving an injunction which had been granted, on motion by the maker of "A. Golsh's Friction Matches," to restrain the sale of matches in boxes labelled "Menck & Backe's Friction Matches, late chemist to A. Golsh," affirmed, on the ground (1) that ordinary purchasers would not be deceived; (2) that the plaintiff was disentitled by reason of his continuing to use the name of Golsh, to

whose business he had succeeded, after the latter had ceased to be connected with the business.

Per Walworth, C.—"The question in such cases is not whether the complainant was the original inventor or proprietor of the article made by him, and upon which he now puts his trade mark, or whether the article made and sold by the defendant under the complainant's trade mark, is an article of the same quality or value. But the Court proceeds upon the ground that the complainant has a valuable interest in the goodwill of his trade or business; and that, having appropriated to himself a particular label, or sign, or trade mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, or by his authority, or that he carries on business at a particular place, he is entitled to protection against a defendant who attempts to pirate upon the goodwill of the complainant's friends or customers, or the patrons of his trade or business, by sailing under his flag without his authority or consent."

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92. **PURSER** *v.* **BRAIN.**

Jan. 21*st*, 1848.

[*Shadwell, V.C. of E.*——17 *L. J., Ch.* 141].

The plaintiff, trading under the name of "The London Manure Company," the defendants began to trade as "The London Patent Manure Company," and to issue circulars imitated from the plaintiff's.

On motion by the defendants, an injunction which had been granted on motion by the plaintiffs, to restrain the defendants from the use of their name, and from issuing such circulars, dissolved, and an action at law directed, on the ground that there might be a question as to the plaintiffs having acquired an exclusive right by length of user, which ought to be considered by a jury.

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93. **CLARK** *v.* **FREEMAN.**

Jan. 31*st*, 1848.

[*Lord Langdale, M.R.*——11 *Beav.* 112; 17 *L. J., Ch.* 142; 12 *Jur.* 149; 11 *L. T.* 22; 35 *Leg. Obs.* 436].

The plaintiff, Sir James Clark, being an eminent

physician, who did not compound or sell pills, the defendant began to compound and sell a quack medicine as "Sir J. Clarke's Consumption Pills."

Motion by the plaintiff, for an injunction to restrain the defendant from so doing, refused, on the ground that there was no right of property to be protected, and that the Court had no jurisdiction to stay the publication of a libel, the remedy for which must be sought at law.

FLEMING *v.* **NEWTON.** [94.]

Feb. 17*th*, 1848.

[*Ct. of Session*——*Ct. of Sess. Cas., 2nd Ser., VIII.*, 677.]
[*House of Lords*——1 *H. L. C.* 363.]

The respondent's name was placed upon the register of protests for non-acceptances of bills of exchange.

Interdict to restrain, so far as the respondent's name was concerned, the publication of a copy of the register, granted by the Court of Session, but rescinded by the House of Lords, on the ground that the question of defamation was one for a jury.

Per Lord Cottenham, C., 1 H. L. C. 376.—"The liberty of the press consists in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels, public or private. But if the publication is to be anticipated and prevented by the intervention of the Court of Session, the jurisdiction over libels is taken from the jury, and the right of unrestricted publication is destroyed."

BULLOCK *v.* **CHAPMAN.** 95.

March 1*st*, 1848.

[*Knight Bruce, V.C.*——2 *De G. & Sm.* 211; 12 *Jur.* 738; 11 *L. T.* 326.]

Motion by the plaintiff for an injunction to restrain a banking company from returning his name to the Stamp Office, under 7 & 8 Vict. c. 113, among the names of the

shareholders in the company, he alleging that he had ceased to be a shareholder, refused, on the ground that the plaintiff's case was not clearly proved, and that, in any case, the apprehended damage would not be irreparable.

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96. **WEDGWOOD** *v.* **SMITH.**

1848.

[*Shadwell, V.C. of E.*——.]

The plaintiff being a manufacturer of pottery, which he marked with his name "Wedgwood," the defendant began to sell other pottery marked "Wedgwood," or "Wedgewood."

Injunction granted to restrain the defendant from infringing the plaintiff's mark.

[97.] **SCOVILLE** *v.* **TOLAND.**

1848.

[*U. S. C. C., Dt. of Ohio.*——6 *West. L. J.* 84.]

The defendant imitated the labels used by the plaintiff on certain medicines prepared by him.

Injunction to restrain the defendant from so doing, refused, on the ground that the case was not within the jurisdiction of the Circuit Court, and *Held*, that such labels were not capable of protection by means of the provisions of the Copyright Acts, though an application of them to spurious medicines would be restrained on general grounds by the proper Court.

PRINCE ALBERT *v.* STRANGE. 98.

Jan. 16*th*, *Feb.* 8*th*, *June* 2*nd*, 1849.

[*Knight Bruce, V.C.*——2 *De G. & Sm.* 652; 13 *Jur.* 45—507; 12 *L. T.* 367; 13 *L. T.* 341; 37 *Leg. Obs.* 276.]

[*Lord Cottenham, C.*——1 *Mac. & G.* 25; 1 *H. & Tw.* 1; 18 *L. J. Ch.* 120; 13 *Jur.* 109; 12 *L. T.* 441; 37 *Leg. Obs.* 394.]

The defendant published a catalogue of certain etchings executed by the plaintiff, some copies of which had been obtained surreptitiously and by breach of trust, the catalogue being so framed as to lead to the belief that the defendant was acting with the plaintiff's consent.

On motion by the plaintiff, injunction granted to restrain the exhibition of the etchings and publication of the catalogues, and *Held*, that the Court of Chancery would exercise an original and exclusive jurisdiction to restrain the publication, not only of unpublished compositions which the author desired to keep private, but also of any catalogue or description of them made and published without his consent.

COFFEEN *v.* BRUNTON (1). 99

May, 1849.

[*U. S. C. C., Dt. of Ind.—McLean, J.*——4 *McLean*, 516; *R. Cox* 82.]

The plaintiff being the inventor and proprietor of a medical preparation which he called "The Chinese Liniment," the defendant began to make and sell another preparation under the name of "The Ohio Liniment," in bottles labelled with directions, &c., similar to those on the plaintiff's bottles, and made other misrepresentations calculated to deceive, in advertisements and handbills.

On motion by the plaintiff, injunction granted to restrain the defendant from using such directions and making such misrepresentations, and *Held*, (1) that without a patent there could be no exclusive right of manu-

facture; (2) that where a trade mark was infringed, some damages must be given at law, though no specific injury was proved.

"It would seem that an intentional fraud is not necessary to entitle the plaintiff to protection, but that where the same mark or label is used, which recommends the article to the public by the established reputation of another, who sells a similar article, and the spurious article cannot be distinguished from the genuine one, an injunction will be granted, although there was no intentional fraud. And I am inclined to think that this is a correct view of the principle, for the injury will be neither greater nor less by the knowledge of the party."

[100.] **THE AMOSKEAG MANUFACTURING CO.** *v.* **SPEAR.**

Oct., 1849.

[*N. Y. Super. Ct.*—*Duer, J.*] ——2 *Sandf. S. C.* 599; *R. Cox* 87.]

The plaintiff company manufacturing cotton tickings, which they sold with a printed label affixed, on which the letters "A. C. A." were prominent, the defendants began to sell a similar article similarly labelled.

On motion by the defendants, to dissolve an injunction which had been granted to restrain the defendants from using labels similar to those of the plaintiffs, or having thereon the letters "A. C. A.,"

Held, (1) that a partial imitation would be restrained, if it was calculated to deceive; (2) that a gratuitous acquiescence by the owner of a trade mark in its use by another was in the nature of a licence which was revocable and might be withdrawn; (3) that the labels in question were, as a whole, calculated to deceive, and that the injunction must be maintained as to them, but that as far as it regarded the letters in particular, which were merely indicative of quality, and could not be appropriated, it must be dissolved until an action at law should result in the plaintiffs' favour.

"The manufacturer's trade mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. To protect him, therefore, in the exclusive use of the mark that he appropriates, is not only the evident duty of a Court, as an act of justice, but the interests of the public, as well as of the individual, require that the necessary protection shall be given."

"The owner of an original trade mark . . . has no right to an exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality."

RUDDEROW *v.* **HUNTINGTON.** [101.]

Oct., 1849.

[*N. Y. Super. Ct.*——3 *Sandf. S. C.* 252; *R. Cox* 106.]

The plaintiffs, auctioneers, having sold certain boxes of what was supposed to be, and was labelled as, "Thompson's Eye Water," but without any warranty or false representation, the purchaser, who had given a promissory note for the price, discovered the lotion and labels to be spurious, and refused to pay for it.

Action on the note.

Held that, the plaintiffs being ignorant of the fraud, and having made no warranty or false representation, were entitled to recover the price.

SMALE *v.* **GRAVES.** 102.

Feb. 14*th*, 1850.

[*Knight Bruce, V.C.*——3 *De G. & Sm.* 706; 19 *L. J., Ch.* 157; 14 *Jur.* 662; 15 *L. T.* 179.]

The defendant, being the widow and acting executrix of a surgeon-dentist, agreed to sell to a person, as his successor, the goodwill of the practice and an introduction to the patients, for an annuity of £100 for five years, to be paid by half-yearly instalments, to be secured by mortgage.

Administration suit.

Held that, if not the whole, at any rate some part of the annuity belonged to the estate.

[103.] **DAVIS** *v.* **KENDALL.**

Sept., 1850.

[*Rhode I. Sup. Ct.*——2 *R. I.* 566; *R. Cox* 112.]

The plaintiff being the original inventor and manufacturer of Perry Davis' "Pain Killer," the defendant began to make and sell another article as "Perry's Vegetable Pain Killer," and in bottles similarly labelled to the plaintiff's.

Action on the case.

Held, that the plaintiff was entitled to judgment.

Per Greene, C.J.—"All are entitled to make and vend this compound, and to vend it as a similar article to that made and sold by the plaintiff; but no one but the plaintiff has a right to sell it as a medicine manufactured by the plaintiff. The adoption of the same label as the plaintiff's will, of course, be actionable; and so the adoption of a label so like the plaintiff's as to mislead the public would be actionable. If the difference be merely colourable, it will not avail the defendant."

[104.] **STONE** *v.* **CARLAN.**

1850.

[*N. Y. Super. Ct.*—*Campbell, J.*——13 *Monthly L. R.* 360; *R. Cox* 115.]

The plaintiffs being coach-proprietors, who had contracted with the proprietors of "The Irving Hotel," at New York, for the conveyance to and fro of their visitors, and for the use of their name and that of their hotel, upon their coaches and their servants' badges, the defendants

used the names "Irving Hotel," "Irving House," "Irving," &c., upon their coaches and servants' badges.

On motion by the plaintiffs, injunction granted to restrain the defendants from so doing.

JOLLIE *v.* **JAQUES.** [105.]

October, 1850.

[*U. S. C. C., S. Dt. of N. Y.—Nelson, J.*} ——1 *Bl. C. C.* 618.]

Suit under the U. S. Copyright Act of 1831 to restrain an imitation of a musical composition, entitled "The Serious Family Polka."

It having been decided that the plaintiff's claim to copyright could not be supported,

Held, that the plaintiff not being entitled to the copyright in the composition, he was not entitled to protection in respect of the title.

"The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it, as certainly as the principal carries with it the incident."

HOLLOWAY *v.* **HOLLOWAY.** 106.

November 9th, 1850.

[*Lord Langdale, M.R.*——13 *Beav.* 209.]

The plaintiff, Thomas Holloway, manufacturing and selling pills and ointment at 244, Strand, as "Holloway's Pills and Ointment," the defendant, his brother, Henry Holloway, began to sell other pills and ointment at 210, Strand, as "H. Holloway's Pills and Ointment," the pill-boxes, pots, labels, and wrappers being similar to those used by the plaintiff.

On motion by the plaintiff for an injunction to restrain the defendant from infringing the plaintiff's rights,

Held, (1) that the defendant's conduct was intended and calculated to deceive; (2) that the fact that the defendant's name was the same as the plaintiff's did not entitle him so to act; (3) that the assumption by the plaintiff, without authority, of the title of "Professor," and some exaggerated commendations of his medicines did not disentitle him; (4) that the injunction must be granted; (5) that the defendant alleging that he had not had time to answer the plaintiff's affidavits, liberty must be given him, expressed in the order, to move to dissolve the injunction.

"The defendant's name being Holloway he has a right to constitute himself a vendor of Holloway's pills and ointment, and I do not intend to say anything tending to abridge any such right. But he has no right to do so with such additions to his own name as to deceive the public, and make them believe that he is selling the plaintiff's pills and ointment."

"I do not mean to say that I have any sort of respect for this sort of medicines. I have none; but the law protects persons from fraudulent misrepresentations, and this is a species of property which the law does allow, and so long as the law recognises it, it must be protected, and persons in the situation of the defendant will not be allowed to practise a fraud like that here complained of."

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107. **FOOT** *v.* **LEA.**

Dec. 5th, 1850.

[*Smith, M.R. of I.*——13 *Ir. Eq.* 484.]

The petitioners, Lundy Foot & Co., being Dublin snuff manufacturers, who used a show-board over their door, and placed labels on their packets of snuff, on each of which their name appeared, the respondent, who had formerly been in their employ, opened a shop in Dublin, and styled himself on the show-board over his door, and on the labels on his packets of snuff, "A. Lea, late of Lundy Foot & Co.," the words "late of" being much smaller than the rest.

Petition for an injunction to restrain the respondent from so doing, dismissed, on the ground that the question was one of a legal right which must be decided at law.

HOWARD *v.* **HENRIQUES.** [108.]

March, 1851.

[*N. Y. Super. Ct.*——3 *Sandf. S. C.* 725; *R. Cox* 129.]

The plaintiff being the proprietor of a hotel at New York, called the "Irving House," or "Irving Hotel," the defendant opened another hotel at New York under the same name.

Motion by the defendant to dissolve an injunction which had been granted, on motion by the plaintiff, to restrain the defendant from so doing, refused.

Per Campbell, J.—"We think that the principle of the rule is the same, to whatever subject it may be applied, and that a party will be protected in the use of a name which he has appropriated, and by his skill rendered valuable, whether the same is upon articles of personal property which he may manufacture, or applied to a hotel where he has built up a prosperous business."

COFFEEN *v.* **BRUNTON** (2). [109.]

May, 1851.

[*U.S. C. C., Dt. of Ind.*—*McLean J.*}——5 *McLean*, 256; *R. Cox* 132.]

The plaintiff being the proprietor of a medical preparation called "The Chinese Liniment," the defendant began to sell another preparation under the name of "The Ohio Liniment," in bottles similarly labelled.

Injunction to restrain the defendant from so doing, refused, on the ground that the defendant was originally

concerned with the plaintiff in bringing out the lotion, that a partnership between them had been in contemplation, and that it was at least probable that the defendant was acquainted with the composition of the plaintiff's lotion, so that the plaintiff should be required to try his right at law in the first place.

"To entitle a complainant to protection against a false representation, it is not essential that the article should be inferior in quality, or that the individual should fraudulently represent it, so as to impose upon the public; but if by representation it be so assimilated as to be taken in the market for an established manufacture or compound of another, the injured person is entitled to an injunction. The injury is not the less, though the false representations be made without a knowledge of such interference."

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110. MORISON *v.* MOAT.

Aug. 20*th*, 1851; *Jan.* 22*nd*, 1852.

[*Turner, V.C.*——9 *Hare*, 241; 20 *L. J., Ch.* 513; 15 *Jur.* 787.]
[*Knight Bruce and Lord Cranworth, L.JJ.*——21 *L. J., Ch.* 248; 16 *Jur.* 321.]

The plaintiffs being two of the surviving partners in the firm of Morison, Moat & Co., and the legatees of the secret recipe and prescription of an unpatented medicine, called "Morison's Universal Medicine," the defendant, who was the third surviving partner in the firm, began, after the dissolution of the partnership, to use the secret recipe, and sell the medicine under the same name, having made himself acquainted with the secret through a breach of confidence on the part of a third person.

On motion by the plaintiffs, injunction granted to restrain the defendant from using the secret recipe or selling any medicine under the name, and *Held*, that a defence of delay on the part of the plaintiffs failed.

Per Turner, V.C. (9 Hare, 258).—"What we have to deal with here is, not the right of the plaintiffs against the world, but their right against the defendant. It may well be that the plaintiffs have no title against the world in general, and may yet have a good title against this defendant."

Per Lord Cranworth, L.J. (21 L. J. Ch. 248).—"There is no doubt whatever that where a party who has a secret in a trade employs persons under contract, express or implied, or under duty, express or implied, those persons cannot gain the knowledge of that secret and then set it up against their employer."

MARSH *v.* BILLINGS. [111.]

March, 1852.

[*Mass. Sup. Ct.*——7 *Cush.* 322; 14 *Monthly L. R.* (4 *N. S.*) 664; *R. Cox* 118.]

The plaintiffs being coach-proprietors, who had purchased from the proprietor of "The Revere House" hotel, at Boston, the exclusive right of conveyance of the visitors to that hotel, and the use of the name of the hotel on their coaches, servants' badges, &c., the defendants, who had had the same right previously to the plaintiffs, continued to act in the same manner after the right had passed to the plaintiffs.

Action on the case.

Held, that the defendants were entitled to convey passengers freely, but that they were not entitled to falsely represent themselves as having the patronage of the proprietor of the establishment, and that the plaintiffs were entitled to recover such damages as the jury, upon the whole evidence, should be satisfied that they had sustained, and not merely for the loss of such passengers as could be actually proved to have been diverted from their coaches to the defendants'.

112. **LUMLEY** *v.* **WAGNER.**

May 20*th*, 26*th*, 1852.

[*Parker, V.C.*——5 *De G. & Sm.* 485.]

[*Lord St. Leonards, C.*——1 *De G. M. & G.* 604; 21 *L. J., Ch.* 898; 16 *Jur.* 871.]

The plaintiff being a theatrical manager, the defendant, a singer, agreed with him to sing at his theatre for a certain period, and there only, but subsequently agreed to sing at another theatre before that period had elapsed

On motion by the plaintiff, injunction granted to restrain the defendant from singing elsewhere without permission, during the existence of the agreement, and *Held*, that the positive and negative stipulations formed one contract, and that the violation of the negative stipulation would be prevented, though the specific performance of the entire agreement could not be enforced.

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113. **FARINA** *v.* **SHAW.**

June 3*rd*, 1852.

[*Parker, V.C.*——*Cited* 3 *Eq. Rep.* 886-7; 1 *K. & J.* 514; 24 *L. J. Ch.* 632; 25 *L. T.* 211; 3 *W. R.* 532.]

The plaintiff being a manufacturer of Eau de Cologne, which he sold in bottles bearing special labels, the defendant, a printer, printed and sold other labels similar to those used by the plaintiff.

Suit for an injunction.

The defendant undertook not to print or sell any labels in infringement of the plaintiff's rights, and to give up all labels in his possession, and the plates for printing them, and to pay £50 costs.

TURNER *v.* **EVANS.** **114.**

July 30*th*, 1852; *June* 6*th*, 1853.

[*Knight Bruce and Lord Cranworth, L.JJ.*——2 *De G. M. & G.* 740.]
[*Queen's Bench*——2 *E. & B.* 512; 22 *L. J., Q. B.* 412; 17 *Jur.* 1073; 21 *L. T.* 153; 1 *W. R.* 434.]

The plaintiffs purchased from the defendant, a wine merchant in the counties of Carnarvon, Anglesea, and Merioneth, his business, stock in trade, &c., including £2000 as a premium for the goodwill, and the defendant agreed (among other things) not directly or indirectly to carry on the business of a wine merchant in those counties. He subsequently set up business outside those counties, but solicited and obtained orders within them.

On motion by the plaintiffs for an injunction to restrain the defendant from soliciting orders,

Held, by Kindersley, V.C. (affirmed by Lord Cranworth, L.J.), that there had been no breach of the agreement, and that the injunction must be refused until after a trial at law.

Action of assumpsit.

Verdict for the defendant directed, with leave to move to enter a verdict for the plaintiffs, with nominal damages.

On motion by the plaintiffs accordingly,

Held, that there had been a breach of the agreement.

Injunction subsequently granted.

RODGERS *v.* **NOWILL (2).** **115.**

Jan. 17*th*; *Feb.* 22*nd*, 1853.

[*Stuart, V.C.*——17 *Jur.* 109; 1 *W. R.* 122.]
[*Knight Bruce and Turner, L.JJ.*——3 *De G. M. & G.* 614; 22 *L. J., Ch.* 404; 17 *Jur.* 171; 20 *L. T.* 319; 1 *W. R.* 205—216.]

The defendant having been restrained from the use of a certain trade mark on cutlery, consisting of "J. Rodgers

& Sons," with a crown and "V. R.," (*Rodgers* v. *Nowill* (1)), afterwards entered into a partnership with his father and brother in 1848, and thenceforward used the same mark, sometimes with colourable additions.

On motion for committal for breach of the injunction in 1853,

Held, by the V.C., that, on account of the plaintiffs' delay, the motion must be refused, but without costs; by the L.JJ., that the defendant must be committed, unless within a week he suggested and undertook to use for the future a mark which the Court should approve.

Per Turner, L.J.—"On the question of acquiescence, I think that in a case of this description, where there has been an injunction granted by this Court, there must, in order to deprive the party who has obtained the injunction of the right to move for committal upon the breach of it, be a case made out almost amounting to such a licence to the party enjoined, to do the act enjoined against, as would enable him to maintain a bill against others for doing that act. The party enjoined must, I think, show such acquiescence as would be sufficient to create new right in him."

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116. **FLAVEL** *v.* **HARRISON.**

Feb. 22nd, 1853.

[*Wood, V.C.*——10 *Hare*, 467; 22 *L. J., Ch.* 866; 17 *Jur.* 368; 1 *W. R.* 213.]

The plaintiff being the manufacturer, in succession to his father, the original inventor, of an article which, though not patented, he called "Flavel's Patent Kitchener," the defendant, who had been in the plaintiff's employ, began to advertise for sale other goods under the same name.

Motion by the plaintiff for an injunction to restrain the defendant from so doing, refused, liberty being given to bring an action, on the ground that, (1) the plaintiff falsely described his article as patented; (2) he had delayed making his motion for four months after he had known of the defendant's use of the name.

"I think that the use of the word 'patent' operates to prevent the public from testing it (the invention) as they otherwise might; they are dissuaded from examining the article, with a view to imitation; and it is in evidence that persons were prevented from making that free use of it which every purchaser has a right to make of an unpatented article. The knowledge that there was no patent would enable and encourage every ironmonger who bought the article to take it to pieces, and examine, and make copies and models of all the parts for the purpose of imitation, if he thought it likely to be useful, which he would never think of doing with regard to a patented article."

BURGESS *v.* **BURGESS.** **117.**

March 17*th*, 1853.

[*Knight Bruce and Turner, L.JJ.*—3 *De G. M. & G.* 896; 22 *L. J., Ch.* 675; 17 *Jur.* 292; 21 *L. T.* 53.]

The plaintiff manufacturing "Burgess' Essence of Anchovies," at 107, Strand, the defendant, who was his son, and had been in his employ, set up a business for himself, in which he styled himself, on his shop front and labels, as "late of 107, Strand," and called the article he made "Burgess' Essence of Anchovies."

On motion by the plaintiff, before Kindersley, V.C., injunction granted as to "late of 107, Strand," but refused as to "Burgess' Essence of Anchovies."

On appeal, *Held*, (1) that in the absence of fraud, the defendant could not be restrained from using his own name, or describing his article as being what in fact it was; (2) that a delay from October to March in appealing from the refusal of the motion for an injunction was fatal to the appeal; (3) and that the wider injunction must be refused.

Per Turner, L.J.—"Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where

the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not."

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118. **FARINA** *v.* **GEBHARDT.**

March 23*rd*, 1853.

[*Wood, V.C.*——*Cited* 3 *Eq. Rep.* 891; 1 *K. & J.* 517.]

The plaintiff being a manufacturer of Eau de Cologne, which he sold in bottles bearing certain special labels, the defendant imitated those labels.

Motion by the plaintiff for an injunction to restrain the defendant from infringing his rights, refused, on the ground of the plaintiff's delay in making his application. The defendant subsequently submitted to pay his own costs, and undertook to refrain from future infringements.

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119. **EDELSTEN** *v.* **VICK.**

April 16*th*, 1853.

[*Wood, V.C.*——11 *Hare*, 78; 1 *Eq. Rep.* 413; 18 *Jur.* 7.]

The plaintiffs, being the successors in business of the original patentees of "Tayler & Co.'s Patent Solid-headed Pins," continued, after the expiration of the patent, to use, on their packets of pins, labels printed from the old blocks, describing the pins as "patent."

The defendants made pins and sold them in packets made up and labelled similarly to the plaintiffs', except that they added "J. Vick, from the late."

On motion by the plaintiffs for an injunction to restrain the defendants from so doing,

Held, (1) that the plaintiffs were entitled to an injunction to restrain a palpable fraud; (2) that the defendants

could not be absolutely restrained from representing that their pins were made according to Tayler's expired patent, but that they must not do so in such a way as to deceive; (3) that the plaintiffs were not disentitled by reason of their continued user of the word "patent," since there had been a patent, and the word had not been first adopted after its expiration.

"It does not follow, because upon the expiration of the patent the article and its known description become open to all, that therefore all would become entitled to use the label by which the patentees had been accustomed to distinguish their goods. The public may have acquired confidence in that particular label, and that confidence may have given a value to it which the patentees may be entitled to have protected after the expiration of their patent."

R. *v.* DUNDAS. 120.

1853.

[*York Assizes.*—*Erle, J.*}—6 *Cox* 380.]

On an indictment for obtaining money by false pretences, the prisoner having induced the prosecutor to buy blacking of him, contained in bottles labelled "Everett's Premier" (that being the name of an article manufactured by a London maker of high reputation), on a representation that the blacking was Everett's, and himself Everett's agent;

Held, (1) that an offer to sell on sale or return was immaterial, the actual bargain being for cash; (2) that it was unimportant whether the prisoner's name were or were not Everett, as he asserted, if he had acted fraudulently; (3) that the jury must decide whether or not certain differences between the labels on the prisoner's bottles, and those on the genuine ones, were mere small, colourable differences, and intended to deceive.

Guilty—two years' imprisonment.

[121.] **STOKES *v.* LANDGRAFF.**

Oct., 1853; *Sept.*, 1854.

[*N. Y. Sup. Ct.*——17 *Barb.* 608; *R. Cox* 137.]

The plaintiff being a manufacturer of glass, which he sold under the names "Galen," "Lake," "Cylinder," "Wayne," "New York," the defendants made and sold other glass under the same names.

On motion by the defendants, injunction which had been granted, on motion by the plaintiff, to restrain them from so doing, dissolved, on the ground that those words were indicative, not of the manufacturer, but of the quality of the article.

Per Strong, J.—"The principle is well settled that a manufacturer may, by priority of appropriation of names, letters, marks, or symbols of any kind to distinguish his manufactures, acquire a property therein as a trade mark. . . . . In respect to words, marks, or devices, which do not denote the goods, or property, or particular place of a person, but only the nature, kind, or quality of the articles in which he deals, a different rule prevails. No property in such words, marks, or devices can be acquired."

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122. **HOFFMAN *v.* DUNCAN.**

Nov. 2nd, 1853.

[*Wood, V.C.*——*Seton*, 4*th ed.*, 256.]

Partnership suit.

Injunction granted, after the dissolution of the firm of "Hoffman & Duncan," to restrain one of the former partners from the use of the name of the partnership.

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123. **SHRIMPTON *v.* LAIGHT.**

Jan. 19*th*, 1854.

[*Romilly, M.R.*——18 *Beav.* 164.]

The plaintiffs being the makers of a needle which they called "the graduated, grooveless, drill-eyed, ground down,"

and sold in packets labelled with those words, and a statement that they were "invented and made solely by Shrimpton & Hooper, at the Albion Needle Works, Studley," the defendant, authorised, as he alleged, by one David Shrimpton Turvey, who was not a needle-maker, began to sell other needles in packets similarly labelled, except that "Shrimpton & Hooper" and "Albion Needle Works" were omitted, and "Shrimpton Turvey" substituted.

On motion by the plaintiffs, injunction granted to restrain the defendant from imitating the plaintiffs' labels.

"The way in which the Court deals with these cases is, not to see whether manufacturers themselves would distinguish them, but whether the public, who may be more easily misled, would probably be deceived."

TAYLOR *v.* **TAYLOR.** **124.**

Jan. 19*th*, 1854.

[*Wood, V.C.*——*2 Eq. Rcp.* 290 ; 23 *L. J., Ch.* 255 ; 22 *L. T.* 271.]

The plaintiffs being manufacturers of thread, which they sold on reels bearing labels, on which the words "Taylor's Persian Thread" were prominent, the defendant began to sell thread similarly put up, except that before the name "Taylor" he inserted "Sam." instead of "J. W."

On motion by the plaintiffs, injunction granted to restrain the defendant from selling thread on reels labelled with that name or any other colourable imitation of the plaintiffs' labels.

"In every case the Court must ascertain whether the differences are made *bonâ fide* in order to distinguish the one article from the other, whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colourable, and the resemblances are such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance which is of primary importance for the Court to consider, because if the Court finds, as it almost

invariably does find in such cases as this, that there is no reason for the resemblance, except for the purpose of misleading, it will infer that the resemblance is adopted for the purpose of misleading."

[125.] **LEMOINE *v.* GANTON.**

Jan., 1854.

[*N. Y. C. P.*——2 *E. D. Smith*, 343; *R. Cox* 142.]

The plaintiff, a French manufacturer of calf-skin leather, adopted a new trade mark for his leather, and discontinued the use of his old mark. About a year later the defendant sold leather not prepared by the plaintiff, bearing the plaintiff's discontinued mark.

Action for damages.

A verdict having been returned for the plaintiff,

On motion for a new trial,

Held, that the plaintiff was entitled to recover damages for the defendant's infringement of his rights, notwithstanding that he had discontinued the use of the mark.

Per Daly, J.—"The wrong and injury to the plaintiff consisted in the sale of calf-skins falsely purporting and declared to be of his manufacture; and it makes no difference whether that object was effected by counterfeiting the trade mark which he uses at present, or one that he formerly used. An injury results to him in either case."

[126.] **GILLOTT *v.* KETTLE.**

March, 1854.

[*N. Y. Super. Ct.*——3 *Duer* 624; *R. Cox* 148.]

The plaintiff being a penmaker, who sold his pens in boxes labelled respectively with the number "303" or "753," the former denoting the superior, the latter the inferior quality, the defendant removed the labels with "753" from the boxes of inferior pens, and substituted for them labels imitated from the labels used on the boxes of superior pens, with "303."

On motion by the plaintiff, injunction granted, and upheld, to restrain the defendant from so doing.

Per Bosworth, J.—"The fraud complained of consists in selling an inferior article of the plaintiff's manufacture as being one of a superior quality. The fraud, to the extent that it may be successful, is twofold. The public is defrauded by being induced to buy the inferior for the superior article. The plaintiff is defrauded by an unjust destruction of confidence that his pens are put up for sale and assorted with reference to the quality, indicated to dealers by the labels on the boxes which contain them."

EVANS *v.* HUGHES. 127.

March 30*th*, 1854.

[*Wood, V.C.*——18 *Jur.* 691.]

The plaintiff being the widow and executrix of one of the partners in the firm of "Evans & Hughes," which was constituted under articles of which one provided that, on the decease of either partner, his personal representative was to have the power, within three months, of electing to continue his share; the defendant, being the surviving partner in the firm, before the expiration of the three months, or election, began to carry on business in his own name.

On motion by the plaintiff, injunction granted to restrain the defendant, until the expiration of the three months, or election, from carrying on the business under any other name than that under which it had been carried on in the lifetime of the deceased partner.

POTTER *v.* THE COMMISSIONERS OF INLAND REVENUE. 128.

June 15*th*, 1854.

[*Exchequer*——10 *Ex.* 147; 23 *L. J., Ex.* 345; 18 *Jur* 778; 23 *L. T.* 269; 2 *W. R.* 561.]

Case stated by the Commissioners of Inland Revenue.

Held, that the assignment by deed of the goodwill of a

trade was a conveyance of property, within the Stamp Act, 13 & 14 Vict. c. 97, and not of a mere possibility, and was therefore subject to *ad valorem* duty.

Per Pollock, C.B.—"Very frequently the goodwill of a business or profession, without any interest in land connected with it, is made the subject of sale, though there is nothing tangible in it: it is merely the advantage of the recommendation of the vendor to his connexions, and his agreeing to abstain from all competition with the vendee. Still, it is a valuable thing belonging to himself, and which he may sell to another for a pecuniary consideration."

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129. **HALL** *v.* **HALL.**

March 5*th*, 1855.

[*Romilly, M.R.*——20 *Beav.* 139.]

Partnership suits.

Cross suits having been commenced by each of the partners in a brewing business, carried on under articles of partnership, which provided that the surviving or continuing partner, in case of the death or retirement of the other, should have the option of taking over the share of the deceased or retiring partner in the partnership "property, credits and effects," and it having been agreed that the partnership should be dissolved, and that the continuing partner should take over the partnership "stock in trade and effects" at a valuation,

Held, that the goodwill was not to be taken into account and valued as being included in the partnership "property, credits and effects," or "stock in trade and effects."

FARINA *v.* SILVERLOCK. 130.

June 6th, 1855; *July 9th*, 1856; *June 1st*, 1858.

[*Wood, V.C.*——1 *K. & J.* 509; 3 *Eq. Rep.* 883; 24 *L. J., Ch.* 632; 25 *L. T.* 211; 3 *W. R.* 532.]

[*Lord Cranworth, C.*——6 *De G. M. & G.* 214; 26 *L. J., Ch.* 11; 2 *Jur., N. S.* 1008; 27 *L. T.* 277; 4 *W. R.* 731; 52 *Leg. Obs.* 342.]

[*Queen's Bench*——30 *L. T.* 242; 31 *L. T.* 99.]

[*Wood, V.C. (after trial at Law)*——4 *K. & J.* 650.]

The plaintiff being a manufacturer of Eau de Cologne, which he sold in bottles bearing a special label, with his signature and other particulars, the defendant, a printer, printed and sold similar labels.

On motion by the plaintiff for an injunction to restrain the defendant from so doing,

Held, by the V.C., that the plaintiff was entitled to an injunction to restrain the defendant from "scattering over the world the means of enabling parties to commit frauds upon the plaintiff."

Held, by the Lord Chancellor, that, since the labels might be printed for a legitimate purpose, viz., to replace genuine labels on genuine goods, which had become obliterated, the injunction must be dissolved, liberty being given to bring an action.

An action having been brought, and having resulted in a verdict for the plaintiff, which was upheld by the Court of Queen's Bench, injunction restored.

Per Wood, V.C. (1 K. & J. 515).—"No man has a right to sell wares with a trade mark upon them which has been used to designate the wares of the party complaining. A man may acquire, not an absolute kind of property, but that kind of right in a trade mark which entitles him to say, 'No one shall sell goods of his own making marked with my trade mark, which I have been in the habit of using in my trade, so as to make people think that they are of my manufacture.'"

Per Lord Cranworth, C. (6 De G. M. & G. 217).—"This right cannot be properly described as a copyright, it is in fact a right which can 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 owner of the trade mark. . . . . I apprehend that the law is perfectly clear, that any one who has adopted a particular mode of designating his particular manufacture, has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to steal (so to call it) his trade mark, and make purchasers believe that it is the manufacture to which that trade mark was originally applied."

P. 219.—"I think it clear that any man would be at liberty, if it was writing instead of printing, to write, or if he was capable of printing and engraving, to print and engrave for himself, a label being a colourable imitation of, or a copy of the plaintiff's label, and to put it on Eau de Cologne, being the Eau de Cologne of the plaintiff."

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131. **MORRIS** *v.* **MOSS.**

July 24th, 1855.

[*Romilly, M.R.*——25 *L. J., Ch.* 194.]

Administration suit.

Held, that the goodwill of a business, which had been carried on by a wife before marriage, and afterwards by the husband and wife, on the death of the husband survived to the wife, and that she might dispose of it and receive the purchase money for her own benefit, even though it was carried on upon leasehold premises, forming a part of the husband's estate, and of which he had disposed by his will.

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132. **CHAPPELL** *v.* **SHEARD.**

Aug. 2nd, 1855.

[*Wood, V.C.*——2 *K. & J.* 117 ; 1 *Jur., N. S.* 996 ; 3 *W. R.* 646.]

The plaintiffs being the publishers and proprietors of a song entitled "Minnie," which was published with a

special kind of title page, the defendant published another song under the name of "Minnie Dale," with a title page copied from the plaintiffs'.

Suit for an injunction.

Held, (1) that the song was known to the purchasing public by four characteristics—the names of the song, of the singer, of the composer, of the publisher; (2) that a statement on the plaintiffs' title page "written by George Linley," he having written the words, though not composed the music, did not disentitle the plaintiffs, though Linley was better known as a composer than as a poet; (3) that the plaintiffs were not disentitled by their own delay, they having first become acquainted with the piracy on June 18th; (4) and that the injunction must be granted.

HEATH *v.* **WRIGHT.** [133.]

Oct., 1855.

[*U. S. C. C., E. Dt. of Penn.—Kane, J.*——3 *Wall. Jr.*; *R. Cox* 154.]

The plaintiff preparing and selling a toilet compound under the name of "Kathairon," the defendant sold another preparation under the same name.

Motion by the plaintiff, for an injunction to restrain the defendant from so doing, refused, on the ground that the misstatements and exaggerations contained in the labels on the plaintiff's own bottle, were such as to disentitle him to any relief.

THE MERRIMACK MANUFACTURING CO. *v.* **GARNER.** [134.]

Nov., 1855.

[*N. Y. C. P.*——2 *Abb. Pr.* 318; 4 *E. D. Smith* 337; *R. Cox* 155.]

The plaintiffs being manufacturers of cotton prints, which they sold labelled with the words "Merrimack

Prints, Fast Colours, Lowell, Mass.," the defendants sold other cotton goods labelled with the words "English Free Trade, Merrimack Style, Warranted Fast Colours."

Suit for an injunction.

Injunction which had been granted, on motion by the plaintiffs, to restrain the defendants from so doing, dissolved, on the ground that the plaintiffs' title was not sufficiently clear for an injunction to be granted without a preliminary trial at law.

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135. **AUBIN** *v.* **HOLT.**

Nov. 23*rd*, 1855.

[*Wood, V.C.*——2 *K. & J.* 66 ; 25 *L. J., Ch.* 36 ; 4 *W. R.* 112.]

The plaintiff and defendant, being the members of the firm of "Holt & Aubin," solicitors, having agreed, upon the dissolution of the partnership, that the defendant should continue to carry on the business in the old name, after the dissolution, he paying a certain annuity to the plaintiff, the retiring partner, the defendant failed to pay the annuity in accordance with the terms of the agreement.

Suit for specific performance of the agreement.

Held, that the agreement was not void as being against public policy, and that specific performance must be granted.

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136. **CHAPPELL** *v.* **DAVIDSON.**

Nov. 26*th*, 1855 ; *Jan.* 11*th*, 1856.

[*Wood, V.C.*——2 *K. & J.* 123.]

[*Knight Bruce & Turner, L.JJ.*——8 *De G. M. G.* 1.]

The plaintiffs being the publishers and proprietors of a song called "Minnie," the defendant published another

song under the name of "Minnie, dear Minnie," with a title page copied from that of the plaintiffs' song.

On motion by the plaintiffs to continue an injunction which had been granted to restrain the defendant from so doing,

Held, by the V.C., (1) that the plaintiffs were entitled to an injunction, without a preliminary trial at law; (2) that the plaintiffs were not disentitled by reason of having placed on their title page the words "written by George Linley," he being a well-known composer, the fact being that he had written the words, but not composed the music; (3) that the defendant could not escape his liability by instructing his shopmen to inform customers of the facts, since their statements would not pass on to subsequent purchasers; (4) that the defendant, having insisted on his right of publication, and refused to submit, must pay costs.

Held, by the L.JJ., that the injunction ought to be continued only on the terms of the plaintiffs undertaking to bring an action, and to be answerable in damages.

CHRISTY *v.* MURPHY. [137.]

Feb., 1856.

[*N. Y. Sup. Ct.*—*Clerke, J.*] ——12 *How. Pr.* 77; *R. Cox* 164.]

The plaintiff being the original founder of the "Christy's Minstrels," during a temporary discontinuance of his performances the defendants, most of whom had been in his service, began to perform under that name.

On motion by the plaintiff, injunction granted to restrain the defendants from so doing, notwithstanding that the plaintiff's performances were for the time being in abeyance; and *Held* that, even if the defendants could have proved a licence from the plaintiff to use the name, unless

they could also prove it to be irrevocable, they would have had no right to continue the use of the name one moment after the plaintiff had signified his intention to withdraw the permission.

[138.] **WALTON *v.* CROWLEY.**

March, 1856.

[*U. S. C. C., S. Dt. of N. Y.—Betts, J.*——3 *Bl. C. C.* 440; *R. Cox* 166.]

The plaintiff being the sole vendor in America, under an exclusive contract with an English firm, of the needles made by that firm, the defendant sold other needles with trade marks similar to those on the plaintiff's needles.

On motion by the plaintiff, injunction granted to restrain the infringement of the trade marks on the needles made in England and sold by him.

"The plaintiff was not the inventor of this label or trade mark, nor the one who originally adopted it, but he is the assignee of it, and of the goodwill of the trade. He stands, thus, in the same relation to the defendant as his assignor would."

"A tradesman, to bring his privilege of using a particular mark under the protection of Equity, is not bound to prove that it has been copied in every particular by another. It is enough for him to show that the representations employed bear such a resemblance to his as to be calculated to mislead the public generally who are purchasers of the article, and to make it pass with them for the one sold by him. If the *indicia* or signs used tend to that result, the party aggrieved will be allowed an injunction staying the aggression until the merits of the case can be ascertained and determined."

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139. **WEDDERBURN *v.* WEDDERBURN.**

April 7th, 1856.

[*Romilly, M. R.*——22 *Beav.* 84; 25 *L. J. Ch.* 710; 2 *Jur. N. S.* 674; 28 *L. T.* 4.]

Partnership suit.

Held, that the plaintiffs, being the representatives of a

deceased partner in a partnership business, carried on under articles, which provided that the goodwill of the business should, on the death of one partner, belong to the survivors, were not entitled to share in profits attributable to the goodwill; though, in the absence of express agreement, goodwill was partnership assets.

22 Beav., p. 104.—"Goodwill manifestly forms a portion of the subject matter which produces profits, which constitutes partnership property, and which is to be divided between the surviving partners and the estate of the deceased partner, according to the terms of the contract, and when that is silent, according to their shares in the concern. There is considerable difficulty in defining accurately what is included under this term goodwill. It seems to be that species of connexion in trade which induces customers to deal with a particular firm. . . . I am of opinion that, both on principle, on the authority of the decided cases, and on the ordinary rules of common sense, I must, whenever there is a reputation and connexion in business, constituting goodwill, treat that as part of the assets of the concern."

LAWSON *v.* THE BANK OF LONDON. 140.

April 22nd, 1856.

[*Common Pleas*——18 *C. B.* 84; 25 *L. J., C. P.* 188; 2 *Jur., N. S.* 716; 27 *L. T.* 134; 4 *W. R.* 481.]

The plaintiff having established a bank in London, called "The Bank of London," the defendant bank commenced business under the same name.

Action on the case.

On demurrer,

Held, that it was a fatal objection that there was no averment in the declaration that the plaintiff had ever carried on the business of a banker at his bank, since, from that omission, it disclosed no cause of action, and that the demurrer must be allowed.

Per Willes, J., p. 94.—"In any way of reading this declaration, one cannot glean from it that the plaintiff had ever carried on the business of a banker. If that had been averred in the declaration,

and it had been shown that the defendants carried on their business under the same name, for the purpose of making it to be believed that it was the plaintiff's business, then the question whether a corporation could as such be liable for such a fraud, would have arisen. I am not prepared to say that they would not be liable, if the cause of complaint were properly alleged. They would have capacity to do the act, and might possibly be responsible for its consequences."

P. 93.—"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 misuser of it."

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141. **PROWETT** *v.* **MORTIMER.**

May 3rd, 1856.

[*Stuart, V.C.*——2 *Jur., N. S.* 414; 27 *L. T.* 132; 4 *W. R.* 519.]

The plaintiff, having become by purchase the proprietor of *The Britannia* newspaper, incorporated it with another paper called *The John Bull*, and issued the combined paper as *The John Bull and Britannia*, and the defendant, being the former printer and publisher of *The Britannia*, began to publish a new paper under the name of *The True Britannia*, as an imitation and continuation of *The Britannia*.

On motion by the plaintiff for an injunction to restrain the defendant from so doing,

Held, that the plaintiff, in the circumstances of the case, was not disentitled by the fact that he was not registered at the Stamp Office as the proprietor of either newspaper, and that an injunction must be granted to restrain the defendant from publishing his paper, or any other paper, as a continuation of the plaintiff's paper, and from soliciting custom as for the plaintiff's paper.

STEWART *v.* **SMITHSON.** [142.]

May, 1856.

[*N. Y. C. P.*——1 *Hilt.* 119; *R. Cox* 175.]

The plaintiffs being manufacturers of thread, which they sold under a trade mark consisting of the words "Hall & Moody's patent thread, Barnsley," and "Grant & Wilson's celebrated patent thread, Berwick," the defendants sold other thread similarly marked.

Action for an injunction and an account.

Motion by the defendants for leave to amend their answer, refused, on the ground that the intended amendments, to the effect that the plaintiffs' thread had never been manufactured by any such persons as those by whom it purported to have been manufactured, and that no patent for the thread had ever existed, if true, would constitute no defence to the action.

SAMUEL *v.* **BERGER.** [143.]

Dec., 1856.

[*N. Y. Sup. Ct.*—*Davies, J.*——24 *Barb.* 163; 13 *How. Pr.* 342; 4 *Abb. Pr.* 88; *R. Cox* 178.]

The plaintiff being a watchmaker, who had purchased from another watchmaker, named Brindle, the exclusive right to stamp on his own watches the name of the latter, which had acquired a reputation, the defendants sold other watches made by Brindle, before the sale to the plaintiff, and stamped with his name.

Motion by the plaintiff for an injunction to restrain the defendant from so doing, refused, with costs, since to have granted it would have been to protect the sale of the spurious article, and restrain that of the genuine.

[144.] **FETRIDGE** *v.* **WELLS.**

Jan., 1857.

[*N. Y. Super. Ct.*—*Duer, J.*] ——4 *Abb. Pr.* 144; 13 *How. Pr.* 385; *R. Cox* 180.]

The plaintiff being the proprietor of a cosmetic called "The Balm of Thousand Flowers," the defendants began to prepare and sell a similar article, under the name of "The Balm of Ten Thousand Flowers."

Injunction which had been granted, on motion by the plaintiff, to restrain the defendants from so doing, dissolved, on the ground that (1) the name did not constitute a trade mark, and (2) the plaintiff was disentitled by his own misrepresentations in the following particulars, viz.:—*First*, Though the compound was not derived from flowers, the name was as above, and the directions for use contained direct statements to that effect; *second*, the plaintiff in his advertisements falsely overstated the amount paid by him for the secret recipe; and, *thirdly*, the directions contained the most exaggerated statements with respect to the valuable qualities of the cosmetic.

The defendants being *in pari delicto*, no costs given.

[145.] **FETRIDGE** *v.* **MERCHANT.**

Jan., 1857.

[*N. Y. Super. Ct.*—*Hoffman, J.*] ——4 *Abb. Pr.* 156; *R. Cox* 194.]

The plaintiff being the proprietor of a cosmetic called "Balm of Thousand Flowers," the defendants sold another preparation under a similar name.

On motion by the defendants to dissolve an injunction which had been granted to restrain them from so doing,

Held, (1) that the name was a fancy name, and not descriptive; (2) but that the injunction must be dissolved,

the plaintiff to bring an action, on the ground of the uncertainty of the plaintiff's having been the first to appropriate the name.

"The further removed such an appellation (*i.e.*, a fancy name) is from actually representing the article in question, the more exclusive and decided becomes the right to it."

"Even if the term used may be used in common, yet it may be employed by one with such peculiar emblems, colours, and devices, as to give to him an exclusive right. Strictly, the right of appropriation in such instances results from the peculiar emblems."

BLOSS *v.* BLOOMER. [146.]

March, 1857.

[N. Y. Sup. Ct.——23 Barb. 604; R. Cox 200.]

The defendant purchased from the plaintiffs a number of seed bags, marked with the plaintiffs' label, and agreed to fill them with seeds of good quality, but filled them with inferior seeds.

Action for damages.

On demurrer,

Held, that the plaintiffs were not entitled to recover damages from the defendant for injury caused to their reputation by his so doing, since the contract was for a fraud upon the public, and that the demurrer must be allowed.

Per E. D. Smith, J.—"If it be a crime to counterfeit labels, words, or devices, previously appropriated to distinguish property, or to vend goods thus stamped, without disclosing the fact to the purchaser, it is equally an offence against the spirit of the law, equally injurious to trade and commerce, and equally an imposition upon the public, to palm off spurious goods under cover of genuine labels and devices. Contracts to do this are clearly against public policy, and should not be upheld and enforced by the courts."

147. **R. *v.* BRYAN.**

May 11*th*, 1857.

[*C. C. R.*——*D. & B.* 265; 7 *Cox* 312; 26 *L. J., M. C.* 84; 3 *Jur., N. S.* 620; 45 *C. C. C. Sess. Pap.* 529.]

On an indictment for obtaining money by false pretences, the prisoner having been found by the jury to have obtained advances of money from pawnbrokers on certain plated spoons, by means of fraudulent representations that the spoons had as much silver on them as Elkington's A, and that the foundations were of the best material, knowing that to be untrue;

Held, that the statement made by the prisoner merely amounted to an exaggerated commendation in the course of bargaining, with respect to a matter of opinion, and not to a deliberate mis-statement of a matter of fact, and that the conviction must be quashed.

[148.] **CLARK *v.* CLARK.**

May, 1857.

[*N. Y. Sup. Ct.*——25 *Barb.* 76; *R. Cox* 206.]

The plaintiffs being manufacturers of thread, which they sold in spools labelled with their name and other particulars, the defendant sold other thread labelled in a very similar manner.

Suit for an injunction.

Injunction, which had been granted, on motion by the plaintiffs, to restrain the defendant from imitating the plaintiffs' trade marks on spool cotton, and which had afterwards been dissolved, restored in part, so as to restrain the use by the defendant of his own name (which was the same as the plaintiffs'), only when so placed as to produce deception, and not absolutely.

Per Mitchell, J.—"If the wholesale buyer, who is most conversant with the marks, is not misled, but the small retailer or the consumer is, the injury is the same in law, and differs only in degree. The right of action must exist for the last as well as for the first."

PETERSON *v.* **HUMPHREY.** [149.]

May, 1857.

[*N. Y. Sup. Ct.*—*Mitchell, J.*——*4 Abb. Pr.* 394; *R. Cox* 212.]

After the dissolution of the firm of "Peterson & Humphrey," each partner commenced a new business, and one, the defendant, trading under the name of "Humphrey & Co." at the old premises, continued to use the old sign with the old name on the premises, without sufficient alterations to show the change in the firm.

Injunction granted to restrain the defendant from so doing, and also to restrain him from publishing any notice to the effect that he was carrying on the business of the old firm; but the defendant to be at liberty to state that he had been a member of the old firm, and was carrying on the same kind of business as formerly.

WILLIAMS *v.* **JOHNSON.** [150.]

June, 1857.

[*N. Y. Super. Ct.*——*2 Bos.* 1; *R. Cox* 214.]

The plaintiff being a manufacturer of soap, which he sold in boxes labelled, among other things, with the words "Genuine Yankee Soap—manufactured at Manchester, Conn., by Williams & Bro.," the defendants sold other soap in boxes on which was a label containing the words "Genuine Yankee Soap, manufactured at New York, by L. Williams & Co."

Injunction granted to restrain the defendants from infringing the plaintiff's labels.

151. **THE COLLINS COMPANY** *v.* **BROWN.**

June 10*th*, 1857.

[*Wood, V.C.*——3 *K. & J.* 423; 3 *Jur., N. S.* 929; 30 *L. T.* 62.]

The plaintiffs being an American Company of edge-tool manufacturers, who stamped their goods "Collins & Co., Hartford Cast Steel, Warranted," the defendant, an English maker, made other goods with the same stamp.

Suit for an injunction and account.

Demurrer by the defendant, on the ground of the plaintiffs' alienage, overruled.

"If a man has been in the habit of using a particular mark for his goods for a long time, during which no one else has used a similar mark, and then another person begins to use the same mark, that can only be with a fraudulent intent; and any fraud may be redressed in the country in which it is committed, whatever may be the country of the person who has been defrauded."

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152. **THE COLLINS COMPANY** *v.* **COWEN.**

June 11*th*, 1857.

Wood, V.C.——3 *K. & J.* 428; 3 *Jur., N. S.* 929; 29 *L. T.* 245; 30 *L. T.* 62; 5 *W. R.* 676.]

The plaintiffs being an American Company of edge-tool manufacturers, who stamped their goods "Collins & Co., Hartford Cast Steel, Warranted," the defendants, English makers, made other goods with the same stamp.

Demurrer by the defendants, on the ground of the plaintiffs' alienage, overruled.

"The question has nothing to do with the question of copyright."

"I apprehend that every subject of every country, not being an alien enemy—and even to an alien enemy the Court has extended relief in cases of fraud—has a right to apply to this Court to have a

fraudulent injury to his property arrested. And here the plaintiffs have the right—a right recognised, I imagine, everywhere in the world, or at least in every civilized community—of saying, 'We, being the manufacturers of certain goods, claim that another man shall not manufacture goods, and put upon them our trade mark, and then pass them off as manufactured by us.'"

DARBEY *v.* WHITAKER. 153.

July 13*th*, 1857.

[*Kindersley, V.C.*——4 *Drew.* 134 ; 5 *W. R.* 772.]

Specific performance of a written agreement for the sale of a leasehold public-house, goodwill, &c., refused, the agreement containing a clause as to arbitration which the Court could not enforce; although, but for that clause, specific performance would have been granted.

"It is said there can be no specific performance of a contract to purchase a goodwill. No doubt you cannot have a specific performance of a contract to purchase a goodwill alone, unconnected with business premises, by reason of the uncertainty of the subject-matter. But when a goodwill is entirely or mainly annexed to the premises, and the contract is for the sale of the premises and goodwill, there is not the slightest ground for doubt that such a contract is a fit matter for a decree in a suit for specific performance."

BROOKLYN WHITE-LEAD CO. *v.* MASURY. [154.]

Sept. 1857.

[*N. Y. Sup. Ct.*—— 25 *Barb.* 416 ; *R. Cox* 210.]

The plaintiffs and defendant alike manufactured white-lead in Brooklyn, and had a shop in New York. The plaintiffs labelled their kegs "Brooklyn White-Lead Co.," the defendant at first labelled his "Brooklyn White-Lead, Pure, 100 lbs.," but afterwards changed this to "Brooklyn White-Lead and Zinc Company."

Injunction granted to restrain the defendant from the use of the word "Company" or "Co."

"*Per* Mitchell, J.—"It is to protect the plaintiffs' right of selling their own that the law of trade marks has been introduced. It must include a right to sell to all, to the incautious, as well as to the cautious. Any false name that is assumed in imitation of a prior true name is in violation of this right, and the use of it should be restrained by injunction."

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155. **R. *v.* CLOSS.**

Nov. 30*th*, 1857.

[*C. C. R.*——*D. & B.* 460; 7 *Cox* 494; 27 *L. J., M. C.* 54; 3 *Jur., N. S.* 309.]

On an indictment for obtaining money by false pretences, for a cheat at Common Law, and for forgery, the prisoner having sold a copy of a painting as the original, with the signature of the painter, J. Linnell, imitated in the corner, and the jury having acquitted the prisoner on the first count, but found him guilty on the others,

Held, (1) that as to the count for forgery, the conviction was bad, there being no forgery of a written document; (2) that as to the count for a cheat at Common Law, the conviction would have been good if the count had shown that it was by the false token that the money had been obtained, but that, this not being so, the conviction on this count was bad; (3) and, therefore, that the conviction must be quashed.

Per Cockburn, C.J.—"A forgery must be of some document or writing; and this was merely in the nature of a mark put upon the painting with a view of identifying it, and was no more than if the painter put any other arbitrary mark as a recoguition of the painting being his. . . . . If a person in the course of his trade, openly and publicly carried on, were to put a false mark or token upon an article, so as to pass it off for a genuine one, when in fact it was only a spurious one, and the article was sold and money obtained by means of that false mark or token, that would be a cheat at Common Law."

AUSTEN *v.* BOYS. 153.

Dec. 7th, 1857; *June 23rd*, 1858.

[*Romilly, M.R.*——24 *Beav.* 598; 27 *L. J., Ch.* 243; 3 *Jur., N. S.* 1285; 30 *L. T.* 216.

[*Lord Chelmsford, C.*——2 *De G. & J.* 626; 27 *L. J., Ch.*, 714; 4 *Jur., N. S.*, 719; 31 *L. T.* 276; 6 *W. R.* 729.]

Partnership suit.

The parties, solicitors, having agreed, by their articles of partnership, to become partners for seven years, and the articles providing that, if either retired, he should receive the value of his goodwill,

Held that, on the retirement of one of the partners, by notice given two days before the end of the seven years, he was only entitled to receive the value of the goodwill as for those two days, and not as of a going concern.

Per Lord Chelmsford, C.—"It is very difficult to give any intelligible meaning to the term 'goodwill' as applied to the professional practice of a solicitor in this abstract sense. Where a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. It was truly said in argument that 'goodwill' is something distinct from the profits of a business, although in determining its value the profits are necessarily taken into account; and it is usually estimated at so many years' purchase upon the amount of these profits. But the term 'goodwill' seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs."

WELCH *v.* KNOTT. 157.

Dec. 22nd, 1857.

[*Wood, V.C.*——4 *K. & J.*, 747; 4 *Jur., N. S.* 330.]

The plaintiffs being manufacturers of soda water, which they sold in bottles in which were moulded the words "J.

Schweppe & Co., 51, Berners Street, Oxford Street, Genuine Superior Aerated Waters," and which had a label of coloured paper over the cork, with the words "J. Schweppe & Co.," the defendant sold other soda water in old bottles of the plaintiffs', moulded with their name, and with somewhat similar labels over the cork, but printed with the words "Soda Water," instead of the plaintiffs' name.

On motion to dissolve an injunction which had been granted, on motion by the plaintiffs, to restrain the defendant from infringing the plaintiffs' rights,

Held, that the injunction must be dissolved, on the ground that the bottles were not shown to have been sold, when refilled, with any intention to deceive, or probability of deception, although, if a probability of deception had been caused, though unintentionally, by the defendant, the injunction would have been continued.

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158. **DAVIES** *v.* **HODGSON.**

Feb. 15*th*, 1858.

[*Romilly, M.R.*——25 *Beav.* 177 ; 27 *L. J., Ch.* 449 ; 4 *Jur., N. S.* 252 ; 31 *L. T.* 49 ; 6 *W. R.* 355.]

Administration suit.

Held that, since a surviving partner or clerk, who is appointed executor, remains at liberty to continue to carry on the same trade, a purchaser of the goodwill of a testator's business must take it subject to the chance of retaining the old customers, and that, in the case in question, the goodwill was valueless, since the brother of the testator, who had been actively concerned in the business, could not be prevented from continuing to carry it on.

Ex parte **FOSS**; *In re* **BALDWIN.** 159.

Feb. 16*th*, *March* 23*rd*, 1858.

[*Evans, Comm.*——30 *L. T.* 354.]

[*Knight Bruce and Turner, L.JJ.*——2 *De G. & J.* 230; 27 *L. J., Bkptcy.* 17; 4 *Jur., N. S.* 522; 31 *L. T.* 30.]

The registered proprietor of the *Standard* and *St. James' Chronicle* newspapers became bankrupt, while the sheriff was in possession of his premises.

Held, that the right of publication of the newspapers was property, and therefore "goods and chattels" within the enactments in the Bankruptcy Acts as to reputed ownership, but that it was intangible property, and, therefore, incapable of seizure by a sheriff, and, therefore, that though the sheriff was in possession of the premises at the time of the bankruptcy, the right of publication passed to the assignees in bankruptcy.

LAZENBY *v.* **LAZENBY.** 160.

March 17*th*, 1858.

[*Romilly, M.R.*——*Seton*, 4*th ed.* 237; *cited* 41 *L. J., Ch.* 354.]

Injunction granted to restrain the defendant from using upon sauces not of the plaintiff's manufacture labels or trade marks similar to those placed by the plaintiff upon his "Harvey's Sauce."

R. *v.* **SMITH.** 161.

April 24*th*, 1858.

[*C. C. R.*——*D. & B.* 566; 8 *Cox* 32; 27 *L. J., M. C.* 225; 4 *Jur., N. S.* 1003; 31 *L. T.* 135; 6 *W. R.* 495; 47 *C. C. C. Sess. Pap.* 269; 48 *ib.* 8.]

On an indictment for forgery, the prisoner having had printed a large number of wrappers in imitation of those

used on Borwick's baking powders and egg powders, having the name of Borwick in a prominent position, but with his signature, and the notice that without that no powder was genuine, omitted, and the prisoner having sold a quantity of spurious powder in these wrappers,

Held that, although the prisoner might have been convicted of obtaining money by false pretences, the offence was not that of forgery, and that the conviction must be quashed. The prisoner subsequently pleaded guilty to an indictment for obtaining money by false pretences.

Per Pollock, C.B.—"The issuing of this wrapper without the stuff within it would be no offence. In the printing of these wrappers there is no forgery; the real offence is the issuing them with fraudulent matter in them."

Per Bramwell, B.—"Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the other. In the present case one of these documents is as good as the other—the one asserts what the other does—the one is as true as the other, but the one is improperly used."

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162. **MARSHALL** *v.* **WATSON.**

April 28th, 1858.

[*Romilly, M.R.*——25 *Beav.* 501.]

The plaintiff being one of two joint proprietors of two newspapers, called *The Northern Daily Express* and *The Northern Weekly Standard*, and having agreed to sell his interest to his partner, the defendant, the latter, while the contract for purchase was still incomplete, and a suit by the plaintiff for specific performance of the contract was pending, published statements as to the profits and loss of the papers, with a view to the formation of a company to carry them on.

Motion by the plaintiff, for an injunction to restrain the

defendant from publishing such statements, on the ground that they were injurious to the interests of the newspapers and himself, refused.

ANSELL *v.* GAUBERT. 163.

June 5th, 1858.

[*Wood, V.C.*——*Seton, 4th ed.* 235.]

Injunction granted to restrain the defendant from using the names belonging to the plaintiff's preparations for the hair, and using labels imitated from the plaintiff's, and making preparations after the plaintiff's secret recipes, and publishing advertisements and circulars representing that the defendant was carrying on the plaintiff's business and manufacturing the plaintiff's goods.

THE COLLINS COMPANY *v.* REEVES. 164.

June 29th, 1858.

[*Stuart, V.C.*——28 *L. J., Ch.* 56; 4 *Jur., N. S.* 865; 33 *L. T.* 101; 6 *W. R.* 717.]

The plaintiffs being American manufacturers of edge-tools, which they stamped with the words, "Collins & Co., Hartford Cast Steel, Warranted," the defendant marked goods of his own make in the same manner, in obedience to an order from English merchants.

An interim injunction having been granted, motion by the plaintiffs for decree for a perpetual injunction, refused, the defendant alleging a trade custom for makers' marks to be placed by their orders upon goods made for them, and that the plaintiffs had themselves ordered this to be done in other cases, which was not contradicted by the plaintiffs. But injunction continued for a year, the plaintiffs being required to bring an action at law within that time.

"The plaintiffs, if they have an exclusive right to the use of the trade marks in question, are entitled to the protection of this Court in the enjoyment of such use. Though they are aliens, they are entitled to sue in this Court against any fraudulent invasion of their right, and that notwithstanding that the tools stamped with the marks, the fraudulent use of which is complained of, are not usually sold by them in this country."

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165. **MACDONALD** *v.* **RICHARDSON.**

July 26th, 1858.

[*Stuart, V.C.*——1 *Giff.* 81; 5 *Jur., N. S.* 9; 32 *L. T.* 237.]

Partnership suit.

The plaintiffs, being the residuary legatees of one of two partners in the business of a commission agent, sought to make the surviving partner, who was also an executor of the deceased partner, account for the estate of the latter.

Held (among other things), that the value of the testator's share of the goodwill of the partnership business at his death should be ascertained, and that the executor should make good to the testator's estate what should be found to be due to it for such share of goodwill and interest.

[166.] **FENN** *v.* **BOLLES.**

Sept., 1858.

[*N. Y. Super. Ct.*—*Hoffman, J.*——7 *Abb. Pr.* 202.]

The defendant, being the surviving partner in the firm of "Hobart Fenn & Co.," continued after the death of his partner to trade in the old name.

On motion by the administratrix of the estate of the deceased partner, injunction granted to restrain the defendant from using the name "Hobart Fenn," or "Hobart

Fenn & Co.," on the ground that either the partnership name died with the partnership, or, if it survived, was the common property of the surviving partner and the estate of the deceased one.

MYERS *v.* **BAKER.** 167.

Nov. 22*nd*, 1858.

[*Exchequer*——3 *H. & N.* 802; 28 *L. J., Ex.* 90; 32 *L. T.* 133; 7 *W. R.* 66.]

Action brought under 5 & 6 Will. IV. c. 83, s. 7, to recover a penalty for marking patent penholders with the mark "K. & G., Patent Elastic," without the licence of the patentee.

Held, that it was no defence to say that the invention was not new, and the patent therefore bad; but that a fraudulent intention on the part of the defendants must be proved.

Cockburn, C.J., told the jury at the trial that "the intention of the defendants was of the essence of the offence; that the plaintiffs were bound to show that the defendants had put the marks upon the articles in question with the intention of imitating the marks used by the plaintiffs on their patented articles, that unless they thought that the marks on the pens and penholders manufactured by the defendants were substantially the same as, and intended to counterfeit, the plaintiffs' marks, they should find for the defendants."

COOPER *v.* **HOOD.** 168.

Dec. 3*rd*, 1858.

[*Romilly, M.R.*——26 *Beav.* 293; 28 *L. J., Ch.* 212; 4 *Jur., N. S.* 1266; 32 *L. T.* 171; 7 *W. R.* 83.]

Suit for the specific performance of a contract for the purchase of a share in a business.

Held, that specific performance would not be refused on account of one of the items to be purchased being described in the contract only as "goodwill, &c.," those words having a sufficiently definite meaning; but specific performance refused on other grounds.

"The words are, 'goodwill, &c.' Now these words are connected together, and unite such other things as are necessarily connected with and belong to the goodwill, many of which are easily pointed out; for instance, the use of trade marks, and a covenant by the vendor not to carry on a similar business in Great Britain, for a reasonable time, to be limited in the conveyance, having regard to the nature of such undertakings. All these would be included in the words *et cætera*, and would be included in the conveyance."

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169. **BURGESS** *v.* **HATELY.**

Dec. 14*th*, 1858.

[*Romilly, M.R.*——26 *Beav.* 249.]

The plaintiffs being manufacturers of "Essence of Anchovies," the defendant sold another sauce in bottles labelled in imitation of the plaintiffs'.

Suit for an injunction.

On motion by the plaintiffs for decree, the defendant stating that no application had been previously made to him, and that he had acted in ignorance of the plaintiffs' rights, and would have submitted if previous application had been made to him, but he having made no offer to pay the costs,

Held, that an injunction must be granted, and that the defendant must pay the whole costs, since he was the aggressor, by invading the plaintiffs' rights.

BURGESS *v.* HILLS. 170.

Dec. 7th, 1858.

[*Romilly, M.R.*——26 *Beav.* 244; 28 *L. J., Ch.* 356; 5 *Jur., N. S.* 233; 32 *L. T.* 328; 7 *W. R.* 158.]

The defendant sold a sauce similar to the plaintiffs' "Essence of Anchovies" under the name of "John Burgiss & Sons' Original and Superior Essence of Anchovies."

Suit for an injunction and account.

On motion for decree, the defendant having offered to submit to an injunction, but declined to pay costs,

Held, that the defendant must pay the whole costs of the suit, though he had acted in ignorance of the plaintiffs' rights.

"If the defendant had offered the plaintiffs all they were entitled to, and after that the plaintiffs had proceeded in the suit, I most certainly should not have given the plaintiffs a penny of the costs incurred after that period, indeed, I should have endeavoured to make them pay them."

THE COLLINS COMPANY *v.* WALKER. 171.

Jan. 26th, 1859.

[*Kindersley, V.C.*——7 *W. R.* 222.]

The plaintiffs being American manufacturers of edge tools, which they stamped with the words "Collins & Co., Hartford Cast Steel, Warranted," the defendant, in accordance with a customer's orders, made knives and stamped them with the plaintiffs' mark.

Suit for an injunction.

The defendant stating that he had acted in ignorance of the plaintiffs' existence, and offering to give up the stamp, but refusing to pay the costs,

Held, that he must submit to a perpetual injunction, and pay the costs.

172. **CHURTON** *v.* **DOUGLAS.**

March 17*th*, 1859.

[*Wood, V.C.*——*Johns.* 174; 28 *L. J., Ch.* 841; 5 *Jur., N. S.* 887; 33 *L. T.* 57; 7 *W. R.* 365.]

The defendant, John Douglas, a partner in the firm of "John Douglas & Co.," having sold his share in the business and goodwill to his partners, the plaintiffs, who continued the business as "Churton, Bankart & Hirst, late John Douglas & Co.," afterwards set up another business in the same neighbourhood as "John Douglas & Co.," and otherwise represented himself to be carrying on business in continuation of the old concern.

On motion by the plaintiffs, injunction granted to restrain the defendant from so doing.

P. 187. "The sale of the goodwill of a business, without more, does not imply a contract on the part of the vendor not to set up again a *similar* business himself."

P. 188. "'Goodwill,' I apprehend, must mean every advantage, every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."

P. 189. "The name of a firm is a very important part of the goodwill of the business carried on by the firm. . . . The question of trade mark is, in fact, the same question. The firm stamps its name on the articles. It stamps the name of the firm which is carrying on the business on each article, as a proof that they emanate from that firm; and it becomes the known firm to which applications are made, just as when a man enters a shop in a particular locality. And when you are parting with the goodwill of a business, you mean to part with all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it."

BRADBURY *v.* **DICKENS.** 173.

March 26th, 1859.

[*Romilly, M.R.*——27 *Beav.* 53 ; 28 *L. J., Ch.* 667 ; 33 *L. T.* 54.]

The parties being the proprietors of a weekly journal called "Household Words," on the dissolution of partnership between them, the defendant, who had also acted as editor, put out advertisements in which he announced his intention of publishing a new periodical, and the discontinuance of the old one.

On motion by the plaintiffs for an injunction to restrain him from so doing,

Held, that the defendant was at liberty to advertise the discontinuance of his connexion with the periodical, but that he must not advertise simply that the publication would be discontinued, for the goodwill of the publication, if of any value, was the property of the partnership.

"The property in a literary periodical like this is confined purely to the mere title, and the title of this work is "Household Words," and that forms part of the partnership assets, and must be sold for the benefit of the partners, if it be of any value."

CLEMENT *v.* **MADDICK.** 174.

April 27th, 1859.

[*Stuart, V.C.*——1 *Giff.* 98 ; 5 *Jur. N. S.* 592 ; 33 *L. T.* 117.]

The plaintiffs being the proprietors of a newspaper called "Bell's Life in London," the defendants began to publish another newspaper under the name of "The Penny Bell's Life and Sporting News."

On motion by the plaintiffs, injunction granted to restrain the defendants from publishing any newspaper under that name, or any other name in which the words "Bell's Life" should occur.

"This is an application in support of the right to property. . . . The absence of a fraudulent intention is no defence against an application to the Court for an injunction by the person whose property has been injured."

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175. **INGRAM** *v.* **STIFF.**

June 3*rd*, 1859.

[*Knight Bruce & Turner, L.JJ.*——5 *Jur., N. S.* 947; 33 *L. T.* 105.]

The plaintiff being the proprietor and publisher of a periodical called "The London Journal," the defendant, the former proprietor and publisher of that journal, advertised a new periodical to be published by him under the name of "The London Daily Journal."

On motion by the plaintiff, injunction granted by V. C. Wood to restrain the defendant from so doing, and continued on appeal.

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176. **SMITH** *v.* **EVERETT.**

June 30*th*, 1859.

[*Romilly, M.R.*——27 *Beav.* 446; 29 *L. J., Ch.* 236; 5 *Jur., N. S.* 1332; 34 *L. T.* 58; 7 *W. R.* 605.]

The defendant, being the survivor of two partners in a banking business, sold the goodwill of the business for a considerable sum.

Suit by the widow and executrix of the deceased partner for the purpose of obtaining half the proceeds of the goodwill for her testator's estate.

Held, that the estate of a deceased partner was entitled to a share in the value of the goodwill of the business, but that, in ascertaining the share, regard must be had to the rights of the surviving partner; and that, in the case in question, the share of the estate of the deceased partner in

the proceeds of the goodwill must be ascertained, regard being had to the facts that (1) the premises on which the business was carried on belonged to the survivor; (2) the survivor was entitled to carry on a banking business at the same place after the sale of the goodwill; (3) the sole right of issuing bank-notes survived to the survivor.

MELLERSH *v.* **KEEN.** **177.**

July 12*th*, 1859; *July* 6*th*, 1860.

[*Romilly, M.R.*——27 *Beav.* 236; 28 *Beav.* 453.]

Partnership suit.

Held, (1) that partners in a banking business, who had obtained the whole benefit of the goodwill and firm name, must account to the retiring partner for his share of the value of the goodwill, &c., as at the date of the dissolution; (2) that, in estimating such value, regard must be had to the fact that the continuing partners were at liberty to carry on the business and issue notes, without that being treated as part of the goodwill; (3) that the value had been correctly estimated by the Chief Clerk at one year's net annual profits, calculated on an average of the three years preceding the dissolution.

28 Beav. 456. "The difficulty of ascertaining the value of the goodwill of a business is very great. . . . But the Court is bound to look at it in this point of view:—What would it have produced, if it had been sold in the most advantageous manner, and under such circumstances that it would have produced the largest sum for all the parties interested?"

[178.] **DAYTON *v.* WILKES.**

Sept., 1859.

[*N. Y. Super. Ct.*—*Hoffman, J.*] ——17 *How. Pr.* 510; *R. Cox* 224.

Partnership suit.

Held, that on the dissolution of partnership between the proprietors of a newspaper called "Porter's Spirit of the Times," the goodwill, title, &c., of the paper were partnership assets, and must be protected and disposed of for the benefit of the creditors of the firm, or of the partners jointly.

[179.] **WOLFE *v.* GOULARD.**

Oct. 1859.

[*N. Y. Sup. Ct.*—*Ingraham, J.*] ——18 *How. Pr.* 64; *R. Cox* 226.]

The plaintiff being the manufacturer of "Wolfe's Schiedam Schnapps," the defendant began to sell another spirit as "Voldner's Schiedam Schnapps."

On motion by the defendant, injunction which had been granted to restrain the defendant from so doing, dissolved, on the ground that there was nothing distinctive in the words "Schiedam Schnapps," which alone had been imitated.

"No person can acquire a right to the exclusive use of words, applied as the name of an article sold by him, if in their ordinary acceptation they designate the same or a similar article."

[180.] **COMSTOCK *v.* WHITE.**

Feb. 1860.

[*N. Y. Sup. Ct.*—*Sutherland, J.*] ——18 *How. Pr.* 421; *R. Cox* 232.]

The plaintiffs and defendants having carried on business as pill manufacturers in partnership, under the name of

"A. J. White & Co.," the defendants left the plaintiffs and carried on the same business on their own account, under the old name.

On motion by the defendants, injunction which had been granted, continued, so far as it restrained the defendants from applying to their pills the term "Dr. Morse's Indian Root Pills," in imitation of the plaintiffs', but dissolved, so far as it restrained the use by the defendants, in connexion with the manufacture of pills, of the name of their firm, "A. J. White & Co.," the name of one of the defendants being "A. J. White," and

Held, that exaggerated commendations of their medicines did not disentitle the plaintiffs as against defendants who had been engaged with them in the same business.

CROOKES *v.* **PETTER.** **181.**

Feb. 16*th*, 1860.

[*Romilly, M.R.*——6 *Jur. N. S.* 1131 ; 3 *L. T., N. S.* 225.]

The plaintiff being the editor of a journal called *The Photographic News*, under an agreement with the defendants, the proprietors of the journal, by which it was provided that the title should not be altered without mutual consent, the defendants terminated the agreement with the plaintiff, and omitted his name from the title-page.

Motion by the plaintiff for an injunction to restrain the defendants from so doing, refused, on the ground that the name of the editor, appearing on the title-page, formed no part of the title.

182. **R. *v.* JONES.**

March, 1860.

[*Middlesex Sessions*——*Lloyd on Trade Marks, p.* 11 : *Poland on the Merchandise Marks Act*, 1862, *p.* 33.]

On an indictment for obtaining money by false pretences, the prisoner having used spurious wrappers similar to those in which Borwick's Baking Powder was enclosed,

Prisoner convicted—3 years penal servitude.

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183. **R. *v.* GRAY & GOSLING.**

[*Lloyd on Trade Marks, p.* 11.]

On an indictment for obtaining money by false pretences, the prisoners having fraudulently used labels imitated from those placed on Allsopp's ales,

Prisoners convicted—12 months' hard labour.

[184.] **BARROWS *v.* KNIGHT.**

March 1860.

[*Rhode I. Sup. Ct.*——6 *R. I.* 434 ; *R. Cox* 238.]

The plaintiff being a manufacturer of cotton cloth, which he stamped with the words "Roger Williams' Long Cloth," the defendants marked other cotton cloth with the name "Roger Williams."

Action on the case.

Demurrer overruled, and

Held, (1) that the name was a good trade mark, being the name of a dead celebrity; (2) that exact imitation was not requisite to entitle the plaintiff to his remedy.

HOWE *v.* SEARING. [185.]

March, 1860.

[*N. Y. Super. Ct.*——6 *Bos.* 354; 10 *Abb. Pr.* 284; 19 *How. Pr.* 14; *R. Cox* 244.]

The plaintiff sold the goodwill of his baking business at New York, known as "Howe's Bakery," to B., covenanting not to resume the same business in the same city without B.'s consent. He afterwards purchased from B. the right to resume business at New York, covenanting not to interfere with the latter's business. The defendant bought the bakery from B., and continued to trade in the old name of "Howe's Bakery."

Action for an injunction.

Held, that the plaintiff was entitled to an injunction to restrain the defendant from using the old name of "Howe's Bakery," and otherwise using the plaintiff's name in the business, on the ground that the sale of a goodwill did not of itself give a right to the use of the trade name.

Per Hoffman, J.—"It is, I apprehend, a well settled rule that the goodwill of a partnership business does not survive to a continuing partner. It belongs to the firm as much as the ordinary stock-in-trade, and must be disposed of in some manner for the benefit of the firm."

COLLADAY *v.* BAIRD. [186.]

1860.

[*Phila. C. P.*—*Ludlow, J.*——4 *Phila.* 139; *R. Cox* 257.]

The plaintiff being a manufacturer of cotton goods, known as "Aramingo Check," which he sold ticketed with a label on which the words "Aramingo Mills" were prominent, the defendant began to sell other goods also bearing a label on which the name "Aramingo Mills" appeared.

Injunction to restrain the defendant from the use of the words "Aramingo Mills," refused, on the ground that the manner in which the defendant used the words was so different from that in which the plaintiff used them that deception was not to be anticipated.

[187.] **CORWIN** *v.* **DALY.**

June, 1860.

[*N. Y. Super. Ct.*——*7 Bos.* 222; *R. Cox* 265.]

The plaintiffs selling gin in bottles labelled "Club-House Gin," the defendants sold other gin in bottles labelled "London Club-House Gin."

Injunction to restrain the defendants from using the term "Club-House" gin, refused, on the ground that the term was generally understood to be indicative of a certain superior quality, and not of the plaintiffs' manufacture.

[188.] **BYASS** *v.* **SULLIVAN.**

July, 1860.

[*N. Y. Sup. Ct.*—*Bonney, J.*}——21 *How. Pr.* 50; *R. Cox* 278.]

The defendants sold bottled porter labelled in imitation of the plaintiff's labels with the words "Best Stout Porter from R. B. Byass, London," and a fac-simile of his signature.

On a reference to ascertain the damages sustained by the plaintiffs by reason of the defendants' wrongful conduct,

Held, that the defendant was privileged from answering certain questions, and producing books or papers, which might tend to convict him of a criminal offence, but that in other respects he must make full discovery.

ROBERTSON *v.* QUIDDINGTON. 189.

July 17th, 1860.

Romilly, M.R.——28 *Beav.* 529.

The owner of a two-thirds share in a partnership business having bequeathed two-thirds of his share in the goodwill alone to his son-in-law, and his share in the partnership property, apart from the goodwill, having been assigned by his executors to the surviving partner,

Held that, notwithstanding that the executors had assented to the bequest of the share of the goodwill, it was not competent for the son-in-law and legatee to file a bill against the legatee of the remaining one-third part of the testator's share of the goodwill, and the surviving partner, who was entitled to all the rest of the goodwill, to have the bequest specifically made good, and also, on the authority of *Lewis* v. *Langdon*, that the firm name survived to the surviving partner.

"The goodwill is a valuable and tangible thing in many cases, but it is never a tangible thing unless it is connected with the business itself, from which it cannot be separated, and I never knew a case in which it has been so treated."

BROOK *v.* EVANS. 190.

July 26th ; Aug. 2nd, 1860.

[*Stuart, V.C.*——29 *L. J., Ch.* 616 ; 6 *Jur., N. S.* 1025 ; 2 *L. T., N. S.* 740.]

[*Knight Bruce & Turner, L.JJ.*——29 *L. J., Ch.* 617 ; 3 *L. T., N. S.* 571.]

The plaintiffs having instituted a suit for an injunction to restrain the defendants from selling thread under the name of "Glacé," in infringement of their rights, the motion for injunction was, on the ground of the plaintiffs' delay, ordered to stand over, liberty being given to bring

an action. The plaintiffs in the suit printed and distributed a report of the proceedings, containing, among other things, a statement that they had established their claim to be the first who had used the word in question, the fact being that no evidence had been gone into.

Motion by the defendants for an injunction to restrain the publication of this report, refused, on the ground that it was not calculated to obstruct the course of justice.

[191.] **HOBBS** *v.* **FRANÇAIS.**

Sept. 1860.

[*N. Y. Super. Ct.*— *Bosworth, C.J.* } ——19 *How. Pr.* 567; *R. Cox* 287.]

The plaintiff being the manufacturer of a skin-powder which he called "Meen Fun," and sold in boxes bearing a particular label, the defendant sold another powder in boxes bearing a substantially identical label.

Motion by the plaintiff for an injunction to restrain the defendant from infringing his rights, refused, on the ground that the plaintiff's own labels falsely represented his American compound to be made in England and patronized by the Queen, and also, that it was not established that the term "Meen Fun" was indicative of the plaintiff's manufacture.

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192. **WADE** *v.* **JENKINS.**

Nov. 20*th*, 1860.

[*Stuart, V.C.*——2 *Giff.* 509; 30 *L. J., Ch.* 633; 7 *Jur., N. S.* 39; 3 *L. T., N. S.* 464.]

Partnership suit.

On the determination of a partnership carried on under articles which provided that "the goodwill should belong to the partners in the proportion of their shares in the

business, but should not be taken into account in the accounts of the partnership;" and also that "on the determination of the partnership, a general account and valuation of the property and effects of the partnership should be taken,"

Held, that in the valuation of the partnership property the goodwill must be included.

HARPER *v.* **PEARSON.** **193.**

Dec. 20th, 1860.

[*Wood, V.C.*——*3 L. T., N. S.* 547.]

On the expiration of a lease to the plaintiffs, Messrs. Harpers & Moore, of certain fire-brick works, those works, but not the mines from which the clay there worked was obtained, were leased by the defendants, who then issued cards and circulars in which they styled themselves "E. & J. Pearson (late Harpers & Moore)," and which were calculated to lead the public to the belief that the former lessees had retired from business, though they were, in fact, continuing to carry on business elsewhere.

On motion by the plaintiffs, injunction granted to restrain the issue of the cards and circulars, and the misrepresentations; and

Held, that an injunction would, if asked for by him, have been granted, almost as a matter of course, to the owner of the mines of fire-clay leased by the plaintiffs, but not by the defendants.

DIXON *v.* **FAWCUS.** **194.**

Jan. 22nd, 1861.

[*Queen's Bench.*——*3 Ell. & Ell.* 537; 30 *L. J., Q. B.* 137; 7 *Jur., N. S.* 895; 3 *L. T., N. S.* 693; 9 *W. R.* 414.]

The plaintiff having, in accordance with the defendant's

order, manufactured fire-bricks marked with the name "Ramsay," that name being the trade mark of one G. H. Ramsay, the latter filed a bill in Chancery against the plaintiff for an injunction and an account, which resulted in the plaintiff compromising the matter at a considerable expense.

Action by the plaintiff for the recovery from the defendant of the loss which his order had occasioned to the plaintiff.

Demurrer, on the ground that the defendant had no right to compromise the suit, since the absence of fraudulent intention on his part prevented him from being liable in equity—overruled, and

Held, that the plaintiff was justified in compromising the suit, though innocent of intentional fraud, since that would have been no defence in equity, and that he was entitled to recover from the defendant.

[195.] **DALE** *v.* **SMITHSON.**

Feb., 1861.

[*N. Y. C. P.*——12 *Abb. Pr.* 237; *R. Cox* 282.]

The plaintiffs being manufacturers of thread, which they sold in packets labelled with the words, "Courtria Flax. Thomas Nelson & Co. Warranted fast colours, & 16 oz.," the defendants sold other thread in packages similarly labelled.

Action at law.

Judgment having been rendered for the plaintiffs,

Held, on appeal, that the plaintiffs were entitled to succeed, notwithstanding that the name placed by them on their label was fictitious, since the manner in which it was there stated was adopted without any fraudulent intention or actual deception of the public.

DENT *v.* **TURPIN.** **196.**

TUCKER *v.* **TURPIN.**

April 22nd, 1861.

[*Wood, V.C.*——2 *J. & H.* 139 ; 30 *L. J., Ch.*, 495 ; 7 *Jur., N. S.* 673; 4 *L. T., N. S.* 637 ; 9 *W. R.* 548.]

E. J. Dent, who carried on at three several shops the business of a watchmaker, and marked his goods with the trade mark, "Dent, London," bequeathed the business carried on at two of these shops to F. Dent, and that carried on at the third shop to R. Dent, which persons thenceforward carried on distinct businesses at these shops, and each continued to use the trade mark. After the deaths of both these persons the defendants began to deal in watches marked with their trade mark.

Suits for injunction and account by the representatives of both firms.

On demurrer in the first suit,

Held, that each plaintiff might, without averring special damage, sue alone for an injunction, and for the delivery up of the marked articles for erasure, and also for an account of profits and for payment to the respective plaintiff of the part of such profits to which she was entitled, and that the demurrer must be overruled.

THE EMPEROR OF AUSTRIA *v.* **DAY AND KOSSUTH.** **197.**

May 4th ; June 12th, 1861.

[*Stuart, V.C.*——2 *Giff.* 628 ; 30 *L. J., Ch.* 690 ; 7 *Jur., N. S.* 483 ; 4 *L. T., N. S.* 274 ; 9 *W. R.* 568.]

[*Lord Campbell, C.*
Knight Bruce & Turner, L.JJ. ——3 *De G. F. & J.* 217 ; 30 *L. J., Ch.* 690 ; 7 *Jur., N. S.* 639 ; 4 *L. T., N. S.* 494 ; 9 *W. R.* 712.]

The plaintiff being the Emperor of Austria and King of Hungary, the defendants, without his authority, issued notes purporting to be Hungarian notes.

Injunction granted to restrain the defendants from issuing such notes, on the ground of property in the Emperor.

Per Lord Campbell, C., 3 De G. F. & J. 240.—"I consider that this Court has jurisdiction by injunction to protect property from an act threatened, which, if completed, would give a right of action. I by no means say that in every such case an injunction may be demanded as of right, but if the party applying is free from blame, and promptly applies for relief, and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, the injunction will be granted."

Per Turner, L.J., *ib.* 253.—"I agree that the jurisdiction of this Court in a case of this nature rests upon injury to property, actual or prospective, and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal, or merely illegal, and do not affect any rights of property, but I think there are here rights of property quite sufficient to found jurisdiction in this Court."

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198. **HENDERSON** *v.* **JORSS.**

June 21*st*, 1861.

[*Wood, V.C.——Seton, 4th ed.* 236 ; *Cited in Lloyd on Trade Marks, p.* 54.]

The plaintiff's cloths being exported to the Chinese market, and stamped with the figure of a lion or elephant, from which the cloths had come to be known as the "lion chop," or "elephant chop," the defendants exported other cloths also stamped with a lion or elephant, so as to produce deception.

Injunction granted to restrain the defendants from so doing, and

Held, that the fact that round the figures the respective names of the parties appeared was not sufficient to prevent deception in China, or to operate as a defence.

CARTIER *v.* **WESTHEAD.** 199.

July 11*th*, 1861.
[*Wood, V.C.*]

The plaintiff being a French cotton manufacturer, who sold his cotton in parcels labelled with a cross and the letters "C. B." (from which the cotton had come to be known as "cross cotton"), the defendants began to deal in cotton of another make, labelled with an anchor (the flukes of which were concealed by the wrapping thread) and the letters "W. T.," and supplied such cotton, so marked, in answer to an inquiry for "cross embroidery cotton."

On motion by the plaintiff, injunction granted to restrain the defendants from selling cotton, not the plaintiff's, under the name of "French cross embroidery cotton," or "cross embroidery cotton," or "cross cotton," and from using deceptive labels.

CARTIER *v.* **MAY.** 200.

July 12*th*, 1861.
[*Wood, V.C.*——*Cited in Lloyd on Trade Marks, pp.* 55—77.]

An injunction having been granted in April, 1859, to restrain the defendant from selling cotton in parcels labelled in imitation of the plaintiff's, which bore a cross and the initials "C. B.," from which it had acquired the name of "cross cotton," the defendant adopted an altered label, containing the words "cross cotton," and calculated in other respects to deceive.

Motion to commit refused, the defendant having avoided a breach of the injunction, and the plaintiff having delayed to enforce his rights for fifteen months; but the injunction enlarged to cover the new fraud, and the defendant to pay all costs of the application.

[201.] **BOWMAN *v.* FLOYD.**

Nov., 1861.

[*Mass. Sup. Ct.*—*Merrick, J.*}——85 *Mass.* (3 *Allen*) 76.]

Two of the defendants having been in business with J. G. Loring, under the style of "John G. Loring & Co.," after his death they took the two remaining defendants into partnership, and continued to use the old name as before, both as their trade name and as a trade mark on their goods.

Suit by the executors of J. G. Loring, for an injunction to restrain the defendants from so doing.

Held that, so far as the name was used as a trade mark on goods, the defendants had acquired by user a right to continue so to use it, but that, so far as it was used as a trade name, the representatives of J. G. Loring were entitled, under the Massachusetts Statute (Gen. St. c. 56), to restrain them from continuing to use it without their consent.

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202. **TURNER *v.* MAJOR.**

Jan. 15*th*, 1862.

[*Stuart, V.C.*——3 *Giff.* 442; 8 *Jur., N. S.* 909; 5 *L. T., N. S.* 600; 10 *W. R.* 243.]

Partnership suit.

On a dissolution of partnership between two partners, whose business had been carried on at two distinct establishments in separate localities, superintended by the partners respectively, it was agreed that the partnership premises, stock, goodwill, &c., should be sold for the benefit of the partners, and until sale should vest in receivers.

On motion by the one partner, injunction granted to restrain the other, until the sale, from carrying on the business in one of the localities on his own account.

HOWE *v.* **McKERNAN.** **203.**

Feb. 10*th*, 1862.
[*Romilly, M. R.*——30 *Beav.* 547.]

The defendant, who had been the London agent of the plaintiff, an American maker of sewing machines, called "The Howe Sewing Machines," continued, after dismissal, to advertise himself as the plaintiff's agent, and to sell as the "Howe" sewing machines, machines not manufactured by the plaintiff.

Suit for an injunction and damages or an account.

On exceptions to interrogatories, the defendant having refused discovery of all the machines sold by him, the price, profit, names of the purchasers, and other particulars, on the ground that he would thereby disclose the names of his customers and secrets of his business,

Held, that full discovery must be made.

CARTIER *v.* **CARLILE.** **204.**

March 7th, 1862.
[*Romilly, M. R.*——31 *Beav.* 292; 8 *Jur., N. S.* 183.]

The plaintiff made and sold cotton for embroidery, which became known as "Cross Cotton," from its being labelled with the trade mark of a cross, together with the letters "C. B." The defendants manufactured and sold cotton similarly marked, except that for "C. B." was substituted "C. S."

Suit for an injunction to restrain the defendants from infringing the plaintiff's rights.

Held, that an injunction must be granted, and also an account, notwithstanding that the defendants stated themselves to have been ignorant of the rights, and even of the existence of the plaintiff.

"I am of opinion that the liability to account for the profits is incident to the injunction, and that the fact of the defendant not knowing to whom the trade mark he copies belongs, does not in the slightest degree affect the right of the owner to an injunction and to an account of the profits, as soon as he ascertains that it is imitated and used."

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205. **YOUNG *v.* MACRAE.**

March 21*st*, 1862.

[*Wood, V. C.*——9 *Jur., N. S.* 322.]

The plaintiffs being the owners of a patent for the distillation of "Paraffin" and "Paraffin Oil," the defendant began to deal in another oil, under the name of "Paraffin Oil," or "American Paraffin Oil."

Motion by the plaintiffs for an injunction to restrain the defendant from using those names, refused, on the ground that, although (1) a fancy name, "and the more ridiculous it is, the better it is," which is recognised as indicating the goods of a particular manufacturer, will be protected; (2) where a person "has found out an article which is a natural product, and has given that natural product a name," that name becomes designatory of the natural product and may be generally used, and (3) if the name has been usually applied to goods manufactured by a particular person, not because they are of his make, but because he, as having taken out a patent, could alone make them, then, after the expiration of the patent, the name may be generally used; or even during the continuance of the patent, if a new means of getting at the natural product is discovered, which does not infringe the patent.

PARSONS *v.* HAYWARD. 206.

April 28th ; June 11th, 1862.

[*Romilly, M. R.*——31 *Beav.* 199; 31 *L. J. Ch.* 666; 8 *Jur., N. S.* 474; 6 *L. T., N. S.* 523; 10 *W. R.* 531.]

[*Lord Westbury, C.*——31 *L. J. Ch.* 666; 8 *Jur., N. S.* 924; 6 *L. T. N. S.* 628; 10 *W. R.* 651.]

Partnership suit.

The plaintiff and defendant entered into partnership as tailors for seven years, the plaintiff being a mere sleeping partner, and the business being managed by the defendant alone, and in his name. No notice of dissolution having been given, the defendant continued, after the expiration of the seven years, to carry on the business upon the same premises and in his own name.

Held, that the defendant must account to the plaintiff for his share of the profits since the expiration of the seven years.

Per M. R.—"It is quite clear that" at the end of the seven years "the place of business should have been sold; for although it is true that a house may be of little value in itself, if held at rack rent, still it may be of great value as a place for carrying on the business, and there may be a peculiar species of value attached to a particular spot where a business has for a long time been carried on, and which may be an asset of the partnership of very high value."

BURROWS *v.* FOSTER. 207.

May 8th, 1862.

[*Knight Bruce and Turner, L. JJ.*——1 *N. R.* 156; 32 *Beav.* 18; *Seton, 4th ed.* 257.]

It having been agreed by deed that the two partnership firms of Foster, Lacy & Co., and Bashall, Lacy & Co., insurance brokers, should be dissolved, and their estates

liquidated by the plaintiff and another, the plaintiff to "have the benefit and advantages of the businesses and connexions" of the former two partnership firms, and to be at liberty to carry on the businesses in a new partnership with Lacy, who had been a partner in both firms, the defendant, who had been a partner in Foster, Lacy & Co, issued circulars to the connexions of his old firm, stating the dissolution, and his intention to continue to carry on business, and asking for orders.

Injunction granted to restrain the defendant from representing by circular or letter that his new business was a continuation of the business of either of the former firms, and from soliciting the customers of the former firms.

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208. **BURFIELD** *v.* **ROUCH.**

June 13*th*, 1862.

[*Romilly, M. R.*——31 *Beav.* 241.]

Partnership suit.

The parties having carried on business in partnership under articles which provided that, on the dissolution of partnership, the defendant should have the option of taking over the lease of the partnership premises, stock in trade, &c., at a valuation (the lease of the premises being the private property of the plaintiff), but made no mention of the goodwill,

Held that, in the valuation of the lease, the plaintiff was precluded by the articles from having any consideration paid to the fact that a business had long been carried on upon the premises, since that would be to add the value of the goodwill to the value of the lease.

OLDHAM *v.* JAMES. 209.

Nov. 5*th*, 1862; *Jan.* 27*th*, 1863.

[*Smith, M. R. of I.*——13 *Ir. Ch.* 393.]

[*Brady, C. of I. and Blackburne, L. J.*——14 *Ir. Ch.* 81.]

The respondents being the proprietors of a compound which they called "Lieutenant James' Blistering Compound," and sold under a particular trade mark, and the petitioner having sold another compound under a similar trade mark, an agreement was entered into between the parties, by which all claims of the respondents in respect of the infringement were compromised, both with regard to the infringer himself, and to persons who had purchased from him. The respondents subsequently took proceedings against persons who had purchased the spurious goods from the petitioner before the compromise, and were still selling them.

Petition for specific performance of the agreement.

Held, (1) that the agreement only compromised sales made before its date, and did not authorise future sales, even of goods bought before such date; (2) and further that, even if it did profess to authorise them, it would involve a fraud on the public, and could not be specifically enforced, so as to prevent the owner of the trade mark from suing the persons selling the spurious goods.

CLARK *v.* LEACH. 210.

Dec. 4*th*, 1862; *Jan.* 30*th*, 1863.

[*Romilly, M. R.*——32 *Beav.* 14; 32 *L. J., Ch.* 290; 9 *Jur., N. S.* 165; 8 *L. T., N. S.* 40; 11 *W. R.* 227; 1 *N. R.* 155.]

[*Lord Westbury, C.*——1 *De G. J. and S.* 409; 32 *L. J., Ch.* 290; 9 *Jur., N. S.* 610; 8 *L. T., N. S.* 40; 11 *W. R.* 351.]

Partnership suit.

The parties carried on business in partnership under

articles, by which it was provided that they should be partners for seven years, and that, in certain events, the one should have a right to give notice to the other of the termination of the partnership, in which case the partner receiving the notice should "be considered as quitting the business for the benefit of the partner giving the notice." After the expiration of the seven years such notice was given by the plaintiff to the defendant, who then set up business in the neighbourhood as "R. Leach & Co., late Leach & Clark," the plaintiff continuing to use the old name of "Leach & Clark."

Held that, the seven years having expired, the partnership had become a partnership at will, and the clause did not apply to the altered circumstances.

Per M.R., 32 Beav. 18.—"Has not the defendant a right to say that he lately belonged to a certain firm, and cannot he advertise that fact? The difficulty is, if he cannot be prevented from carrying on the same business, is he not at liberty to solicit the public at large, and to do so by telling, as is the truth, that he belonged to a late firm?"

[211.] **JURGENSEN** *v.* **ALEXANDER.**

Dec., 1862.

[*M. R. C. P.*— } ——24 *How. Pr.* 269; *R. Cox* 298.]
[*Brady, J.* }

The plaintiff being a maker of watches, which he stamped with the name "Jules Jurgensen, Copenhagen," the defendant exposed other watches for sale, bearing a similar stamp.

Action for an injunction to restrain the defendant from so doing.

Held, that the injunction must be granted, and that the marked watches must be produced for the spurious marks to be erased, and that the defendant must pay the costs.

WOODWARD *v.* LAZAR. [212.]

Jan., 1863.

[*Cal. Sup. Ct.*——21 *Cal.* 448; *R. Cox* 300.]

The plaintiff having erected on a plot of land of which he was tenant a hotel which he called "The What Cheer House," and having afterwards built a new "What Cheer House" on an adjoining plot, and surrendered the former plot, the defendants purchased the first plot and house from the owners, after the surrender, and opened a hotel there, under the name of "The Original What Cheer House" ("original" being in small letters on the sign).

Injunction granted to restrain the defendants from using the name "What Cheer House" as the name of any hotel in the same city.

"*Per* Norton, J.—"A person may have a right, interest, or property in a particular name, which he has given to a particular house, and for which house, under the name given to it, a reputation and goodwill may have been acquired; but a tenant, by giving a particular name to a building which he applies to some particular use, as a sign of the business done at that place, does not thereby make the name a fixture to the building, and transfer it irrecoverably to the landlord."

EDELSTEN *v.* EDELSTEN. 213.

Jan. 28*th*, 1863.

[*Lord Westbury, C.*——1 *De G. J. & S.* 185; 9 *Jur., N. S.* 479; 7 *L. T., N. S.* 768; 11 *W. R.* 328; 1 *N. R.* 300.]

The plaintiff being a manufacturer of wire which he sold with metal labels, or tallies, attached to it, bearing his trade mark, an anchor, from which his wire had acquired the name of "Anchor Brand Wire," the defendants made and sold wire with tallies bearing an anchor and small crown, and called the wire "Crown and Anchor Wire."

Suit for an injunction and account.

Held, (1) that the plaintiff was entitled to an injunction to restrain the infringement; (2) that an account would only be given with the injunction in respect of any user by a defendant after he had become aware of the prior ownership; (3) that proof of fraud was of the essence of the action at law, but that the Court of Chancery would "act on the principle of protecting property alone," and that the plaintiff need not prove fraud or inferiority of quality; (4) that if the goods were sold for the purpose of being resold in the market, the plaintiff would have his equitable remedy, though all the immediate purchasers knew that the goods were not the plaintiff's; (5) that proof of actual deception was not necessary in equity, if the Court were satisfied that the resemblance was such as to be likely to cause the one mark to be mistaken for the other; (6) that where the plaintiff was found entitled to the relief he asked, he would be entitled to the costs of the suit in which it was given.

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214. THE LEATHER CLOTH CO. (LIMITED) *v.* HIRSCHFELD (1).

March 11*th*, 1863.

[*Wood, V. C.*—1 *N. R.* 551 (*and see* 1 *H. & M.* 295).]

The plaintiffs being manufacturers of leather cloth, the defendants, trading as "The Anglo-American Leather Cloth Co.," sold a similar article under a trade mark similar to the plaintiffs'.

Suit for an injunction to restrain the defendants from so doing.

Held, that an injunction must be granted, and an inquiry as to damages directed, notwithstanding that the plaintiffs' trade mark contained the words "tanned leather

cloth, patented Jan. 24th, '56," and that the plaintiffs' leather cloth was, in fact, no longer tanned or patented, since the statement was correct when it was first inserted in the trade mark.

HALL *v.* **BARROWS.** **215.**

March 16*th*; *Dec.* 21*st*, 1863.

[*Romilly, M. R.*——32 *L. J., Ch.* 548; 9 *Jur., N. S.* 483; 8 *L. T., N. S.* 227; 11 *W. R.* 525; 1 *N. R.* 543.]

[*Lord Westbury, C.*——4 *De G. J. & S.* 150; 33 *L. J., Ch.* 204; 10 *Jur., N. S.* 55; 9 *L. T., N. S.* 561; 12 *W. R.* 322; 3 *N. R.* 259.]

The plaintiffs were the executors of one of two partners in an ironmaster's business carried on under articles which gave the last surviving partner the option of taking over the "stock belonging to the partnership" at a valuation.

Suit for an account, sale of the business, and goodwill, &c.

Held, by the M. R., (1) That the business and goodwill must be sold as a going concern; (2) that the trade mark "B. B. H." with a crown, used by the firm, (the initials being those of the original partners in the firm), was a personal and not a local mark, and could not be sold with the goodwill, since it would induce a belief that the purchaser was the old firm, and so deceive the public; (3) that the surviving partner could not be prevented from using the mark after the sale of the goodwill of the business, but that he would, on the contrary, retain the exclusive right of using it.

Held, by Lord Westbury, C., (1) that the surviving partner having an option, under the partnership articles, of taking over the business at a valuation, the value must be ascertained in chambers, and not by means of a sale;

(2) that there was no evidence to show that the trade mark was personal—that it, therefore, was a subject of sale, and as such must be taken into account in the valuation to the surviving partner; (3) that the goodwill of the business must be taken into account and valued, as being included in the "stock belonging to the partnership;" (4) that the valuation must be made on the footing of the surviving partner being at liberty to set up and carry on the same business as that of the partnership.

Per M. R.—"The interference of a Court of Equity cannot depend on the length of time the manufacturer has used the trade mark."

Per L. C.—"A name, though originally the name of the first maker, may in time become a mere trade mark or sign of quality, and cease to denote or to be current as indicating that any particular person is the maker. In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the individual who first affixed it. In such cases the name is accepted in the market either as a brand of quality, or it becomes the denomination of the commodity itself, and is no longer a representation that the article is the manufacture of any particular person.

"There can be no right to the exclusive ownership of any symbols or marks universally in the abstract; thus an ironfounder who has a particular mark for his manufactures in iron could not restrain the use of the same mark when impressed on cotton or woollen goods; for a trade mark consists in the exclusive right to the use of some name or symbol as applied to a particular manufacture or vendible commodity, and such exclusive right is property.

"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 if the mark used by the defendant is not such as is mistaken, or is likely to be mistaken, by the public for the mark of the plaintiff; but the true ground of this Court's jurisdiction is property."

HOPKINS *v.* HITCHCOCK. 216.

April 20th, 1863.

[*Common Pleas*——14 *C. B., N. S.* 65; 32 *L. J., C. P.* 154; 9 *Jur., N. S.* 896; 8 *L. T., N. S.* 204; 11 *W. R.* 597; 2 *N. R.* 32.]

The firm of "Snowden & Hopkins" having manufactured bar iron and stamped it with "S. & H." and a crown, when that firm was replaced by the new firm of "Hopkins & Co." the latter stamped the same quality of iron with "H. & Co." and a crown. The defendant bought iron from Hopkins & Co., described in the bought and sold notes as "S. & H. (crown) common bars," but the iron, when tendered, being found to be marked "H. & Co." with a crown, was rejected.

Action for non-acceptance.

The jury having found a verdict for the plaintiffs, on the ground that the mark was not a material part of the bargain, and that the defendant had substantially what he had bargained for;

Held, that the contract was for iron of a particular quality, and not for iron bearing a particular brand, and that the plaintiffs were entitled to recover.

WOOLLAM *v.* RATCLIFF. 217.

May 27th, 1863.

[*Wood, V. C.*——1 *H. & M.* 259.]

The plaintiff being a silk throwster, who was in the habit of making up his silk in a distinctive manner, and affixing to each bundle a label with the mark, "St. A*****" (St. Alban's), the defendant, in obedience to an order, made up silk in the same manner, omitting the trade mark.

Injunction to restrain the defendant from infringing the plaintiff's rights, refused, on the ground that there was no actual deception proved, and that, though there was the express order to imitate the plaintiff's bundle, with the omission of the mark, it was not established that deception was probable.

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218. **BATTY** *v.* **HILL.**

May 28th, 1863.

[*Wood, V. C.*——1 *H. & M.* 264; 8 *L. T., N. S.* 791; 11 *W. R.* 745; 2 *N. R.* 265.]

The plaintiff being a prize medallist at the London International Exhibition, 1862, the defendant, who had not exhibited or obtained any medal there, placed on his goods the words, "Prize Medal, 1862."

Motion by the plaintiff, for an injunction to restrain the defendant from so doing, refused, on the ground that no one could obtain a right of property in the nature of a trade mark in a prize medal, since all medallists could use it, and that even if it were possible to do so, the defendant had used it first.

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219. **SCHIELE** *v.* **BRAKELL.**

May 30th, 1863.

[*Stuart, V. C.*——11 *W. R.* 796; *Seton, 4th ed.*, 253.]

The plaintiffs having carried on business at North Moor, Oldham, as "C. Schiele & Co," or "Christian Schiele & Co.," the defendants bought their manufacturing business, and obtained from them a lease of their business premises and exclusive licences for the use of certain patents owned by them. The defendants caused all letters addressed to "C. Schiele & Co." to be brought to them,

and executed orders intended for the plaintiffs, for the manufacture of articles under other patents than those which the defendants were licensed to use.

Injunction granted to restrain the defendants from opening such letters, executing such orders, &c.

McINTYRE *v.* **BELCHER.** **220.**

June 5th, 1863.

[*Common Pleas*——14 *C. B., N. S.* 654; 32 *L. J., C. P.* 254; 10 *Jur., N. S.* 239; 8 *L. T., N. S.* 461; 11 *W. R.* 889; 2 *N. R.* 324.]

The plaintiffs having entered into an agreement with the defendant for the sale to him of a surgeon's practice and the goodwill of it, and having thereby further contracted not to practise in the neighbourhood for ten years, to introduce the defendant to his patients, &c., the defendant contracting to pay the plaintiffs a certain proportion of the profits at the end of each of the first four years, the defendant incapacitated himself from carrying on the business and from obtaining any receipts from it.

Action on the agreement.

Held that, though there was no special undertaking, there was an implied undertaking to keep up the practice.

THE LONDON ASSURANCE *v.* **THE LONDON AND WESTMINSTER ASSURANCE CORPORATION (LIMITED).** **221.**

June 11th, 1863.

[*Stuart, V. C.*——32 *L. J., Ch.* 664; 9 *Jur., N. S.* 497; 8 *L. T., N. S.* 497.]

Motion by the plaintiffs for an injunction to restrain the defendants from using their name (as above) or any other name resembling that of the plaintiffs, refused.

222. **BURY** *v.* **BEDFORD.**

June 25th, 1863; *May 3rd*, 1864.

[*Romilly, M. R.*——32 *L. J., Ch.* 741; 9 *Jur., N. S.* 956; 8 *L. T., N. S.* 847; 11 *W. R.* 973; 1 *N. R.* 5.]

[*Knight Bruce and Turner, L. JJ.*——4 *De G. J. & S.* 352; 33 *L. J., Ch.* 465; 10 *Jur., N. S.* 503; 10 *L. T., N. S.* 470; 12 *W. R.* 726; 4 *N. R.* 180.]

The defendant, John Bedford, a steel manufacturer at Sheffield, acquired from the Cutlers' Company, though not a member of the company, a mark consisting of the figure of a lion couchant, surmounted by crossed arrows, with the initials "J. O. B. S." (John Bedford, Oughtibridge, Sheffield) written in the spaces formed by the crossings of the arrows. He also purchased the mark "Wm. Ash & Co." On his entering into partnership with certain other persons, the articles of partnership provided that the corporate mark should be used by the partnership, and should be a partnership asset, and that at the expiration of the partnership the several partners should be entitled to use it for the remainder of their lives. The corporate mark was used by the firm on certain classes of goods, "Wm. Ash & Co." on others. The partnership property and the separate estates of the partners having been assigned by a creditors' deed to trustees for the creditors of the firm, the plaintiff bought from the trustees the partnership property and trade marks.

Suit for an injunction to restrain John Bedford from using or granting the right to use the trade marks.

Held, by the M. R., that, as to the corporate mark, the injunction could only be granted to restrain an assignment of the right to use, and not to restrain the use of the mark by the defendant, and that no order as to the mark "Wm. Ash & Co." should be made.

Held, by the L. JJ., (1) that, at all events, where owned by a non-freeman of the Cutlers' Company, a Cutlers' corporate mark was assignable; (2) that the assignability of a mark containing a personal element must depend upon the circumstances of the particular case; (3) that the corporate mark in question was not so personal as to be incapable of assignment; (4) that all the interest of the defendant in the mark passed to the trustees under the creditors' deed; (5) that the purchase by the plaintiff from the trustees was good; (6) that the plaintiff thereby acquired a right to exclude the defendant from the use of the mark; (7) that the mark "Wm. Ash & Co." passed to the partnership on its formation, there being no express provision to the contrary; and that, therefore, the injunction must go to the full extent prayed.

Per Turner, L. J., 4 De G. J. & S. 374.—"The whole trade is carried into the partnership, and the trade mark is but an element of the trade."

THE LEATHER CLOTH CO. (LIMITED) *v.* **THE AMERICAN LEATHER CLOTH CO. (LIMITED).** 223.

July 8th; Dec. 21st, 1863; *May 12th*, 1865.

[*Wood, V. C.*——1 *H. & M.* 271; 32 *L. J., Ch.* 721; 8 *L. T., N. S.* 829; 11 *W. R.* 931; 2 *N. R.* 481.]

[*Lord Westbury, C.*——4 *De G. J. & S.* 137; 33 *L. J., Ch.* 199; 10 *Jur., N. S.* 81; 9 *L. T., N. S.* 558; 12 *W. R.* 289; 3 *N. R.* 264.]

[*House of Lords*——11 *H. L. C.* 523; 35 *L. J., Ch.* 53; 11 *Jur., N. S.* 513; 12 *L. T., N. S.* 742; 13 *W. R.* 873; 6 *N. R.* 209.]

Suit for an injunction to restrain the infringement of a complicated stamp on leather cloth.

Held, by the V. C., (1) that the general similarity of the stamps was such as to render the one likely to be taken for the other; (2) that the plaintiffs were not disentitled

by the fact that their stamp contained the words "tanned patented," although the stamp was usually applied to cloth neither tanned nor patented, since the statement was correct when first made, and no one could be deceived as to the tanning; (3) that the plaintiffs were not disentitled by the fact that their stamp contained the words "J. R. and C. P. Crockett, Manufacturers," the plaintiffs being entitled to use the name of those to whose business they had succeeded; (4) that the plaintiffs were not prevented from suing by the fact that there was another person in existence who might have, but had not, used the name "Crockett"; (5) that persons who had been in Crockett's employ were justified in styling themselves "late with Crockett," in such a manner as not to produce deception (1 H. & M. 279); (6) that an injunction must be granted, with costs, but without any damages or account (see 11 W. R. 933).

Held, by the L. C., that, assuming the stamps to be similar, so that the one would be an infringement of the other, the plaintiffs were disentitled by reason of the misstatements contained in their stamp (4 De G. J. & S. 147), of which the principal were the false statement of "tanned patented" and the use of the words "J. R. & C. P. Crockett, Manufacturers," which was calculated to attribute the manufacture of the cloth to those persons individually, though the plaintiffs might have styled their cloth "Crockett's Leather Cloth." Decision reversed, but without costs, on account of the defendants' disingenuous conduct.

Held, by the House of Lords, (1) that the defendants' stamp was not so similar to the plaiutiffs' as to be an infringement; (2) that, if it had been, the plaintiffs would have been disentitled by their misrepresentations.

Held, further, by the L. C., that the stamps were not trade marks at all, but mere labels.

Per V. C. (1 H. & M. 290).—"Every case must rest on its own

circumstances; but the general principle is that one person shall not be allowed to proclaim his goods as the goods of another, and if it appear that the mark used does not indicate the plaintiff more than a multitude of other persons (as in the case where 'Prize Medal' was the symbol), then a defendant who uses it does not bring himself within the prohibition."

Per L. C. (4 De G. J. & S. 141).—"The mistake of buyers in the market, under which they, in fact, take the defendant's goods as the goods of the plaintiff, that is to say, imposition on the public, becomes the test of the property in the trade mark having been invaded and injured, and not the ground on which the Court rests its jurisdiction."

P. 142.—"It is correct to say that there is no exclusive ownership of the symbols which constitute a trade mark, apart from the use or application of them; but the word "trade mark" is the designation of these marks or symbols as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property. The true principle, therefore, would seem to be that the jurisdiction of the Court in the protection given to trade marks rests upon property, and that the Court interferes by injunction, because that is the only mode by which property of this description can be effectually protected."

P. 144.—"It is true that a name or the style of a firm may by long usage become a mere trade mark, and cease to convey any representation as to the fact of the person who makes, or the place of manufacture; but where any symbol or label claimed as a trade mark is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it, or, in other words, the exclusive use of it cannot be maintained."

P. 148.—"I cannot receive it as a rule, either of morality or equity, that a plaintiff is not answerable for a falsehood, because it may be so gross and palpable as that no one is likely to be deceived by it. If there be a wilful false statement, I will not stop to inquire whether it be too gross to mislead."

Per Lord Cranworth (11 H. L. C. 533).—"The right which a manufacturer has in his trade mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured."

"But I further think that the right to a trade mark may, in general, treating it as property, or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser. Difficulties, however, may arise where the trade mark consists merely of the name of the manufacturer."

P. 535.—"No general rule can be laid down as to what is or is not a mere colourable variation. All that can be done is to ascertain in every case, as it occurs, whether there is such a resemblance as to deceive a purchaser using ordinary caution."

Per Lord Kingsdown (p. 538).—"A man may mark his own manufacture, either by his name, or by using for the purpose any symbol or emblem, however unmeaning in itself, and if such symbol or emblem comes by use to be recognized in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar description."

P. 542.—"If a manufacturing house uses the name of a firm, and stamps the name of its firm upon its goods, though the name of the firm no longer represents the same persons as at first, it is no fraud upon the public."

P. 544.—"If the trade mark represents the article as protected by patent, when in fact it is not so protected, I cannot think that it can make any difference whether the protection never existed or has ceased to exist."

"Though a man may have a property in a trade mark, in the sense of having a right to exclude any other trader from the use of it in selling the same description of goods, it does not follow that he can in all cases give another person a right to use it, or to use his name."

HIRSCHFELD (2).

July 16*th*, 1863.

[*Wood, V.C.*——1 *H. & M.* 295 ; 11 *W. R.* 933.]

The defendant having been directed to account for all goods sold by him impressed with a particular mark,

Held, that he was compellable to disclose the names of all persons to whom he had sold goods so marked, and that if he could not give such information precisely, he might then, and then only, be required to disclose the names of all customers to whom he had sold goods which he would not positively swear to have been unmarked.

WILLIAMS *v.* **SPENCE.** [225.]

July, 1863.

[*N. Y. Super. Ct.*—*Monell, J.*}——25 *How. Pr.* 366; *R. Cox* 305.]

The plaintiff being a manufacturer of soap, which he sold under the name of "Genuine Yankee Soap," the defendant sold other soap under the same name, and in boxes, and with labels, handbills, &c., only colourably differing from the plaintiff's.

On motion by the plaintiff, injunction granted to restrain the defendant from infringing the plaintiff's rights.

BRAHAM *v.* **BUSTARD.** 226.

Aug. 3*rd*, 1863.

Wood, V.C.——1 *H. & M.* 447; 9 *L. T., N. S.* 199; 11 *W. R.* 1061; 2 *N. R.* 572.

The plaintiffs being the manufacturers of a kind of soap which they sold under the name of "Excelsior White Soft Soap," the defendants began to sell another soap of their own make as "Bustard and Co.'s Excelsior White Soft Soap."

On motion by the plaintiffs,

Held, (1) that the word "Excelsior" was a fancy name and not a mere word of quality, as "superfine" or "superior;" (2) that the plaintiffs' right to an injunction was not affected by the fact that the defendants had never used the word except in conjunction with their firm name, or by the fact that the plaintiffs had recently adopted a distinctive trade mark; (3) and that an injunction must be granted to restrain the defendants from selling their soap under the name given by the plaintiffs to their article.

"The additional trade mark adopted by the plaintiffs in March last does not, to my mind, affect the question. The name 'Conveyance Company' (in *Knott* v. *Morgan*) was not a trade mark, and I cannot hold it to be any justification for a defendant to say 'the plaintiff has two ways of identifying his goods, and I have only stolen one of them.'"

[227.] **WOTHERSPOON & CO. *v.* GRAY & CO.**

Nov. 10*th*, 1863.

[*Ct. of Session——Ct. of Sess. Cas., 3rd Ser., II.* 38.]

The plaintiffs being manufacturers of confectionery, who sold lozenges of their make in packets bearing the words "Wotherspoon's Machine-made Cinnamon (or Clove, Musk, Rose, &c.) Victoria Lozenges," on the front, and announcements as to their process of manufacture, &c., on the side, the defendants sold lozenges of their own in packets with the words "Cinnamon Victoria Lozenges" on the front, and "John Gray & Co.'s Machine-made Victoria Lozenges," on the side.

Interdict to restrain the defendants from using the name "Victoria," and from imitating the plaintiffs' announcements, refused, on the ground that the name "Victoria" was in common use, and that, in any case, the name "Gray & Co.'s Victoria Lozenges" was distinguishable from "Wotherspoon's Victoria Lozenges," and that the defendants' wrappers and announcements thereon were essentially different from the plaintiffs'.

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228. **KINAHAN *v.* BOLTON.**

Dec. 10*th*, 1863.

[*Brady, C. of I.*——15 *Ir. Ch.* 75.]

The petitioners being makers of whiskey, which they sold in bottles, &c., labelled with the letters "L. L." and a

coronet, the respondent sold whiskey in bottles, &c., labelled with the same letters.

On petition, injunction granted to restrain the respondent from selling whiskey marked with those letters, and

Held, that acquiescence in the infringement of the trade mark was not established by proof of the publication of advertisements which, though in some instances they infringed the petitioners' rights, did not do so uniformly or continuously.

"In such suits, in order to found the jurisdiction of this Court, there must be established, first, the existence of the trade mark; next, the fact of an imitation, whether a direct imitation, or one with such variatio that the Court must regard them as merely colourable; and, thirdly, the fact that the imitations were made without licence, or anything that this Court could regard as acquiescence in their use."

PONSARDIN *v.* **PETO**; *Ex parte* **UZIELLI.** 229.

Dec. 10*th*, 1863.

[*Romilly, M.R.*——33 *Beav.* 642; 33 *L. J., Ch.* 371; 10 *Jur., N. S.* 6; 9 *L. T., N. S.* 567; 12 *W. R.* 198; 3 *N. R.* 237.

An injunction having been granted to restrain a dock company from parting with wine spuriously marked with the plaintiffs' mark;

On motion by a third person who had advanced money on the dock-warrants, in ignorance of the spuriousness of the marks, for the wine to be delivered to him,

Held, that the applicant was entitled to have the wine delivered to him, on its being re-corked, but that he must pay the costs of the application.

"The dock company would have the first charge on the wine for their expenses, Mr. Uzielli the second for his advances and his costs, and the plaintiffs the third for their costs of suit."

230. **BROWNE *v.* FREEMAN (1).**

Jan. 11*th*; *July* 12*th*, 1864.

[*Wood, V. C.*——12 *W. R.* 305; 4 *N. R.* 476.]

The plaintiff being the inventor of a medicine to which he gave the name of "Chlorodyne," and which he sold in bottles labelled with the words "Dr. J. Collis Browne's Chlorodyne," and "The only Genuine Chlorodyne," the defendant began to sell a preparation as "Chlorodyne," and afterwards as "The Original Chlorodyne," the plaintiff having in the meantime procured the dismissal with costs of a bill which he had filed to restrain the defendant from using the name "Chlorodyne."

On motion for an injunction (12 W. R.), and at the hearing of the cause (4 N. R.),

Held, (1) that, although the word "Chlorodyne" might originally have been protected as a fancy name, the plaintiff had abandoned all claim to an exclusive right in it, by dismissing the suit which he had commenced to restrain the use of it; and (2) that the plaintiff was not entitled to an injunction to restrain the defendant from styling his "The Original Chlorodyne," since there was no evidence that the assumption of that title by him caused his medicine to be supposed to be of the plaintiff's manufacture.

No costs given.

[231.] **TAYLOR *v.* BEMIS.**

Jan., 1864.

[*U. S. C. C., N. Dt. of Ill.*—*Drummond, J.*——4 *Biss.* 406.]

Suit by execution creditors of H. V. Bemis, one of the partners in the firm of "Downer, Bemis & Co.," brewers,

for a sale of the defendant's interest in the name or trade mark of Downer, Bemis & Co.

Held, that such sale must be refused, on the ground that the defendant's interest in the mark was merely a right to a part of it, and that such right was of no value apart from the connexion of the partnership business.

PHALON *v.* WRIGHT. [232.]

1864.

[*Phila. C. P.*—*Thompson, P. J.*] ——5 *Phila.* 464; *R. Cox* 307.]

The plaintiff being the maker of a perfume, which he sold under the name of "Night Blooming Cereus," the defendants sold another perfume under the name of "Wright's Night Blooming Cereus."

On motion by the plaintiff for an injunction to restrain the defendants from using the name,

Held, (1) that, the perfume not being made from that flower, the use of the title was a misrepresentation; (2) that, if the perfume had been made from the flower, the name would have been merely descriptive of the origin of the perfume, and therefore could not be a valid trade mark; (3) that the labels were not similar, and that the defendants' name appeared prominently on theirs; (4) and that the injunction must be refused.

"The trade mark, to be capable of an exclusive use, must be such as will identify the article to which it is affixed as that of the person naming it, and distinguish it from others. A word which is the name of the article, or indicates its quality, cannot be so appropriated. Every one has the right to manufacture the same article and to call it by its name or descriptive character."

[233.] **McCARDEL *v.* PECK.**

March, 1864.

[*N. Y. Sup. Ct.*——28 *How. Pr.* 120; *R. Cox* 312.]

The "McCardel House" having been established and carried on by W. Hitchcock for the benefit of the plaintiff's husband, the plaintiff, after the death of her husband, required the defendant, who had purchased the business from W. Hitchcock, to discontinue the use of the name.

Injunction granted to restrain the defendant from using the name, it having been used by W. Hitchcock and the defendant by virtue of a licence, which was capable of being, and had been revoked; and an attachment for contempt issued against the defendant, who had violated the injunction by continuing to use the name.

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234. **McANDREW *v.* BASSETT.**

March 4th; *May 7th*, 1864.

[*Wood, V. C.*——33 *L. J., Ch.* 561; 10 *Jur., N. S.* 492; 10 *L. T., N. S.* 65, 442; 4 *N. R.* 12.]

[*Lord Westbury, C.*——4 *De G. J. & S.* 380; 33 *L. J., Ch.* 566; 10 *Jur., N. S.* 550; 10 *L. T., N. S.* 442; 12 *W. R.* 777; 4 *N. R.* 123.]

The plaintiffs having recently begun to sell liquorice of their manufacture stamped with the word "Anatolia," the defendants began to sell other liquorice under the same stamp.

Suit for an injunction to restrain the defendants from so doing.

Held, (1) that the word "Anatolia" was a good trade mark on liquorice, being used as a fancy name, and not as indicative of the origin of the liquorice; (2) that the

plaintiffs had acquired an exclusive right therein, though they had only used it for about six weeks; (3) (10 Jur. N. S. 495) that it was not a case in which an account need be directed; (4) that the defendants must pay costs, although they had offered to submit, since they had not offered to pay the costs of the proceedings up to the time of the offer.

Per L. C., p. 384.—"An element of the right to the property in a trade mark may be represented as being the fact of the article being in the market as a vendible article, with that stamp or trade mark, at the time when the defendants imitate it. The essential ingredients for constituting an infringement of that right probably would be found to be no other than these:—First, that the mark has been applied by the plaintiffs properly, that is to say, that they have not copied any other person's mark, and that the mark does not involve any false representation; secondly, that the article so marked is actually a vendible article in the market; and thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description."

P. 386.—"Property in the word (Anatolia) for all purposes cannot exist; but property in that word, as applied by way of stamp upon a particular vendible article, as a stick of liquorice, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation whereby the stamp gets currency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public."

MOET *v.* COUSTON. 235

May 3rd, 1864.

[*Romilly, M.R.*——33 *Beav.* 578; 10 *L. T., N. S.* 395; 4 *N. R.* 86.]

The defendants having purchased and resold in England a quantity of the plaintiffs' champagne, marked as "Moet's," the plaintiffs filed a bill for an injunction and an account, and after answer the defendants offered to submit to an injunction, each party paying his own costs.

Held, that the injunction must be granted, but no account and no costs, the plaintiffs having asked for an account, to which they were not entitled.

10 L. T., N. S. 396.—"If a man manufactures goods himself, and puts upon them the trade mark of another, though he may not know to whom that mark belongs, he must at least know that he has himself no right to the mark. That knowledge makes him liable to account for the profits he may have realised by his conduct. But if a man buys goods from a third party, believing them to be genuine, while in fact they are spurious, it is not until he has been told that they are so that he can be considered to be guilty of any fraud, or to be liable to render any account."

33 Beav. 581.—"If the defendants had offered to submit to the injunction and to pay the costs, and the plaintiffs had afterwards brought the case to a hearing, I should have given the defendants their costs subsequent to that offer."

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236. **THE COLONIAL LIFE ASSURANCE COMPANY *v.* THE HOME AND COLONIAL ASSURANCE COMPANY (LIMITED).**

May 9th, 1864.

[*Romilly, M.R.*——33 *Beav.* 548; 33 *L. J., Ch.* 741; 10 *Jur., N. S.* 967; 10 *L. T., N. S.* 448; 12 *W. R.* 783; 4 *N. R.* 129.]

Motion for an injunction to restrain the defendants from using their name (as above) or any other name resembling that of the plaintiffs, refused, on the ground that the real object of the motion was to obtain a monopoly of the word "Colonial."

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237. **EDGINGTON *v.* EDGINGTON.**

Nov. 7th, 1864.

[*Wood, V.C.*——10 *L. T., N. S.* 299.]

Injunction to restrain the defendant from falsely representing himself to be carrying on the plaintiff's business,

or to be carrying on business in connexion with, or in succession to him, refused, but without costs, the only case in which an attempt at personation was proved being a case in which the defendant had opened a letter addressed to the plaintiff, and had attempted, but without success, to obtain the custom thereby offered to the plaintiff.

JOHNSON *v.* HELLELEY. 238.

Nov. 8th; Dec. 21st, 1864.

[*Romilly, M.R.*——34 *Beav.* 63; 34 *L. J., Ch.* 32; 10 *Jur., N. S.* 1041; 11 *L. T., N. S.* 295; 13 *W. R.* 38; 5 *N. R.* 4.]

[*Knight Bruce and Turner, L.JJ.*——2 *De G. J. & S.* 446; 34 *L. J., Ch.* 179; 11 *L. T., N. S.* 581; 13 *W. R.* 220; 5 *N. R.* 211.]

Partnership suit.

The goodwill of a partnership business carried on under the name of "Samuel Johnson & Sons" having been directed to be sold, upon the death of one of the partners, in a suit commenced by the surviving partner for the purpose of having the business wound up, and the Chief Clerk proposing to give the purchaser the exclusive right to hold himself out as the successor of the firm of "Samuel Johnson & Sons,"

Held, that the surviving partner retained the right to set up a similar business in the old neighbourhood, and that the advertisements and particulars of sale must give purchasers notice to that effect.

239. **HUNT** *v.* **MANIERE.**

Dec. 8th, 1864; *Jan. 28th*, 1865.

[*Romilly, M.R.*——34 *Beav.* 157; 34 *L. J., Ch.* 142; 11 *Jur., N. S.* 28; 11 *L. T., N. S.* 469; 13 *W. R.* 212; 5 *N. R.* 181.]

[*Knight Bruce and Turner, L.JJ.*——34 *L. J., Ch.* 144; 11 *Jur., N. S.* 73; 11 *L. T., N. S.* 723; 13 *W. R.* 363; 5 *N. R.* 295.]

The plaintiffs, being wharfingers with whom spurious champagne, marked with a counterfeit brand of "Veuve Clicquot, Ponsardin & Co.," was warehoused, and who had notice of the spurious mark and of the intention of the injured party to apply for an injunction, refused to deliver up the wine to the indorsee of the dock warrants, who thereupon commenced an action for damages against them.

Suit for an injunction to restrain the action.

Held, that the wharfingers were justified in acting as they had done, and that the injunction must be granted.

[240.] **BINNINGER** *v.* **WATTLES.**

Jan., 1865.

[*N. Y. C. P.*—*Brady, J.*]——28 *How. Pr.* 206; *R. Cox* 318.]

The plaintiffs being vendors of gin, which they sold in bottles labelled with the words "Old London Dock Gin," the defendant sold other gin similarly labelled.

On motion by the defendant to dissolve an injunction which had been granted to restrain him from infringing the plaintiffs' rights,

Held, (1) that the name "Old London Dock Gin," was descriptive of the article, and therefore could not be exclusively appropriated, and further, that any person of the same name could not be prevented from selling "Bin-

ninger's Old London Dock Gin;" (2) but that the motion must be refused, on the ground that the defendant's labels were intended and calculated to deceive.

ORR EWING *v.* **CHOONEELOLL MULLICK.** [241.]

Jan. 16*th*, 1865.

[*Bengal High Ct.*— *Morgan, J.* } ——*Cor.* 150.]

The plaintiffs being a Glasgow firm of manufacturers of cotton goods which they exported to India and sold there with certain trade marks in the form of tickets affixed, the defendant, a dealer in the Burra Bazaar at Calcutta, sold goods there similarly marked.

On motion by the plaintiffs, injunction granted to restrain the defendant from so doing, notwithstanding that he had not himself affixed the spurious marks to his goods but had purchased the goods so marked from the importers, and was, further, only proved to have sold goods spuriously marked on one occasion, and that to the plaintiffs' agent.

MONTAGUE *v.* **MOORE.** 242.

March 1*st*, 1865.

[*Wood, V.C.*——*Seton*, 4*th ed.* 238.]

The plaintiffs being the managers of the "Christy's Minstrels," the defendants, who had been members of their company, represented themselves to be "The Christy's Minstrels."

On motion by the plaintiffs, injunction granted to restrain the defendants from representing themselves to be the successors or representatives of that company, and from representing the plaintiffs to have been connected with the defendants' company.

243. **SOUTHORN *v.* REYNOLDS.**

March 10*th*, 1865.

[*Wood, V.C.*——12 *L. T., N. S.* 75.]

The plaintiff being a manufacturer of "Southorn's Broseley Pipes," the defendant took into his employment a workman of that name and from that place, and sold pipes under the same name.

Suit for an injunction.

Held, that the plaintiff was entitled to an injunction to restrain the defendant from selling clay tobacco pipes in boxes, &c., labelled so as to indicate that they were manufactured by Southorn of Broseley, notwithstanding that the defendant had a workman of that name and from that place in his employ, and notwithstanding that the plaintiff's brother, who did not join in the suit, had an equal right to the use of the mark "Southorn, Broseley," with himself.

Account also granted, and an enquiry as to damages.

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244. **HARRISON *v.* TAYLOR.**

May 1*st*, 1865.

[*Wood, V.C.*——11 *Jur., N. S.* 408; 12 *L. T., N. S.* 339.]

The plaintiffs being manufacturers of mustard, which they sold with a label affixed, the conspicuous feature of which was the figure of an ox, the defendants sold other mustard with a very similar label, but having their own name substituted for the plaintiffs'.

On motion by the plaintiffs, injunction granted to restrain the defendants from infringing their rights, notwithstanding that there was some evidence that a certain class of customers were in the habit of ordering "Harrison's"

mustard, and not "ox" mustard, and although the plaintiffs had delayed commencing proceedings from Aug., 1863, till May, 1864.

But *Held* that no account of profits before the filing of the bill could be given, on account of the plaintiffs' delay.

SWIFT *v.* **DEY.** [245.]

May, 1865.

[*N. Y. Super. Ct.*——4 *Robertson* 611; *R. Cox* 319.]

An injunction having been granted to restrain the defendant from selling matches in boxes labelled in imitation of the plaintiff's, the defendant changed his labels, but, as the plaintiff thought, insufficiently.

Motion by the plaintiff for the committal of the defendant for contempt, refused, on the ground that the defendant's new label would not deceive ordinary purchasers.

Per Robertson, C. J.—"It is the unwary, and not the wary, who are to be protected, as most likely to be taken in by the counterfeit."

Per McCunn, J.—"The great principle laid down and applied in all the cases of trade marks is that, if persons of ordinary understanding purchasing the article would be placed on their guard, and would be led to enquire whether they were being deceived by the article they were purchasing, that fact is sufficient for the Court to refuse its interference."

THE CORRESPONDENT NEWSPAPER CO. (LIMITED) 246.
v. **SAUNDERS.**

June 1*st*, 1865.

[*Wood, V.C.*——11 *Jur., N. S.* 540; 12 *L. T., N. S.* 540; 13 *W. R.* 804.]

The plaintiffs being a company which had been formed for the purpose of publishing a newspaper to be called

The Correspondent (which paper had been registered at Stationers' Hall on April 8th, 1864, under 5 & 6 Vict. c. 45, but was not issued till May 3rd, 1865, when another entry was made on the register), the defendants registered a publication under the same title on March 3rd, 1865, and published the first number as *The Public Correspondent*, on May 6th, 1865.

Motion by the plaintiffs for an injunction to restrain the defendants from publishing any newspaper containing the word "Correspondent," refused, on the ground that (1) the entry on the register was of no avail without actual publication; (2) it was doubtful whether in any case registration would protect the title as being included in the copyright; (3) the difference between the dates of the respective first publications was so slight as to render the exclusive right of the plaintiffs in the title, by way of trade mark, too doubtful for an interlocutory injunction to be granted; (4) the plaintiffs had delayed giving the defendants notice of their claim till they had brought out their own paper, eight days after they became aware of the defendants' intentions.

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247. **GLENNY** *v.* **SMITH.**

July 18*th*, 1865.

[*Kindersley, V.C.*——2 *Drew. & Sm.* 476; 11 *Jur., N. S.* 964; 13 *L. T., N. S.* 11; 13 *W. R.* 1032; 6 *N. R.* 363.]

The plaintiffs being Thresher, Glenny & Co., of 152, Strand, the defendant, one of their employés, left their service and opened a shop in Oxford Street, where he placed his own name over the door, but on the brass plates and awning the words "from Thresher & Glenny," the word "from" being in very small letters.

Injunction granted to restrain the defendant from using the name of the plaintiffs' firm in any way so as to deceive, and

Held, that the fact that the defendant had cautioned a shopman not to permit deception, was evidence against the defendant, as showing that he doubted the propriety of his use of the name.

"There is no question but that if a man, having been in the employment of a firm of reputation, sets up in business for himself, he has a right in any way in which he thinks fit, provided it is done in accordance with the rule I have stated (*i.e.*, so as not to deceive), to inform the public that he has been in such employment, and in that way to appropriate to himself some of the benefit arising from the reputation of his former employers. But in so doing he must take especial care that it is done in such a way as not to mislead the public to the detriment of his former employers."

"It does not signify, for the purpose of the plaintiffs' right to relief, whether the defendant has acted with a fraudulent intention or not; it is enough if, even without any unfair intention, he has done that which is calculated to mislead the public. . . . . And it is not the question whether the public generally or even a majority of the public, is likely to be misled; but whether the unwary, the heedless, the incautious portion of the public would be likely to be misled."

BANKS *v.* **GIBSON.** **248.**

July 21*st*, 1865.

[*Romilly, M.R.*——34 *Beav.* 566; 34 *L. J., Ch.* 591; 11 *Jur., N. S.* 680; 13 *W. R.* 1012; 6 *N. R.* 373.]

The plaintiff's husband and the defendant entered into a partnership for fifteen years, as pencil-makers, under the firm name of "Banks & Co.;" at the end of ten years the plaintiff's husband died, and the plaintiff replaced him in the partnership for four years longer, when the partnership was dissolved and the assets were divided, but no arrangement was come to with respect to the firm name. The plaintiff

continued to carry on the same business in the same town, but not on the old premises, and the defendant continued to do so on the old premises, each under the old name of "Banks & Co."

Injunction to restrain the defendant from using the name of "Banks & Co.," or "Banks," in his business, refused, with costs.

"The name or style of the firm of 'Banks & Co.,' in which the defendant had been engaged for a period of fourteen years, was an asset of the partnership, and if the whole concern and the goodwill of a business have been sold, the name, as a trade mark, would have been sold with it. If, by arrangement, one partner takes the whole concern, there must be a valuation of the whole, including the name or style of the firm. But if the partners merely divide the other partnership assets, then each is at liberty to use the name just as they did before. It is the same as if two persons, who alone carried on the business of 'Child & Co.,' thought fit to separate, each would be entitled to use the name by which they carried on their business."

[249.] **DERRINGER *v.* PLATE.**

Oct., 1865.

[*Cal. Sup. Ct.*——29 *Cal.* 292; *R. Cox* 324.]

The plaintiff being a Philadelphian pistol-maker, who marked his goods "Derringer, Philadel.," the defendant, a Californian, sold other pistols similarly marked.

Action at law.

Demurrer overruled, and

Held, (1) that the right of property in a trade mark was not limited in its enjoyment by territorial bounds, so that a person owning a mark in one American State owned it in all, and, therefore, that the plaintiff could be protected in California; (2) that the plaintiff's right of property in his trade mark could be protected at Common Law, though he had not complied with the requirements of the Californian Statute of 1863.

BRADLEY *v.* **NORTON.** [250.]

Nov., 1865.

[*Conn. Sup. Ct.*——33 *Conn.* 157; *R. Cox* 331.]

The plaintiff being a manufacturer, under an exclusive licence from the inventor and patentee, of an agricultural compost, which he sold under the name of "Coe's Superphosphate of Lime," the defendants sold an article under the same name.

Injunction granted to restrain the defendants from so doing.

Per M'Curdy, J.—"It is well settled that the imitation of a trade mark to render a party liable need not be a precise copy. If there is a substantial similarity, so that the community would be likely tc be deceived, it is a sufficient infringement of the right."

BEARD *v.* **TURNER.** 251.

Nov. 8*th*, 1865.

[*Wood, V.C.*——13 *L. T., N. S.* 746.]

The plaintiffs being manufacturers of needles, which they sold in packets labelled with a trade mark, consisting of a crest of an elephant's head on a coronet, and the words "Kirby's ne plus ultra," the whole embossed in white on a blue ground, the defendant sold other needles with a label bearing a general resemblance to the plaintiffs'.

Suit for an injunction to restrain the defendant from infringing the plaintiffs' rights.

Held, (1) that the words "ne plus ultra" and the white device embossed on blue were proved to be common to the

trade; (2) that a trade mark might consist of a crest, but that the defendant, having used a lion's head instead of an elephant's head, and having placed "Turner & Co." in place of "Kirby & Co.," the other elements being common, not only to the parties, but to the trade generally, had not adopted a mark likely to deceive; (3) that it was an element strongly in favour of the defendant's *bona fides* that he had exhibited his needles and labels side by side with the plaintiffs' at the Exhibition of 1862; (4) that the injunction could not be granted; (5) that, even if relief could have been granted, the plaintiffs, having lain by for two years after they became aware of what the defendant was doing, could have had no account or costs, by reason of that delay.

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252. THE LEATHER CLOTH COMPANY *v.* **HIRSCHFELD (3).**

Nov. 15*th*, 1865.

[*Wood, V.C.*——*L. R.* 1 *Eq.* 299 : 13 *L. T., N. S.* 427 ; 14 *W. R.* 78.]

The plaintiffs, having obtained an injunction to restrain the infringement of their trade mark, and an inquiry as to damages, failed to prove special damage, but claimed the amount of profits which they would have made if they had sold the amount of cloth which the defendant had sold under their mark.

On adjourned summons,

Held, that the burden lay on the plaintiffs to prove special damage by loss of custom or otherwise, and that it could not be assumed that the same quantity would have been bought of the better goods at the higher price as had been bought of the inferior goods at the lower price, and therefore, that in the case in question no damage could be said to have been suffered.

BARNETT *v.* **LEUCHARS.** 253.

Dec. 4th, 1865.

[*Stuart, V.C.*——13 *L. T., N. S.* 495; 14 *W. R.* 166.]

The plaintiffs being inventors and manufacturers of toy fireworks, called "Pharaoh's Serpents," the defendant sold similar fireworks, and by the request of his customers, and without making any false representations, placed them in old boxes bearing the plaintiffs' labels.

Suit for an injunction.

Held, (1) that the injunction must be granted, notwithstanding that the defendant had placed the fireworks in those boxes only at the request of customers, and without making any false representations; (2) but that no costs could be given, the defendant having acted *bonâ fide*, and having discontinued the objectionable practice immediately on the plaintiffs serving on him their notice of motion.

"According to the principle which governs these cases, an owner has an exclusive right to a trade mark or label, and that right is to be regarded as his property."

WILLIAMS *v.* **OSBORNE.** 254.

Dec. 8th, 1865.

[*Wood, V.C.*——13 *L. T., N. S.* 498.]

The plaintiffs having purchased the perfumery business formerly carried on by Robert Hendrie, deceased, from his executors, the defendants, who had been long in Hendrie's employ, set up business in partnership, and used labels and made representations which the plaintiffs considered to amount to an infringement of their rights.

Suit for an injunction to restrain the defendants from selling their goods as Headrie's, or representing themselves as his successors in business.

Held, (1) that, having been long in his service, they were justified in placing on their shop their names, with the words, "from the late R. Hendrie," and in styling themselves on placards "managers and manufacturers to the late R. Hendrie," and using Hendrie's name on their labels, in conjunction with their own, if they only used the name fairly and without mis-statements; (2) that no case of fraudulent intention was proved, though, if the defendants had continued to act in a certain way after it had been pointed out to them that the public were deceived, what was not at first fraudulent would have become so; (3) that the bill must be dismissed, and having been filed too hastily, with costs.

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255. **CHUBB** *v.* **GRIFFITHS.**

Dec. 15*th*, 1865.

[*Romilly, M.R.*——35 *Beav.* 127.]

The plaintiff being a manufacturer of iron safes, the defendant, being still an infant, sold spurious secondhand iron safes marked with the plaintiff's trade mark.

Suit for an injunction.

Held that, notwithstanding his infancy, the defendant must pay the costs of the suit, although he submitted at once, and alleged that he had acted in ignorance.

SEIXO *v.* PROVEZENDE. 256.

Jan. 22*nd*, 1866.

[*Lord Cranworth, C.*——*L. R.* 1 *Ch.* 192 ; 12 *Jur., N. S.* 215 ; 14 *L. T., N. S.* 314 ; 14 *W. R.* 357.]

The plaintiff being a Portuguese wine-grower, who sold his wine in casks stamped with a crown and eagle and "B. S." on the head of the cask, and a crown, "Seixo," and a date at the bunghole, from which the wine had acquired the name of "Crown Seixo" wine, the defendants sold their wine in casks stamped on the head and at the bunghole with a crown, "C. B.," "Seixo de Cima," and "1861."

Injunction granted to restrain the defendants from using the brand of a crown and "Seixo," or any other marks likely to cause their wine to be mistaken for the "Crown Seixo" wine, although the marks were not similar when seen side by side.

"In order to entitle a party to relief, it is by no means necessary that there should be absolute identity. What degree of resemblance is necessary is, from the nature of things, a matter incapable of definition *à priori*. All that courts of justice can do is to say that no trader can adopt a trade mark so resembling that of a rival as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use. If a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device."

257. **AINSWORTH** *v.* **WALMSLEY.**

Jan. 24th, 1866.

[*Wood, V.C.*——*L. R.* 1 *Eq.* 518; 35 *L. J., Ch.* 352; 12 *Jur., N. S.* 205; 14 *L. T., N. S.* 220; 14 *W. R.* 363.]

The plaintiff's thread being known in the market by the name "Ainsworth's Thread," and marked with a graduated scale of numbers, the defendants bought thread from a firm of thread-winders, who were known to wind the plaintiff's thread, and sold this thread, bearing the winders' name, but invoiced under the plaintiff's system of numbers, and accompanied by an assurance that it was of the plaintiff's make, to a retail dealer, who re-labelled it with the plaintiff's name and sold it as his. The thread turned out not to be the plaintiff's, but inferior to it.

Suit for an injunction to restrain the defendants from selling thread, not being the plaintiff's, as his.

Held, that the defendants having sold the thread to the retail dealer with the name of the winders on it, and not that of the plaintiff, an injunction could not be granted against them, but that their conduct in making the representations, and especially in the use of the plaintiff's system of numbers, was so improper as to disentitle them to costs.

"If a manufacturer does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them, the Court has said that no one shall be at liberty to defraud that man by using that mark, and passing off goods of his manufacture as being the goods of the owner of that mark. And inasmuch as the Court protects the owner of the mark, he is entitled to authorize another, when he hands over his business to him, to place that mark on his goods. That is a right which, being protected by this Court, may be disposed of for value, may be bought and sold, and is therefore, in that sense of the word, property."

"Is not a man's name as strong an instance of trade mark as can be suggested?—subject only to this inconvenience, that if a Mr. Jones or a Mr. Brown relies on his name, he may find it a very inadequate security, because there may be several other manufacturers of the same name."

STANDISH *v.* WHITWELL. 258.

March 9th, 1866.
[*Wood, V.C.*——14 *W. R.* 512.]

The plaintiffs carrying on business as "The Eagle Coal and Iron Company," and having long stamped their iron with the figure of an eagle, from which it had acquired the name of "eagle iron," the defendants began to sell their iron stamped with an "eagle brand."

On motion by the plaintiffs,

Held, (1) that an injunction must be granted, to restrain the defendants from stamping the figure of an eagle on their iron, notwithstanding that they alleged it to be their family crest; (2) that the costs of an affidavit, making charges of fraud which were not substantiated, must be disallowed.

AINSWORTH *v.* BENTLEY. 259.

March 16th, 1866.
[*Wood, V.C.*——14 *W. R.* 630.]

The plaintiff having purchased from the defendant "Bentley's Miscellany," on which occasion the defendant covenanted not to publish, &c., any periodical of a like nature, the defendant began to publish another periodical called "Temple Bar," with his name on the cover.

On motion by the plaintiff,

Held, that an injunction must be granted to restrain the defendant from publishing the magazine with his name on it, but that he could not be restrained from publishing the magazine without his name appearing in connexion with it.

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260. **DICKSON *v.* McMASTER & CO.**

May 28th, 1866.

[*Brady, C. of I.*——18 *Ir. Jur.* 202.]

Partnership suit.

Held, that upon the true construction of a partnership agreement, which provided for accounts being taken of the partnership "stock-in-trade, goods, chattels, and effects," the continuing partner in the firms of "Dunbar, McMaster & Co.," and "Dunbar, Dickson & Co.," who was the owner of the premises on which the partnership business was carried on, and who was entitled, on the termination of the partnership, to take over the shares of the retiring partners at a valuation, was also entitled to take over the goodwill, trade name, and trade marks of those firms, without further payment on a separate valuation of those particulars (those particulars being held not to be included in the term "stock-in-trade, goods, chattels, and effects"), but that he was not entitled to use the names of the retiring partners.

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261. **HUDSON *v.* BENNETT.**

June 30th, 1866.

[*Stuart, V.C.*——12 *Jur., N. S.* 519; 14 *L. T., N. S.* 698; 14 *W. R.* 911.]

The plaintiffs having obtained an interim injunction to restrain the defendant from infringing their trade mark on

beer, the defendant offered to pay the costs of the suit, as between solicitor and client, and to give an undertaking in the terms of the first part of the prayer of the bill, amounting to an offer of all material relief, but refused to insert an apology in the newspapers.

The plaintiffs having, nevertheless, brought the case to a hearing,

Held that, although the perpetual injunction must be granted, no costs could be given, the plaintiffs having refused the defendant's offer at their peril in respect of costs.

GREEN *v.* **SHEPHERD.** [262.]

July 4th, 1866.

[*Ct. of Session.*——*Ct. of Sess. Cas., 3rd Ser., IV.* 1028; 2 *Scot. L. Rep.* 168.]

The plaintiff being an English chemist and manufacturer of washing powder, the defendant, a Scotch manufacturer of the same article, sold his goods under the plaintiff's trade mark.

Action for damages and an interdict.

Motion by the plaintiff for an interim interdict, refused, on the ground that the summons was framed on the footing that the plaintiff had no case for an interim interdict, but undertook to prove his right by recovering damages, as a preliminary to obtaining an interdict.

SHERWOOD *v.* **ANDREWS.** [263.]

Aug. 1866.

[*Chicago Super. Ct.*—— 5 *Am. L. Reg., N. S.* 588.]

The plaintiffs being manufacturers of "Holbrook's School Apparatus" (that apparatus having been first

manufactured by J. Holbrook, afterwards by his son, D. Holbrook, and next by a company organized by D. Holbrook, and called "The Holbrook School Apparatus Company," which company had recently been dissolved by the plaintiffs, the sole stockholders therein), the defendants began to sell another apparatus under the same name.

Injunction to restrain the defendants from using the name "Holbrook" or "Holbrook's" on such apparatus, refused, and

Held, (1) that the name, having been used by several persons other than the plaintiffs or their predecessors, had become generic and descriptive and incapable of protection as a trade mark; (2) that even if the company had had a valid right in the mark, it did not pass to the plaintiffs as being the stockholders at the time of the dissolution; (3) that a trade mark should not be protected in the hands of an executor, assignee, or other person claiming through its first adopter, unless such person added to it words indicative of the relation between himself and the first adopter of the mark, since otherwise a fraud would be committed on the public.

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264. **MAXWELL** *v.* **HOGG.**

Nov. 8*th*, 1866; *Jan.* 15*th*, 1867.

[*Stuart, V.C.*——12 *Jur. N. S.* 916; 15 *L. T., N. S.* 204; 15 *W. R.* 84.]

[*Turner and Cairns, L.JJ.*——*L. R.* 2 *Ch.* 307; 36 *L. J., Ch.* 433; 16 *L. T., N. S.* 130; 15 *W. R.* 467.]

The defendants having, in 1863, registered, under the Copyright Acts, the name "Belgravia," as the title of a new magazine, but not having published the magazine, the

plaintiff registered the same name in 1866, and went to considerable expense in respect of his intended publication. The defendants, having discovered this in August, hastened on their own publication, and announced it on Sept. 24th, and published it on the 25th. The plaintiff's magazine was brought out in October.

Injunction to restrain the defendants from using the name, refused, on the ground that the name had been first used on an actual publication by the defendants, and that the expense which the plaintiff had been at in the preparation of the work, advertisements, &c., could not give him an exclusive right in the name.

Per Turner, L. J.—"It seems to me that there is a great distinction between the case of advertisement followed by publication and a case resting upon advertisement only. In the case of advertisement followed by publication, the party publishing has given something to the world, and there is some consideration for the world's giving him a right; but in the case of mere advertisement he has neither given, nor come under any obligation to give, anything to the world, so that there is a total want of consideration for the right which he claims."

Per Cairns, L.J. (p. 310).—"It always appeared to me that *Clark* v. *Freeman* might have been decided in favour of the plaintiff, on the ground that he had a property in his own name."

P. 314.—"All the definitions which have been given in this Court of the nature of the right to protection in the case of trade marks seem to me to be opposed to the idea that protection can be given where there has been no sale, or offering for sale, of the articles to which the name is to be attached."

P. 315.—"I am prepared to hold, without any hesitation, that the mere intention, and the declaration of intention, to use a name will not create any property in that name, and to hold also that there can be no protection in this Court for the intended name during the course of manufacture of the article which is to bear that name."

265. **HOGG *v.* MAXWELL.**

Nov. 8*th*, 1866; *Jan.* 15*th*, 1867.

[*Stuart, V.C.*——12 *Jur., N. S.* 916; 15 *L. T., N. S.* 204; 15 *W. R.* 84.]

[*Turner and Cairns, L.JJ.*——*L. R.* 2 *Ch.* 316; 36 *L. J., Ch.* 437; 16 *L. T., N. S.* 133; 15 *W. R.* 470.]

Cross suit by the defendants in *Maxwell* v. *Hogg*.

Injunction to restrain the plaintiff in that suit from using the name "Belgravia" as the title of a magazine, refused, on the ground that the prior registration of the name under the Copyright Acts by the plaintiffs in the cross suit, without actual publication, gave them no exclusive right in the name; and, further, that they could not be protected in the assertion of such a right in respect of their short actual prior user, by reason of their uncandid conduct in receiving and inserting in other publications of theirs advertisements of the forthcoming rival magazine under the title in dispute, at the very time when they were hastening on their own publication.

No costs given on either side, in either suit.

[266.] **DEIZ *v.* LAMB.**

Nov. 1866.

[*N. Y. Super. Ct.*—*Monell, J.*——29 *N. Y. Super. Ct.* (6 *Robertson*), 537.]

The plaintiff having purchased the "Prescott House" Hotel, the defendant, a coach-proprietor, who had had a revocable licence from the former proprietor of the hotel to place the name "Prescott House" upon his coaches, continued so to use the name of the hotel.

On motion by the plaintiff, injunction granted to restrain the defendant from so doing, on the ground that the licence had determined upon the sale of the hotel to the plaintiff.

MORGAN *v.* McADAM. 267.

Dec. 5*th*, 1866.

[*Wood, V.C.*——36 *L. J., Ch.* 228; 15 *L. T., N. S.* 348.]

The plaintiffs being manufacturers of crucibles, who traded under the name of "The Patent Plumbago Crucible Co.," and sold their crucibles as "Patent Plumbago Crucibles," the defendants began to trade under the same name, and to sell their crucibles under the same name.

Injunction to restrain the defendants from so doing, refused, on the ground that the plaintiffs' crucibles were not and never had been the subject of a patent, though the plaintiffs stated that they had been informed by one of the persons from whom they had bought the secret of the construction of the crucibles, that there was an American patent; and

Held that, since the objection to the plaintiffs' title had already been brought to their notice by the dismissal on that ground of a summons brought by them before a magistrate, under the Merchandise Marks Act, 1862, the bill must be dismissed with costs.

Held, further, that where an article had, during the existence of a patent, been sent into the market as "patent pins," "patent wire," &c., on the expiration of the patent the marked articles might still be sold, though it would be better to place on them the date of the patent.

"All that this Court has to determine is, has the plaintiff who comes here to seek relief, any ground whatever for asking the Court to assist him in the protection of that right which he sets up? If the Court finds it to be a right founded upon fraud, and certainly, in effect, this is such, the Court says it cannot assist a person in carrying on a fraud."

268. **SCOTT *v.* SCOTT.**

Dec. 13*th*, 1866.

[*Wood, V.C.*——16 *L. T., N. S.* 143.]

On the dissolution of the partnership of "Robert & Walter Scott," the interest of the plaintiff, W. Scott, in the partnership premises was purchased by his partner R. Scott, and it was agreed that each should be at liberty to carry on the business, but that the old name should not be used by either, except for inding up the affairs of the partnership. The defendants, having been placed in possession of the old premises by R. Scott, began to style themselves on a doorplate "Scott & Nixon, late Robert & Walter Scott."

On motion by the plaintiff, injunction granted to restrain the defendants from using a doorplate with an inscription representing that they were carrying on business in continuation of or in succession to the old firm, on the ground that the effect of the new plate was to represent the plaintiff as having retired from business, and to appropriate his interest in the goodwill of the old firm.

[269.] **GILLOTT *v.* ESTERBROOK.**

Jan. 1867; *Jan.* 1872.

[*N. Y. Sup. Ct.*——47 *Barb.* 455; *R. Cox* 340.]

[*N. Y. Comm. of App.*——48 *N. Y.* (3 *Sickels*) 374; 8 *Amer. Rep.* 553.]

The plaintiff being a penmaker who stamped his pens "Joseph Gillott, Extra Fine, 303," and sold them in boxes labelled with the same name and figures, the defendants began to sell other pens similarly stamped, in boxes similarly

labelled, except that they put their name, "Esterbrook & Co.," in place of "Joseph Gillott."

Injunction granted to restrain the defendants from using the figures "303," with damages and costs.

Per Potter, J. (R. Cox 347).—"The principle, in short, is that no man has a right to sell his own goods as the goods of another, and the Courts will lend their aid to prevent the imposition; but there is a limitation to this right. The trade mark which is entitled to protection must be such as will identify the article to which it is affixed as that of the person adopting it, and distinguish it from others."

P. 348.—"A word that is well known in the language, and which is the name of an article, or words that merely indicate the quality of an article, cannot, it seems, be so exclusively appropriated as a trade mark. Nor can the appropriated name of a manufactured article, if the article is a known substance or production, be exclusively used as a trade mark, except by those who have an exclusive property in the article itself, though a mere name may be protected as a trade mark where it is used merely to indicate the true origin or ownership of the article offered for sale, or when a new preparation or compound is made, and a distinctive and specific name is necessarily given to it, which has not before by adoption and use become known."

MATSELL *v.* FLANAGAN. [270.]

Jan. 1867.

[*N. Y. C. P.*—*Brady, J.*] ——2 *Abb. Pr. N. S.* 459; *R. Cox* 367.]

The plaintiffs being the proprietors and publishers of *The National Police Gazette*, commonly known as *The Police Gazette*, the defendants began to publish another paper under the name of *The United States Police Gazette*.

Motion by the defendants to dissolve an injunction, which had been granted, on motion by the plaintiffs, to restrain them from publishing a paper under that name, refused, there being evidence of actual deception.

"The enforcement of the doctrine that trade marks shall not be simulated does not depend entirely upon the alleged invasion of individual rights, but as well upon the broad principle that the public are entitled to protection from the use of previously appropriated names or symbols, in such a manner as may deceive them, by inducing or leading to the purchase of one thing for another."

[271.] **DIXON** *v.* **JACKSON.**

Jan. 29th, 1867.

[*Ct. of Session——Ct. of Sess. Cas., 3rd Ser., V.*, 326; 3 *Scot. L. Rep.* 188.]

The plaintiffs being iron-masters at Govan, who were in the habit of marking their bar iron "Govan,*" from which they alleged that it had acquired the name of "star iron;" the defendant, who was an iron-master at Coats, and had been in the habit of marking his bar iron with the word "Coats" simply, began to mark it "Coats.*"

Interim interdict granted to restrain the defendant from so doing.

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272 **GRAVELEY** *v.* **WINCHESTER.**

March 14th, 1867.

[*Wood, V.C.——Seton, 4th ed.* 257.]

The plaintiffs being a firm of engineers, who had purchased the business of Winchester & Co., the defendant began to carry on business under the name of "Winchester & Co."

On motion by the plaintiffs, injunction granted to restrain the defendant from so doing, and from representing that he was carrying on business in succession to that carried on by that firm, with directions for the delivery up of trade cards or circulars, and an inquiry as to damages.

STEPHENS *v.* **PEEL.** **273.**

March 21*st*, 1867.
[*Wood, V.C.*——16 *L. T., N. S.*, 145.]

The plaintiffs being ink-makers, who sold their ink in bottles bearing labels consisting in part of white letters on a red ground, in part of white letters on a blue ground, and in part of blue letters on a white ground, with a white crown, and the words "Stephens' Blue Black Writing Fluid" in white, the defendant began to sell other ink in bottles similarly labelled, but having the word "Steelpens" substituted for "Stephens'."

On motion by the plaintiffs, injunction granted to restrain the defendant from using labels calculated to deceive.

BLACKWELL *v.* **CRABB.** **274.**

April 25*th*, 1867.
[*Wood, V.C.*——36 *L. J. Ch.* 504.]

The plaintiffs being manufacturers of pickles, which they sold in bottles bearing a label composed of a number of details, the defendant began to sell other pickles in similar bottles labelled very similarly.

Motion by the plaintiffs for an injunction to restrain the defendant from selling pickles in bottles so labelled, refused, on the ground that, though there was a considerable general resemblance between the two, the name, to which a customer would look to discover the identity, was conspicuously different, and there were other points of difference, besides that the elements combined in the labels were, for the most part, of common right.

275. **FARINA *v.* CATHERY.**

April 26th, 1867.

[*Wood, V.C.*——*L. J. Notes of Cases* 1867, *p.* 134.]

The plaintiff being a German manufacturer of Eau de Cologne, which he sold in bottles bearing a special label, the defendants, as agents for another German manufacturer, sold other Eau de Cologne in bottles labelled in exact imitation of the plaintiff's, except that the word "Josephs" was substituted for the word "Jülichs."

Injunction granted to restrain the defendants from so doing, and

Held, that a defence that the defendants' labels had been exhibited in the United Kingdom many years previously, and that their use was not prohibited by Prussian law, failed, on the ground that progressive alterations had been made in the labels, producing greater and greater similarity to the plaintiff's, and varying the device to which a right was alleged to have been acquired in Germany.

[276.] **SMITH *v.* WOODRUFF.**

April, 1867.

[*N. Y. Sup. Ct.*——48 *Barb.* 438; *R. Cox* 373.]

The plaintiffs being compounders of a perfume, which they sold under the name of "Sweet Opoponax of Mexico," the defendant began to sell another perfume under the same name.

Injunction granted to restrain the defendant from so doing, and

Held, (1) that that name had become indicative of the plaintiffs' article, though it had been used by others before them; (2) that evidence produced by the defendant, to show the absence of opoponax from the plaintiffs' composition, being contradicted, and that fact, even if established, not proving any flagrant imposition on the part of the plaintiffs, a defence based on the plaintiffs' own alleged misstatements failed.

BURNETT *v.* **PHALON.** [277.]

June, 1867.

[*N. Y. Super Ct.*——22 *Monthly L. R.* (12 *N. S.*) 220; 9 *Bos.* 193; *R. Cox* 376.]

[*N. Y. Ct. of App.*——3 *Keyes*, 534; 3 *Trans. App.* 167; 5 *Abb. Pr.*, *N. S.* 212; *R. Cox* 397.]

The plaintiffs being manufacturers of a hair-oil which they sold under the name of "Cocoaine," the defendants began to sell an oil of their own under the name of "Cocoïne."

Injunction granted to restrain the defendants from selling their oil under that name, or any other name imitated from the name applied by the plaintiffs to their oil, that name being held not to be descriptive of the ingredients composing the article.

Per Pierrepont, J.—"Every man has a right to the reward of his skill, his energy, and his honest enterprise; and when he has appropriated, as his trade mark, letters combined into a word before unknown, and has used that word, and has long published it to the world as his adopted trade mark, he has acquired rights in it which the Courts will protect."

[278.] **FABER *v.* FABER.**

June, 1867.

[*N. Y. Sup. Ct.*—*Sutherland, J.*—49 *Barb.* 357; 3 *Abb. Pr., N. S.*, 115; *R. Cox* 401.]

The plaintiff being a maker of lead pencils, which he stamped "A. W. Faber," the defendant, John H. Faber, sold other pencils stamped with his name.

Motion to continue an injunction which had been granted to restrain the defendant from so doing, refused, on the ground that the defendant was entitled to use his own name without fraud.

[279.] **FULTON *v.* SELLERS.**

1867.

[*Penn. Sup. Ct.*—4 *Brews.* 42.]

The plaintiffs (respondents) being the proprietors, by assignment, of a medical preparation, which they sold under the name of the original inventor, as "Dr. J. M. Lindsey's Improved Blood Searcher," the defendants (appellants) began to sell another compound under a similar name.

Suit for an injunction to restrain the defendants from infringing the plaintiffs' rights.

Held, (1) that the words in question constituted a legitimate trade mark; (2) that such trade mark passed to the plaintiffs, under their agreement with the original inventor for the purchase of all his right, title, and interest in the article known by the name in question, and of a right to take his name and all his interest, so far as was necessary; (3) that the plaintiffs were not disentitled by reason of their using the name without words to mark their derivative title; (4) and that the injunction must be granted.

"A manufacturer or vendor cannot adopt words in common use, descriptive of similar articles, and call upon a court to prevent other parties from using them. Such words cannot be made trade marks, nor can words which simply define the nature, kind, or quality of articles sold. If a trade mark consists of words, as it may, they must be specific and distinctive in their meaning. They must point to the articles, and to nothing else. It is undoubtedly true that the name of an inventor or discoverer, or manufacturer, may be employed as a part of a trade mark. It may give to other parts of the appellation a distinctive character, or, rather, it may make words distinctive that, without the name, would not be. Such trade marks are recognised as legitimate."

"The right to use his (the vendor's) name and all his interest must include the right to the use of the trade mark. That was an interest of the vendor, he had a property in the trade mark."

"We do not think the position tenable that the complainants are not entitled to relief because they are only assignees of the trade mark, and use it without designating themselves assignees. We do not perceive how their using the mark after they bought it, without giving notice that they are not the original owners of it, can be fraud upon the public, of which the defendant can avail himself. A trade mark, like the goodwill of a shop or manufacturing establishment, is a subject of commerce, and it has many times been held entitled to protection at a suit of the vendees."

FIELD *v.* LEWIS. 280.

Aug. 3rd, 1867.
[*Wood, V.C.*——*Seton, 4th ed.* 237.]

The plaintiffs having long manufactured and sold soap under the name of "United Service" soap, the defendant began to sell other soap under the same name.

Injunction granted to restrain the defendant from using the name in question, with costs, notwithstanding that the defendant had placed his own name on his own label, and that there was no evidence of actual deception, and that the bill had been filed without any previous intimation being given to the defendant.

[281.] **DAVIS *v.* KENNEDY.**

Sept. 3rd, 1867.

[*Canada West Chanc.*—*Mowat, V.C.*]—*Codd. Dig.* 236.]

The plaintiff being the inventor and manufacturer of a medical preparation, which he called and labelled "Perry Davis' Vegetable Pain Killer," the defendant began to manufacture and sell a similar article, under the name of "The Great Home Remedy, Kennedy's Pain Killer," but with quite different labels.

Injunction granted to restrain the defendant from using the words "Pain Killer" in connexion with his preparation, that term being held to be a fancy name indicative of the plaintiff's article.

[282.] **NEWMAN *v.* ALVORD.**

Sept., 1867 ; *Sept.*, 1872.

[*N. Y. Sup. Ct.*——49 *Barb.* 588 ; 35 *How. Pr.* 108 ; *R. Cox* 404.]

[*N. Y. Comm. of App.*——51 *N. Y.* (6 *Sickels*) 189 ; 10 *Amer. Rep.* 588.]

The plaintiffs manufacturing cement at Akron, in Erie County, New York, which they sold in packages labelled "Newman's Akron Cement Co., Manufactured at Akron, N. Y. The Hydraulic Cement, known as the Akron Water Lime," the defendants, who manufactured cement at Syracuse, in Onondaga County, New York, began to sell it in packages labelled "Alvord's Onondaga Akron Cement, or Water Lime, manufactured at Syracuse, New York."

Injunction granted to restrain the defendants from using the word "Akron" in connexion with their cement, although, if the defendants had manufactured at Akron, the decision might have been different.

Per Daniels, J. (R. Cox 413).—"Where words or names are in common use, the law does not permit an appropriation of them as trade marks to be made, so far as they are comprehended by such use. And for that reason words and names having a known or established signification cannot, within the limits of such specification, be exclusively appropriated to the advancement of the business purposes of any particular individual, firm, or company. The inability to make such appropriation of them arises out of the circumstance that, on account of their general or popular use, every individual in the community has an equal right to use them, and that right is in all cases paramount to the rights and interests of any one person, firm, or company. What alike may be claimed and used by all cannot be exclusively appropriated to advance the interests of any person. . . . But while this limitation is entirely reasonable, there can be no propriety in extending it beyond the circumstance upon which it is founded; and accordingly any member of the community whose interests and business may be promoted by doing so, should be at liberty to apply even names and words in common use to the products of his industry, in such a manner as to indicate their origin or particular manufacture, where such application will not intrench upon and be in no way included in their use by the public. By doing so, the rights of no member of the community can be in any manner infringed, and no public inconvenience whatever can be occasioned by it. The public will still be left at full liberty to use such words or terms as they were used before; while for a special purpose a new office or purpose may be imposed upon them."

ROGERS *v.* TAINTOR. [283.]

Oct., 1867.

[*Mass. Sup. Ct.*——97 *Mass.* (1 *Browne*) 291.]

Fay, Joslin, Rogers, and Taintor manufactured machinery in partnership at Worcester (Mass.), under the name of "Fay & Co." Fay, Joslin, Rogers, and Cheney did the same at Cincinnati, under the same name. After Fay's death the two businesses continued to be carried on as before by the respective surviving partners, until the dissolution of the Worcester firm, when the defendant Taintor, one of the partners in that firm, bought the business and

goodwill, and continued to carry on business in the same name, but as a vendor of machines not manufactured by him.

Suit by the Cincinnati firm for an injunction to restrain him from using the name in his business or on machines not made by the plaintiffs.

Injunction to restrain him from so doing, refused, on the ground that, (1) the name in question was not that of any of the plaintiffs; (2) the representative of Fay was not a party to the suit (this refers to the Mass. Gen. St., c. 56); (3) the defendant was carrying on business in continuation of the Worcester firm, and did not assume any connexion with the plaintiffs; (4) the defendant, if he had a right to use the name at all, had a right to use it as he pleased, on goods of his own make, or otherwise; (5) the plaintiffs could not have acquired, by the dissolution of the Worcester firm, which was quite distinct from theirs, any special rights in the name beyond such as they had already.

[284.] **HOWE** *v.* **THE HOWE MACHINE COMPANY.**

Nov., 1867.

[*N. Y. Sup. Ct.*——50 *Barb.* 236; *R. Cox* 421.]

The plaintiff, A. B. Howe, being a manufacturer of sewing machines, which he made under a licence from his brother, Elias Howe, the patentee, and stamped with the name "Howe," the defendant company, claiming under Elias Howe, began to manufacture other machines, and to stamp them in the same way.

On appeal from an order dissolving an injunction which had been granted to restrain the defendants from so doing,

Held, (1) that the plaintiff was entitled to appropriate the name as his trade mark on sewing machines, to the

exclusion of his brother Elias Howe, the original inventor and patentee of the particular machine, which the plaintiff only made by his licence, and also of the defendant company; but (2) that, there being a question whether Elias Howe was not entitled to use the trade mark under an agreement between him and the plaintiff, no injunction could be granted before the trial.

R. *v.* **SUTER AND COULSON.** 285.

Nov. 16*th*, 1867.

[*C. C. R.*——10 *Cox* 577; 17 *L. T., N. S.* 177; 16 *W. R.* 141.]

On an indictment for obtaining money on false pretences,

Held, that the prisoners, who had obtained money by falsely representing a spurious stamp on a watch to be a genuine hall mark of the Goldsmiths' Company, and to prove the watch to be of 18-carat gold, were rightly convicted.

Per Kelly, C.B.—"There is no difference in principle between a misrepresentation of a mark, and one that an acceptance was the acceptance of John Jones, or any other person."

THE LIEBIG'S EXTRACT OF MEAT COMPANY (LIMITED) *v.* **HANBURY.** 286.

Nov. 19*th*, 1867.

[*Wood, V.C.*——17 *L. T., N. S.* 298.]

The plaintiffs being manufacturers and vendors of "Liebig's Extract of Meat," the defendants began to prepare meat in accordance with Liebig's recipe, and to sell it under the same name.

Injunction to restrain the defendants from using the name, refused, on the ground that the name had for some

time past been in common use as descriptive of an article prepared in a particular manner, and that it would be injurious to the defendants to require them to change the name of their article.

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287. **R. *v.* HUNTER.**
R. *v.* CARTER.

Nov. 23*rd*, 1867.

[*C. C. R.*——10 *Cox* 642; 17 *L. T., N. S.* 321; 16 *W. R.* 342.]

On indictments for obtaining money under false pretences,

Held, that the prisoners, who were coal-hewers, and had obtained payment for more work than they had done, by removing the tokens or tickets of others from the tubs of coal and substituting their own, were rightly convicted.

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288. **LAMPLOUGH *v.* BALMER.**

Dec. 3*rd*, 1867.

[*Wood, V.C.*——*W. N.* 1867, *p.* 293.]

The plaintiff selling a medical compound as "Pyretic Saline," the defendant began to sell another article under the name of "Balmer's Pyretic Salts."

Motion by the plaintiff for an injunction to restrain the defendant from so doing, refused, on the ground that the plaintiff's labels contained the words, "Royal Letters Patent," he not having taken out any patent, and notwithstanding an explanation by the plaintiff that he had used the term in consequence of his having long paid duty on his medicine as a patent medicine.

CASWELL *v.* DAVIS. [289.]

Dec. 1867; *Sept.* 1874.

[*N. Y. C. P.*——4 *Abb. Pr., N. S.* 6; 35 *How. Pr.*, 76; *R. Cox* 429.]
[*N. Y. Ct. of App.*——58 *N. Y.* (13 *Sickels*) 223.]

The plaintiffs being the compounders of a medicine which they called "Ferro-phosphorated Elixir of Calisaya Bark," the defendant, who had been in the plaintiffs' employ, began to sell another preparation as "Davis & Sons' original and genuine Ferro-phosphorated Elixir of Calisaya Bark."

Suit for an injunction to restrain the defendant from so doing.

Held, on appeal, that an injunction could not be granted to restrain the defendant from using the word "Ferro-phosphorated," the word being descriptive of the composition of the medicine.

Per Folger, J. (58 N. Y. 233)—"There is no principle more firmly settled in the law of trade marks than that words or phrases which have been in common use and which indicate the character, kind, quality, and composition of the thing may not be appropriated by any one to his exclusive use. In the exclusive use of them the law will not protect. Nor does it matter that the form of words or phrases adopted also indicate the origin and maker of the article. The combination of words must express only the latter. It is the result of all the decisions that known words and phrases indicative of quality and composition are the common property of all mankind. They may not be appropriated by one to mark an article of his manufacture, when they may be used truthfully by another to inform the public of the ingredients which make up an article made by him."

PEABODY *v.* NORFOLK. [290.]

Jan., 1868.

[*Mass. Sup. Ct.*—*Gray, J.*——98 *Mass.* (2 *Browne*) 452.]

The plaintiff having invented a secret process of manufacture of cloth, and the defendant Norfolk having, on

entering into the plaintiff's service, undertaken not to give information in regard to the process to any one, the defendant Norfolk left the plaintiff's employ, and entered into an arrangement with other persons, by which they were to build another factory for the purpose of manufacturing there according to the plaintiff's secret process, which the defendant Norfolk was to communicate to them.

Injunction granted, to restrain the defendant Norfolk from carrying out such arrangement and making such communication, and also to restrain the defendant Cook, who was one of the persons with whom the arrangement had been made, and who was fully aware of the circumstances, from acting in execution of such arrangement.

[291.] **CURTIS** *v.* **BRYAN.**

Jan., 1868.

[*N. Y. C. P.*——2 *Daly* 212; 36 *How. Pr.* 33; *R. Cox* 434.]

The plaintiffs being the makers of a medicine for children, which they sold under the name of "Mrs. Winslow's Soothing Syrup," and in bottles stamped and labelled in English, French, German, and Spanish, the defendant began to sell another medicine under the same name, in similar bottles, similarly labelled.

Injunction granted to restrain the defendant from infringing the plaintiffs' rights, and

Held, (1) that the plaintiffs were not disentitled by merely collateral misrepresentations, if established; (2) that a defendant who had imitated the plaintiffs' article could not be heard to say that it was injurious.

Per Van Vorst, J.—"I cannot understand how the right of a plaintiff to be protected in a trade mark adopted by him is to be affected by advertisements of his article in the newspapers. The trade mark is one thing, the notices or commendations of his medi-

cines, when the inventor offers them for sale, are quite another. If the trade mark contained a false statement, and the advertisement of the plaintiff tended to establish it, they might be used for that purpose, and, except as it bore on that question, it would not answer to determine the right of a plaintiff to protection in his trade mark by the standard of credit allowed to an advertisement of the qualities of the article."

KELLY *v.* HUTTON. 292.

Feb. 8*th*; *July* 30*th*, 1868.

[*Stuart, V.C.*——37 *L. J., Ch.* 297; 17 *L. T., N. S.* 591.]

[*Wood and Selwyn, L.JJ.*——*L. R.* 3 *Ch.* 703; 37 *L.J., Ch.* 917; 19 *L. T., N. S.* 228; 16 *W. R.* 1182.]

Suit for the establishment of the plaintiff's claim to one moiety of the *Sporting Life* newspaper.

Held, (on appeal) that the registration at Stationers' Hall, under the Copyright Acts, of an assignment of a share in the newspaper, was of no effect, the title of a newspaper not being a subject of copyright.

Per Wood, L. J.—"It appears to us that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person from adopting the same name for any other similar publication; and that this right is a chattel interest capable of assignment was held in *Longman v. Tripp* and *Ex parte Foss*.

BARNARD *v.* PILLOW. 293.

March 19*th*, 1868.

[*Lord Romilly, M.R.*——*W. N.* 1868, *p.* 94.]

The plaintiff being a writer and composer of songs and music, under the name of "Claribel," the defendants, music publishers, published and sold certain songs, of which the

plaintiff had written the words, but not composed the music, with the words, "Song, written by Claribel," on the title-page.

Motion by the plaintiff, for an injunction to restrain the defendants from publishing the songs in that manner, as being calculated to mislead as to the authorship of the music, refused, on the ground that the words "written by" did not mean the same *as* "written and composed by," and that ordinary purchasers using ordinary caution would not be deceived.

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294. **BOULNOIS** *v.* **PEAKE.**

March 19th, 1868.

[*Giffard, V.C.*——*W. N.* 1868, *p.* 95.]

The plaintiffs being carriage-dealers, who had for many years sold carriages at the "Carriage Bazaar" in Baker Street, the defendant set up in business as a carriage-dealer at a house also in Baker Street, which at first he styled the "Carriage Repository," but afterwards began to style the "New Carriage Bazaar," and to describe as "opposite Madame Tussaud's," which was not strictly correct.

On motion by the plaintiffs, injunction granted to restrain the defendant from applying those designations to his shop on the ground that the defendant had acted with the intention of gaining an unfair advantage over the plaintiffs.

[295.] **STEPHENS** *v.* **DE CONTO.**

March, 1868.

[*N. Y. Super. Ct.*—*Monell, J.*——4 *Abb. Pr., N. S.* 47; 30 *N. Y. Super. Ct.* (7 *Robertson*) 343; *R. Cox* 442.]

The plaintiff being the proprietor of a newspaper called

La Cronica, the defendant began to publish another paper under the name of *El Cronista*.

Injunction, which had been granted to restrain the defendant from so doing, dissolved, on the ground that the names were sufficiently dissimilar to prevent deception.

FALKINBURG *v.* **LUCY.** [296.]

April, 1868.

[*Cal. Sup. Ct.*——35 *Cal.* 52; *R. Cox* 448.]

The plaintiffs being manufacturers of washing powder, which they sold in packets labelled with a complicated design, the defendants began to sell other washing powder in packets somewhat similarly labelled.

On appeal, injunction, which had been granted to restrain the defendants from infringing the plaintiffs' rights, dissolved, on the ground that the design which constituted the plaintiffs' trade mark had not been copied, and that the particulars in which the defendants' label resembled the plaintiffs' were in the nature of directions for use, words in common use, &c., and not the subjects of a right of trade mark.

STEVENS *v.* **PAINE.** 297.

June 11*th*, 1868.

[*Giffard, V.C.*——18 *L. T., N. S.* 600.]

The defendants, having been in the employ of the plaintiffs' firm of "Clayton & Co.," left them, and began to issue circulars calculated to mislead the public into the belief

that the firm of Clayton & Co. had ceased to carry on business, and that they had been succeeded by the defendants.

On motion by the plaintiffs, injunction granted to restrain the defendants from so doing.

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298. **SCHWEITZER** *v.* **ATKINS.**

July 16*th*, 1868.

[*Malins, V.C.*——37 *L. J., Ch.* 847; 19 *L. T., N. S.* 6; 16 *W. R.* 1080.]

The plaintiff being the manufacturer of a preparation of cocoa, which he sold in packets labelled with the words "Schweitzer's Cocoatina, or Anti-Dyspeptic Cocoa, Registered," the defendant Atkins, who had been in the plaintiff's employ, left him, and went into partnership with the defendant Otto Schweitzer, and began to sell another preparation under the name of "Otto Schweitzer, Atkins & Co.'s Cacaotine, Registered," in packets labelled in imitation of the plaintiff's.

On motion by the plaintiff, injunction granted to restrain the defendants from infringing the plaintiff's rights.

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299. **RIVERO** *v.* **NORRIS.**

July 30*th*, 1868.

[*Giffard, V.C.*——*Seton, 4th ed.* 236.]

The defendant had at the Docks boxes of cigars branded and labelled in imitation of the plaintiff's trade mark and label.

On motion by the plaintiff, injunction granted to restrain the defendant from passing such boxes of cigars from the Docks into the market.

MESSEROLE *v.* TYNBERG. [800.]

Sept. 1868.

[*N. Y. C. P.*—*Brady, J.*] ——4 *Abb. Pr., N. S.* 410; 36 *How. Pr.* 14; *R. Cox* 479.]

The plaintiffs being manufacturers of paper collars, which they sold with the name "Bismarck" on them, the defendant began to sell the same article bearing the same name.

Motion by the defendant to dissolve an injunction, which had been granted to restrain him from so doing, refused.

"Whenever a trade mark is employed to designate a particular manufacture, whether the term used is a popular one, formed of words or symbols common to the world, or one expressly created for the purpose to which it is applied, and the manufacture acquires reputation and becomes valuable as an article of merchandise, an imitator thereof, for a kindred or similar manufacture, is presumed to intend wrongfully, and the burden rests upon him to show that there is either no property in the term or symbol, arising from priority of use for the article to which it has been applied, or that no deceit or injury can result from the imitation."

ROWLEY *v.* HOUGHTON. [301.]

Sept., 1868.

[*Phila. C. P.*—*Ludlow, J.*] ——2 *Brews.* 303; 7 *Phila.* 39; *R. Cox* 486.]

The plaintiff being a manufacturer of glass jars, which he stamped with the words "The Hero," and who afterwards began to stamp his jars with the words "The Heroine," the defendant began to stamp other jars with the words "The Heroine," before the plaintiff adopted those words as an alternative for "The Hero."

Injunction granted to restrain the defendant from using

the name "The Heroine," although he had used that name before the plaintiff had adopted it as an alternative for his mark "The Hero."

"No right can be absolute in a name as a name merely. It is only when that name is printed or stamped upon a particular label or jar, and thus becomes identified with a particular style and quality of goods, that it becomes a trade mark."

[302.] **BOARDMAN** *v.* **THE MERIDEN BRITANNIA COMPANY.**

Sept., 1868.

[*Conn. Sup. Ct.*——35 *Conn.* 402; *R. Cox* 490.]

The plaintiffs being makers of teaspoons, which they sold in packets bearing labels, of which the principal features were their names and a number, coupled with some other particulars, the defendant company began to sell other teaspoons in packets with labels similar in general appearance to the plaintiffs', and with the same numbers, but with the name of the company.

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

Per Carpenter, J.—"The object or purpose of the law, in protecting trade marks as property, is twofold—first, to secure to him who has been instrumental in bringing into market a superior article of merchandise the fruit of his industry and skill; second, to protect the community from imposition, and furnish some guarantee that an article purchased as the manufacture of one who has appropriated to his own use a certain name, symbol, or device as a trade mark, is genuine. Consequently, the violation of property in trade marks works a twofold injury: the appropriator suffers, in failing to receive that remuneration for his labours to which he is justly entitled, and the public in being deceived and induced to purchase articles manufactured by one man, under the belief that they are of the production of another."

"It may be difficult to give to bare numbers the effect of indicating origin or ownership, and it may be still more difficult to show that they were originally designed for that purpose; but if it be

once shown that that was the original design, and that they have had that effect, it may not be easy to assign a reason why they should not receive the same protection, as trade marks, as any other symbol or device. But in this case the numbers were associated with the name of the plaintiffs, and the form, colour, and general arrangement of the labels; and, by virtue of that connexion, form an important part of the trade mark itself."

NEWLING *v.* **DOBELL.** **303.**

Nov. 19*th*, 1868.

[*Malins, V.C.*——38 *L. J. Ch.* 111; 19 *L. T., N. S.* 408.]

The defendant, after having sold to the plaintiff the goodwill of his tailor's business, and covenanted "not to carry on or be concerned or interested in" the business of a tailor within five miles of his former shop, entered as a journeyman into the service of his nephew, who carried on the same trade, and under the same name, within the five miles.

On motion by the plaintiff, injunction granted to restrain the defendant from so committing a breach of his covenant.

CAVE *v.* **MYERS.** **304.**

Dec. 3*rd*, 1868.

[*Giffard, V.C.*——*Seton, 4th ed.* 238.]

The plaintiffs carrying on business at 31A, Wigmore Street and 1, Edwards Street, Portman Square, as manufacturers and sellers of trunks and ladies' dress baskets (for which they had gained a first prize at the Paris Exhibition of 1867) under the name of "H. J. Cave & Sons," and having been, since 1863, appointed to supply

their goods to the Princess of Wales, the defendant, who occupied a shop at the corner of Wigmore Street and Marylebone Lane, close to the plaintiffs' shop, adopted the name of "Cavendish House" for his establishment, and had it painted up by his express order over the frontage, in place of his name "Myers," in such a manner that "Cave" alone appeared on the Wigmore Street side, the remaining letters being over the angle and in Marylebone Lane; and he also exhibited a board to the following effect:—"Paris Exposition, 1867. By Her Majesty's Royal Letters Patent. The only prize awarded for the Royal Alexandra expanding and collapsing dress baskets. Designed for Her Royal Highness the Princess of Wales, 1865. The Dublin Exhibition;" the fact being that, while the defendant had gained the only prize at Dublin, the plaintiffs had gained the only prize at Paris, though the defendant had competed. The defendant also exhibited a letter from a member of the household of the Princess of Wales, acknowledging the receipt of an application by the defendant for the appointment of trunk-maker to the Princess, but containing no promise of such an appointment, in such a manner as to cause it to be taken as containing an actual appointment.

On motion by the plaintiffs for an injunction to restrain the defendant from representing his business to be the plaintiffs', and from using any name, inscription, or device calculated to mislead the public,

Held, (1) That the plaintiffs were not disentitled by reason of having described themselves as patentees, they having secured the exclusive manufacture of their baskets by registration as a design, though not by letters patent; (2) that the plaintiffs were not disentitled by reason of a moderate delay, but that they were justified in a certain degree of delay in order to obtain evidence of actual deception, which they had succeeded in doing in several cases;

(3) that the defendant had acted in a manner intended and calculated to deceive, and which had deceived, and that the injunction must be granted.

COLTON *v.* **THOMAS.** [305.]

Dec., 1868.

[*Phila. C. P.—Allison, P. J.* ——7 *Phila.* 257; 2 *Brews.* 308; *R. Cox* 507.

The plaintiff practising as a dentist under the name of "The Colton Dental Association," the defendant, who had been in the plaintiff's employ, left him, and set up in business as a dentist, and began to style himself on his door and on his cards "Dr. F. R. Thomas, late operator at the Colton Dental Rooms," the words "late operator at the" being in very small letters.

Injunction granted to restrain the defendant from using such signs and cards, and from representing his place of business to be the plaintiff's.

"An imitation with partial difference, such as the public would not observe, does as much harm as an entire counterpart. If such variations impose on a portion or class of customers only, it is evident that the damage is of the same character, though varied in amount or degree."

TOWN *v.* **STETSON.** [306.]

Dec., 1868.

[*N. Y. C. P.*——5 *Abb. Pr. N. S.* 218; 3 *Daly* 53; *R. Cox* 514.]

The plaintiff being a dealer in "Desiccated Codfish," the defendant began to sell fish under the same name.

On motion by the defendant, injunction which had been granted on motion by the plaintiff to restrain the defendant

from using that name for his fish, dissolved, the name being purely descriptive of the article.

Per Barrett, J. "No manufacturer can acquire a special property in an ordinary term or expression, the use of which as an entirety is essential to the correct and truthful designation of a particular article or compound."

[307.] **FERGUSON *v.* THE DAVOL MILLS.**

Dec., 1868.

Phila. C. P.— *Allison, P. J.* } ——2 *Brews.* 314; 7 *Phila.* 253; *R. Cox* 516.

The plaintiffs being manufacturers of cotton goods, which they sold ticketed with a label containing the letter K in a double circle, with the words "No." and "Yds.," the defendants sold other cotton goods with a similar label.

Injunction to restrain the defendants from using the label, refused, on the ground that the label was not indicative of the manufacturer.

[308.] **PALMER *v.* HARRIS.**

Jan., 1869.

Penn. Sup. Ct.——60 *Penn.* 156; *R. Cox* 523; 8 *Am. L. Reg. N. S.* 137.]

The plaintiff being a maker of cigars, which he sold in boxes bearing labels on which the words "Golden Crown" and other matters were printed, the defendant began to sell other cigars in boxes very similarly labelled.

Injunction to restrain the defendant from infringing the plaintiff's rights, refused, on the ground that the plaintiff's labels contained false statements, as to his cigars being made in Havannah, &c., and that, notwithstanding that the statements were in the Spanish language, and not in English

EMERSON *v.* BADGER. [309.]

Jan., 1869.

[*Mass. Sup. Ct.*——101 *Mass.* (5 *Browne*) 82.]

Charles Emerson, the inventor of a razor strop which he called "Emerson's Elastic Razor Strop," and sold in cases labelled (among other things) with the words "Charles Emerson, Emerson Place, Charlestown," taught the trade to five of his nephews, and allowed such of them as left him in his lifetime, and set up on their own account, to use his labels; B. Badger being the earliest of them. At Charles Emerson's death intestate, the plaintiff, being one of the five nephews, and bearing the same name, bought his premises, but the business was not conveyed to any one, and the customers were distributed among the four nephews (exclusive of B. Badger), and the stock in trade among the five. B. Badger continued to carry on his own trade till his death, and the defendant, his son, after him; and the latter used labels describing his razor strops as "Genuine Emerson's Elastic Razor Strop," and stating him to be the "son and successor of B. Badger, senior successor to the original Charles Emerson, Emerson Place, Charlestown," and stating the facts and dates correctly.

Suit by Charles Emerson, junior, for an injunction to restrain the defendant from using the name, address, &c.

Injunction refused, on the ground that no fraud was shown, and that the defendant had acted within his rights.

BASS *v.* DAWBER. 310.

Jan. 21st, 1869.

[*Lord Romilly, M.R.*——19 *L. T., N. S.* 626.]

The plaintiffs being brewers, the prominent features of whose trade mark consisted of a red pyramid, the words

"Bass & Co.'s Pale Ale," and the fac-simile of the signature "Bass & Co.," the defendants began to use labels bearing a somewhat general resemblance to the plaintiffs', but containing a red Spanish shield reversed, the words "East India Pale Ale," and a fac-simile of the signature "Dawber & Co."

Injunction to restrain the defendants from infringing the plaintiffs' rights, refused, with costs, the defendants having offered to print their crest in black on the shield.

"If a person has *bonâ fide* taken a label or trade mark which does resemble the label of another person, and this is not done with the intention to deceive, the Court will not require him to change it completely, because a change in a trade mark is a serious thing. . . . No tradesman likes to alter his trade mark completely; it is like beginning a new firm; and therefore in dealing with cases of this description, if the defendant has acted *bonâ fide*, the Court will not compel him by injunction to make a totally different thing."

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311. **DIXON *v.* HOLDEN.**

Feb. 24*th*, 1869.

[*Malins, V.C.*——*L. R.* 7 *Eq.* 488; 20 *L. T., N. S.* 357; 17 *W. R.* 482.]

On motion by the plaintiff, injunction granted to restrain the defendant from publishing an advertisement falsely stating that the plaintiff was a member of a bankrupt firm, as being calculated to affect injuriously his property in his name and reputation.

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312. **DuBOULAY *v.* DuBOULAY.**

March 15*th*, 1869.

[*Privy Council*——*L. R.* 2 *P. C.* 430—441; 6 *Moo. P. C. N. S.* 31; 38 *L. J. P. C.* 35—38; 22 *L. T., N. S.* 228—231; 17 *W. R.* 594.]

On appeal from the Windward Is. Ct. of App., injunction to restrain the defendant from assuming the plaintiff's

family name, refused, on the ground that there was no right of property in a name, apart from a business.

Per Lord Chelmsford.—"In this country we do not recognise the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connexion with a trade or business is familiar to our law; and any person using that name, after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or, at least, of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name which is the patronymic of a family by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress."

FILLEY *v.* **FASSETT.** 313.]

March, 1869.

[*Missouri Sup. Ct.*——44 *Mo.* 173; *R. Cox* 530; 8 *Am. L. Reg. N. S.* 402.]

The plaintiff being a maker of stoves, which he sold stamped with the words "Charter Oak," and a sprig of oak leaves, the defendant sold other stoves stamped with the words, but not with the sprig of leaves.

Injunction granted to restrain the defendant from infringing the plaintiff's rights, notwithstanding that only a portion of the plaintiff's mark appeared on his stoves.

And *Held*, that it was no defence that other persons had used the same words subsequently to the plaintiff, without his knowledge, he having taken proceedings in two instances which had become known to him.

Per Currier, J.—"The imitation of an original trade mark need not be exact or perfect. It may be limited and partial; nor is it requisite that the whole should be pirated. Nor is it necessary to show that any one has, in fact, been deceived, or that the party complained of made the goods; nor is it necessary to prove inten-

tional fraud. If the Court sees that the plaintiff's trade marks are simulated in such a manner as probably to deceive customers or patrons of his trade or business, the piracy should be checked at once by injunction."

[314.] **THE AMOSKEAG MANUFACTURING COMPANY *v.* GARNER (1).**

May, 1869.

[*N. Y. Sup. Ct.*—*Barnard, J.*] ——55 *Barb.* 151; 6 *Abb. Pr., N. S.* 265; *R. Cox* 541.]

The plaintiffs being manufacturers, but not printers, of cotton cloths, who placed the word "Amoskeag" on their cloths, the defendants, who were printers of made cloths, but did not manufacture them, placed the same word on their printed cloths.

On motion by the defendants, injunction which had been granted, on motion by the plaintiffs, to restrain them from so doing, dissolved, on the ground that the two trades were distinct, and also the classes of goods produced; and

Held, further, that a delay of nine years after the plaintiffs became aware of the use of the name by the defendants disentitled them to relief.

[315.] **GRAHAM AND CO. *v.* KERR, DODS AND CO.**

June 14*th*, 1869.

[*Calcutta High Court*—*Phear, J.*] ——3 *Beng. L. R. App.* 4.]

The plaintiffs being Scotch merchants trading with India, the defendants sold in India goods bearing a mark very similar to that of the plaintiffs.

On motion by the plaintiffs, injunction granted to restrain the defendants from infringing the plaintiffs' trade mark, notwithstanding that the defendants had only sold the goods marked in the same manner as when received from Scotland, and that no fraudulent intention was proved.

"It is not enough to say that there was no fraudulent intention. That is no reason why an injunction should not be granted. I do not think I have any option if the marks which the defendants have used are those of the plaintiffs; no matter what their intention was, a perpetual injunction would be granted. In the meantime an interlocutory injunction must issue. There is obviously a close imitation."

MARSHALL *v.* **ROSS.** **316.**

July 30*th*, 1869.

[*James, V.C.*——*L. R.* 8 *Eq.* 651; 39 *L. J., Ch.* 225; 21 *L. T., N. S.* 260; 17 *W. R.* 1086.]

The plaintiffs being manufacturers of thread at Shrewsbury, who sold their thread labelled with the words "Shrewsbury—Marshall & Co.—Patent Thread," foreign thread labelled "Schrewsbury—Marchal—Patent Thread," was consigned to the defendant, a shipping agent, from abroad.

On motion by the plaintiffs, injunction granted to restrain the defendant from dealing with or disposing of the thread, notwithstanding that the plaintiffs had no patent for the thread, on the ground that such use of the word "patent" had, by long usage, come only to denote the character of the thread, and did not imply the existence of any patent.

CHANCE *v.* **SHEPPARD.** **317.**

July 30*th*, 1869.

[*Malins, V.C.*]

The plaintiff being the proprietor of a newspaper called *The Bedfordshire Express and General Advertiser for the*

Counties of Cambridge, Hertfordshire, Huntingdonshire, and Middlesex, the defendant began to publish another paper under the name of *The Bedfordshire Express and General Advertiser for the County*, the words "The Bedfordshire Express" being printed by the defendant in the same style as by the plaintiff.

On motion by the plaintiff, injunction granted to restrain the defendant from so doing.

[318.] **NEWBY** *v.* **THE OREGON CENTRAL RAILWAY COMPANY.**

Aug. 3*rd*, 1869.

[*U .S. C. C., Dt. of Oregon—Deady, J.*] —— *Deady*, 609; 9 *Amer. Rep.* 331 *n.*]

The plaintiff being a bondholder and creditor of the "Oregon Central Railway Co." the defendant company was started under the same name.

Suit for an injunction to restrain the defendant company from assuming the name, on the ground that such a course of conduct was calculated to depreciate the property of the original company.

On demurrer,

Held, that the original company would be entitled to an injunction, but that the plaintiff was not entitled to sue, until that company had refused itself to bring the suit.

[319.] **LOCKWOOD** *v.* **BOSTWICK.**

Sept., 1869.

[*N. Y., C. P.—Daly, C.J.*] —— 2 *Daly*, 521; *R. Cox* 555.]

The plaintiffs, being the assignees of the business of a certain clarifying company, manufactured, in succession

to the company, a pomade under the name of "Bovilene." The defendants began to sell another pomade under the name of "Bovina."

Motion by the defendants, to dissolve an injunction which had been granted to restrain them from infringing the plaintiffs' rights, refused.

"There is a right of property in a trade mark which is capable of being transferred to another."

BRADBURY *v.* **BEETON.** **320.**

Nov. 3*rd*, 1869.

[*Malins, V.C.*——39 *L. J., Ch.* 57; 21 *L. T., N. S.* 323; 18 *W. R.* 33.]

The plaintiffs being the proprietors of "Punch," published weekly at 3*d.*, the defendant began to publish another weekly comic paper at 1*d.*, under the name of "Punch and Judy."

Motion by the plaintiffs, for an injunction to restrain the defendant from so doing, refused, on the ground that deception was not probable, the names, title pages, and prices being sufficiently dissimilar.

"Every person who uses a trade mark, be it a label on a bottle, or the name or title of a periodical or magazine, by his appropriation and user of the name acquires a property in that name, and has a right to restrain any other person from using the same name in such a manner as would lead, or be calculated to lead, the public to believe that they are purchasing one thing when in truth they are purchasing another."

TONGE *v.* **WARD.** **321.**

Nov. 8*th*, 1869.

[*Lord Romilly, M.R.*——21 *L. T., N. S.* 480.]

The plaintiffs being cloth manufacturers who marked their goods with the name "Tonge's," the defendants'

manager, in obedience to an order from a customer, but without the defendants' own knowledge, affixed to goods of the defendants' make tickets with the name "Tung's."

Injunction granted to restrain the defendants from infringing the plaintiffs' rights, and

Held, that the defendants must also pay costs, although they had stated their ignorance, and offered to give an undertaking to pay £50 to a charity, since they had not offered to submit to a decree in the terms prayed.

"The defendants are bound to know what their agents do, and if they do not know, they are responsible exactly as if they did know."

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322. **THE WHEELER AND WILSON MANUFACTURING COMPANY *v.* SHAKESPEAR.**

Nov. 10*th*, 1869.

[*James, V.C.*——39 *L. J., Ch.* 36.]

The plaintiffs being American sewing-machine manufacturers, the defendant, who had been their agent for the sale of their sewing machines, continued to represent himself to be such agent after the determination of his agency.

Injunction granted to restrain the defendant from so doing; but

Held, that no injunction could be granted to restrain the use of the words "Wheeler & Wilson," since they were indicative of a machine manufactured on a certain principle, whether by the plaintiffs or others.

"It seems to me that the name 'Wheeler & Wilson' machine has come to signify the thing manufactured according to the principle of the patent. That being so, I cannot restrain anybody, after the expiration of the patent, from representing his article as being the article which was so patented. A man cannot prolong his monopoly by saying 'I have got a trade mark in the name of a thing which was the subject of the patent.'"

HUDSON *v.* OSBORNE. 323.

Nov. 11*th*, 1869.

[*James, V.C.*——39 *L. J., Ch.* 79 ; 21 *L. T., N. S.* 386.]

The plaintiffs, Hudson Brothers, having purchased the goodwill, stock-in-trade, &c., of the business carried on at "Osborne House," Ludgate Hill, by the defendant George Osborne, from his assignees in bankruptcy, the defendants, Osborne and Parker (the latter having formerly been Osborne's manager), set up in business in the Old Bailey, and styled their new establishment "Osborne House," and put out circulars, advertisements, &c., representing that they were carrying on the business formerly carried on by the defendant Osborne and sold to the plaintiffs.

On motion by the plaintiffs, injunction grantedto restrain the defendants from so doing, and

Held, that an objection that the plaintiffs were disentitled by reason of having retained on their door a brass plate bearing the defendant Osborne's name, failed.

"In substance there is no distinction between a sale by a man himself of his business and the goodwill of it, and the sale by the assignees in bankruptcy of all a bankrupt's assets of every kind."

"It has been settled that there is no implied covenant of any kind in the sale by an individual himself of the goodwill of his business; but it seems to be settled that a trader, whose business and the goodwill of whose business have been sold by himself, or by any person deriving title under him, has no right to represent himself as carrying on that identical business ; he has no right to use the trade marks which were the marks of that business, or by the use of the name, or of a title of the firm, to represent himself as being the continuer of that identical business which was sold."

324. **THE LEATHER CLOTH COMPANY** *v.* **LORSONT.**

Nov. 12*th*, 1869.

[*James, V.C.*——*L. R.* 9 *Eq.* 345 ; 39 *L. J., Ch.* 86 ; 21 *L. T., N. S.* 661 ; 18 *W. R.* 572.]

Suit for an injunction to restrain the defendant from manufacturing leather-cloth in breach of contract, and from using trade marks alleged to be similar to the plaintiffs'.

Injunction to restrain the use of the trade marks, refused, on the ground that the plaintiffs were disentitled by reason of their marks wrongfully containing the word "patent," there never having been a patent for the cloth, and there being no evidence, as in *Marshall* v. *Ross*, to show that it indicated a particular kind of article; and

Held, that no costs could be given as to this part of the suit, though the defendant would have been entitled to them if he had not, as manager of the plaintiffs, been personally concerned in the adoption and wrongful use of the marks by the plaintiffs.

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325. **LEE** *v.* **HALEY.**

Dec. 9th ; *Dec.* 18*th*, 1869.

[*Malins, V.C.*——21 *L. T., N. S.* 546 ; 18 *W. R.* 181.]
[*Giffard, L.J.*——*L. R.* 5 *Ch.* 155 ; 39 *L. J., Ch.* 284 ; 22 *L. T., N. S.* 251 ; 18 *W. R.* 242.]

The plaintiffs being coal merchants, carrying on business at 22, Pall Mall, as "The Guinea Coal Co.," the defendant, their former manager, set up for himself at Beaufort Buildings, Strand, as the "Pall Mall Guinea Coal Company," and afterwards removed to 46, Pall Mall.

On motion by the plaintiffs, injunction granted to restrain the defendant from trading under that name in Pall Mall; and

Held, that defences of misrepresentation by the plaintiffs, and of sale of short weight by them, failed on the evidence, and that the plaintiffs were justified in delaying proceedings from August till November, for the purpose of obtaining evidence of actual deception.

Per Malins, V.C. (21 L. T., N. S. 547).—"Put the case of a well-established shop or inn, or of a publication; directly the name is established so as to constitute a reputation, no person can adopt the same name (which, although not a copyright, is in the nature of a trade mark), because by doing so he leads the public to believe that they are dealing with the party who has established the name, when in truth they are dealing with another person."

Per Giffard, L. J. (L. R. 5 Ch. 161).—"I quite agree that the plaintiffs have no property in the name (*Guinea Coal Co.*), but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

"It is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead and does lead other people to suppose that his business is the business of another person."

DEL VALLE *v.* MAYER. 326.

Jan. 20th, 1870.

[*James, V.C.*——*Seton, 4th ed.* 236.]

Injunction granted, to restrain the defendant from passing into the market from the docks goods marked in imitation of the plaintiff's.

[327.] THE DELAWARE AND HUDSON CANAL COMPANY *v.* CLARK.

Jan. 1870; *Dec.* 1871.

[*U. S. C. C.; S. Dt. of N. Y.*—*Blatchford, J.*——7 *Bl. C.C.* 112.]

[*U. S. Sup. Ct.*——13 *Wallace* 311; 5 *Am. L. T.* 135; 1 *U. S. Pat. Gaz.* 279.]

The plaintiffs being dealers in coal, which they raised from the Lackawanna Valley, and called by that name, the defendant sold coal also raised in that valley, but not by the plaintiffs, as "Lackawanna Coal."

Injunction to restrain the defendant from using the word "Lackawanna," refused, although the plaintiffs had long exclusively raised coal there and used the name, on the ground that it correctly described the origin of the defendant's coal.

Per Strong, J., 13 Wall. 323.—"No one can claim protection for the exclusive use of a trade mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade mark, and the exclusive use of it be entitled to legal protection."

P. 327.—"No one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from truthfully using the same designation. It is only when the adoption or imitation of what is claimed to be a trade mark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it."

MILNER *v.* **REED.** **328.**

Feb. 3*rd*, 1870.

[*Lancaster Chanc.*—*Wickens, V.C.*]—*Bryce on Trade Marks*, 90.

A surgeon, resident in a place called "Oldfield Lane," having acquired a considerable local reputation as "The Oldfield Lane Doctor," the plaintiff, who had been his assistant and afterwards his partner, continued to practise under the same name for some years after the death of the person to whom it was originally applied. The defendant, who had come into occupation of the premises formerly occupied by the partnership in Oldfield Lane, began to describe himself by the name of "The Oldfield Lane Doctor."

Injunction granted to restrain the defendant from so doing.

WOTHERSPOON *v.* **CURRIE.** **329.**

Feb. 25*th*; *July* 5*th*, 1870; *April* 18*th*, 1872.

[*Malins, V.C.*——22 *L. T., N. S.* 260; 18 *W. R.* 562.]

[*James, L. J.*——42 *L. J., Ch.* 130; 23 *L. T., N. S.* 443; 18 *W. R.* 942.]

[*House of Lords*——*L. R.* 5 *H. L.* 508; 42 *L. J., Ch.* 130; 27 *L. T., N. S.* 393.]

The plaintiffs being manufacturers of "Glenfield Starch," carrying on business in succession to the original makers, at first at Glenfield, afterwards at another place, the defendant obtained possession of a small plot of land at Glenfield, and began to manufacture starch and to sell it in packets on which the word "Glenfield" appeared in large and conspicuous letters.

Injunction granted to restrain the defendant from using the word "Glenfield" in connexion with his starch, notwithstanding that his own name had also been placed on his packets.

Per Lord Hatherley, C. (L. R. 5 H. L. 517).—"It has been long ago pointed out in decided cases that it is not upon a *malâ mens* towards the first purchaser that the decision of these cases rests."

Per Lord Chelmsford (p. 519).—"For the purpose of establishing a case of infringement, it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade mark belongs."

Per Lord Westbury (p. 522).—"I have no doubt that this case comes within the principle on which the jurisdiction is founded—the principle being to prevent a party from fraudulently availing himself of the trade mark of another which has already obtained currency and value in the market, by whatever means he may devise for the purpose, provided the means are devised in order to give him a colourable title to the use of the word, and provided it be shown from the manner in which he has employed those means that his object was from the beginning to invade the property of the appellants."

[330.] **GENIN *v.* CHADSEY.**

[*New York.——Cited*, 2 *Brews.* 330 ; *R. Cox* 567.]

The plaintiff being the proprietor of an oyster saloon, over the door of which he placed a sign, bearing the words "The Captain's Live and Let Live Oyster and Dining Saloon," the defendants carried on the same business next door, and put up a sign with the words "G. W. Chadsey & Co.'s Great Eastern Live and Let Live Dining Saloon."

Injunction granted to restrain the defendants from using the words "Live and Let Live."

THE DIXON CRUCIBLE COMPANY *v.* GUGGENHEIM. [331.]

March, 1870.

[*Phila. C. P.*—*Paxson, J.*} ——7 *Phila.* 408; 2 *Brews.* 321; 3 *Am. L. T.* 288; *R. Cox* 559.]

The plaintiffs being makers of stove polish, which they sold labelled with the words "Stove Polish—Dixon's Prepared Carburet of Iron," the defendants began to sell stove polish labelled "J. C. Dixon's Stove Polish—Carburet of Iron."

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

"The property or right to a trade mark may pass by an assignment, or by operation of law, to any one who takes at the same time the right to manufacture or sell the particular merchandise to which the said trade mark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment, or descend to a man's legal representative."

McCARTNEY *v.* GARNHART. [332.]

March, 1870.

[*Missouri Sup. Ct.*——45 *Mo.* (4 *Post*) 593.]

The plaintiffs being whiskey manufacturers, who sold their whiskey in barrels branded with a device consisting of two anchors and the initials "S. McC.," the defendant began to sell whiskey in barrels branded with two picks, a pair of scales, and the words "J. H. Garnhart's Old Bourbon."

Injunction to restrain the defendant from infringing the plaintiffs' rights, refused, on the ground that the resemblance between the two brands was not sufficiently close to

render deception probable, and that no intention to deceive was shown.

"To justify an injunction it should at least appear that the resemblance between the two brands is sufficiently close to raise the probability of mistake on the part of the public, or design and purpose to mislead and deceive on the part of the defendant."

[333.] **STONEBRAKER *v.* STONEBRAKER.**

April, 1870.
[*Maryland Ct. of App.*——33 *Md.* 252.]

The plaintiff, Henry Stonebraker, having invented and manufactured a series of medicines, known as "Stonebraker's Medicines," the defendants, of whom two had been in partnership with the plaintiff, but had covenanted on dissolution not to imitate his medicines, &c., and another was the plaintiff's brother, began to use the brother's name, and to manufacture and sell medicines as "Stonebraker's Medicines," in some cases introducing the plaintiff's certificates and testimonials.

Injunction granted to restrain the defendants from imitating the plaintiff's medicines, and selling medicines under the same names, imitating the plaintiff's trade marks, labels, &c.; and

Held, that the defendants must account for profits made on goods actually sold by them with the prohibited marks, &c., but not for goods manufactured but not sold, and not for goods forming part of the stock of the former partnership, which the former partners retained the right to sell, under the terms of dissolution.

RILLET *v.* **CARLIER.** [334.]

June 6*th*, 1870.

[*N. Y. Sup. Ct.*—*Pratt, J.*] ——61 *Barb. S. C.* 435; 11 *Abb. Pr. N. S.* 186.]

The plaintiff manufacturing from pomegranate juice a syrup which he called "Grenadine" and "Grenade Syrup," the defendant began to sell another syrup as "Grenade Syrup."

Motion by the defendant to dissolve an injunction which had been granted to restrain him from selling a syrup under that name, refused, on the ground that the plaintiff had acquired a right of trade mark in the word "Grenade," as applied to syrup, by being the first to adopt it in America, notwithstanding that the word was an ordinary French one signifying "pomegranate," and that the term "Grenade Syrup" was in common use in France, and notwithstanding that the defendant used the term in combination with other words.

GILLIS *v.* **HALL** (1). [335.]

July, 1870.

[*Phila. C. P.*—*Paxson, J.*] ——7 *Phila.* 422; 2 *Brewster* 342; *R. Cox* 580.]

The defendant, having sold to the plaintiff his interest in the firm of "R. P. Hall & Co.," and in the secret of a certain preparation called "Hall's Vegetable Sicilian Hair Renewer," and in the use of the name, covenanting not to use his name in the manufacture of similar articles, nor to impart the secret, subsequently formed a partnership with another person under the same name of "R. P. Hall & Co.," and commenced to manufacture and sell the same article under the same name and with a trade mark imitated from the plaintiff's.

Injunction granted to restrain the defendant from making and selling such preparations, or using his name in connexion therewith, or imitating the plaintiff's labels, although liquidated damages, to be forfeited in case of breach of the contract, were specified in the contract.

[336.] **CHOYNSKI** *v.* **COHEN.**

July, 1870.

[*Cal. Sup. Ct.*——39 *Cal.* 501 ; 2 *Amer. Rep.* 476 ; *R. Cox* 593.]

The plaintiff's place of business being styled "The Antiquarian Book Store," the defendant began to style his establishment "The Antiquarian Book and Variety Store."

Injunction to restrain him from so doing, refused, on the ground that the name was merely descriptive of the particular class of books sold, and could not be exclusively appropriated by any one.

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337. **HOVENDEN** *v.* **LLOYD.**

July 20th, 1870.

[*Bacon, V.C.*——18 *W. R.* 1132.]

S. Lloyd having invented a toilet preparation which he termed "Lloyd's Euxesis," after his death intestate, in 1854, his son, A. S. Lloyd, who had been in his employ, continued to make the article, but without taking out administration to his father. A. S. Lloyd died in 1868, and the plaintiff was the purchaser of the goodwill of his business, together with what right he had to the trade mark.

Suit for an injunction to restrain the widow of A. S. Lloyd from manufacturing the article and using the name.

Held, that A. S. Lloyd had acquired no title to the trade mark capable of being enforced, or of being transferred to the plaintiff, and, further, that if A. S. Lloyd had had any title, it would have been waived by his having taken no proceedings during a period of fifteen months preceding his death, for which time the defendant had carried on her business, and that the injunction must be refused.

HARGREAVES *v.* **SMITH.** **338.**

Aug. 8*th*, 1870.
[*Manchester Assizes*— *Lush, J.*

The plaintiffs being the executors of a bleacher, dyer, and finisher of gray cloths, whose trade mark consisted of his arms, crest, and initials, with a scroll and a border in blue, white, and gold, the defendant began to use a trade mark, consisting of his own arms, crest, and initials, similarly arranged and coloured, before the testator's death, and continued to do so afterwards.

Action for damages.

Held, at the trial, by Lush, J., that the points for the jury were: (1) whether the plaintiffs' trade mark was a good one; (2) whether the plaintiffs' trade mark had been copied; (3) whether the resemblance, if any, had been produced with the intention of diverting customers from the plaintiffs to the defendant.

Verdict for the plaintiffs.

[339.] **CANDEE, SWAN & CO. *v.* DEERE & CO.**

Sept., 1870.

[*Ill. Sup. Ct.*——54 *Ill.* 439; 5 *Amer. Rep.* 125; 4 *Am. L. T.* 266; 10 *Am. L. Reg., N. S.* 694.]

The respondents (plaintiffs) being manufacturers of ploughs at Moline, which they stamped with the words "John Deere, Moline, Ill.," the appellants (defendants) made ploughs at the same place and stamped them "Candee, Swan & Co., Moline, Ill."

On appeal, injunction which had been granted to restrain the appellants (defendants) from using the word "Moline," dissolved, on the ground that the word was only indicative of the place of manufacture, to which all inhabitants of the town had an equal right, and

Held, that no exclusive right could be claimed in the letters and figures "A. No. 1," "A. X. No. 1," "No. 1," "X. No. 1," "No. 3," and "B. No. 1," used to designate the different qualities of the ploughs.

Per Breese, J. (5 Amer. Rep. 136).—"It is the actual use of the trade mark, affixed to the merchandise of the manufacturer, and this alone, which can impart to it the element of property. The mere declaration of a person, however long and however extensively published, that he claims property in a word as his trade mark, cannot even tend to make it his property."

P. 141.—"The law is well settled that no circular, price list, or advertisement, no matter how frequently repeated, can constitute a trade mark."

[340.] **HOLMES, BOOTH & HAYDENS *v.* THE HOLMES, BOOTH & ATWOOD MANUFACTURING CO.**

Sept., 1870.

[*Conn. Sup. Ct.*——37 *Conn.* 278; 9 *Amer. Rep.* 324.]

Holmes & Booth, having been two of the principal promoters of the plaintiff corporation, established under

the above name, left it and set up the defendant company under a very similar title.

Injunction granted to restrain the defendant company from using the names of Holmes & Booth.

Per Carpenter, J.—"The ground on which Courts of Equity afford relief in this class of cases is the injury to the party aggrieved, and the imposition upon the public, by causing them to believe that the goods of one man or firm are the production of another. The existence of these consequences does not necessarily depend upon the question whether fraud or an evil intent does or does not exist. The *quo animo*, therefore, would seem to be an immaterial inquiry."

EX PARTE KING. [341.]

Sept. 19th, 1870.

[*U. S. Patent Office—Fisher, Comm.*] ——*U. S. Pat. Comm. Decis.* 1870, 109.]

Application for a grant of letters patent for a design for a trade mark, refused, on the ground that, since the U. S. Statute of 1870, the only proper statutory mode of obtaining the exclusive use of a trade mark was by procuring its registration under that Act as a trade mark, and not by patenting it as a design, or otherwise.

IN RE ENGLISH. [342.]

Nov. 2nd, 1870.

[*U. S. Patent Office—Fisher, Comm.*] ——*U. S. Pat. Comm. Decis.* 1870, 142.]

On an application for the registration of certain trade marks on brooms, of which one consisted of the words and letters "R. W. English's X Broom. Buffalo, N. Y. Order English's X Brooms," and the others were the same, except that the X was changed into XX and XXX,

Held, (1) that the fact that X and XX had been used as descriptive of quality in the liquor trade did not disqualify those symbols from being arbitrarily adopted as trade marks in an entirely different trade, and that the trade marks must be admitted to registration; (2) that a separate application must be made for the registration of each separate variation in the label by the addition of an X, the X, XX, &c., being in each case a mere arbitrary symbol.

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343. **NIXEY** *v.* **ROFFEY.**

Nov. 14*th*, 1870.
[*Malins, V.C.*——*W. N.* 1870, *p.* 227].

The plaintiff being a manufacturer of black lead, which he sold under special labels, on which he was described as "Manufacturer and Patentee," though he had taken out no patent for the article in question, the defendant sold other black lead under similar labels.

Suit for an injunction to restrain the defendant from imitating the plaintiff's labels.

An injunction having been granted on motion by the plaintiff, and the defendant having since ceased to use the labels, and sold his business,

Held, on motion for decree, that the plaintiff's use of the words "Manufacturer and Patentee" was equivalent to his describing his article as "patent," and that this being incorrect, the bill must be dismissed without costs.

LAZENBY *v.* WHITE (1). **344.**

Nov. 18*th*, 1870; *Jan.* 16*th*, 1871.

[*Lord Romilly, M.R.*——*Cited L. R.*, 11 *Eq.* 448; 40 *L. J., Ch.* 576; 24 *L. T., N. S.* 280; 19 *W. R.* 595; *Seton, 4th ed.* 237.]

[*James and Mellish, L.JJ.*——41 *L. J., Ch.* 354.]

The plaintiffs being the successors in business of the inventor of "Harvey's Sauce," that name having become open to the use of all manufacturers of the sauce, the defendant began to sell a sauce under the name of "The Original Lazenby's Harvey's Sauce."

Injunction granted to restrain the defendant from so doing, and

Held, that a defence that the plaintiffs were disentitled by reason of their own delay, failed.

CLOWES *v.* HOGG. **345.**

Dec. 17*th*, 1870; *Feb.* 17*th*, 1871.

[*Malins, V.C.*——*W. N.* 1870, *p.* 268; *L. J. Notes of Cases*, 1870, *p.* 267.]

[*James and Mellish, L.JJ.*——*W. N.* 1871, *p.* 40.]

The plaintiffs being the proprietors of a magazine called *London Society*, the defendant, who had formerly owned the magazine, and had, on mortgaging it to another firm, covenanted to do nothing to injure it, began to publish a magazine which he called *English Society*, in a cover calculated to induce the belief that it was a substitute for or continuation of *London Society*.

On motion by the plaintiffs, injunction granted to restrain the defendant from so doing.

On appeal, the defendant having in the meantime

adopted a new style of cover to which the plaintiffs did not object,

Held, that the injunction must be dissolved, the defendant undertaking to use the new cover until the hearing.

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346. **LAZENBY** *v.* **WHITE (2).**

Dec. 22nd, 1870.

[*James, L. J.*——*L. R.* 6 *Ch.* 89 ; 19 *W. R.* 291.]

On motion by the defendant, his appeal against the injunction which had been granted to restrain him from selling his sauce under the name of "The Original Lazenby's Harvey's Sauce," advanced to the head of the list of appeals for the next term, on the ground of the irreparable damage which would be occasioned to the defendant by the continuance of the injunction.

[347.] **GRAHAM** *v.* **PLATE.**

Jan., 1871.

[*Cal. Sup. Ct.*——40 *Cal.* 593 ; 6 *Amer. Rep.* 639 ; 4 *Am. L. T.* 75.]

In an action to recover damages for an infringement by the defendant of the trade mark of Henry Derringer, of whose estate the plaintiff was administrator, the whole profits made by the defendant by the sale of the spuriously marked goods were awarded as damages.

Held, on appeal, that the damages were not excessive.

Per Crockett, J.—"Every consideration of reason, justice, and sound policy demands that one who fraudulently uses the trade mark of another should not be allowed to shield himself from liability for the profit he has made by the use of the trade mark on the plea that it is impossible to determine how much of the profit is due to the trade mark, and how much to the intrinsic value of the commodity. The fact that it is impossible to apportion the profit renders it just that he should lose the whole."

ELLIS *v.* ZEILEN & CO. [348]

Jan., 1871.

[*Georgia Sup. Ct.*——42 *Ga.* 91.]

The plaintiffs (defendants in error), having purchased a medicine called "Dr. Simmons' Liver Regulator, or Medicine," the defendants (plaintiffs in error), began to sell a medicine of their own as "Dr. A. Q. Simmons' Genuine Liver Medicine."

Suit for an injunction to restrain the defendants from using similar packages and wrappers to the plaintiffs'.

Demurrer by the defendants, overruled, on the ground that, although the trade marks did not appear so similar as to be likely to deceive, it must be assumed from the pleadings, for the purpose of the demurrer, that the defendants had acted with a view "to take advantage of the reputation" of the plaintiffs; and

Held, that another ground of demurrer, that the plaintiffs' medicine was a quack remedy, and a deceit upon the public, failed, on the principle that in such cases the Court would only adjudicate between the conflicting claims of the parties, and not with a view to the guardianship of the public with respect to the qualities of nostrums, except where injury to the public health or morals was to be apprehended.

R. *v.* ARDLEY. 349.

Jan. 31*st*, 1871.

[*C. C. R.*——*L. R.* 1 *C. C. R.* 301; 12 *Cox* 23; 40 *L. J. M. C.* 85; 24 *L. T., N. S.* 193; 19 *W. R.* 478.]

On an indictment for obtaining money by false pretences, the prisoner having induced the prosecutor to purchase a gold chain spuriously stamped "15 ct." on

every link, in imitation of the hall mark, on a representation that it was made of 15 carat gold, and that the mark was genuine,

Held, that the conviction was right and must be affirmed, on the ground that the prisoner's statement was not mere exaggerated commendation of the article of which he wished to dispose, but a deliberate misstatement of what was not a matter of opinion, but a matter of fact.

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350. **SHIPWRIGHT** *v.* **CLEMENTS.**

Feb. 20th, 1871.

[*Malins, V.C.*——19 *W. R.* 599.]

The defendant, having been in partnership with the plaintiff as perfumers, assigned to the plaintiff, on the dissolution of the partnership, all his interest in the partnership premises, and effects, without specifically referring to the goodwill or trade marks, and covenanted not to interfere with the plaintiff, but he nevertheless subsequently represented that the old business had been removed to his new premises, and sold a perfume called "The Zingari Bouquet" under the name and mark which the partnership had used for it.

Injunction granted to restrain the defendant from infringing the plaintiff's rights, but on account of the smallness of the amount, no account given.

"The sale of a business is a sale of the goodwill. It is not necessary that the word 'goodwill' should be mentioned. The defendant sold the business, and with it everything producing profit. . . . In the sale of a business a trade mark passes, whether specially mentioned or not."

COCKS *v.* CHANDLER. 351.

March 3*rd*, 1871.

[*Lord Romilly, M.R.*——*L. R.* 11 *Eq.* 446; 40 *L. J., Ch.* 575; 24 *L. T., N. S.* 379; 19 *W. R.* 593.]

The plaintiff being the successor in business of the inventor of "Reading Sauce," the defendant began to sell a sauce under the name of "The Original Reading Sauce."

Injunction granted to restrain the defendant from so doing.

"Where there are a great number of persons who produce the same article, 'original' means that the article so called is that made by the first inventor. That is the meaning of the word 'original' which the Court of Chancery has always recognized."

RODGERS *v.* PHILP. [352.]

1871.

[*Columbia Sup. Ct.*—*Wylie, J.*——1 *U. S. Pat. Gaz.* 29.]

The plaintiffs being a firm of Sheffield cutlers, who stamped their cutlery with the name "Rodgers," or "Rodgers & Sons," or "J. Rodgers & Sons," together with a star and Maltese cross, the defendants sold other cutlery marked with "Rogers & Son," and the same symbols, alleging that such cutlery had been manufactured by a German firm, and sold so marked, for twenty-five years.

On motion by the plaintiffs for an injunction to restrain the defendants from so doing,

Held, (1) that the marks on the defendants' goods, though not identical with those on the plaintiffs', constituted an infringement of the plaintiffs' rights; (2) that a licence from the King of Prussia to the German manu-

facturers to use the fraudulent marks, if it existed, could be no defence; (3) that the plaintiffs were not disentitled by reason of not having registered their trade marks in America, under the U. S. Statute of 1870, since registration was not made obligatory; (4) but that the plaintiffs were disentitled to an injunction, at all events as regarded innocent purchasers of goods spuriously marked, by a delay of twenty-five years in arresting the infringement, and that the motion must therefore be refused.

[353.] **GILLIS** *v.* **HALL** (2).

1871.

[*Phila. C. P.*—*Paxson, J.*] —8 *Phila.* 231; 3 *Brews.* 509; *R. Cox* 596.]

The defendant, having been restrained by injunction from using the names "Hall," "R. P. Hall," &c., in connexion with a preparation called "Hall's Vegetable Sicilian Hair Renewer," sold an article which he styled "R. P. Hall's improved preparation for the hair," and enclosed it in wrappers containing a statement that the preparation was entirely different from "Hall's Vegetable Sicilian Hair Renewer," but was compounded by the same inventor, R. P. Hall.

Attachment issued against the defendant for contempt.

[354.] **THE CONGRESS AND EMPIRE SPRING CO.** *v.* **THE HIGH ROCK CONGRESS SPRING CO.**

April, 1871.

[*N. Y. Sup. Ct.*—57 *Barb.* 526; *R. Cox* 599.]
[*N. Y. Ct. of App.*—45 *N. Y.* (6 *Hand*) 291; 10 *Abb. Pr., N. S.* 348; 6 *Amer. Rep.* 82; 4 *Am. L. T.* 168; *R. Cox* 624.

The plaintiffs, being the purchasers of the "Congress Spring" at Saratoga, continued, as their predecessors had

long done, to sell the medicinal water from the spring as "Congress Water," and in bottles and cases so labelled. The defendants began to use the name "Congress" in their corporate name and in connexion with their water from another spring.

On appeal from an order dissolving an injunction which had been granted, on motion by the plaintiffs, to restrain the defendants from so doing,

Held, (1) that the exclusive owner of a natural spring had a right to designate the water of the spring by a trade mark exclusively his own; (2) that the purchase of the spring conveyed to the plaintiffs the right to the name and mark which their predecessors had used, and therefore (3) that a new trial must be granted.

Per Folger, J. (R. Cox 626.)—"It is held that the right of property in a trade mark can be said to exist only, and can be tested only, by its violation. But its violation is when one adopts or imitates, and applies to an article of his manufacture the name or mark previously used by another as a designation for his production. The wrong done is the sale by the first of his goods as and for the goods of the last. The violation and the wrong are the same, whether the commodity is one which the hand of man has made, or which nature has put into the hand of man—certainly so, if into the hand of but one man has it been put. It is a matter of property, and the profitable use of property."

P. 630.—"A property in trade mark may be obtained by transfer from him who has made the primary acquisition, though it is essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trade mark has been attached. And it may also pass by operation of law to any one who at the same time takes that right."

FABER *v.* D'UTASSEY. [355.

April, 1871.

[*N. Y. Super. Ct.*—*Brady, J.*]—11 *Abb. Pr., N. S.* 399.]

Action for damages for an infringement by the defendants of the plaintiff's trade mark.

On motion for judgment against one of the defendants, on his answer, by which he denied any knowledge of the plaintiff's ownership, or any intention to do wrong, and alleged that only a single sale of the article wrongly marked had occurred, and that to the plaintiff or his agent,

Held, that such answer was not frivolous, since, even if the statements made afforded no defence, they were at all events important on the question of damages, and that the motion must be refused.

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356. **CARVER** *v.* **PINTO LEITE.**

April 15th; Nov. 21st, 1871.

[*Lancaster Chanc.*—*Wickens, V.C.*} ——*L. R. 7 Ch.* 92; 41 *L. J., Ch.* 93; 25 *L. T., N. S.* 724; 20 *W. R.* 135.]

[*James and Mellish, L.JJ.*——*L. R.* 7 *Ch.* 90; 41 *L. J., Ch.* 92; 25 *L. T., N. S.* 722; 20 *W. R.* 134.]

The defendants, being commission agents, exported to Portugal cotton goods having the plaintiffs' trade marks impressed upon them.

Suit for an injunction to restrain the defendants from so doing.

An order having been made for the production of documents by the defendants, the defendants sealed up parts of various books and documents, and objected to disclose them.

Held, on appeal, that they were not bound to disclose the names of their customers, or the prices at which the goods were bought or sold by them, or the names or addresses of any persons to or from whom any letters produced were written or received (with a specified exception), but that they must disclose the places to which they exported the marked goods, the names and addresses of

the writers or recipients of the excepted letters, the marks in connexion with which the alleged spurious marks had been used, and the directions given to the defendants with respect to those marks.

Per James, L. J.—"In such cases it is important to consider whether the discovery is material for the purpose of enabling the plaintiff to establish his case at the hearing, or material only for the subsequent purposes of the suit, in case the plaintiff should succeed. I am not at all disposed to grant discovery when I am satisfied that it is likely to be injurious to the defendant, and am not satisfied that there is any real prospect of its being of material service to the plaintiff at the hearing."

IN RE HAUTH^.WAY (1). [357.]

April 24th, 1871.

[*U. S. Patent Office.—Leggett, Comm.*} —— *U. S. Pat. Comm. Decis.*, 1871, 97.]

Application to register the words "Beeswax oil" as a trade mark, refused, on the ground that the words were purely descriptive of the substance and qualities of the article.

IN RE PORTER BLANCHARD'S SONS. [358.]

April 24th, 1871.

[*U. S. Patent Office.—Leggett, Comm.*} —— *U. S. Pat. Comm. Decis.*, 1871, 97.]

The words "The Blanchard Churn" admitted to registration as a trade mark on churns, on the ground that such a phrase was capable of constituting a good trade mark previously to the U. S. Statute of 1870, and that the phrase was also not obnoxious to the clause in that statute by which "the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons," was refused registration, since other words were coupled with the name.

[359.] **IN RE ROBERTS (1).**

April 24th, 1871.

[*U. S. Patent Office.*—*Leggett, Comm.*] ——*U. S. Pat. Comm. Decis.*, 1871, 113.]

The words "A luxury. R. J. Roberts' Razor-steel Scissors. The best in the world. The best is the cheapest. For sale here," admitted to registration as a trade mark.

[360.] **IN RE ROBERTS (2).**

April 25th, 1871.

[*U. S. Patent Office.*—*Leggett, Comm.*] ——*U. S. Pat. Comm. Decis.*, 1871, 100.]

The words "An exquisite pleasure to shave with R. J. Roberts' Diamond-edged Razors," admitted to registration as a trade mark.

[361.] **IN RE ROBERTS (3).**

April 25th, 1871.

[*U. S. Patent Office.*—*Leggett, Comm.*] ——*U. S. Pat. Comm. Decis.*, 1871, 101.]

The words "R. J. Roberts' Diamond-edge Razor. Every razor warranted," admitted to registration as a trade mark.

[362.] **IN RE ROBERTS (4).**

May 17th, 1871.

[*U. S. Patent Office.*—*Leggett, Comm.*] ——*U. S. Pat. Comm. Decis.*, 1871, 100.]

Application for the registration of the words "Razor-steel" as a trade mark in respect of cutlery, refused, on the ground that the words were purely descriptive of the substance and qualities of the article.

GRAY *v.* KOCH. [363.]

1871.

[*Michigan C. C.—Sutherland, J.*] ——2 *Mich. N. P.* 119.]

The plaintiff having begun to style his establishment for the sale of ready-made clothes "The Mammoth Wardrobe," and having placed those words over his door, and advertised them, but always in connexion with his name and address, the defendant, who kept an establishment next door to the plaintiff's, placed the same words over his shop.

Motion by the plaintiff for an injunction to restrain the defendant from allowing those words to remain, refused, on the ground that the words in question were descriptive of an establishment of the kind, and were truthfully used by the defendant; and that, further, the different names used in connexion with those words would probably suffice to prevent deception.

"The plaintiff has no right to appropriate a sign or symbol which, from the nature of the fact it is meant to signify, others may employ with equal truth for the same purpose. Names having a definite and established meaning in the language, and which do not indicate ownership or origin, or something equivalent, cannot be appropriated by one so as to exclude a similar use by others. No property can be acquired in words or marks which do not denote the goods, or property, or peculiar place of business of a person."

THE ALLEGHANY FERTILIZER CO. *v.* WOODSIDE. [364.]

[*U. S. C. C., Dt. of Md.—Giles, J.*] ——1 *Hughes* 115.]

The plaintiff company manufacturing, at Boston, an agricultural compost, under the name of "Eureka Ammo-

niated Bone Superphosphate of Lime," the defendants, a Baltimore firm, who had been the plaintiffs' agents, began to sell another article as "Baltimore 'Eureka' Ammoniated Bone Superphosphate of Lime."

Injunction granted to restrain the defendants from infringing the plaintiffs' rights, on the ground that the word "Eureka" was a valid trade mark, though the remaining descriptive words could not be exclusively appropriated.

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

[365.] **GARDNER** *v.* **BAILEY.**

1871.

[*U. S. C. C., Dt. of Penn.*——*Codd. Dig.* 131.]

The plaintiffs being owners of certain mills called "The Stark Mills," and manufacturers there of seamless bags, on which they placed the word "Stark" over a semi-circular arch, with the letter "A" beneath, the defendants made and sold similar goods, similarly marked, except that they substituted the word "Star" for "Stark."

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

[366.] **HOSTETTER** *v.* **VOWINKLE.**

1871.

[*U. S. C. C., Dt. of Neb.*— *Dillon and Dundy, JJ.* ——1 *Dill.* 329.]

The plaintiffs being manufacturers of "Hostetter's Celebrated Stomach Bitters," which they sold in bottles

labelled with that name, directions for use, a device of St. George and the Dragon, a likeness of the inventor, and a fac-simile signature "Hostetter & Smith," the defendants began to sell other bitters under the plaintiffs' label without alteration, but afterwards changed "Hostetter" to "Holsteter," and "Hostetter & Smith" to "Holsteter & Smyte."

Injunction granted to restrain the defendants from infringing the plaintiffs' rights, and damages assessed at the amount of profits which the plaintiffs would have made, if they had sold the same quantity of their cordial as the defendants had sold of theirs under the spurious label.

SOHL *v.* **GEISENDORF.** [367.]

1871.

[*Indianapolis Super. Ct.*—*Rand, J.*] ——1 *Wilson* (*Ind.*) 60.]

The plaintiffs being flour-dealers, the defendants sold flour under similar trade marks.

On motion by the plaintiffs, injunction granted to restrain the defendants from infringing the plaintiffs' rights, and

Held, (1) that the fact that the plaintiffs had purchased part of their trade mark and invented the rest did not interfere with their exclusive right; (2) that an abandonment of their mark by the plaintiffs was not proved by the fact that some isolated features of their mark had been used by others; (3) that the fact that the mark to some extent indicated quality did not disentitle the plaintiffs; (4) that the defendants could derive no title under a sale from one of the persons who had previously sold to the plaintiffs.

"If the two marks were seen at different times or places, a majority of purchasers would not distinguish the one from the other, unless their attention was specially called to the difference. If such be the case, the law is well settled that the defendants' trade mark is an infringement of the plaintiffs', even if the marks, side by side, would not mislead."

[368.] **REEVES** *v.* **DENICKE.**

June, 1871.

[*N. Y. Super. Ct.*—*Monell, J.*——12 *Abb. Pr., N. S.* 92.]

The plaintiffs trading as "E. H. Reeves & Co.," the principal partner being "E. H. Reeves," the defendants, who had formerly been in partnership with E. H. Reeves, as "E. H. Reeves & Co.," and to whom E. H. Reeves had assigned his interest in the property of that partnership, traded under the name of "Robert C. Reeves, successor to E. H. Reeves & Co."

Injunction granted and continued to restrain the defendants from continuing to use the name "E. H. Reeves & Co.," even in that combination.

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369. **UPMANN** *v.* **ELKAN.**

June 5th; Dec. 5th, 1871.

[*Lord Romilly, M.R.*——*L. R.* 12 *Eq.* 140; 40 *L. J., Ch.* 475; 24 *L. T., N. S.* 896; 19 *W. R.* 867.]

[*Lord Hatherley, C.*——*L. R.* 7 *Ch.* 130; 41 *L. J., Ch.* 246; 25 *L. T., N. S.* 813; 20 *W. R.* 131.]

The plaintiffs, being cigar manufacturers in Cuba, discovered that boxes of spurious cigars, bearing their marks, had arrived in the St. Katharine Docks, and were entered in the names of the defendants, Messrs. Elkan, forwarding agents.

Suit for an injunction to restrain those defendants from dealing with the boxes of cigars in question, and from infringing their trade marks.

Held, (1) that the defendants, Messrs. Elkan, were not protected from the injunction by the fact that they did not

deal in the goods, but only acted as forwarding agents; (2) that, on their undertaking to give immediate notice of fresh consignments of marked cigars, they should not have to pay the plaintiffs' costs, since they had offered to give what information they could, had not participated in the fraud, and had submitted to act as the Court should direct; (3) that they were not entitled to receive their costs from the plaintiffs, not having submitted unconditionally; (4) that innocent consignees of the goods spuriously marked were entitled to the costs occasioned by their being made parties to the suit; (5) that those consignees must pay their own costs of the appeal, having appeared, though informed that no alteration in the order as affecting them would be asked; (6) that the Dock Company who held the goods in the name of Messrs. Elkan were entitled to their costs; (7) that the consignors should be at liberty to intervene, and that, if they did not do so, the spurious marks should be erased, and the plaintiffs should have a lien on the cigars for their costs and the costs of the Dock Company.

Per M.R.—"It is his duty (*i.e.*, the duty of the person in whose name the Dock Company hold the goods spuriously marked) at once to give all the information required, and to undertake that the goods shall not be removed or dealt with until the spurious brand has been removed, and to offer to give all facilities to the person injured for that purpose. If, after that, the person injured files a bill, though he will be entitled to all that he asks in the shape of relief, as he might have got it all without suit, he will not get from such defendants the costs of the suit, and he may have to pay them. I do not mean by this to lay down that the plaintiff—by which I mean the person whose trade mark is fraudulently imitated—may not file a bill without making any inquiry at all."

370. THE ANGLO-SWISS CONDENSED MILK CO. *v.* THE SWISS CONDENSED MILK CO.

July 6*th*, 1871.

[*Malins, V.C.*——*W. N.* 1871, *p.* 163; *L. J., Notes of Cases*, 1871, *p.* 154.

The plaintiffs selling their condensed milk in tins bearing labels with the figure of a milk-maid, with a medal on either side, the defendants began to sell milk in tins labelled with the figure of a milkman, with the arms of Switzerland in a medallion on either side, and having other particulars imitated from the plaintiffs' labels.

On motion by the plaintiffs, injunction granted to restrain the defendants from infringing the plaintiffs' rights; but the plaintiffs not having taken any proceedings on hearing of the arrival of the first small consignment, but having waited for the arrival of a larger quantity before doing so, the injunction not to extend to the milk already arrived and warehoused in London.

"It is not necessary, in order to enable the Court to interfere, that there shall be absolute identity; but there certainly is so close a resemblance between the two as to deceive an ordinary purchaser."

[371.] IN RE THE DUTCHER TEMPLE CO.

Sept. 21*st*, 1871.

[*U. S. Patent Office*—*Leggett, Comm.*——*U. S. Pat. Comm. Decis.*, 1871, 248.]

The letter "D.," enclosed within a lozenge, admitted to registration as a trade mark on loom temples, on the ground that it was sufficiently distinctive of the origin of the goods, and was not descriptive of kind or quality.

WILDER *v.* **WILDER.** [372.]

[*Kentucky Chancery——Cited, 2 Sawyer* 78–89.]

Injunction granted to restrain the defendants from selling a compound under the name of "J. B. Wilder & Co.'s Stomach Bitters," and from imitating the bottles in which the plaintiff's compound was contained, or the labels affixed to them.

MOORMAN *v.* **HOGE.** [373.]

Oct., 1871.

[*U. S. C. C., Dt. of Cal.*—*Sawyer, J.*] ——2 *Sawyer* 78; 4 *Am. L. T.* 217; 6 *Am. L. Rev.* 365.]

The plaintiffs being whiskey manufacturers, who sold their article in a barrel of peculiar dimensions, which had acquired the name of "The Cutter Barrel," after the plaintiffs' predecessor in business, and which, together with the brands impressed upon it, had been duly registered as a trade mark in the U. S. Registry, the defendants acted as agents for the sale of whiskey contained in barrels of similar dimensions, but having entirely different brands.

Injunction to restrain the defendants from infringing the plaintiffs' rights, refused, on the ground that (1) a certificate by the commissioner of patents, of registration as a trade mark, did not preclude the Court from considering whether a mark placed on the registry was a good one or not; (2) that a barrel of peculiar dimensions could not become a trade mark, to be protected irrespective of the brands on it, although if the brands were partially imitated, an imitation of the peculiar barrel would be an element in deciding the question of fraudulent intention.

"I find no case where the use of a package of peculiar form and dimensions has been restrained, without having imprinted upon, or connected with it, some other symbol, word, letter, or form, adopted as a trade mark."

[374.] **SELTZER *v.* POWELL.**

Nov., 1871.

[*Phila. C. P.*— *Paxson, J.* ——8 *Phila.* 296.]

The plaintiffs having manufactured whiskey, and sold it as "Silver Grove" whiskey, since 1867, though it did not appear that the name was generally known, the defendant began in 1870 to sell whiskey under the name of "Silver Brook" whiskey.

On motion by the defendant, injunction which had been granted to restrain him from using those words, dissolved, on the ground that the prior appropriation by the plaintiffs was not sufficiently clearly made out, and that they must establish their claim at law before they could obtain an injunction.

[375.] **IN RE FRANCIS & MALLON.**

Nov. 8th, 1871.

[*U. S. Patent Office*— *Leggett, Comm.* ——*U. S. Pat. Comm. Decis.*, 1871, 283.]

The word "Beaverine" admitted to registration as a trade mark on boots and shoes made partly of beaver cloth and partly of leather, on the ground that, though the word was suggestive of the material of which the article was in part made, it was not a word known to the language and in common use, but a fancy word newly-coined for the purpose of being used on the applicants' goods.

IN RE BLAKESLEE & CO. [376.]

Nov. 15*th*, 1871.

[*U. S. Patent Office*—*Leggett, Comm.*] ——*U. S. Pat. Comm. Decis.* 1871, 284.]

Application for registration of the words and letters "Cundurango Ointment, C. O.," as a trade mark in respect of ointment containing cundurango, a South American plant, refused, on the ground that the words were descriptive of the article, and that the letters did not add the requisite distinctiveness.

IN RE HAUTHAWAY (2). [377.]

Nov. 15*th*, 1871.

[*U. S. Patent Office*—*Leggett, Comm.*] ——*U. S. Pat. Comm. Decis.* 1871, 284.]

An application to register the words "Beeswax Oil" as a trade mark having been refused on the ground of their being merely descriptive [*In re Hauthaway* (1)],

Motion to re-open the case, on the ground that the practice of the office had been changed since that decision, refused, and

Held, that there was no change in the practice.

IN RE PALMER. [378.]

Nov. 16*th*, 1871.

[*U. S. Patent Office*—*Leggett, Comm.*] ——*U. S. Pat. Comm. Decis.* 1871, 289.]

Application for the registration of the word "Invisible" as a trade mark in respect of packets of face powder, refused, on the ground that, though the word might be a trade mark if used in a non-natural sense, yet, when applied to face powder, it was merely indicative of a quality of the article.

379. ABBOTT *v.* THE BAKERS AND CONFECTIONERS' TEA ASSOCIATION, LIMITED.

Nov. 16*th*, 1871; *Feb.* 8*th*, 1872.

[*Malins, V.C.*——*W. N.* 1871, *p.* 207; *L. J., Notes of Cases*, 1871, *p.* 199.]

[*Lord Hatherley, C.*——*W. N.* 1672, *p.* 31.]

The plaintiffs being tea merchants, the defendants sold tea in wrappers similar to those in which the plaintiffs' tea was sold, the general appearance being imitated, though the details differed.

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

Per V.C. (L. J. N. of C. 1871, p. 199)—"The rule of the Court is that a man who has adopted a distinguishing mark has a right to be protected against any other person adopting one sufficiently like it to mislead an unwary public."

Per L. C. (W. N. 1872, p. 31).—"Though no one particular mark is exactly imitated, the combination is very similar and likely to deceive. It is true that there is no proof that any one has been deceived, or that the plaintiffs have incurred any loss; but where the similarity is obvious that is not of importance."

[380.] **IN RE WHYTE.**

Nov. 28*th*, 1871.

[*U. S. Patent Office—Duncan, Act. Comm.*——*U. S. Pat. Comm. Decis.* 1871, 304.]

Application for letters patent for a device described by the applicant as an "ornamental print for fabrics," refused, on the ground that the real intention of the applicant was to use the device by way of a trade mark, and that this being so, he must apply for its registration as a trade mark, and not for letters patent for it as a design.

ISAACSON *v.* THOMPSON. 381.

Dec. 6*th*, 1871.

[*Bacon, V.C.*——41 *L. J., Ch.* 101; 20 *W. R.* 196.]

The plaintiff trading as a milliner under the name of "Madame Louise," the defendant began to use on his shops the names of "Agnes Ellis" and "E. Louise," under the pretence that they were his daughters' names.

Motion by the plaintiff for an injunction to restrain the defendant from using those names, or otherwise causing his shops to be mistaken for the plaintiff's, refused, on the ground that the plaintiff had delayed moving for nine or ten months after he had obtained sufficient evidence of actual deception.

"It is one of the most wholesome rules that a person who comes for the extraordinary relief of an injunction should come speedily."

EX PARTE DAWES & FANNING. [382.]

1871.

[*U. S. Patent Office—Leggett, Comm.*——] *U. S. Pat. Gaz.* 27.]

On an application to register a trade mark for use on umbrellas, consisting of the number "140,"

Held, that the number was a good trade mark within the U. S. Statute of 1870, as consisting of an arbitrarily selected combination of numerals, and not used in its ordinary signification, and registration granted.

BOND *v.* MILBOURN. 383.

Dec. 20*th*, 1871.

[*Bacon, V.C.*——20 *W. R.* 197.]

Partnership suit.

The plaintiff and defendant having carried on business

in partnership under the style of "James Milbourn & Co.," and the plaintiff having bought the interest of the defendant in the partnership, under a provision in the articles, the defendant set up business next door, and employed his former workmen, and used the former style, so as to render the goodwill purchased by the plaintiff valueless.

Held, that the plaintiff was not entitled to have the premium he had paid on originally entering the partnership returned to him, since "Milbourn" was the defendant's own name, which he had a right to use in his business, and there was no provision in the articles for a return of premium.

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384. **FORD** *v.* **FOSTER.**

Jan. 18*th*, *June* 11*th*, 1872.

[*Bacon, V.C.*——*L. R.* 7 *Ch.* 616; 27 *L. T., N. S.* 220; 20 *W. R.* 311.]

[*James and Mellish, L.JJ.*——*L. R.* 7 *Ch.* 611; 41 *L. J., Ch.* 682; 27 *L. T., N. S.* 219; 20 *W. R.* 818.]

The plaintiff being the manufacturer of "Ford's Eureka Shirt," which he marked "R. Ford's Eureka Shirt, London," the defendants sold other shirts as "The Eureka Shirt," and marked with those words.

Injunction granted, on appeal, to restrain the defendants from using the name "Eureka" upon any shirts not of the plaintiff's make, but the injunction not to extend to advertisements between the defendants and the trade. And

Held, (1) that the fact that the plaintiff had habitually used his own name with the fancy name did not deprive him of his remedy; (2) that the name in question was not proved to have become *publici juris*; (3) that the

plaintiff was not disentitled by reason of having called himself "patentee" in his advertisements, the misrepresentation being, at most, collateral; (4) that the plaintiff not having been active in defending his rights, and the defendants' business and connexion being much larger than his, so as to make it impossible to calculate the sales lost to the plaintiff by those effected by the defendants, the account should be granted only from the filing of the bill.

Per Mellish, L. J.—"What is the test by which a decision is to be arrived at whether a word which was originally a trade mark has become *publici juris?* I think the test must be whether the use of it by other persons is still calculated to deceive the public; whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods."

LABOUCHERE *v.* DAWSON. 385

Jan. 18*th*, 1872.

[*Lord Romilly, M.R.*——*L. R.* 13 *Eq.* 322; 41 *L. J., Ch.* 427; 25 *L. T., N. S.* 894; 20 *W. R.* 309.]

The plaintiffs having purchased a brewery business, the defendant, being one of the vendors, set up in business in another place, and solicited his former customers to deal with him, and not with the plaintiffs, so as to destroy the value of the business he had sold.

On motion by the plaintiffs, injunction granted to restrain the defendant from so doing.

"The goodwill is the probability of the old customers going to the new firm to whom the business is sold."

"The new firm, the defendant in this case, is entitled to publish any advertisement he pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world to say that he is carrying on such a business, but he is not entitled, either by private letter, or by a visit, or by his traveller or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm. That is not a fair and reasonable thing to do after he has sold the goodwill."

386. **ROWLAND** *v.* **BREIDENBACH.**

[*Lord Romilly, M.R.*——*Cited* 1 *Trade Marks* 261.]

The plaintiff being the manufacturer of Rowland's "Macassar" Oil, the defendant began to manufacture and sell another article under the name of "Macassarine."

Injunction to restrain the defendant from so doing, refused, on the ground that the name of the plaintiff's article was descriptive.

[387.] **WEED** *v.* **PETERSON.**

Feb., 1872.

[*N. Y. Sup. Ct.*—*Learned, J.*——12 *Abb. Pr. N. S.* 178.]

The plaintiffs having succeeded to the business of "D. Simmons & Co.," and having acquired the right to use that name and the name "D. Simmons" alone as their trade mark, the defendants used the name "D. Simmons" on their goods, having received the stamps and labels from their predecessors in business, who had wrongfully used the same.

Action for an injunction to restrain the defendants from so doing.

Held, (1) that the plaintiffs were entitled to an injunction to restrain the defendants from using the name, notwithstanding that the latter had acted in ignorance of the plaintiffs' rights, and had since discontinued their business altogether, and that costs must be given; (2) but that the plaintiffs were not entitled to recover damages from the defendants, since they had acted perfectly *bonâ fide*.

JAMES *v.* JAMES. 388.

Feb. 23*rd*, 1872.

[*Lord Romilly, M.R.*——*L. R.* 13 *Eq.* 421 ; 41 *L. J., Ch.* 353 ; 26 *L. T., N. S.* 568 ; 20 *W. R.* 434.]

The plaintiffs being persons entitled, under an assignment by Robert James, the original inventor, to an ointment known as "Lieutenant James' Horse Blister," the defendant, Robert Joseph James, began to sell an ointment under the same name, with the signature "Robert James," and a statement that it alone was genuine.

Injunction granted to restrain the defendant from omitting the name Joseph from his signature, and from stating that his ointment alone was genuine; but

Held, that the defendant could not be restrained from using the name "Lieutenant James' Horse Blister," that having become the name by which the article was known, and the defendant not having come into possession of the secret recipe by a breach of trust or fraud.

"When a person has discovered a valuable invention, and has not patented it, any one who has discovered the ingredients (I am not talking of the case of a breach of trust, or of fraud, or the like), may sell those ingredients, and may use the name of the person who has discovered them after his death, but not in his lifetime, so as to suggest that they are made by him."

GREEN *v.* ROOKE. 389.

Feb. 23*rd*, 1872.

[*Wickens, V.C.*——*W. N.* 1872, *p.* 49 ; *L. J., Notes of Cases*, 1872, *p.* 54.]

The plaintiff being the proprietor of an ointment known as "Dr. Johnson's" or "Singleton's Golden Ointment," the recipe of which had been invented by one Dr. Johnson in

the seventeenth century, and had long been in the possession of the Singleton family, the defendant began to sell an ointment under the name of "Dr. Rooke's Golden Ointment."

Motion by the plaintiff for an injunction to restrain the defendant from selling any ointment under the name "Golden Ointment," refused, on the ground that, although persons were not at liberty to sell "Singleton's Ointment," there was no law to prevent the sale of "Golden Ointment" by those who could discover its composition.

[390.] **WOLFE** *v.* **BARNETT.**

Feb., 1872.

[*Sup. Ct. of Louisiana*——24 *La. Ann.* 97 ; 13 *Amer. Rep.* 111.]

The plaintiff making and selling "Wolfe's Aromatic Schiedam Schnapps," the defendants sold other spirits under the same name.

Injunction granted to restrain the defendants from so doing, with damages; and

Held, that the following defences failed:—(1) that the defendants had used their mark for ten years; (2) that the plaintiff was not the first manufacturer of the article; (3) that the separate words used by the plaintiff were not new, the combination being so; (4) that the defendants had a written permission from a Mr. Wolfe, not being the plaintiff, to use his name; (5) that the plaintiff's label, which he stated to be copyright, did not show the date of entry.

[391.] **HALLETT** *v.* **CUMSTON.**

March, 1872.

[*Mass. Sup. Ct.*——110 *Mass.* (14 *Browne*) 29.]

The plaintiff having been in partnership with the defendant's father as "Hallett & Cumston," and having, on

the termination of the partnership, entered into the latter's service under an agreement by which the latter was to have the use of the plaintiff's name during the continuance of the agreement, the defendant continued, after his father's death, to carry on his father's business under the old name, and on the plaintiff withdrawing his permission to use his name, obtained the use of the name of another person of the same name.

Injunction to restrain the defendant from using the name "Hallett" or "Hallett & Cumston," refused, on the ground that (1) the plaintiff had no interest in the name or trade mark of "Hallett & Cumston;" (2) as to the name Hallett, although the defendant could not use the plaintiff's name without his consent, that did not prevent him from using the name of another person, though the same.

BLACKWELL *v.* **ARMISTEAD.** [392.]

March, 1872.

[*U. S. C. C., Dt. of W. Va.*—*Rives, J.*——5 *Am. L. T.* 85; *Browne on Trade Marks*, 510.]

The plaintiffs being manufacturers of tobacco at Durham, North Carolina, who used as their trade mark a side view of a bull, with the words "Genuine Durham Smoking Tobacco," the defendant also manufactured tobacco, and sold it with labels containing the figure of a bull's head, with the words "The Durham Smoking Tobacco."

Injunction granted, to restrain the defendant from infringing the plaintiffs' rights.

SCOTT *v.* **ROWLAND.** 393.

March 16th, 1872.

[*Wickens, V.C.*——26 *L. T., N. S.* 391; 20 *W. R.* 508.]

The plaintiff having been in partnership with the defendant as glass-stainers, under the name of "John

Scott & Co." and having been bought out by the latter, the defendant continued to trade under the old name of "John Scott & Co."

On motion by the plaintiff, injunction granted to restrain the defendant from using the plaintiff's name in connexion with his business, so as to represent that the plaintiff was a partner in his business, on the ground that the retention of the name of an outgoing partner, who survived the dissolution of partnership, in the firm name of the business might to some extent render him responsible for the liabilities of the concern.

[394.] **MORRISON** *v.* **CASE.**

April, 1872.

[*U. S. C. C., Dt. of Conn.*—*Shipman, J.*] ——9 *Bl. C. C.* 548; 2 *U. S. Pat. Gaz.* 544.]

The plaintiff being the proprietor of certain trade marks registered under the U.S. Act of 1870, and consisting respectively of the words "The Star Shirt," the words "The Star Shirt" together with the figure of a star, and the words and device "The * Shirt," the defendant sold other shirts under the same marks.

Suit for an injunction to restrain the defendant from infringing the plaintiff's trade marks.

Held, that the marks in question were lawful trade marks within the Act, and that the injunction must be granted.

[395.] **COOK** *v.* **STARKWEATHER.**

1872.

[*N. Y. Super. Ct.*—*Monell, J.*] ——13 *Abb. Pr. N. S.* 392.]

The plaintiffs being whiskey manufacturers who sold their whiskey in barrels branded with the words "Valley

Whiskey" or "Old Valley Whiskey," the letters "AAA," and a Maltese cross, the head of the barrel being glazed in a particular manner and the rim painted red, the defendants sold other whiskey in barrels similarly prepared and branded, except that the letters "XXX" and a crown were substituted for the letters "AAA" and the cross.

Action for an injunction to restrain the defendants from infringing the plaintiffs' rights.

Held, that, whether the plaintiffs were or were not entitled to the exclusive use of the words "Valley Whiskey" or "Old Valley Whiskey," which was not clearly established, the course of conduct adopted by the defendants was intended and calculated to deceive, and that the plaintiffs were therefore entitled to an injunction.

"The package, case or vessel in which the commodity is put, if prepared in a peculiar or novel manner, though in itself, perhaps, not a trade mark, may very properly be a very important part of it; and where a peculiar device is applied to a box or barrel which has been especially prepared to receive and give prominence to the design, such specially prepared box or barrel constitutes a part of the trade mark, and may participate in the protection which will be given to the trade mark itself."

"The rule is, that the imitation of a trade mark need not be exact and perfect. It may embrace variations that a comparison would instantly disclose. Yet, if a resemblance exists which was designed to mislead the public, its use may be restrained."

WINSOR *v.* CLYDE. [396.]
STETSON *v.* WINSOR.

May 21*st*, 1872.

[*Phila. C. P.*—9 *Phila.* 513.]

Cross motions for injunctions.

Held, (1) that Stetson & Co., who carried on business as shippers of merchandise by ships which they did not own, but of which they had the entire management while loading and unloading, &c., and who denominated each line of vessels used by them and plying in a particular direction,

by the name "The Keystone Line for ——," had acquired a right of property in the name; (2) that Winsor and Harding, who had owned the steamships employed for a certain period on one of these lines, had acquired no right in the name by its application to their ships, but had at most been entitled to use the name under a revocable licence; (3) that an injunction must be granted to restrain Winsor and Harding from continuing to use the name after the termination of their connexion with Stetson & Co., and that their motion for an injunction must be refused.

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397. **RADDE** *v.* **NORMAN.**

May 30*th*, 1872.

[*Wickens, V.C.*——*L. R.* 14 *Eq.* 348; 41 *L. J., Ch.* 525; 26 *L. T., N. S.* 788; 20 *W. R.* 766.]

The plaintiff being entitled to the exclusive right of importing from the Leopoldshall mines in Anhalt a kind of rock salt called "Kainit," and who designated it "The Genuine Leopoldshall Kainit," the defendants sold another article, not being the article which the plaintiff had the exclusive right of exporting, under the name of "Kainit [*Leopoldsalt*]."

On motion by the plaintiff, injunction granted to restrain the defendants from infringing his rights.

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398. **HOOKHAM** *v.* **POTTAGE.**

June 7th, Nov. 12*th*, 1872.

[*Malins, V.C.*——*L. R.* 8 *Ch.* 93 *n.*; 26 *L. T., N. S.* 755; 20 *W. R.* 720.]

[*James and Mellish, L.JJ.*——*L. R.* 8 *Ch.* 91; 27 *L. T., N. S.* 595; 21 *W. R.* 47.]

The plaintiff, defendant, and defendant's brother having been in partnership as tailors, under the name of "Hook-

ham and E. & S. Pottage," on the dissolution of that partnership the plaintiff was held by the Court of Chancery to be entitled to continue in possession of the business, the defendant receiving the value of his interest; and the plaintiff continued to trade under the new name of "Hookham & Co." The defendant subsequently set up in business within a few doors of the plaintiff, and placed over his shop the words "S. Pottage, from Hookham and Pottage," the words "from" and "and" being in small letters.

Injunction granted to restrain the defendant from using the plaintiff's name in such a manner as to deceive, on the ground that, although the defendant was entitled to state fairly his connexion with the former firm, he was not entitled to act so as to divert to himself custom intended for the plaintiff.

ARMISTEAD *v.* BLACKWELL. [399.]

June 14*th*, 1872.

[*U. S. Patent Office—Leggett, Comm.*] ——1 *U. S. Pat. Gaz.* 603; *Browne on Trade Marks*, 495.]

Blackwell (who manufactured tobacco at Durham, N.C., in succession to Green, who had begun to designate his tobacco as "Durham" tobacco in 1865) having obtained registration of a trade mark consisting of the words "Durham Smoking Tobacco, Manufactured by W. T. Blackwell, Durham, North Carolina," Armistead, who manufactured tobacco at Lynchburg, Va., applied for the registration in his name of the words "Durham Smoking Tobacco." His business was carried on in succession to W. A. Wright, who had in 1860, when in partnership with Morris as "Morris & Wright," begun to designate his tobacco made at Durham as "Best Spanish-Flavoured Durham Smoking Tobacco," but had dissolved partnership

with Morris in 1861, and after a few months longer discontinued manufacturing altogether till 1869, when he again began to prepare tobacco for the market.

Interference declared for the purpose of determining to which, if either, the words "Durham Smoking Tobacco" belonged.

Held, (1) that, to be entitled to claim the benefit of the prior user of Morris & Wright, Armistead should show that he claimed through Morris as well as through Wright; (2) that, at all events, the user by his predecessor was longer than that by Blackwell's predecessor; (3) but that the words were not registrable as a trade mark, and that Blackwell had obtained registration by error, since a geographical name could not constitute a trade mark capable of becoming the exclusive property of any one person, but must remain open to the use of all inhabitants of the town or district, although strangers might be enjoined against the use of it; (4) and that the fact that Blackwell had obtained a wrongful registration of the words mentioned, which could not be cancelled, could not entitle Armistead to a similar wrongful registration, and that his application must be refused.

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400. **HIRST** *v.* **DENHAM.**

June 20th, 1872.

[*Bacon, V.C.*——*L. R.* 14 *Eq.* 542; 41 *L. J., Ch.* 752; 27 *L. T., N. S.*, 56.]

The plaintiff being a manufacturer of woollen cloths, who had invented and adopted certain new fancy patterns and named them respectively "Turin," "Sefton," "Leopold," "Liverpool," the defendants, one of whom had been in the plaintiff's service, began to use the same names on tickets resembling the plaintiff's, affixed to cloths of their own make of a similar pattern to the plaintiff's, but of inferior quality.

On motion by the plaintiff, injunction granted to restrain the defendants from describing their cloths by those names, and from placing them on tickets affixed to their cloths, imitating the plaintiff's tickets, &c.

SMITH *v.* **REYNOLDS** (1). [401.]

June, 1872.

[*U. S. C. C., S. Dt. of N. Y.*—*Blatchford, J.*] ——10 *Bl. C. C.* 85; 3 *U. S. Pat. Gaz.* 213.]

Suit for an injunction to restrain the infringement of the plaintiffs' trade mark, registered under the U.S. Act of 1870.

Injunction refused, on the ground that there was no sufficient evidence of the filing at the Patent Office of a declaration under oath as to the right to the mark, as required by the Act, the only evidence produced being a certificate by the Commissioner of Patents of the deposit of the trade mark for registration, of the filing of a statement in respect of the mark, and that the depositor had otherwise complied with the Act, &c., but which certificate did not refer to any such declaration as was required.

SMITH *v.* **REYNOLDS** (2). [402.]

July, 1872.

[*U. S. C. C., S. Dt. of N. Y.*—*Blatchford, J.*] ——10 *Bl. C. C.* 100; 3 *U. S. Pat. Gaz.* 214.]

The plaintiffs being paint manufacturers, who had registered as their trade mark on paints, under the U.S. Act of 1870, a device of a crown, but who had not actually used it on white lead, the defendants, who, or their predecessors in business, had used a device of a crown on white lead previously to the use and registration of the device by the plaintiffs, continued so to do.

On motion by the plaintiffs for an injunction to restrain the defendants from so doing,

Held, (1) that the registration of the device in the name of the firm, and not in the names of the individual partners, was good; (2) that the registration for paints generally was good, without further description of the particular goods; (3) that the device of a crown was a good registrable trade mark within the Act; (4) but that the prior use of the device on white lead by the defendants prevented the plaintiffs from having a right to register the mark in respect of white lead, and that the registration, being bad in respect of part of the class it purported to cover, was bad altogether; (5) that the motion for injunction must be refused.

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403. **MACK *v.* PETTER.**

July 23*rd*, 1872.

[*Lord Romilly, M.R.*——*L. R.* 14 *Eq.* 431; 41 *L. J., Ch.* 781; 20 *W. R.* 964.]

The plaintiff being the proprietor and publisher of "The Birthday Scripture Text-Book," the defendants brought out a book of similar arrangement and style, under the name of "The Children's Birthday Text-Book."

Injunction granted to restrain the defendants from publishing any book with that title, or any other title calculated to deceive, and from imitating the arrangement, binding, &c., of the plaintiff's book in such a way as to deceive.

[404.] **IN RE JOHNSON & CO.**

Sept. 12*th*, 1872.

[*U. S. Patent Office—Thacher, Act. Comm.*——2 *U. S. Pat. Gaz.* 315.]

Application for the registration of two trade marks, consisting respectively of the words and letters "Parsons'

Purgative Pills, P.P.P.," and "Johnson's American Anodyne Liniment, Established A.D. 1810," refused, on the ground that both designations were descriptive of the article; the letters "P.P.P." becoming so when used in combination with the words of which they were the initials, though, if used alone, they might have acquired an arbitrary signification; and the date of discovery, in the second case, not supplying the needed distinctiveness.

IN RE TOLLE. [405.]

Oct. 3*rd*, 1872.

[*U. S. Patent Office—Thacher, Act. Comm.*} ——2 *U. S. Pat. Gaz.* 415.]

Application for the registration of two trade marks for flour, consisting of the words "Cherry St. Mills," in the one case, and "Market St. Mills" in the other, combined in both cases with the masonic emblem of the square and compass, refused, on the ground that as to the name of the locality no exclusive right could be acquired; and as to the emblem, it could not be divested of its universal signification and be exclusively appropriated in a particular business; and that, as to the whole, a combination of two objectionable parts could not constitute a valid trade mark.

THE McGOWAN BROS. PUMP MACHINE CO. [406.]
v. **McGOWAN.**

Oct., 1872.

[*Cincinnati Super. Ct.*——2 *Cinc.* 313.]

The defendant in error, J. H. McGowan, having been in partnership with his brother, T. J. McGowan, as machine manufacturers, sold his interest in the partnership to his brother, reserving the right to manufacture under the partnership patents. The notice of dissolution of partner

ship stated that T. J. McGowan was to use the firm name "in settlement," and to carry on business "under the old style firm name." T. J. McGowan, having joined with other persons, incorporated a company under the name "The McGowan Bros. Pump and Machine Co.," being the plaintiffs in error. J. H. McGowan, the defendant in error, recommenced business under the name of "John H. McGowan & Co.," at "The McGowan Engine and Pump Company's Works."

Action by the defendant in error.

Injunction granted to restrain the plaintiffs in error from the use of the words "The McGowan Brothers," as part of their name, except on patterns sold by J. H. to T. J. McGowan, and castings therefrom, on the ground that, although the goodwill of the partnership business passed to T. J. McGowan, he had only a revocable licence to use the name, and that the continued user by him was injurious to, and objected to by the defendant in error. But the plaintiffs in error to be at liberty to style themselves "Successors to the McGowan Brothers."

Per Hagans, J.- "There can be no doubt that, where one partner sells to another partner a going business, every advantage arising from the fact of the sole ownership of the premises, stock and establishment, including advantages acquired by the old firm in carrying on its business, whether connected with the old place or the old name, passes to the purchaser. But the vendor will not be prevented from carrying on a similar business when, where, or with whom he pleases."

[407.] **LEA** *v.* **WOLFF.**

Nov. 1872; *Oct.* 1873.

[*N. Y. Sup. Ct.*— *Ingraham, P. J.* ——13 *Abb. Pr., N. S.* 389; 1 *Thomp. & C.* 626.]

[*N. Y. Sup. Ct.*——1 *Thomp. & C.* 626; 15 *Abb. Pr., N. S.* 1; 46 *How. Pr.* 157; 1 *Am. L. T., N. S.* 400.]

The plaintiffs being manufacturers in Worcestershire of a sauce which they called "Worcestershire Sauce," the

defendants began to manufacture a sauce elsewhere, which they called by the same name, and placed on their bottles labels very closely resembling those of the plaintiffs, except that their own names appeared as those of the manufacturers.

On motion by the plaintiffs for an injunction to restrain the defendants from using the name and labels,

Held, by Ingraham, P.J., (1) that the name, being the name of the locality in which the sauce was made, could not be protected as a trade mark; (2) but that an injunction must be granted to restrain the imitation of the labels, notwithstanding the appearance therein of the defendants' own names.

Held, by the Supreme Court, that the injunction must be extended to restrain the use of the name "Worcestershire Sauce," since it was evident that the defendants had acted with fraudulent intention, and they, further, did not manufacture within the county in question.

Per Fancher, J.—"Where words or names are in common use, no one person can claim a special appropriation of them to his peculiar use; but where words and the allocation of words have, by long use, become known as designating the article of a particular manufacturer, he acquires a right to them as a trade mark, which competing dealers cannot fraudulently invade. The essence of the wrong is the false representation and deceit. When the improper design is apparent, an injunction should be issued."

"As a general rule, geographical names cannot be appropriated as trade marks; but the rule has its exception, where the intention in the adoption of the descriptive word is not so much to indicate the place of manufacture as to encroach upon the previous use and popularity of another's trade mark."

SOHIER *v.* JOHNSON. [408.]

Nov. 1872.

[*Mass. Sup. Ct.*——111 *Mass.* (15 *Browne*) 238.]

W. P. Winchester, surviving partner in the firm of "E. A. & W. Winchester," whose trade mark consisted of

that firm name, having taken the defendant into partnership and died, and the defendant having subsequently continued to trade under and use that name, for some years in partnership with others, and afterwards by himself, the plaintiffs, being W. P. Winchester's executors and trustees, sold the factory and premises to a third person.

Suit for an injunction to restrain the defendant from using the trade mark, and an order for him to join in conveying it to the purchaser from the plaintiffs.

Held, that the trade mark had become the property of the partnership between W. P. Winchester and the defendant, on its formation, and had descended to the defendant on the death of the former, and that the plaintiffs had no right therein, and that the injunction and order must be refused.

"The trade mark is the device or symbol used to identify the article manufactured, and the right to use it will pass with the business and goodwill as an incident, unless something appears to show a different intention of the parties."

[409.] **THE MERIDEN BRITANNIA CO.** *v.* **PARKER.**

Nov. 1872.

[*Conn. Sup. Ct.*——39 *Conn.* 450; 12 *Amer. Rep.* 401; 13 *Am. L. Reg., N. S.* 153.]

The plaintiffs having acquired from three brothers named Rogers the right to use a trade mark, "1847, Rogers Bros., A 1," and the brothers Rogers being employed by them to superintend the manufacture of the goods so stamped, the defendant began to place on similar goods stamps containing the words "C. Rogers Bros., A 1" and "C. Rogers & Bros., A 1."

Injunction granted to restrain the defendant from using such stamps or any other stamp containing the words "Rogers Bros." though he had used his stamps by the permission of three brothers of the name of Rogers.

But *Held*, that no injunction could be granted as to the name "Rogers" alone, nor with respect to goods already stamped by the defendant, the parties being left to their remedy at law as to the last point.

Per Carpenter, J.—"The fact that careful buyers who scrutinize trade marks closely are not deceived, does not materially affect the question. It only shows that the injury is less, not that there is no injury."

OSGOOD *v.* ALLEN. [410.]

Nov. 1872.

[*U. S. C. C., Dt. of Maine.—Shepley, J.*] ——1 *Holmes*, 185; 6 *Am. L. T.* 20; 3 *U. S. Pat. Gaz.* 124.]

The plaintiffs being the proprietors and publishers of a monthly magazine for the young, published at Boston, Mass., under the title "Our Young Folks; an Illustrated Magazine for Boys and Girls," the defendant began to advertise and publish and sell at Augusta, Maine, a fortnightly illustrated paper for the young, under the title "Our Young Folks' Illustrated Paper."

Suit for an injunction to restrain the defendant from using the words "Our Young Folks," as the title of a publication.

Held, (1) that the title of a copyrighted publication was not capable of protection as copyright, except in conjunction with the publication which it was used to designate, and that the copyright in the paper not having been infringed, that in the title had not been; (2) that, treating the title on principles applicable to trade marks, the case must be referred to a Master to report whether the use of the title by the defendant was deceiving, or was calculated to deceive the public.

"Words or devices may be adopted as trade marks, which are not original inventions of the one who adopts and uses them. Words in common use may be adopted, if, at the time of adoption, they were

not used to designate the same or similar articles of production. A generic name, or a name merely descriptive of an article of trade, or its qualities or ingredients, cannot be adopted as a trade mark, so as to give a right to the exclusive use of it. The office of a trade mark is to point distinctively to the origin or ownership of the article to which it is affixed. Marks which only indicate the names or qualities of products cannot become the subjects of exclusive use, for, from the nature of the case, any other producer may employ, with equal truth and the same right, the same marks for like products. Geographical names, which point out only the place of production, and not the producer, cannot be appropriated exclusively, so as to prevent others from using them and selling articles produced in the districts they describe under these appellations."

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411. **BROADHURST** *v.* **BARLOW.**

Nov. 21*st*, 1872.

[*Wickens, V. C.*——*W. N.* 1872, *p.* 212; *L. J. Notes of Cases*, 1872, *p.* 183.]

The plaintiffs being manufacturers of Spanish shirtings for export to the East, who marked their goods with a lion in a scroll, the words "Spanish shirtings" in a scroll, the figures "No. 120," certain lines, and the words "exactly 12 yards," in Turkish, Armenian and Greek, the defendants used on their goods an elephant and castle in place of a lion, and curved instead of straight lines, the marks being in other respects the same.

On motion by the plaintiffs, injunction granted to restrain the defendants from using the words "exactly 12 yards" in the same languages as the plaintiffs used, and placed between a figure or crest and the words "Spanish Shirtings" in a scroll, in a manner similar to that used by the plaintiffs.

And *Held*, that an offer to submit and abandon the mark objected to did not deprive the plaintiffs of their right to the injunction.

IN RE GRAHAM. [412.]

Nov. 30*th*, 1872.

[*U. S. Patent Office—Thacher, Act. Comm.*——2 *U. S. Pat. Gaz.* 618.]

Application for the registration of the words "The New Manny" as a trade mark for a harvesting machine, refused, on the ground that the term "the Manny" was commonly applied to a large class of machines, that the word "new" was practically equivalent to "improved," and that the words, therefore, merely constituted a descriptive appellation of the article.

THE SINGER MANUFACTURING CO. *v.* KIMBALL AND MORTON. [413.]

Jan. 14*th*, 1873.

[*Ct. of Session.*——*Ct. of Sess. Cas.*, 3*rd Ser.*, *XI.* 267; 10 *Scot. L. Rep.* 173.]

The plaintiffs being American manufacturers of the "Singer" sewing machines, the defendants advertised machines for sale as "Singer" machines, but placed their own names, as those of the makers, on all of them.

Interdict granted to restrain the defendants from using the name "Singer" in respect of machines other than those made by the plaintiffs, on the ground that the name was indicative of machines of the plaintiffs' make, and not of machines made according to a certain principle of construction.

Per Lord President Inglis.—"Whether it be a star, or any other device, or a name, as in the present case, the result is the same. If it be exclusively appropriated for a series of years, and has obtained a certain exclusive meaning in the trade, as signifying the goods or the productions of a particular manufacturer, then it is his property as a trade mark, and no one else is entitled to use it."

"In an application for an interdict it is not only not necessary to prove any pecuniary damage, but it is not necessary to prove that any injury has been actually inflicted. A threat of injury is a sufficient ground for an application for an interdict, and in like manner a reasonable apprehension of injury from the proceedings of the parties complained against is also in many circumstances a very good ground for such an application."

Per Lord Ardmillan.—"Singer & Co. have no monopoly of the invention, and no exclusive right to make or to sell the machine. Any one may make it, any one may sell it. But there must be no deception, no sailing under false colours, no unfair and delusive assumption of a trade mark, or of a name appropriated and known as a trade mark."

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414. **CHRISTIE** *v.* **CHRISTIE.**

Jan. 15*th*; *March* 20*th*, 1873.

[*Malins, V.C.*——42 *L. J., Ch.* 261; *L. R.*, 8 *Ch.* 502 *n.*]

[*Lord Selborne, C., and Mellish, L.J.*——*L. R.*, 8 *Ch.* 499; 42 *L. J., Ch.* 544; 28 *L. T., N. S.* 607; 21 *W. R.* 493.]

The plaintiffs being Messrs. Christie, Manson & Woods, auctioneers, the defendants issued a certain prospectus in which they styled themselves "Messrs. Christie & Christie," and made preparations for carrying on business under the name of "Christie & Co."

Suit by the plaintiffs for an injunction to restrain the defendants from so doing.

Exceptions for scandal to a statement in the bill, to the effect that one of the defendants had, on a previous occasion, been brought up in a police court on a charge of fraud.

Held, on appeal, that the exceptions must be allowed, on the ground that such a charge of fraud, even if it could be substantiated, was wholly immaterial to the suit in question, and that its insertion in the bill was not only scandalous but oppressive.

BURKE *v* CASSIN. [415.]

Jan. 1873.

[*Cal. Sup. Ct.*——45 *Cal.* 467; 13 *Amer. Rep.* 204.]

The plaintiff being the executor of Udolpho Wolfe, who manufactured and sold "Wolfe's Aromatic Schiedam Schnapps," the defendants sold other spirits under the name of "Von Wolf's," or "Van Wolf's Aromatic Schiedam Schnapps."

Injunction granted to restrain the defendants from using the name "Wolfe," or "Wolf," or "Von Wolf," or "Van Wolf," but not from using the words "Aromatic Schiedam Schnapps," those words being descriptive of the article.

IN RE RICHARDSON. [416.]

Feb. 7th, 1873.

[*U. S. Patent Office.*—*Leggett, Comm.*——3 *U. S. Pat. Gaz.* 120.]

Application for the registration of the words "A. Richardson's Patent Union Leather-Splitting Machine" as a trade mark, refused, as to the word "patent," on the ground that, the patent having expired, the continued use of the word was deceptive; and, as to the remainder, on the ground that the name, having been applied to a patented article during the existence of the patent, had become descriptive of the article, and open to the use of the public on the expiration of the patent.

[417.] **STERNBERGER** *v.* **THALHEIMER.**

Feb. 8*th*, 1873.

[*U. S. Patent Office*—*Thacher, Act. Comm.*}——3 *U. S. Pat. Gaz.* 120.]

Thalheimer having in five or six instances used the word "Centennial" as an experimental trade mark on clothing about March 6th, 1872, and procured the registration of the word as his trade mark, but not having used the word seriously until June, Sternberger, in February, 1872, registered a trade mark containing that word, with other particulars, began to use the word extensively about March 12th, 1872, and applied for registration of the word as his trade mark.

Interference declared between the parties.

Held, that, notwithstanding the prior registration of Thalheimer, Sternberger was entitled to registration, since he was the first to use the word seriously, besides having previously registered it in combination with other particulars.

[418.] **LAIRD** *v.* **WILDER.**

Feb., 1873.

[*Kentucky Ct. of App.*——9 *Bush* 131 ; 15 *Amer. Rep.* 707.]

The plaintiff manufacturing and selling "Laird's Bloom of Youth or Liquid Pearl," the defendants began to sell another preparation in bottles of a similar shape to the plaintiff's, and with labels copied in all particulars from his, except that for "George W. Laird, No. 74, Fulton St., New York," were substituted the words, "Joseph Laird, No. 384, Broadway, New York."

Injunction to restrain the defendants from so doing,

refused, on the ground that the plaintiff's preparation contained carbonate of lead, or other noxious ingredients, whereas he described it as being "free from all mineral and poisonous substances," and that he was, therefore, disentitled to relief.

TUDOR *v.* TUDOR. 419

March 13*th*, 1873.
[*Malins, V.C.*——*W. N.* 1873, *p.* 72.]

The plaintiff, W. Tudor, having transferred a business, which he had carried on in partnership with his brother S. Tudor, during the latter's lifetime, and since his death, alone, under the name of "S. & W. Tudor," to the defendants, the sons of S. Tudor, the defendants continued to use the plaintiff's initial, "W.," as part of their firm name, notwithstanding that there was an express provision in the deed under which the plaintiff retired, for the removal of his name from the business.

On motion by the plaintiff, injunction granted to restrain the defendants from continuing so to do.

CORNS *v.* GRIFFITHS. 420.

May 3*rd*, 1873.
[*Malins, V.C.*——*W.N.* 1873, *p.* 93 ; *Pemberton*, 2*nd ed.* 308.]

The plaintiffs being the proprietors of a weekly newspaper entitled *The Iron Trade Circular* (*Rylands'*), the defendant, who had for many years published a weekly report of the iron trade, not in the form of a newspaper, as *The Iron Trade* (*Griffiths' Weekly Report*), substituted for this report a newspaper much resembling the plaintiffs', and entitled *The Iron Trade Circular* (*Edited by Samuel Griffiths*).

On motion by the plaintiffs, injunction granted to restrain the defendant from using a title for his newly-established newspaper identical with that used by the plaintiffs for theirs.

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421. **FULLWOOD *v.* FULLWOOD (1).**

May 5th, July 31st, 1873.

[*Malins, V.C.*——*W.N.* 1873, *p.* 93.]

[*James & Mellish, L.JJ.*——*W. N.* 1873, *p.* 185.]

The plaintiff being a manufacturer of annatto, trading as "R. J. Fullwood & Co.," and who sold his annatto in earthenware bottles with special labels on the sides, the defendant, H. Fullwood, the plaintiff's nephew, began to manufacture annatto under the name of "H. Fullwood & Co.," though he had no partner, and removed into the same street as the plaintiff, and sold his goods in similar bottles, similarly labelled to the plaintiff's, as to which several instances of actual deception were proved.

On motion by the plaintiff, injunction granted to restrain the defendant from selling his annatto in similar bottles labelled in a similar manner to the plaintiff's.

[422.] **IN RE THE AMERICAN SARDINE CO.**

May 13th, 1873.

[*U. S. Patent Office—Leggett, Comm.*——3 *U. S. Pat. Gaz.* 495.]

Application for registration of the words "American Sardines" as a trade mark on boxes containing a species of American fish, not the true sardines, refused, on the ground that the application of the words to fish, not being really sardines, was calculated to deceive purchasers, while, if applied to true sardines, the words would be properly descriptive of the fish.

WITT *v.* CORCORAN. 423.

June 13*th*, 1873.

[*Bacon, V.C.*——*Seton, 4th ed.*, 257 ; 2 *Ch. D.* 69 ; 45 *L. J., Ch.* 603 ; 34 *L. T., N. S.* 550 ; 24 *W. R.* 501.]

The plaintiff having been in partnership with the defendant and his son, under the firm of "Bryan Corcoran, Witt & Co.," and having purchased the business, goodwill, trade name, trade marks, &c., the defendant carried on business under the name of "Bryan Corcoran, & Co.," or "Bryan Corcoran, Son & Co."

Injunction granted to restrain the defendant from carrying on business under those names, or any other name calculated to induce the belief that the defendant was carrying on business in succession to the original firm, and from interfering with letters intended for the original firm.

BROWNE *v.* FREEMAN (2). 424.

July 23*rd*, 1873.

[*James & Mellish, L. J. J.*——*W. N.* 1873, *p.* 178.]

The plaintiff being the original inventor of chlorodyne, but who had lost his exclusive right in the name, the defendant represented that a medicine of his own manufacture was the "True and Original Chlorodyne," and made certain other representations with regard to his chlorodyne.

Injunction to restrain the defendant from so doing, refused, on the ground that the name had become the name of the article; that the defendant had always sold his under his own name, and that any false statements in the defendant's advertisements only amounted to slander, for which damages were the proper remedy.

[425.]

POPHAM *v.* WILCOX.
(afterwards POPHAM *v.* COLE.)

1873; *Dec.* 9*th*, 1874: *April* 25*th*, 1876.

[*N. Y. Super. Ct.*—*Monell, J.*}——14 *Abb. Pr., N. S.* 206.]
[*N. Y. Super. Ct.*——38 *N. Y. Super Ct.* (6 *J. & S.*) 274.]
[*N. Y. Ct. of App.*——66 *N. Y.* (21 *Sickels*) 69; 23 *Amer. Rep.* 22.]

The plaintiff being a manufacturer of refined lard, which he sold in vessels stamped with the figure of a fat hog, his name, and "Prime Leaf Lard," the defendants began to sell the same article in vessels stamped with a globe, a small wild boar, their name, and "Prime Leaf Lard."

Action for an injunction to restrain the defendants from infringing the plaintiff's rights.

Held, by Monell, J., that although there was not much similarity between the marks when seen side by side, the defendants' mark was likely to attract to itself the same name as the plaintiff's, viz., "the pig brand," and that, therefore, the injunction which had been granted must be continued.

Held, by the N. Y. Super. Court, that, the plaintiff being unable to prove himself to have been the first inventor, and it being proved that the pig mark had been used by various other refiners, the injunction must be dissolved.

Held, by the N. Y. Ct. of App., that the decision in favour of the defendants must be maintained, on the ground that there was not sufficient resemblance between the marks to be calculated to deceive; and further, that it was doubtful whether the figure of the animal from which the lard was derived was not descriptive of the article, and, therefore, incapable of being appropriated.

Per Monell, J.—"The question in these cases always is, whether there is such a similarity of the two devices as to deceive the public. It is not required that the imitation shall be so close as to require a

careful examination to detect the difference, nor that it shall be such that persons entirely familiar with one would not be mistaken. But it must have such a resemblance to the genuine that the general public would be likely to mistake the one for the other."

"A mere design to injure would not of itself be sufficient. It must be accompanied by evidence of actual or prospective injury, but in establishing the injury the intent may properly be considered."

Per N. Y. Ct. of App.—"The question in this, as in every other case, is whether there is such resemblance between the two as to deceive a purchaser using ordinary caution. . . . . The Court is not bound to interfere where ordinary attention will enable purchasers to discriminate between the trade marks used by different parties."

DAWES *v.* DAVIES. [426.]

1873.

[*N. Y. C. P.*——*Codd. Dig.* 260.]

The plaintiff being an umbrella manufacturer, whose trade mark consisted of the number "140," placed in a white oblong within a five-pointed star, the defendants used on their umbrellas the number "142" within a sunburst.

Motion by the plaintiff for an injunction to restrain the defendants from so doing, refused, on the ground that different numerals were commonly used in the trade as trade marks, and that it was not probable that persons of ordinary intelligence would be deceived.

HARDY *v.* CUTTER. [427.]

1873.

[*U. S. C. C., Dt. of Cal.*—*Wheeler, J.*——*3 U. S. Pat. Gaz.* 468.]

The plaintiffs being manufacturers of "Cutter" whiskey (as successors by purchase to J. H. Cutter), who branded their barrels with a crown and the words "J. H. Cutter—Old Bourbon," and used wrappers and labels containing the

same words with other particulars, the defendant, a son of J. H. Cutter, also manufactured whiskey, and used wrappers and labels containing the words "J. F. Cutter, son of the late J. H. Cutter, of Louisville, Ky.," the wrappers and labels bearing no other resemblance to the plaintiffs'.

Action for an injunction to restrain the defendant from so doing.

Demurrer allowed, on the ground that there was no similarity between the marks, except in the use of the name "Cutter," and that, with regard to the name, the defendant was entitled to use his own name in an honest manner.

"Every person has the right to use his own name in connexion with the articles he manufactures or sells, provided he does not use it in such a way as to deceive or defraud the public, or to obtain for himself, at the expense of another, an undue advantage."

[428.] **LOWELL MANUFACTURING CO. *v.* LARNED.**

1873.

[*U. S. C. C., Dt. of Penn.*——*Codd. Dig.* 341.]

The plaintiffs being carpet manufacturers, who were in the habit of rolling their carpets upon a peculiarly-formed stick, made in two pieces, and with the ends shaped into octagonal rings, which appeared in the centre of the rolls of carpet, and who had registered this stick in the U. S. as their trade mark, the defendants began to roll their carpets upon similar sticks.

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

CLEMENS *v.* **SUCH.** [429.]

July 11*th*, 1873.
[*N. Y. Sup. Ct.*——*Codd. Dig.* 312.]

The plaintiff, an author, who wrote under the *nom de plume* of "Mark Twain," having agreed to allow the defendant to publish one of his essays in a book of selections, and having delivered to him a volume of his essays, published but not copyrighted, for him to select one of them therefrom, the defendant published in his book six essays purporting to be by Mark Twain, with a statement on the title-page that they had been specially revised and selected by Mark Twain for the purpose, five of the six being taken from the plaintiff's volume, and the sixth not being his at all.

On motion by the plaintiff, injunction granted to restrain the defendant from using the *nom de plume* on the title-page of his book, or as the author or reviser of any book, and from publishing any matter alleged to have been written by the plaintiff under his *nom de plume*, except one essay from the plaintiff's volume, but the defendant to be at liberty to state on his title-page that the book included a sketch by Mark Twain.

OSGOOD *v.* **ROCKWOOD.** [430.]

Sept., 1873.
[*U. S. C. C., S. Dt. of N. Y.*—*Blatchford, J.*——11 *Bl. C. C.* 310.]

The plaintiffs being American patentees, under an assignment by the English inventor, of a class of prints known as "Heliotypes," and who had registered the word "Heliotype" as their trade mark in respect thereof under the

U. S. Act of 1870, the defendant used the word "Heliotype" or "Heilotype" on prints not produced by the patented process.

Injunction to restrain the defendant from using the word, refused, on the ground that, whatever rights the plaintiffs might have apart from the Act, and which the Act preserved to them (but which the bill was not framed to assert), they were not entitled to any remedy in virtue of the registration under the Act, since the defendant had not used the word upon substantially the same goods as those in respect of which it was registered by them.

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431. **RAGGETT *v.* FINDLATER.**

Nov. 11*th*, 1873.

[*Malins, V.C.*——*L. R.* 17 *Eq.* 29; 43 *L. J., Ch.* 64; 29 *L. T., N. S.* 448; 22 *W. R.* 53.]

The plaintiff being a manufacturer of stout, who sold it in bottles bearing labels on which the words "Nourishing London Stout" were conspicuous, the defendants sold stout in bottles bearing labels having on them the words "Nourishing Stout," but differing in other respects from the plaintiff's.

Injunction to restrain the defendants from using the words "Nourishing Stout," refused, on the ground that a right of trade mark could not be acquired in a mere English adjective denoting quality.

"It is of the highest importance that, on the one hand, every protection should be given to trade marks when fairly and properly used, and when used within just limits, and, on the other hand, it is of great importance that, by the use of a particular word or anything which may be called a trade mark, the right should not be unduly extended so as to infringe on the right of traders to call their articles by a quality they possess, or to give an undue protection to any one who happens to use a particular word."

SIEGERT *v.* EHLERS. [432.]

Feb. 3*rd*, 1874.

[*Trinidad Sup. Ct.*——*Cited* 7 *Ch. D.* 803; 38 *L. T., N. S.* 351.]

The plaintiffs being a firm manufacturing at Ciudad Bolivar (formerly Angostura), in Venezuela, a fluid which they called "Aromatic Bitters," and put up in bottles enclosed in wrappers, which were printed with the name of the preparation and a description in several languages of its virtues and uses, the defendant, an agent of another manufacturer at Ciudad Bolivar, sold another article in bottles in very similar wrappers.

On motion by the plaintiffs, injunction granted to restrain the defendant from using wrappers printed with the name "Aromatic Bitters," and a description of the uses of the article, in imitation of the plaintiffs'.

COPE *v.* EVANS. 433.

Feb. 14*th*, 1874.

[*Hall, V.C.*——*L. R.* 18 *Eq.* 138; 30 *L. T., N. S.* 292; 22 *W. R.* 453.]

The plaintiffs being cigar manufacturers, who sold their cigars in boxes branded with the words "Flor Fina Prairie Superior Tabac," and the figure of a hunter, the defendants manufactured cigars and sold them in boxes branded with the words "Flor de la Prairie," and the half-figure of a girl.

Injunction to restrain the defendants from using the word "Prairie," refused, on the ground that no actual deception was proved, and that it was not to be anticipated that deception would occur.

"In cases where it appears that defendants have adopted a plaintiff's trade mark, and it is proved that defendants' object in doing so was to pass off their own goods as those of the plaintiff, the Court will, without further inquiry, restrain the defendants, and it will also do so where there has been such adoption, although proof of the defendants' object be wanting, if it appears that any one has in fact been thereby induced to buy the defendants' goods as being the goods of the plaintiff. In the absence of proof of such object and of such deception, if the two trade marks are not to the eye of the Court either altogether identical, or so similar that the Court considers the difference unsubstantial, the plaintiff must make out to the satisfaction of the Court that its intervention is required to protect the plaintiff from the defendants' goods being taken for his (the plaintiff's). For the plaintiff to say that his name or mark is to be found on the defendants' goods is not sufficient."

[434.] **WOLFE** *v.* **BURKE.**

March, 1874.

[*N. Y. Sup. Ct.*——7 *N. Y. Sup. Ct.* (7 *Lans.*) 151; 2 *U. S. Pat. Gaz.* 441.]

[*N. Y. Ct. of App.*——56 *N. Y.* (11 *Sickels*) 115.]

The defendants manufactured and sold spirits, in succession to Udolpho Wolfe, as "Wolfe's Aromatic Schiedam Schnapps," and threatened proceedings against the plaintiffs, who sold "Hudson G. Wolfe's Bell Schnapps."

Injunction, which had been granted to restrain the defendants from interfering with the plaintiffs' business by such threats, dissolved, and

Held, that the plaintiffs were not entitled to the favourable consideration of a Court of Equity, because—(1) they had endeavoured to secure a part of the goodwill of the defendants' business, while avoiding an infringement of their trade mark; (2) they, as well as the defendants, had improperly represented their article as, not merely a spirit, but a medicinal preparation.

BROWN *v.* **MERCER.** [435.]

March, 1874.

[*N. Y. Super. Ct.—Van Vorst, J.*] ——37 *N. Y. Super. Ct.* (5 *J. & S.*) 265.]

The plaintiff being a manufacturer of a preparation for dressing leather, who sold his preparation in bottles enclosed in wrappers peculiarly coloured and arranged, the defendant sold a similar preparation in similar bottles, and gradually assimilated his wrappers more and more to the plaintiff's.

On motion by the plaintiff, injunction granted to restrain the defendant from infringing the plaintiff's rights.

"It is no answer that, in certain particulars, the defendant's label differs from the plaintiff's, so long as the imitation in other respects is so apparent that purchasers have been and are likely to be deceived."

MISSOURI (STATE OF) *v.* **GIBBS.** [436.]

March, 1874.

[*Missouri Sup. Ct.*——56 *Mo.* (15 *Post*) 133.]

The defendant imitated Messrs. Lea & Perrin's "Worcestershire Sauce" and the labels and wrappers used upon it by them.

Held, that the Missouri Statute of Feb. 22nd, 1870, making an infringement of trade mark a criminal offence in that State, was applicable to cases in which the imitated trade mark was the property of English or other foreign manufacturers.

"Trade marks are valuable to the persons who have a proprietary interest in them, and to the people who buy and use the articles, because they are a guarantee of their genuineness."

[437.] **KIDD & CO. *v.* MILLS, JOHNSON & CO.**

March 28th, 1874.

[*U. S. Patent Office*—*Leggett, Comm.*}—5 *U. S. Pat. Gaz.* 337.]

S. N. Pike, having, when in partnership at Cincinnati with H. Pike as "S. N. and H. Pike," adopted as trade marks for whiskey the words "Magnolia" and "Dave Jones," continued to use those marks, sometimes trading alone, sometimes in partnership with various other persons. At a time when he was in partnership with Kidd as "S. N. Pike & Co." he sold the premises on which, and the apparatus, &c., with which the company carried on business at Cincinnati, but which were his private property, to Mills, Johnson & Co., and gave them what purported to be a licence to use the brands used by him. Mills, Johnson & Co. having registered those words as their trade marks, Kidd & Co., consisting of Kidd and another surviving partner in the firm of "S. N. Pike & Co.," carrying on business at New York, since the removal from Cincinnati, applied for the registration of those words as their trade marks.

Interference declared between the parties to try the right to the marks.

Held, (1) that on the dissolution of the various firms in which S. N. Pike was concerned, the right to use the trade marks must be held to have continued in him as the continuing partner, and to have been abandoned by the retiring partners, they having set up no claim thereto; (2) that he brought this right with him into the successive firms which he formed; (3) that at the time of the sale to Mills, Johnson & Co. the trade marks were the property of S. N. Pike & Co., and not of S. N. Pike individually; (4) that the right to use the trade marks did not, there-

fore, pass to Mills, Johnson & Co. on the sale of S. N. Pike's Cincinnati premises, nor under the licence which he purported to give them; (5) that the trade marks, therefore, remained the property of S. N. Pike & Co., and passed to Kidd & Co., the successors of that firm, and that Kidd & Co. were, therefore, entitled to registration.

REID *v.* **SIBBALD.** [438.]

April 10*th*; *May* 13*th*, 1874.

[*Home, Sheriff Subs.*— *Monro, Sheriff of Linlithgowshire.* } ——18 *Journ. of Jurisp.* 392.]

The plaintiff being a sheriff's officer named William Roberts, the defendant, a draper, began to issue circulars to his debtors, signed "Andrew Roberts," threatening proceedings if their debts were not paid within a certain time.

Interdict granted, notwithstanding that the defendant had discontinued the practice and had given up the remaining circulars, to restrain the defendant from attaching the name "Andrew Roberts," or "Roberts" with any other Christian name, to such circulars, on the ground that the defendant intended to induce and had induced a belief that the circulars were issued by the plaintiff, and that the plaintiff would be injured by his name being supposed to be affixed to such absurd documents.

THE GLENDON IRON CO. *v.* **UHLER.** [439.]

May, 1874.

[*Penn. Sup. Ct.*——75 *Penn. St.* 467; 15 *Amer. Rep.* 599; 13 *Am. L. Reg., N. S.* 543; 6 *U. S. Pat. Gaz.* 154.]

The plaintiffs having long stamped the word "Glendon" on their iron manufactured within that borough, the de-

fendants set up in business in the same place, and began to stamp the same word on their iron.

Injunction to restrain the defendants from so doing, refused, on the ground that all persons manufacturing within the borough had an equal right to use the name.

[440.] **ISAACS *v.* DALY.**

May, 1874.

[*N. Y. Super. Ct.*—*Curtis, J.*} ——39 *N. Y. Super. Ct.* (7 *J. & S.*) 511.]

The plaintiff being the author of a copyright play entitled "Charity," the defendant purchased another play bearing the same name, and proceeded to represent it under that name.

Motion by the plaintiff for an injunction to restrain the defendant from so doing, refused, on the ground that the use of a word of such general application could not be restrained in the absence of bad faith, and that the defendant did not appear to have acted otherwise than *bonâ fide*.

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441. **RICHARDS *v.* WILLIAMSON.**

June 10*th*, 1874.

[*Bacon, V.C.*——30 *L. T., N. S.* 746; 22 W. R. 765.]

The plaintiff being a gun-maker, who stamped the lock-plates and levers of his rifles with the name "Westley Richards," or "Westley Richards & Co.," the defendants bought up some of such lock-plates and levers belonging to condemned or worn-out guns, and made them up with parts of other guns not of the plaintiff's make into complete carbines.

Injunction granted to restrain the defendants from so using such lock-plates and levers.

RODGERS *v.* RODGERS. 442.

July 28*th*, 1874.

[*James and Mellish, L.JJ.*——31 *L. T., N. S.* 285.]

The plaintiffs being J. Rodgers & Sons, who had long carried on business as cutlers in Norfolk Street, Sheffield, and stamped their goods, among other marks, with their name and address, the defendants, R. Rodgers & Son, also carried on business as cutlers in Sheffield, and they and their predecessor in business had since 1861 described their place of business and marked their cutlery as from "Norfolk Works, Sheffield."

Action for an injunction to restrain the defendants from using the words "Norfolk Works," or "Norfolk."

Held, that the injunction must be refused, on the ground of the plaintiffs' delay, and failure to produce evidence of actual deception, but that no costs of the cause prior to the appeal could be given, on account of the defendants' unfair dealing.

Per Mellish, L. J.—"I do not think that, as a matter of law, the mere fact that it (the title) has been used for a great number of years necessarily affords a defence. If it was clearly made out that it was originally used for the purpose of fraud, that it was continued for the purpose of fraud, and that it has the practical effect of deceiving the public, I do not think that the lapse of years would prevent the plaintiffs from having a remedy."——"In my judgment, in order to make out a clear case when it has lasted for such a great number of years as this, the plaintiffs ought to prove satisfactorily that persons have actually been deceived."

THE GLEN AND HALL MANUFACTURING CO. *v.* HALL. [443.]

Sept., 1874.

[*N. Y. Sup. Ct.*——6 *N. Y. Sup. Ct.* (6 *Lans.*) 158.]

[*N. Y. Comm. of App.*——61 *N. Y.* (16 *Sickels*) 226; 19 *Amer. Rep.* 278.]

The defendant, being the successor in business of Joseph Hall, who had long carried on business at No. 10, South

Water Street, Rochester, New York, began in February 1869 to use in his handbills the words "The Old Joseph Hall Agricultural Works, No. 10, South Water St., Rochester, N.Y." In September or October, 1869, the plaintiffs opened their establishment in the same street, and styled themselves in their handbills, &c., "The Glen and Hall Manufacturing Company, No. 10, South Water St., Rochester, New York."

Action for an injunction and counterclaim.

Injunction granted, on the defendant's counterclaim, to restrain the plaintiffs from using the words and figures "No. 10."

[444.] **CONSOLIDATED FRUIT JAR CO. *v.* DORFLINGER.**

Oct., 1874.

[*U. S. C. C., E. Dt. of Penn.—Cadwallader, J.*] ——2 *Am. L. T., N. S.* 511.]

The plaintiffs being manufacturers of jars, on which they placed certain trade marks, consisting respectively of the words "Mason's Patent, November 30th, 1858," "Mason's Improved," "The Mason Jar of 1858," as to which jars the patent under which they were made had been decided to be invalid, and also another trade mark, consisting of the words "The Mason Jar of 1872," not open to the same objection, the defendants sold other jars similarly marked.

On motion by the plaintiffs for an injunction to restrain the defendants from infringing their trade marks,

Held, that, as to the first three marks, the plaintiffs were disentitled by reason of the reference to the invalid patent as if it were valid; but that, as to the last mark, a renewed application might be made.

"No title can be successfully asserted in a trade mark, which is of a tendency to mislead or deceive the public. This objection may avail a defendant, notwithstanding what would otherwise be imputable to him as misconduct. The doctrine is that the complainant must come into a Court of Equity with clean hands."

MORSE *v.* **WORRELL,** [445.]
Afterwards
MORSE *v.* **CORNWELL.**

1874; 1875.

[*Phila. C. P.*——9 *Am. L. Rev.* 368; *Codd. Dig.* 242.]

The plaintiff being a manufacturer of stove polish, on which he used a trade mark consisting of the device of an orb, with rays of light, rising over a piece of water, with the words "Rising Sun Stove Polish," the defendant sold other stove polish with a very similar device, with the words "Rising Moon Stove Polish."

Injunction granted, to restrain the defendant from using the device, also from using the name "Rising Moon," and from using the device of an orb rising over a piece of water.

IN RE GODILLOT. [446.]

Nov. 16*th*, 1874.

[*U. S. Patent Office.*—*Spear, Act. Comm.*——6 *U. S. Pat. Gaz.* 641.]

Application for the registration of a label, refused, on the ground that, inasmuch as it possessed all the characteristics of a trade mark, it could only be registered as such.

COTTON *v.* **GILLARD.** 447.

Nov. 24*th*, 1874.

[*Jessel, M.R.*——44 *L. J., Ch.* 90.]

The defendant having invented a sauce which he called the "Licensed Victuallers' Relish," and placed in bottles labelled with a view of the Licensed Victuallers' Asylum,

the sauce was sold at first by the defendant and his partners in business, and after the dissolution of partnership (on which event the recipes and formulas used by the defendant reverted to him) by the defendant's son, who also bought the interest of the defendant's former partners in the sauce. The son becoming bankrupt, his interest in the sauce was bought by the plaintiffs from his trustee in bankruptcy, but the defendant retained the secret recipe, and publicly announced his claim to the title and trade mark.

Suit for an injunction to restrain the defendant from using the name and trade mark.

Injunction refused, on the ground that a trade mark could not exist or be transferred in gross, and that the plaintiffs were not entitled to apply to an article of their own invention the name and mark appropriated to an article of the recipe of which they were ignorant, the result of such a course of proceeding being to pass off a spurious article on the public as the genuine one of the defendant's invention.

[448.] **TAYLOR** *v.* **GILLIES.**

Dec., 1874.

[*N. Y. C. P.*——5 *Daly*, 285.]
[*N. Y. Ct. of App.*——59 *N. Y.* (14 *Sickels*) 331 ; 17 *Amer. Rep.* 333.]

The plaintiff being a manufacturer of saleratus, which he sold in packages labelled "Allen's Gold Medal Saleratus," and "Taylor's Gold Medal Saleratus," the defendants began to sell the same article in packages labelled "Gillies' Gold Medal Saleratus."

Injunction to restrain the defendants from using the words "Gold Medal" in connexion with their saleratus, refused, on the ground that no exclusive right could be claimed in those words.

ESTCOURT *v.* **THE ESTCOURT HOP ESSENCE CO.** **449.**

Dec. 3rd, 1874; *Jan. 21st*, 1875.

[*Malins, V.C.*——31 *L. T., N. S.* 567.]
[*Lord Cairns, C.; James and Mellish, L.JJ.*——*L. R.*, 10 *Ch.* 276; 44 *L. J., Ch.* 223; 32 *L. T., N. S.* 80; 23 *W. R.* 313.]

The plaintiffs being manufacturers of a substitute for hops in brewing, which they called "Estcourt's Hop Supplement," the defendant company began to sell another article as "Estcourt and Co.'s Hop Essence."

Suit by the plaintiffs for an injunction to restrain the defendants from using the name "Estcourt," and from using the secret of the "Hop Supplement," which they alleged to have been communicated to the defendants by the defendant C. Estcourt, who had been in connexion with the plaintiffs.

Held, on appeal, (1) that the defendant, C. Estcourt, was under no obligation to keep the plaintiffs' secret, and, further, that it was not proved that the defendant company had obtained their knowledge from him; (2) that the plaintiffs were disentitled to obtain an injunction by having delayed to take proceedings for seven months after they became aware of the assumption of the name "Estcourt" by the defendant company, and failing even after that period to produce evidence of actual deception; (3) that both parties being engaged in an improper speculation, and the defendant company having made statements in their advertisements calculated to lead to the belief that they were the original inventors of the article, the bill must be dismissed without costs.

450. **WARD *v.* BEETON.**

Dec. 21*st*, 1874.

[*Malins, V.C.*——*L. R.* 19 *Eq.* 207 ; 23 *W. R.* 533.]

The defendant's copyrights, stock-in-trade, &c., as a publisher (including a publication called "Beeton's Christmas Annual"), having been purchased by the plaintiffs in 1866, in 1869 the defendant entered into an agreement with the plaintiffs, under which he was to enter into the plaintiffs' service at a salary, and to give all his time to their business, and was not to permit the use of his name in publications without the consent of the plaintiffs, who were to have the right to use it. The plaintiffs and defendant having disagreed, the plaintiffs caused the Annual for 1874 to be prepared without the defendant's assistance, upon which the defendant put forth advertisements denying that such Annual was in continuation of his series, and stating that the genuine Annual was one which was being prepared by persons other than the plaintiffs.

Motion by the defendant to dissolve an injunction which had been granted to restrain the publication of such advertisements, refused, on the ground that the plaintiffs had a right to use the title, notwithstanding that the defendant had not prepared the work, and that the defendant's conduct was contrary to his engagement.

P. 216.—"When you sell a newspaper, it is not merely the right to sell one number of it, but continuing to publish it from day to day, it may be as long as the world lasts, under the name by which it has become known."

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451. **BROUGHTON *v.* BROUGHTON.**

May 25*th*, 1875.

[*Jessel, M.R.*——44 *L. J., Ch.* 526 ; 23 *W. R.* 779.]

G. Broughton and the defendant having carried on business in partnership, at the death of the former the partner-

ship was insolvent, but the defendant, being also G. Broughton's executor, carried on the business alone with such success that he subsequently sold it for £1,700.

Suit for the administration of G. Broughton's estate.

Held, that the defendant was only chargeable with the value of a moiety of the business at the time of the testator's death, and not at the time of the sale of the business.

BULLOCH, LADE & CO. *v.* **GRAY.** [452.]

Jan. 6th, 1875.

[*Guthrie, Sheriff Subs.*—*Dickson, Sheriff of Lanarkshire.*—19 *Journ. of Jurisp.* 218.]

Cross suits by two rival firms of distillers at Glasgow, of whom the one firm called their establishment "The Loch Katrine Distillery," and the other called their whiskey "Loch Katrine Whiskey," for interdicts to restrain the respective defendants from using the words "Loch Katrine."

Interdict in both cases refused, on the ground that in each case the word was used as descriptive of the water used in the distillery, and that any one who used Loch Katrine water in the manufacture of his whiskey was at liberty to state that such was the fact.

PRUDENTIAL ASSURANCE CO. *v.* **KNOTT.** 453

Jan. 20th, 1875.

[*Lord Cairns, C.; James & Mellish., L.JJ.*—*L. R.* 10 *Ch.* 142; 44 *L.J., Ch.* 192; 31 *L. T., N. S.* 866; 23 *W. R.* 249.]

Suit for an injunction to restrain the publication of a pamphlet alleged to contain passages injurious to the plaintiff company's reputation and business.

Held, that the Court of Chancery had no jurisdiction to restrain the publication of a libel, even when injurious to property.

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454. **HARTER *v.* SOUVAZOGLU.**

Jan. 20*th*, 1875.

[*Hall, V.C.*——*W. N.*, 1875, *p.* 11; *L. J. Notes of Cas.* 1875, *p.* 20.]

[*James & Mellish, L.JJ.*——*W. N.* 1875, *p.* 101.]

The plaintiffs being exporters of cotton cloths to Turkey and the Levant, who affixed to their cloths a certain heading consisting of different coloured threads in combination, the defendants shipped similar goods to Constantinople with a similar heading.

Injunction granted to restrain the defendants from infringing the plaintiffs' trade mark.

[455.] **WESTON *v.* KETCHAM (1).**

Feb. 1*st*, 1875.

[*N. Y. Super. Ct.*——39 *N. Y. Super. Ct.* (7 *J. & S.*) 54.]

The inventor of "Captain S. Pepper's Extra Signal Oil" (the secret of which preparation was only known to himself, his wife, and the plaintiff, Weston,) arranged with the defendant, Ketcham, for the sale by the latter of his oil, on terms of equal profits; and, after Pepper's death, Weston and Ketcham entered into a similar arrangement as "F. O. Ketcham & Co.," one-tenth of the profits being paid to Pepper's widow in return for her interest in the trade mark. Weston subsequently arranged with the widow for the cancellation of the previous agreement with her, and the substitution of an exclusive agreement with himself, for an annual sum, contrary to the wishes of his then partners, Ketcham and another, who had instructed him to

negotiate on behalf of the partnership; but the partnership continued to deal in the article under the same name, the annual payments being made out of the partnership funds, until the dissolution of the partnership, two years later. After such dissolution the plaintiffs, being Weston and the third partner in the old firm, continued to manufacture the same article under the same name and trade mark, as "Weston & Fisk," and the defendants, Ketcham and another, who were not acquainted with the secret, also manufactured an article under the same name and trade mark, as "F. O. Ketcham & Co."

Injunction, which had been granted to restrain the use of the name and trade mark by the defendants, dissolved, on the ground that (1) under the circumstances of the case, Weston's partners in the original firm of "F. O. Ketcham & Co." were entitled to treat him as a trustee for them of the rights which he had acquired under the new arrangement with Pepper's widow; (2) that they were not debarred from enforcing their right by acquiescence, since they were at a disadvantage, in that Weston alone knew the secret, and were, therefore, compelled to submit; (3) that on the dissolution of Ketcham & Co., all the partners retained equal rights in the trade marks, &c., of the firm; (4) and that the fact that the defendants were not acquainted with the secret, gave no rights against them to the plaintiffs, whose right in the trade mark was only equal to theirs; whatever remedy might be open to any member of the public who was deceived by them.

IN RE ROTHSCHILD. [456.]

Feb. 13*th*, 1875.

[*U. S. Patent Office—Spear, Act. Comm.*——7 *U. S. Pat. Gaz.* 220.]

On an application for registration of a trade mark,

Held, that, under the U. S. Statute of 1870, a new trade

mark, which had been devised and originated by the applicant, might be registered, although it had not been actually used by him previous to his application for registration.

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457. **FISHER & CO. (LIMITED) *v.* THE APOLLINARIS CO. (LIMITED).**

Feb. 25th; March 23rd, 1875.

[*Malins, V.C.*——*L. R.* 10 *Ch.* 299 *n.*; 32 *L. T., N. S.* 628.]

[*James & Mellish, L.JJ.*——*L. R.* 10 *Ch.* 297; 44 *L. J., Ch.* 500; 32 *L. T., N. S.* 628; 23 *W. R.* 460.]

Suit by Fisher & Co. (limited), and E. Fisher, whose business had been bought by the company, for an injunction to restrain the defendants from continuing to publish a letter of apology which had been given them by E. Fisher, in order to induce them to discontinue prosecuting him under the Merchandise Marks Act, 1862, for selling spurious aërated water in the Apollinaris Co.'s bottles, such continued publication being injurious to the plaintiff company.

Held, on demurrer, by the L.JJ., that there was nothing improper in compromising a prosecution under the Act in question, and that the defendants could not be restrained from continuing to publish the letter.

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458. **SMITH *v.* MASON.**

March 4th, 1875.

[*Hall, V.C.*——*W. N.* 1875, *p.* 62; *L. J. Notes of Cas.* 1875, *p.* 44.]

The plaintiff being a chemist and druggist, who sold a medicine of his invention under the name of "Pectorine," the defendant began to sell another preparation under the same name.

On motion by the plaintiff, injunction granted to restrain the defendant from so doing.

WILSON *v.* MAXFIELD. **459.**

March 15*th*, 1875.

[*Malins, V.C.*——*L. J. Notes of Cas.* 1875, *p.* 51.]

The plaintiff being a sewing-machine manufacturer, who had stamped a figure of St. George and the Dragon upon certain sewing-machines made by him, and known as "England's Queen," but who had not used the device on bill heads or circulars, or generally in his business, before bill filed, the defendant, who had formerly been in the plaintiff's employ, placed on machines of his own make, and on his circulars, a device of St. George and the Dragon, with the words "Maxfield & Co.'s trade mark."

Injunction to restrain the defendant from using the device, refused, on the ground that the plaintiff had acquired no reputation for the mark by use, and that there was no attempt by the defendant to deceive, or probability of deception.

GOURAUD *v.* TRUST. **[460.]**

March, 1875.

[*N. Y. Sup. Ct.*——10 *N. Y. Sup. Ct.* (3 *Hun*) 627.]

The plaintiff, whose name had formerly been "Dr. J. W. Trust," but had been changed to "Dr. T. F. Gouraud," being the manufacturer of a cosmetic which he called "Gouraud's Oriental Cream or Magical Beautifier," the defendants, his sons, who had retained their original name, began to sell a cosmetic under the name of "Crême Orientale, by Dr. T. F. Gouraud's Sons."

Injunction granted to restrain the defendants from so infringing the plaintiff's rights, on the ground that the statement of the defendants' relationship to the plaintiff, though true, was made with the intention of deceiving, and was calculated to deceive.

[461.] **GODILLOT *v.* HAZARD.**

April, 1875.

[*N. Y. Super. Ct.*—*Monell, C.J.*——49 *How. Pr.* 5.]

The plaintiff being an importer of an article made expressly for him by a particular firm in Paris, consisting of compressed ingredients for Julienne soup, and which he sold under a label containing the words "Conserves Alimentaires," the arms of the City of Paris, with a monogram "A. C." on each side, and the words "Paris," and "Julienne," with directions for use, beneath; the defendants began to sell a similar article under a similar label, except that the monogram was changed to "F. G.;" and they admitted that their label had, by their orders, been copied from the plaintiff's.

Suit for an injunction to restrain the defendants from infringing the plaintiff's rights.

Held, (1) that the plaintiff had no exclusive right in the word "Julienne" *per se*, that word being descriptive of an article commonly made; (2) but that the plaintiff was entitled to an injunction to restrain the use of his compound label by the defendants; (3) and that the fact that the plaintiff did not himself manufacture the article constituted no defence, since the article was expressly made for and imported by him.

"The property and right to protection is in the device or symbol, which is invented and adopted to designate the goods to be sold, and not in the article which is manufactured and sold."

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462. **LLEWELLYN *v.* BUTHERFORD.**

May 5th, 1875.

[*Common Pleas*——*L. R.* 10 *C. P.* 456; 44 *L. J., C. P.* 281; 32 *L. T. N. S.* 610.]

Held, that the sum which an outgoing tenant of a public house was entitled, under agreement, to receive on the

termination of his lease, as the value of the goodwill, must be determined by a calculation of the sum which an incoming tenant would be willing to pay for the goodwill in such a case, and that a general rise in the value of property in the neighbourhood should be taken into consideration.

Per Brett, J.—"In some classes of business, when the trade has long been carried on in a profitable manner in a particular house, and a new tenant comes in and continues to carry on the same business there, it is found by experience that many, if not all, of the customers resort there as before. This is found so regularly to happen that it has become usual to pay a money value for it, which is commonly called 'goodwill.' It may be that there may be a species of goodwill which may be the subject of bargain and sale, although not dependent on the business being carried on in any particular place: for instance, in the case of what are called 'quack medicines.' But when we come to speak of the goodwill of a public house, it is obvious that it is a thing which is attached to a locality."

DEVLIN *v.* DEVLIN. [463.]

May, 1875; *April 3rd*, 1877.

[*N. Y. Sup. Ct.*——11 *N. Y. Sup. Ct.* (4 *Hun*) 651.]
[*N. Y. Ct. of App.*——69 *N. Y.* (24 *Sickles*) 212; 15 *Alb. L. J.* 290.]

The plaintiffs being engaged in the clothing business as "Devlin & Co.," the defendant, J. S. Devlin, who carried on the same business alone, put out a wire sign in front of his shop, bearing the words "Devlin & Co.," with the letters "J. S." in a monogram above, the number of the shop, "826," on each side, and the word "clothing" below.

An injunction having been granted to restrain the defendant from using the name "Devlin & Co.," and from continuing to use such sign, and from trading in any other name than his own christian names and surname, in plain characters and without monograms, the defendant, upon service of the order, so varied his sign that it now contained the initials "J. S.," with "826" on each side in the top

line, "Devlin's" with a hand in the middle, and "clothing" in the bottom line.

On motion by the plaintiffs to commit the defendant for breach of the injunction,

Held, by the Supreme Court, that the defendant had not sufficiently obeyed the injunction, and was, therefore, guilty of contempt, and that a fine must be imposed and the sign removed.

Held, by the Court of Appeal, that the decision of the Supreme Court on a point of fact must be followed, but that the case was sufficiently open to doubt for no costs of the appeal to be given to either party.

[464.] IN RE HANKINSON.

June 2*nd*, 1875.

[*U. S. Patent Office*— *Thacher, Comm.* }——8 *U. S. Pat. Gaz.* 89.]

Application by a carpet-cleaner, who used a certain mark on his waggons, circulars, &c., and on tags attached to the carpets, for the registration of such mark as his trade mark, refused, on the ground that the marks of manufacturers or merchants were alone registrable within the U. S. Statute of 1870, and that the applicant was incapable of specifying, in accordance with that statute, the class and description of goods or merchandise to which the mark was appropriated.

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465. THE APOLLINARIS COMPANY (LIMITED) *v.* NORRISH.

June 3*rd*, 1875.

[*Bacon, V. C.*——33 *L. T., N. S.* 242.]

The plaintiffs being, by agreement with the owners of the Apollinaris Spring in Germany, the exclusive importers of "Apollinaris Water" into England, the defendants sold

an artificial water, containing the same chemical constituents as the natural water, as "London Apollinaris Water," but in different bottles, differently labelled, from those of the plaintiffs.

On motion by the plaintiffs, injunction granted to restrain the defendants from using the name "London Apollinaris Water," or making any other use of the name "Apollinaris" calculated to deceive.

BLACKWELL *v.* **WRIGHT.** [466.]

June, 1875.

[*N. Carolina Sup. Ct.*——73 *N. Car.* 310.]

The plaintiff being a manufacturer of tobacco at Durham, N. Car., whose trade mark consisted of the figure of a bull, with the words "Genuine Durham Smoking Tobacco, Manufactured only by W. T. Blackwell (successor to J. R. Green & Co.), Durham, N. C.," the defendant used a trade mark consisting of the figure of a bull's head, and the words "The Original Durham Smoking Tobacco, Manufactured by W. A. Wright," and published various denials of the exclusive right of the plaintiff to sell "Genuine Durham Smoking Tobacco."

Action for damages, and for an injunction to restrain the defendant from infringing the plaintiff's trade mark, and slandering his title.

Demurrer allowed, and injunction refused, on the ground that there was no such similarity between the marks as to be calculated to produce deception.

Per Bynum, J.—"This rule (*i.e.*, that of the protection of trade marks) is grounded upon a twofold reason: 1st, that the public may be protected from being imposed upon by a spurious or inferior article, as an imitation or counterfeit almost always is; and, 2nd, that the inventor may have the exclusive benefit of the reputation which his skill has given to the article made by him."

"It will make no difference whether the party designed to mislead the public, or whether the symbol adopted was calculated to deceive. But if it appear that the trade mark alleged to be imitated, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. An imitation is colourable, and will be enjoined, which requires a careful inspection to distinguish its mark and appearance from that of the manufacture imitated."

"We must assume that dealers and consumers of such a commodity have ordinary intelligence, and adopt ordinary precaution against imposition and fraud."

[467.] **WOODS** *v.* **SANDS.**

1875.

[*U. S. C. C., Dt. of Ill.*——*Codd. Dig.* 50.]

The plaintiff, who had established and gained a reputation for a hotel at Chicago under the name of "Wood's Hotel," assigned his interest therein to another person, with the exclusive use of his name, and a covenant not to open another hotel during the remainder of the lease. During the continuance of such arrangement the hotel was burnt down, and the plaintiff having subsequently re-purchased the right to the use of the name "Wood's Hotel," and opened a hotel under that name in a different situation, the defendant opened a new hotel in Chicago as "Wood's Hotel," and announced the re-opening of that hotel.

Action by the plaintiff for an injunction to restrain the defendant from using the name.

Held, (1) that the name was capable of assignment, at all events for use in connexion with the premises to which it was attached; (2) that it had passed to the plaintiff under the re-assignment from his assignee, and that he was entitled to the benefit of whatever value it possessed; (3) that the injunction must be granted to restrain the defendant from using the name.

IN RE VOLTA BELT CO. [468.]

June 26th, 1875.

[*U. S. Patent Office—Thacher, Comm.*} ——8 *U. S. Pat. Gaz.* 144.]

On an application for the registration of a trade mark, consisting of a globe, surrounded by clouds, from which lightning-flashes proceeded, with the words "Electricity is life,"

Held, that a description of the mark in the statement on application, as being "a symbol, consisting of the words 'Electricity is Life,' placed beneath clouds, from which lightning-flashes proceed, the whole arranged generally as shown in the *fac simile*," was insufficient, as not clearly distinguishing between the essential and non-essential parts of the mark claimed, and, in particular, making no mention whatever of the globe.

IN RE VIDVARD AND SHEEHAN. [469.]

June 29th, 1875.

[*U. S. Patent Office—Thacher, Comm.*} ——8 *U. S. Pat. Gaz.* 143.]

On an application for the registration of a trade mark,

Held, that the requirement of the U. S. Statute of 1870, that a declaration should be made on oath "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 a right to such use, either in the identical form, or having such near resemblance thereto as might be calculated to deceive," was sufficiently complied with by a declaration that "no other person, firm, or corporation has a right to the use of the said trade mark, or of one substantially the same."

[470.] **IN RE BOEHM & CO.**

Aug. 24*th*, 1875.

[*U. S. Patent Office*— *Spear, Act. Comm.*} ——8 *U. S. Pat. Gaz.* 319.]

On an application for the registration of the word "Centennial" as a trade mark in respect of "alcoholic spirits,"

Held, that such an application for the general class of goods was sufficient, and that it was not necessary to make separate applications in respect of the several kinds of goods included in the class on which it was intended to use the mark, *i.e.*, "Bourbon, wheat, and rye whiskeys, wines, brandies, gins, and bitters," except as to the last, "bitters" not being properly included in the term "alcoholic spirits."

[471.] **IN RE GLINES.**

1875.

[*U. S. Patent Office*— *Spear, Act. Comm.*} ——8 *U. S. Pat. Gaz.* 435.]

The words "Slate Roofing Paint," admitted to registration as a trade mark on paint, on the ground that, though the words might be suggestive of qualities of the paint, they were not, properly speaking, descriptive of its composition or use.

[472.] **MENEELY *v.* MENEELY.**

Sept., 1875.

[*N. Y. Sup. Ct.*——8 *N. Y. Sup. Ct.* (1 *Hun*) 673 ; 2 *Thomp. & C.* 540.]

[*N. Y. Ct. of App.*——62 *N. Y.* (17 *Sickels*) 427 ; 20 *Amer. Rep.* 489 ; 2 *Am. L. T., N. S.* 482.]

The plaintiffs and their predecessors in business having long manufactured bells at Troy, New York, and sold them with the inscription cast on them, "Meneely's, West Troy, N. Y.," the defendants made bells at the same place, and stamped them "Meneely and Kimberley, Troy, N. Y."

Injunction to restrain the defendants from using the name "Meneely" on their bells, refused, on the ground that the defendants were entitled to use their own names without fraud, and that no attempt at fraud was proved.

Per Rapallo, J., 62 N. Y. 427.—"Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead. Where the only confusion created is that which results from the similarity of the names, the Courts will not interfere."

IN RE GREEN. [473.]

Sept. 27th, 1875.

[*U. S. Patent Office—Spear, Act. Comm.*}——8 *U. S. Pat. Gaz.* 729.]

The words "German Sirup" admitted to registration as a trade mark, on the ground that the word "German" was not used as descriptive of a German product, but was a purely arbitrary term.

THE TUCKER MANUFACTURING CO. *v.* BOYINGTON. [474.]

Oct., 1875.

[*U. S. C. C., Dt. of N. Ill.—Blodgett, J.*}——9 *U. S. Pat. Gaz.* 455.]

The plaintiff company manufacturing the "Tucker Spring-Bed" under an expired patent, and having registered a trade mark consisting of a picture of the bed, the monogram "T. M. Co.," and the words "Tucker Spring-Bed," the defendant manufactured a similar bed, and used a label containing a picture of the bed and the words "Tucker Spring-Bed."

Motion by the plaintiffs for an injunction to restrain the defendant from infringing the plaintiffs' rights, refused, on the ground that the right to use the name and represent the bed had become common property on the expiration of the patent, and that the combination registered by the plaintiff company had not been used by the defendant, except as to such elements as were common property.

[475.] **THE INDIA-RUBBER COMB CO. *v.* MEYER.**

1875.

[*N. Y. Super. Ct.*——*Cited*, 8 *U. S. Pat. Gaz.* 905.]

The plaintiff company placing the words "The India-rubber Comb Co." on combs and cases or packages of combs, the defendant used the same words on other combs, cases, &c.

Injunction granted to restrain the defendant from infringing the plaintiffs' rights.

[476.] **IN RE INDIA-RUBBER COMB CO.**

Nov. 24*th*, 1875.

[*U. S. Patent Office*— *Spear, Act. Comm.* }——8 *U. S. Pat. Gaz.* 905.]

The words "The India Rubber Comb Company of New York," admitted to registration as a trade mark, on a rehearing, after a previous refusal, on the ground that the words were established to be the applicants' trade mark by the decision of the Superior Court of New York in *India-rubber Comb Co.* v. *Meyer*, and that, although registration of the mere name of a person, firm, or corporation was forbidden by the U. S. Statute of 1870, yet such a name might be registered as being "a lawful trade mark rightfully in use on the 8th July, 1870."

THE SINGER MANUFACTURING CO. *v.* **WILSON.** **477.**

Dec. 14*th*, 1875; *March* 25*th*, 1876; *Dec.* 13*th*, 1877.

[*Jessel M. R.*——2 *Ch. D.* 434; 45 *L. J., Ch.* 491; 34 *L. T., N. S.* 858; 24 *W. R.* 1023.]

[*Ct. of App.*— *James, Mellish & Baggallay, L.JJ.* ——2 *Ch. D.* 448; 45 *L. J., Ch.* 400; 34 *L. T., N. S.* 863; 24 *W. R.* 1026.]

[*H. of L.*——3 *App. Cas.* 376; 47 *L J., Ch.* 481; 33 *L. T., N. S.* 303; 26 *W. R.* 664.]

The plaintiffs being manufacturers of sewing-machines under various patents, since expired, who placed on their machines the words "The Singer Manufacturing Company," and also a trade mark, consisting of an ellipse containing a shuttle and needles, crossed with a line of cotton in the form of an S, and the words and letters "Trade Mark," "The Singer M. F. G. Co., N. Y.," and who alleged that their machines had become generally known as the "Singer," or "Singer's" machines; the defendant, who manufactured sewing-machines on the principles of a variety of expired patents, began to use, among others, the patents formerly owned by the plaintiffs and their predecessors in business, and, by his agents and in his price-lists, &c., described such machines as "Our Singer Machines," and placed on them his trade mark, consisting of a brass plate representing St. George and the Dragon, within the words "Newton, Wilson & Co., Manufacturers, 144, High Holborn," arranged in a circle, and he alleged that the name "Singer," or "Singer's," was indicative of an article made on the principle of construction which he asserted to run through all the plaintiffs' patents, though they varied in minor particulars, and not of an article made by the plaintiffs.

Suit by the plaintiffs for an injunction to restrain the defendant from using the name "Singer" or "Singer's" in connexion with his machines.

Held, by the M. R. and Ct. of App., upon the plaintiffs'

evidence alone: (1) that where a name or device is affixed to an article, or to a wrapper or vessel in which it is contained, thus becominga trade mark proper, it is not necessary, to constitute an infringement, for actual fraud to be proved; (2) that where a trade name is used in respect of an article, but is not placed upon it, actual fraud must be proved for there to be infringement; (3) that the present case falling into the second class, and the plaintiffs producing no evidence of actual fraud, the injunction must be refused; (4) and that, this being so, it was unnecessary to inquire whether the name was indicative of the plaintiffs' make, or of a principle of construction.

Held, by the H. of L.: (1) that, whether the name is or is not affixed to the article, it is not necessary, to constitute infringement, for actual fraud to be proved, if it is established that the defendant has acted in a way calculated to deceive; (2) that, in the case in question, the plaintiffs had shown a *primâ facie* case, but that, the plaintiffs' evidence only being before their Lordships, they were not in a position to decide finally whether the name "Singer" or "Singer's" was really indicative of the plaintiffs' manufacture, or of a principle of construction, or whether the defendant had acted in a way calculated to deceive; (3) and, therefore, that the case must be remitted to the Court below for decision upon the whole of the evidence.

Per Lord Cairns, C., 3 App. Cas. 389.—"It may well be that, if an imitated trade mark is attached to the article manufactured, there will, from that circumstance, be the certainty that it will pass into every hand into which the article passes, and be thus a continuing and ever-present representation with regard to it; but a representation made by advertisements that the articles sold at a particular shop are articles manufactured by A. B. (if that is the legitimate effect of the advertisements, which is a separate question), must, in my opinion, be as injurious in principle, and may possibly be quite as injurious in operation, as the same representation made upon the articles themselves."

P. 391.—"I wish to state in the most distinct manner that, in

my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade mark."——"A man may take the trade mark of another ignorantly, not knowing it was the trade mark of the other; or he may take it in the belief, mistaken but sincerely entertained, that in the manner in which he is taking it he is within the law, and doing nothing which the law forbids; or he may take it, knowing it is the trade mark of his neighbour, and intending and desiring to injure his neighbour by so doing. But in all these cases it is the same act that is done, and in all these cases the injury to the plaintiff is just the same. The action of the Court must depend upon the right of the plaintiff, and the injury done to that right."

Per Lord O'Hagan, p. 396.—"If a man has acquired legitimately a right to the property in an exclusive use of a name, it is of small account to him, should it be invaded, whether the invasion comes from a purpose to deceive, or from ignorance, or inadvertence, or an honest misconception of the relative rights of the parties, and the law ought not to permit, and will not permit, the continuance of the invasion, whatever may have been its origin."

TALLCOT *v.* **MOORE.** [478.]

Dec., 1875.

[*N. Y. Sup. Ct.*——13 *N. Y. Sup. Ct.* (6 *Hun*) 106.]

The plaintiff sold certain medicines under the name of "The Magic Cure," and described their virtues in a small pamphlet with a red cover, ornamented with a group of figures, and entitled "The Little Red Book, New Series, 1875;" the defendant sold other medicines under the name of "Moore's Pillules," and published a book in a red paper cover, entitled "The Red and White Book," the words "Red Book" being in red letters, but with no figures on the cover, the contents being much the same as those of the plaintiff's book.

Injunction, which had been granted to restrain the defendant from infringing the plaintiff's rights, dissolved, on the ground that deception was not probable, but an intention to deceive being held to be perceptible, no costs given of the appeal, nor of a motion in the Court below to vacate the injunction.

[479.] **PHELAN *v.* COLLENDER.**

Dec., 1875.

[*N. Y. Sup. Ct.*——13 *N. Y. Sup. Ct.* (6 *Hun*) 244.]

The defendant being the surviving partner of the firm of "Phelan and Collender," billiard-table makers, and having purchased from the executors of his deceased partner the interest of the latter in the partnership property, patents, trade marks, &c., described himself as "H. W. Collender, Successor to Phelan and Collender," and his billiard-tables as "Phelan and Collender's Standard American Tables."

Suit by the son of the deceased partner, himself a billiard-table maker, for an injunction to restrain the defendant from so doing.

Injunction refused, on the ground that the plaintiff had no more right than any other person of the same name had to interfere with the defendant's use of his father's name, and that the defendant had not acted with any intent to deceive, or otherwise than he was entitled to do.

[480.] **IN RE KANE & CO.**

Dec. 27th, 1875.

[*U. S. Patent Office*—*Duell, Comm.*——9 *U. S. Pat. Gaz.* 105.]

Application for the registration of "galvanized iron hoops placed on a barrel of a dark colour," as a trade mark in respect of spirituous liquors, refused, on the ground that such hoops had long been used on barrels, and that, even if the applicants were the first to use them on barrels of spirits, they would convey no distinctive idea.

FABER *v.* **HOVEY.** [481.]

Dec. 30*th*, 1875.

[*N. Y. Sup. Ct.*——*Codd. Dig.* 79, 242.]

Action by the plaintiff for an injunction to restrain an infringement of his trade mark on lead-pencils.

Held, (1) that the word "Star" was a good trade mark; (2) that there was no error in an assessment of damages by the referee, in which he found that the damages were equal to the profits which the plaintiff would have made from the manufacture and sale of the same number of articles as the defendant had sold under the spurious mark.

REPUBLIC OF PERU *v.* **REEVES.** [482.]

Jan. 3*rd*, 1876.

[*N. Y. Super. Ct.*——40 *N. Y. Super. Ct.* (8 *J. & S.*) 316.]

An injunction having been granted and continued until further order, in 1873, without opposition by the defendant, to restrain an infringement of the plaintiffs' trade marks on guano, and the defendant having died in 1874,

Motion by his administratrix, in 1875, to have the action continued against herself as such administratrix, refused, on the ground that it was not shown that the defendant had acquired any rights in the litigation, or that his estate would be prejudiced by the action not being continued.

HENNESSY *v.* **WHEELER.** [483.]

Jan., 1876; *April* 10*th*, 1877.

[*N. Y. C. P.*— *Robinson, J.*] ——51 *How. Pr.* 457.]

[*N. Y. Ct. of App.*——69 *N. Y.* (24 *Sickels*) 271; 15 *Alb. L. J.* 454.]

Action by the plaintiffs, brandy manufacturers and importers, for an injunction to restrain an infringement of

their trade mark placed upon the bottles containing their brandy, being nominally "quart" and "pint" bottles.

Held, by the C. P., that the action must be dismissed, on the ground that the plaintiffs were themselves guilty of misrepresentation in selling, as quart and pint bottles, bottles which contained less, the deficiency amounting to about 7—30ths.

Held, by the Ct. of Appeal, that the bottles were not sold by the plaintiffs or others as measures of capacity, but were of the ordinary sizes used in the trade, the capacity of which was generally understood; that there was no evidence that any one had been or was likely to be deceived; that the plaintiffs were, therefore, not disentitled, and that a new trial must be granted.

[484.] **FRESE *v.* BACHOF (1).**

Jan., 1876.

[*U. S. C. C., S. Dt. of N. Y.*—*Johnson, J.*] ——13 *Bl. C. C.* 234.]

The plaintiffs selling tea in packets labelled "J. C. Frese & Co., Hopfensack, 6, Hamburg," the defendant sold tea in packets similarly labelled.

Suit for an injunction to restrain the defendant from infringing the plaintiffs' rights.

Held, (1) that an injunction must be granted to restrain the defendant from using the name "J. C. Frese & Co." and from using on his labels the words "J. C. Frese & Co., Hopfensack, 6, Hamburg," notwithstanding that he claimed to have discontinued the use of the name and label; (2) but that an injunction to restrain the defendant from making up his tea in packages of the same size, shape, and colour as the plaintiffs', must be refused, the defendant's

labels containing his own name in distinct characters, and the plaintiffs shewing no exclusive right to the size, &c., of their packages.

PELTZ *v.* EICHELE. [485.]

Jan., 1876.

[*Missouri Sup. Ct.*——62 *Mo.* (21 *Post*) 171.]

The defendant, having covenanted with the plaintiffs or their assignors, on the sale to them of his match business in St. Louis, with the goodwill, trade marks, &c., and the trade names of "A. Eichele," and "A. Eichele & Co.," that he would not resume the manufacture of matches at St. Louis, or in any other place, for five years, or assist others in so doing, set up as a manufacturer of matches in St. Louis, within the five years, under the name of "P. Eichele & Co.," and diverted customers of the plaintiffs.

Action.

Held, (1) that the covenant was good, at all events as far as regarded St. Louis, and that a breach had been committed; (2) that the measure of damages was the loss occasioned to the plaintiffs by the breach of covenant, and not the defendant's profits, though the defendant's profits were one element to be considered in ascertaining what the plaintiffs had lost.

IN RE THE AMERICAN LUBRICATING OIL CO. [486.]

Feb. 2*nd*, 1876.

[*U. S. Patent Office*—*Duell, Comm.*——9 *U. S. Pat. Gaz.* 687.]

Application for the registration of the word "Star," as a trade mark on oil, refused, on the ground that there was already registered in another name, for use upon the same class of goods, a device representing a star, containing the

letter "G," and that the use of the word "Star" by the applicants would be calculated to deceive the public, inasmuch as their oil, as well as that of the parties already registered, would acquire the name of "star oil."

[487.] **WESTON** *v.* **KETCHAM** (2).

Feb., 1876.

[*N. Y. Super. Ct.*—*Sedgwick, J.*}——51 *How. Pr.* 455.]

Motion by the plaintiffs in *Weston* v. *Ketcham* (1) for an injunction to restrain the defendants in that case from selling "Pepper's Signal Oil," refused, on the ground (1) that the plaintiffs showed no title to the trade mark or name superior to that of the defendants; (2) that the agreement between the plaintiff Weston and the widow of the inventor could add nothing to the plaintiffs' rights, since the widow could acquire no right to the trade mark in gross, and had succeeded to no business to which it was attached; (3) that the allegation that the defendants sold as "Pepper's Signal Oil" that which was not so, gave the plaintiffs no cause of action.

"There is no such thing as a trade mark "in gross," to use that term by analogy. It must be 'appendant' of some particular business in which it is actually used upon, or in regard to, specific articles."

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488. **WYLAM** *v.* **CLARKE.**

Feb. 11th, 1876.

[*Bacon, V.C.*——*W. N.* 1876, *p.* 68.]

The plaintiffs being manufacturers of Spratt's dog biscuits, which they stamped with a X and the words "Spratt's Patent," the defendant began to manufacture

similar biscuits, but marked them with an anchor and the words "Buffalo Meat."

Injunction to restrain the defendant from infringing the plaintiffs' rights, refused, on the ground that the biscuits were not sufficiently alike to deceive, but the defendant not having proved his *bona fides* in the matter, no costs given, except as to a part of the case which the plaintiffs had abandoned.

COE *v.* **BRADLEY.** [489.]

Feb. 17*th*, 1876.

[*U. S. C. C., Dt. of Mass.*—*Shepley, J.*] ——9 *U. S. Pat. Gaz.* 541.]

The plaintiff, being the inventor of "Coe's Superphosphate of Lime," entered into a contract with the defendant, under which the latter was to have the exclusive use of the plaintiff's trade mark, consisting of the name of the article, for a limited period, the contract providing for the payment to the plaintiff of a certain share of the profits of the business, and also that a breach of the contract by the one party should release the other from his obligations.

Suit by the plaintiff for the recovery from the defendant of the share of profits agreed to be paid to the plaintiff.

Held, that, notwithstanding that the plaintiff had broken the contract by the sale of an article under the name of "Coe's Superphosphate of Lime," and "Andrew Coe's Superphosphate of Lime," he was entitled to recover the share of profits agreed to be paid to him, but that there must be deducted from such share a sum to be assessed by way of damages for the infringement by the plaintiff of the trade mark which the defendant had acquired the exclusive temporary right to use.

[490.] **IN RE COGGIN, KIDDER & CO.**

Feb. 21*st*, 1876.

[*U. S. Patent Office*—*Spear, Act. Comm.*——11 *U. S. Pat. Gaz.* 1109.]

Application for the registration of a device, consisting principally of the word "Haxall" and a Maltese cross, as a trade mark on flour, refused, on the ground that the word "Haxall" had for many years been the trade mark of another firm, and that the use of the proposed trade mark would be calculated to deceive.

[491.] **IN RE ROWE & POST.**

Feb. 25*th*, 1876.

[*U. S. Patent Office*—*Spear, Act. Comm.*——9 *U. S. Pat. Gaz.* 496.]

Application for the registration of the words "New York Cutlery Co." as a trade mark, refused, on the ground that the name, having only been used by the applicants for a fortnight, had neither acquired a reputation in the market, nor been in use as an existing trade mark on the 8th July, 1870, and that its registration was, therefore, prohibited by the U. S. Statute of 1870, as being a "mere name of a person, firm, or corporation."

[492.] **WITTHAUS *v.* BRAUN.**

March, 1876.

[*Maryland Ct. of App.*——44 *Md.* 303; 22 *Amer. Rep.* 44.]

The plaintiff being a tobacco manufacturer, who had been accustomed to manufacture a certain kind of tobacco for another person, according to his instructions, and had

recently purchased and had assigned to him the trade mark used by that other person on the tobacco so manufactured, the defendants sold other tobacco under a similar trade mark.

Suit by the plaintiff for an injunction to restrain an alleged infringement of this trade mark by the defendants.

Held, (1) that, although a trade mark could not be transferred in gross, since that would involve a fraud upon the public, a transfer to one who was already the manufacturer of the article was not open to objection on this ground; (2) but that the title of the original user of the mark to its exclusive use was too doubtful for an injunction to be granted.

"Where a trade mark is used to designate the place and the person by whom the goods are made, the right to such trade mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made.

"The mere sale of a trade mark, apart from the article to which it is affixed, confers no right of ownership, because no one can claim the right to sell his goods as goods manufactured by another. To permit this to be done would be a fraud upon the public. But where the trade mark is assigned to the person who manufactured the article to which the trade mark was affixed, there is no false representation to the public, because the tobacco is still manufactured at the same place and by the same person. It is, in fact, the same article."

IN RE DICK & CO. [493.]

March 8th, 1876.

[*U. S. Patent Office*—*Duell, Comm.*}—9 *U. S. Pat. Gaz.* 538.]

Application for the registration of the words and letters "D. D. & Co.—Tasteless" as a trade mark for drugs and medicines, refused, on the ground that the adjective was either descriptive of a quality of the article, or was deceptive; and that the fact that the other elements associated with the word were unobjectionable did not constitute the combination a valid mark.

494. **HIRSCH** *v.* **JONAS.**

March 12th, 1876.

[*Jessel, M.R.*——3 *Ch. D.* 584; 45 *L. J., Ch.* 364; 3 *L. T., N. S.* 228.]

The plaintiff was a London cigar merchant, who imported cigars made by Genir, of Havannah, and which were, at the plaintiff's suggestion, supplied to him by the latter in boxes labelled with a design of Britannia and the words "Gloria de Inglaterra," to which Genir added the words "Of Joseph Genir, Manufacturer of Cigars, of Havannah." Boxes of cigars so labelled were supplied by Genir, until shortly before the commencement of the action, to the plaintiff alone, but he had no contract with Genir for the continued exclusive or any supply of such cigars, and the defendants, being new London agents of Genir, began to sell boxes of cigars, consigned to them by Genir, similarly labelled.

Motion by the plaintiff for an injunction to restrain the defendants from so doing, refused, on the ground that, although it was possible for a trade mark to indicate selection by a person of reputation in that capacity, all that was indicated by the trade marks in question was that the cigars were of Genir's manufacture, and that there was no contract between Genir and the plaintiff, securing to the latter the exclusive sale of the cigars.

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495. **MICKLE** *v.* **EMERY.**

March 18th, 1876.

[*Jessel, M.R.*——*Seton*, 4*th ed.* 234.]

On motion by the plaintiff, injunction granted, upon an undertaking as to damages, to restrain an infringement of the plaintiff's trade marks registered under the T. M. A., 1875.

LAUTZ BROS. & CO. *v.* **SCHULTZ & CO.** [496.]

April 3rd, 1876.

[*U. S. Patent Office—Ducll, Comm.*} ——9 *U. S. Pat. Gaz.* 791.]

Interference declared between the applications of the parties for registration, for the purpose of deciding to which the trade mark, the subject of the applications, belonged.

Motion to dissolve the interference, on the ground that there was no statutory authority given to the Patent Office to declare an interference, refused, on the ground that the Commissioner of Patents was authorised to establish regulations for the conduct of proceedings in the Patent Office, and that this was sufficient to empower him to direct an interference in a trade mark case.

IN RE ROHLAND. [497.]

April 6th, 1876.

[*U. S. Patent Office—Doolittle, Asst. Comm.*} ——10 *U. S. Pat. Gaz.* 980.]

On an application to register the words "Dr. Lobenthal's Essentia Antiphthisica" as a trade mark on a medical composition,

Held, that the words were not merely descriptive of the article, and registration granted.

ROBINEAU *v.* **CHARBONNEL.** 498.

May 4th, 1876.

[*Malins, V.C.——W. N.* 1876, *p.* 160; *L. J. Notes of Cas.* 1876, *p.* 104.]

The plaintiff carrying on business as a confectioner in Paris, under the style of "Maison Boissier," the defendants,

who had been principal *employés* in the plaintiff's establishment, set up business in Bond Street, and placed in their window the words "Ex 1ères de la Maison Boissier de Paris," the words "Ex 1ères de la" being in very small letters.

Injunction to restrain the defendants from infringing the plaintiff's rights, refused, on the ground that, the plaintiff having no shop in England, the public would not be deceived, but no costs given, the conduct of the defendants not having been blameless.

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499. **FOSTER** *v.* **MEGEVAND.**

May 19*th*, 1876.

[*Jessel, M.R.*——*Pemb. 2nd ed.* 393.]

Injunction granted to restrain an infringement of the plaintiff's trade mark, with an account and inquiry as to damages.

[500.] **THE AMOSKEAG MANUFACTURING CO.** *v.* **GARNER (2).**

1876.

[*N. Y. Sup. Ct.*——4 *Am. L. T., N. S.* 176.]

The plaintiff company manufacturing cotton goods, but not prints, and placing on the cotton goods labels containing the word "Amoskeag," or the initials "A. M. Co.," or "A. M. C.," the defendant sold prints labelled with the word "Amoskeag."

Suit for an injunction to restrain the defendant from infringing the plaintiffs' rights.

Held, (1) that the defendant had no right to use the plaintiffs' corporate name; (2) that his intention in so doing was immaterial; (3) that, to constitute infringement,

it was sufficient for there to be a probability, or even a possibility, of the public being deceived; (4) that the injunction must be granted; (5) but that, on account of the plaintiffs' delay in taking proceedings, no damages, account of profits, or costs, could be given.

IN RE WEAVER. [501.]

June 6th, 1876.

[*U. S. Patent Office*—*Duell, Comm.*—10 *U. S. Pat. Gaz.* 1.]

An alternative trade mark, consisting either of the figure of a lion, or of the word "Lion," or of both, admitted to registration, on the ground that the above were merely three forms of the same trade mark.

FILKINS *v.* BLACKMAN. [502.]

June, 1876.

[*U. S. C. C., Dt. of Conn.*—*Shipman, J.*—13 *Bl. C. C.* 440.]

Jonas Blackman, the inventor of a medicine which he called "Dr. J. Blackman's Genuine Healing Balsam," having assigned to M. L. Filkins, for ten years from January 1st, 1866, the exclusive right to manufacture the medicine under that name, on certain terms, with a proviso that if M. L. Filkins complied with those terms for the ten years, the right should be continued for a further period of fifty years, the defendant, being the son of Jonas Blackman, began, after the expiration of the ten years, to make and sell a medicine under the same name.

On motion by Filkins Brothers, injunction granted to restrain the defendant from so doing, and

Held, (1) that the name was a good trade mark; (2) that the assignment was a good transfer of the right to use it on the same goods, though it would give no right to it as used on different goods; (3) that after the assignment the original inventor could give no right in the name to the defendant; (4) that the fact that M. L. Filkins had his brother as a co-plaintiff was no defence, since the trade marks of a person entering into a partnership became partnership property.

"The right to the use of a trade mark cannot be so enjoyed by an assignee, that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached."

[503.] **AMERICAN GROCER PUBLISHING ASSOCIATION v. GROCER PUBLISHING CO.**

June, 1876.

[*N. Y. Sup. Ct.*——51 *How. Pr.* 402.]

Action by the plaintiffs for an injunction to restrain the publication of a newspaper in imitation of their paper, *The American Grocer*.

Motion by the plaintiffs to continue *pendente lite* an injunction which had been granted, refused, on the ground that there was not such similarity between the papers as to justify the Court in deciding in the plaintiffs' favour on motion, and that the balance of convenience was against the continuance of the interlocutory injunction.

[504.] **IN RE LAWRENCE & CO.**

June 20th, 1876.

[*U. S. Patent Office*—*Duell, Comm.*——10 *U. S. Pat. Gaz.* 163.]

Application for the registration of the German words "Für Familien Gebrauch," and "Lawrence Feiner Familien

Flannel," signifying respectively "For Family use," and "Lawrence Fine Family Flannel," as trade marks on flannel goods, refused, on the ground that they were mere words in common use and not distinctive.

EX PARTE STEPHENS [T. M. A. 1875] (1). 505.

June 21*st*, 1876.

[*Jessel, M.R.*——24 *W. R.* 819; 1 *Trade Marks*, 13.]

Application having been made for the registration of a trade mark under the T. M. A., 1875, and the Registrar having declined to register the proposed trade mark, as not being within the Act;

On motion by the applicant, for directions as to the proper mode of applying to the Court, so as to obtain the registration of the proposed trade mark,

Held, that the proper mode of applying for the opinion of the Court was by way of motion to rectify the register by the insertion of the applicant's name as the proprietor of the trade mark, two clear days' notice being given to the Registrar of Trade Marks, and the application being supported by an affidavit by the applicant, stating the facts.

IN RE BUSH & CO. [506.]

June 21*st*, 1876.

[*U. S. Patent Office—Duell, Comm.*——10 *U. S. Pat. Gaz.* 164.]

Application for the registration of the words "Centennial, Isidor Bush & Co., St. Louis, Mo.," in combination with the applicants' already registered trade mark and the obverse and reverse of the centennial medal, as a trade mark on sparkling wines, refused, on the ground that the word "Centennial" had already been registered in another

name for alcoholic spirits, which would to some extent include wines, and that the obverse and reverse of the centennial medal had already been registered in a third name, and that purchasers would be likely to be deceived by the appearance of these appropriated particulars in another trader's mark.

[507.] **IN RE THE RUBBER CLOTHING CO.**

June 28th, 1876.

[*U. S. Patent Office—Duell, Comm.*—10 *U. S. Pat. Gaz.* 111.]

On an application for the registration of the words "Rubber Clothing Company" as a trade mark on clothing,

Held, that, although the words merely composed the name of a corporation, and, therefore, came within the prohibition to register in the U. S. Statute of 1870, yet registration should be granted, as of a "lawful trade mark rightfully in use on the 8th July, 1870," on its being satisfactorily established by affidavit evidence that the name was in actual use as a trade mark at that date.

[508.] **IN RE SIMPSON & SONS.**

July 13th, 1876.

[*U. S. Patent Office—Doolittle, Act. Comm.*—10 *U. S. Pat. Gaz.* 333.]

Application for the registration, as labels, of two labels, of which one consisted of the word "Eddystone," with a picture of a lighthouse and the words "Wm. Simpson & Sons, Philadelphia, No.—yds.," and the other of a picture of three female figures standing near a tomb, with the words "Wm. Simpson & Sons, Philadelphia," refused, on the ground that they were properly trade marks, and must be registered as such.

THE APOLLINARIS COMPANY (LIMITED) *v.* EDWARDS. 509.

July 13*th*, 1876.

[*Bacon, V.C.*——*Seton*, 4*th ed.* 237.]

The plaintiffs being the exclusive importers of Apollinaris water into England, under agreement with the owners of the Apollinaris Spring in Germany, the defendants used the word "Apollinaris" in connexion with waters other than the genuine.

On motion by the plaintiffs, injunction granted to restrain the defendants from so doing.

EX PARTE STEPHENS [T. M. A. 1875]. (2). 510.

July 28*th*, 1876.

[*Jessel, M.R.*——3 *Ch. D.* 659; 46 *L. J., Ch.* 46; 24 *W. R.* 963; 1 *Trade Marks*, 13.]

Motion to register as a trade mark on inks the word or combination of letters "AEILYTON," such word not having been used as a trade mark before the passing of the above Act, refused, on the ground that the wording of the 10th section of the above Act excluded from registration a mere combination of letters, newly adopted since the Act.

SMITH *v.* REYNOLDS. (3). [511.]

July, 1876.

[*U. S. C. C., S. Dt. of N. Y.*—*Shipman, J.*——13 *Bl. C. C.* 458.]

The plaintiff having registered a crown under the U. S. Act of 1870 as his trade mark for paints, but not having at that time, or since, used the crown on white lead, the

defendants used a trade mark containing a crown as their trade mark on white lead, they, or their predecessors in business, having done so from about a year previous to the registration of the plaintiff's mark.

Injunction to restrain the defendants from continuing to use the crown on their white lead, refused, on the ground that the registration of the plaintiff's mark for paints generally did not give him a right to interfere with the continued user by the defendants of a mark which they had acquired a right to use in connexion with a particular kind of paint before the registration of the plaintiff's mark.

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512. **COMPAGNIE LAFERME** *v.* **HENDRICKX.**

July 20th, 1876.
[*Jessel, M.R.*]

The plaintiffs being a Dresden company of cigarette makers, who sold their cigarettes in certain special wrappers, &c., and under the name "Laferme," the defendant sold other cigarettes under the same name and in similar wrappers.

Injunction granted to restrain the use of labels and wrappers imitated from the plaintiffs', but refused as to word "Laferme," on the ground that it was not established that the plaintiffs' predecessor in business was the first in Germany to use it.

Costs up to the motion, at which the interlocutory injunction as to the wrappers, &c., was granted, given to the plaintiffs, subsequent costs to be borne by the respective parties.

LEA *v.* **MILLAR.** **513.**

July 26*th*, 1876.
[*Jessel, M.R.——Seton, 4th ed.* 242.]

The plaintiffs being manufacturers of a sauce which they termed "Worcestershire Sauce," the defendant sold a sauce under the same name and with similar labels.

Injunction to restrain the defendant from using the name and imitating the plaintiffs' labels, refused, on the ground that both the name and the style of label had been long used by sauce manufacturers other than the plaintiffs, and that the plaintiffs had publicly abandoned their old labels by the recent adoption of a new label bearing their signature as a distinctive mark.

BELL, BLACK & CO. *v.* **BELL & CO.** **514.**

Aug. 1*st*, 1876.
[*Bacon, V.C.*]

The plaintiffs being manufacturers of lucifer matches, who sold their matches in boxes bearing a label of deep blue and red colour, on a white ground, with the device of a bell, the defendants, who had sold the same article in boxes bearing a label of the same colours, but paler, with the device of a small beehive, diminished the difference between the labels by deepening the colours of theirs and enlarging the beehive.

On motion by the plaintiffs, injunction granted to restrain the defendants from infringing the plaintiffs' rights.

515. **IN RE MEIKLE [T. M. A., 1875].**

Aug. 7th, 1876.

[*Hall, V.C.*——24 *W. R.* 1067 ; 1 *Trade Marks*, 22.]

The registrar of trade marks refused to register, or advertise for registration, a design accompanied by the words "The Registered Seal of the Bonus Tea Association," unless the word "registered" were omitted, on the ground that the Commissioners of Patents had directed him not to allow that word to appear in connexion with any registered trade mark.

On summons to rectify the register by the insertion of the applicants' name as proprietors of the unaltered mark, adjourned into Court,

Held, (1) that an order could not be made for the registration of the trade mark without the preliminary advertisement required by the rules being inserted in the official journal; and (2) that the Court would not interfere with the directions given to the registrar by the Commissioners of Patents in their discretion, or direct an advertisement of the unaltered mark with a view to its registration.

[516.] **IN RE ROACH.**

Aug. 9th, 1876.

[*U. S. Patent Office*—*Duell, Comm.*——10 *U. S. Pat Gaz.* 333.]

Application for the registration of the words "Croup Tincture" as a trade mark on a croup medicine, refused, on the ground that the words were merely descriptive.

WESTON *v.* HEMMONS. [517.]

Aug. 10*th*, 1876.

[*Victoria Sup. Ct.*—*Molesworth, J.*] ——2 *Vict. L. R. Eq.* 121.]

The plaintiff being the inventor of a secret medicine called "Weston's Wizard Oil," and the defendants having manufactured this medicine by agreement with him, after the termination of the agreement the defendants continued to use the recipe and name.

Injunction granted to restrain the defendants from using or imparting the secret recipe, and from using the name, except in respect of medicines manufactured before the termination of the agreement, but the order to be discharged if the plaintiff should fail to pay for any ingredients, &c., purchased by the defendants for the purpose of the medicine, and which would have been charged in account against the plaintiff if the connexion had continued. As to certain other medicines not satisfactorily proved to have been invented by the plaintiff, or to have been sold in Victoria before the commencement of his connexion with the defendants, no order made.

IN RE IMBS. [518.]

Aug. 29*th*, 1876.

[*U. S. Patent Office*—*Doolittle, Asst. Comm.*] ——10 *U. S. Pat. Gaz.* 463.]

A device consisting of the letter "I" within a shield, the shield being surrounded with wheat and situated above the word "Charm," admitted to registration as a trade mark, notwithstanding that two other trade marks were already on the register, of which the one consisted

of the words "Golden Charm" above a monogram of the letters "F. G. S. & Co.," and the other of the words "Attrition Flour" above a shield on which were bunches of wheat, on the ground that the proposed trade mark was not sufficiently similar to those already registered as to be calculated to deceive.

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519. **ORR** *v.* **DIAPER.**

Nov. 6*th*, 1876.

[*Hall, V.C.*——4 *Ch. D.* 92; 46 *L. J., Ch.* 41; 35 *L. T., N. S.* 468; 25 *W. R.* 23.]

The plaintiffs being manufacturers of sewing thread, who sold their thread in England and abroad, including Valparaiso, under certain marks, discovered that large quantities of thread bearing marks similar to theirs had been shipped to Valparaiso by the defendants on account of other persons.

Action by the plaintiffs for discovery of the names and addresses of the consignors, and particulars and dates of the consignments of marked thread, with a view to further proceedings against the consignors.

Demurrer overruled, and

Held, that the defendants must answer within a month.

[520.] **CHARLESON** *v.* **CAMPBELL.**

Nov. 17*th*, 1876.

[*Ct. of Session*——*Ct. of Sess. Cas., 4th Ser., IV.* 149; 14 *Scot. L. Rep.* 104.]

The plaintiff being the proprietor of "The Station Hotel, Forres," the defendant, who had become proprietor of "The County and Family Hotel," in Forres, changed its name to "The Royal Hotel," and afterwards to "The Royal Station Hotel, Forres."

Interdict to restrain the defendant from styling his hotel "Station Hotel," refused, on the ground that (1) the name of the plaintiff's hotel was a mere descriptive title, not a specific one, and that there was no averment that the defendant had assumed his title with fraudulent intent; and (2) the use of the word "Royal" by the defendant, as part of the name of his hotel, was sufficient to distinguish it from the plaintiff's.

CARMICHEL *v.* **LATIMER.** [521.]

Nov., 1876.

[*Rhode I. Sup. Ct.*——11 *R. I.* 395; 23 *Amer. Rep.* 481; 16 *Alb. L. J.* 73.]

The plaintiffs being A. Carmichel & Co., who had purchased the goodwill of the business of Stillman & Co., woollen manufacturers, and with it the right to use the tickets or labels of that firm, bearing the name "Stillman & Co.," the defendants, Latimer, Stillman & Co., leased a mill formerly used by Stillman & Co., and known as the "Seventh Day Mill," or "Stillman Mill," and there began to manufacture goods similar to the plaintiffs', and to sell them ticketed with a label containing the words "Stillman Mill."

On motion by the plaintiffs for an injunction to restrain the defendants from so doing,

Held, (1) that the plaintiffs' right to use the name "Stillman & Co.," there being no person of that name in the firm, was doubtful; (2) that the defendants were entitled to place the name of their mill on their goods, if they did so without fraud; (3) that there was no evidence or probability of fraud or deception; (4) and, therefore, that the motion must be refused.

Per Potter, J.—"In some of the cases the question has been between partners, or there has been a sale of a business, to be con-

tinued by the vendee, and more or less connected with a place and the goodwill of the business, and in many of these cases the sale of the trade mark would be upheld. But where the reputation of the goods and of the name has grown out of excellence of manufacture, depending on the honesty and skill of the maker, it is more difficult to hold that it can be sold to a stranger, or that it is generally assignable."

Per Durfee, C.J.—"A manufacturer has a right to attach his own name to his manufactures, even though a rival manufacturer of the same name, who has given it prestige in the market, may suffer in consequence. The resulting damage is *dammum absque injurid*. And if a manufacturer has the right to label the products of his mill with his name, I do not see why he has not an equal right to label them with the name of that mill itself, provided the name is not unfairly assumed for that purpose, or fraudulently employed."

[522.] **IN RE THE EAGLE PENCIL CO.**

Nov. 21*st*, 1876.

[*U. S. Patent Office*— *Doolittle, Asst. Comm.* }——10 *U. S. Pat. Gaz.* 981.]

Application for the registration of a trade mark on pencils, stated to consist essentially in the combination of a fraction with the whole number usually marked on a pencil, as $1\frac{1}{4}$ for 1, $2\frac{1}{2}$ for 2 (the figure of an eagle, or the word "Eagle," or other characters, being added or omitted at pleasure), refused, on the ground that the alleged trade mark was in reality a mere indication of the quality of the article.

[523.] **CHASE** *v.* **MAYO.**

Nov. 23*rd*, 1876.

[*Mass. Sup. Ct.*——121 *Mass.* (7 *Lathrop*) 343.]

The plaintiff being a packer and seller of fish, who was also an official inspector of fish, and who branded the parcels of fish packed by him for his private business with

his official brand, the defendant branded other fish with a similar mark.

Action for damages.

Held, that the plaintiff was not entitled to recover damages, on the ground that a public officer could not acquire any private right of trade mark in the brand used by him in his official capacity.

BOOTH *v.* **JARRETT.** [524.]

Nov., 1876.

[*N. Y. C. P.*— / *Van Brunt, J.* } ——52 *How. Pr.* 169.]

The plaintiff being Edwin Booth, who had established a theatre in New York and called it "Booth's Theatre," and who had assigned the lease to J. B. Booth, under whom the defendants claimed, the premises having been described in both assignments, and also in various mortgages made by the plaintiff, as "Booth's Theatre," the defendants continued to call the theatre by that name.

Motion by the plaintiff for an injunction to restrain the defendants from continuing to use the name "Booth" in connexion with the theatre, refused, on the ground that the plaintiff's name had become affixed to the establishment, and did not imply that it was conducted by him.

DECKER *v.* **DECKER.** [525.]

Nov., 1876.

[*N. Y. Sup. Ct.*— / *Lawrence, J.* } ——52 *How. Pr.* 218.]

The plaintiffs being manufacturers of pianofortes in New York, trading under the name of "Decker Brothers," the defendants, also manufacturers of pianos in New York,

trading as "Decker & Barnes," and whose senior partner had previously been in business as "Decker & Co.," placed on their pianos a trade mark consisting of the words "The Decker Piano," which they had registered in the U. S. Patent Office.

Motion by the plaintiffs for an injunction to restrain the defendants from so doing, refused, on the ground that the defendants could not be restrained from the use of their own names, if no fraud appeared, and further, that it was doubtful whether the Court was empowered to interfere with a trade mark awarded by the Commissioner of Patents.

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526. **POWELL** *v.* **McNULTY.**

Nov. 27th, 1876.
[*Bacon, V.C.*]

The plaintiff manufacturing a sauce under the name of "Yorkshire Relish," the defendant sold another sauce under the same name.

Injunction granted to restrain the defendant from so doing.

[527.] **IN RE PRATT AND FARMER.**

Nov. 27th, 1876.
[*U. S. Patent Office—Doolittle, Asst. Comm.*}——10 *U. S. Pat. Gaz.* 866.]

Application for the registration of the figure of a fish as a trade mark for fishing lines, refused, on the ground that the figure was descriptive of the purpose of the article.

CHEAVIN *v.* WALKER. 528.

Dec. 8*th*, 1876; *May* 9*th*, 1877.

[*Bacon, V.C.*——5 *Ch. D.* 854; 46 *L. J., Ch.* 265; 35 *L. T., N. S.* 757.]

Ct. of App.— *Jessel, M.R., James & Baggallay, L.JJ.* } ——5 *Ch. D.* 850; 46 *L. J., Ch.* 686; 36 *L. T., N. S.* 938.]

The plaintiff being G. Cheavin, who manufactured filters on a principle patented by his father, S. Cheavin, in 1862 (but which patent lapsed in 1865), and who placed on his filters a tablet with the words "G. Cheavin's Improved Patent Gold Medal Self-Cleaning Rapid Water Filter, Boston, England," beneath a medallion with the Royal Arms and the words "By Her Majesty's Royal Letters Patent," the defendants, Walker, Brightman & Co., manufactured filters on the principle of the same patent, and placed on them a tablet with the words "S. Cheavin's Patent Prize Medal Self-Cleaning Rapid Water Filter, Improved and Manufactured by Walker, Brightman & Co., Boston, England."

Action for an injunction to restrain the defendants from infringing the plaintiff's rights.

Held, by the V. C., (1) that the plaintiff had acquired a right of trade mark in the tablet; (2) that this right had been fraudulently infringed by the defendants; (3) that the plaintiff was not deprived of his right to an injunction by his reference to the lapsed patent; and (4) that the injunction must be granted.

Held, by the Court of Appeal, (1) that the alleged trade mark was a mere inscription and not a trade mark; (2) that in any case the defendants had committed no infringement, but had merely stated the principle on which the filter was manufactured by them; (3) that the plaintiff was disentitled by reason of his reference to the lapsed patent being such as to induce the belief that it was still

in force; and (4) that the injunction must be dissolved and the action dismissed.

Per Jessel, M.R., 5 Ch. D. 862.—"You may state in so many words, or by implication, that the article is manufactured in accordance with a patent which has expired. But if you suggest that it is protected by an existing patent, you cannot obtain the protection of that representation as a trade mark. Protection only extends to the time allowed by the statute for the patent, and if the Court were afterwards to protect the use of the word as a trade mark, it would be in fact extending the time for protection given by the statute. It is, therefore, impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trade mark."

Per James, L.J.—"It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trade mark. Whatever is mere description is open to all the world."

[529.] **DUNBAR** *v.* **GLENN.**

Jan., 1877.

[*Wisconsin Sup. Ct.*——42 *Wisc.* 118.]

The plaintiff being the proprietor of a spring of mineral water, which he sold under the name of "Bethesda Mineral Water," styling the spring the "Bethesda Mineral Spring," the defendants, who were the proprietors of a neighbouring spring, which they alleged to contain exactly the same water, began to call their spring and water "Glenn-Bethesda Mineral Spring" and "Water," and to issue circulars using those terms and stating that their water was "identical with Bethesda" water.

Injunction granted to restrain the defendants from using the name "Bethesda Mineral Water" in connexion with the water of their spring, and from issuing circulars or trade cards, &c., representing their water to be "Bethesda" water.

"Where the trade mark, in its original signification, or by association, distinctively points to the origin or ownership of the article to

which it is applied, it will be protected. But where it is a generic or geographical name, designating a city or district of country, or is merely descriptive of the article manufactured, and can be employed with truth by other manufacturers, it is not entitled to legal protection as a trade mark."

BARROWS *v.* THE PELSALL COAL AND IRON COMPANY. 530.

Jan. 11*th*, 1877.
[*Hall, V.C.*]

The plaintiffs being manufacturers of iron, which they stamped with the letters "B. B. H." (the initials of the original partners in the firm—Bradley, Barrows & Hall) in Roman characters, and a crown, the defendants, carrying on business in succession to Messrs. Boaz Bloomer & Son, stamped their iron (as that firm had done) with the Roman letters "B. B. S." and a crown. In 1874 the plaintiffs commenced a suit for an injunction, which was compromised, the defendants undertaking to discontinue the use of their mark. The defendants subsequently took proceedings to procure the registration of the letters "*B. B. S.*," in italic characters, with a crown, as their trade mark under the Trade Marks Act, 1875.

On motion by the plaintiffs, injunction granted to restrain the defendants from using or procuring the registration of the mark in question.

HENNESSY & CO. *v.* ROHMANN, OSBORNE & CO. 531.

Jan. 18*th*, 1877.
[*Malins, V.C.*——36 *L. T., N. S.* 51.]

On an *ex parte* application on the part of the plaintiffs, being brandy merchants, who alleged that the defendants had obtained cases of the plaintiffs', and filled them with inferior brandy;

Interim injunction granted, to restrain the defendants from selling brandy not the plaintiffs', so as to deceive, and order made, under Order LII., rule 3, for inspection of the defendants' premises to be made and samples taken by a proper person.

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532. **GRILLON** *v.* **GUÉNIN.**

Jan. 19*th*, 1877.
[*Bacon, V.C.*——*W. N.* 1877, *p.* 14.]

The plaintiff being a manufacturer of lozenges which he sold in boxes labelled with the words "Tamar Indien," the defendant sold other lozenges under the name of "American Tamar."

Injunction granted to restrain the defendant from infringing the plaintiff's trade mark, and

Held, that a defence that the words "Tamar Indien" were merely descriptive of the composition of the plaintiff's lozenges failed.

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533. **MOET** *v.* **CLYBOUW.**

Jan. 20*th*, 1877.
[*Jessel, M.R.*]

The plaintiffs being Moet and Chandon, wine growers, who sold their champagne in bottles closed with corks branded with the letters "M. & C." in a circle on the bottom, and the word "England" on the side, the defendant sold other champagne in bottles closed with corks similarly marked, claiming to use the initials in right of a firm of "Meadows & Clybouw," to whose business he alleged himself to have succeeded, and claiming to use the word "England" as common to the trade.

On motion by the plaintiffs, injunction granted to restrain the defendant from infringing the plaintiffs' rights.

DENCE *v.* **MASON** (1). **534.**

Jan. 25*th*, 1877 ; *Feb.* 12*th*, 1878.

[*Malins, V.C.*——*W. N.* 1877, *p.* 23 ; 1878, *p.* 42 ; *L. J. Notes of Cases*, 1877, *p.* 33.]

The plaintiffs having recently acquired a provision dealer's business in Little Stanhope Street, Mayfair, carried on under the name of "Brand & Co.," and which name was placed on all the packets of essence of beef and other preparations made by the firm; F. Mason, who had been for many years in the employ of the plaintiffs' predecessor in business, and who alleged that during that period he had been the discoverer of the essence of beef, left their service, and began to deal in the same class of goods, in partnership with one Brand as "Brand & Mason." In consequence of proceedings taken by the plaintiffs, this name was changed to "Mason & Brand," and shortly afterwards Brand refused to continue in the partnership, or to permit the defendant to make use of his name, but the defendant nevertheless continued to trade under the name of "Mason & Brand," and to represent that he was the original maker of the article.

On motion by the plaintiffs for an injunction to restrain the defendant from infringing their rights, and again at the hearing of the action,

Held, (1) that during the continuance of the partnership between Mason and Brand it was impossible to prohibit entirely the use of the latter's name in the business; (2) but that after the retirement of Brand the defendant was not entitled to continue to use his name for the purpose of imitating the plaintiffs' name and marks, although he was at liberty to manufacture the same article as the plaintiffs under his own name; (3) that in arranging with the proprietor of a small shop in the same street as the plaintiffs for the exhibition on her shop-front of the words

"Agent for Mason & Braud's Essence of Beef," the words "Agent for" being in small and the rest in large letters, the defendant had acted in a manner intended and calculated to deceive; (4) that, supposing the defendant to have discovered the recipe of the essence of beef, which was not established, he was nevertheless not entitled to represent himself as the original maker, since whatever essence of beef he had made had been made by him as the servant of the plaintiffs or their predecessors, but that he might state that he had been in the plaintiffs' service, and had there learnt the recipe; (5) and that an injunction must be granted to restrain the defendant in the particulars above mentioned.

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535. **EX PARTE GRIMSHAW** [T. M. A., 1875].

Jan. 25*th*, 1877.

[*Hall, V.C.*——*W. N.* 1877, *p.* 24; *L. J. Notes of Cas.* 1877, *p.* 24; 1 *Trade Marks*, 23.]

Two applications being made for the registration of the same trade mark,

Motion by one of the two applicants for a direction that the case should be heard on motion, and not on special case as directed by the rules, refused, on the ground that the method of procedure directed by the rules was the more convenient.

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536. **LINOLEUM MANUFACTURING COMPANY** *v.* **NAIRN.**

Feb. 1*st*, 1877; *Jan.* 30*th*, 1878.

[*Hall, V.C.*]

[*Chanc. Div.*—*Fry, J.*] ——7 *Ch. D.* 834; 47 *L. J., Ch.* 430; 38 *L. T., N.S.* 448; 26 *W. R.* 463; 1 *Trade Marks*, 291.]

The plaintiffs being manufacturers, under certain patents recently expired, of a new species of floor-cloth, which

they called "Linoleum Floor-cloth," or "Linoleum," and who had used and registered as their trade mark a device consisting of a fleur-de-lys in a lozenge, with the words "Linoleum Floor-cloth" and "F. Walton's Patent," the defendants made preparation, upon the expiration of the patents, for the manufacture and sale of a similar article, under the name of "Linoleum Floor-cloth," and adopted a trade mark entirely different from the plaintiffs', consisting of a bunch of thistles with the name "Nairn's."

On motion by the plaintiffs for an injunction to restrain the defendants from using the word "Linoleum,"

Held, by Hall, V. C., that nothing having yet been done, and the question being purely one of the right to use the word, the matter must stand over till the hearing.

At the hearing of the action,

Held, by Fry, J., (1) that the word "Linoleum," as inserted in the plaintiffs' trade mark, did not form an essential feature of the mark; (2) that if the word was descriptive of a substance which the defendants were entitled to make, they were entitled to use the name of the substance also; (3) that the fact that the word had been previously used by the plaintiffs alone, they being hitherto patentees, did not give them an exclusive right in it, since a name appropriated to an article made under a patent was indicative in the first place of the article so made, and only in the second place of the manufacturers; (4) and that the injunction must, therefore, be refused.

"Until some other person is making the same article, and is at liberty to call it by the same name, there can be no right acquired by the exclusive use of a name, as showing that the manufacture of one person is indicated by it, and not the manufacture of another."

537. EX PARTE YOUNG, RE LEMON HART & SON.

Feb. 3*rd*, 1877.

[*London Ct. of Bankruptcy—*
Spring Rice, Reg. for C.J.]

Lemon Hart & Son, wine merchants, whose trade mark consisted of the initials "L. H. & S.," having been compelled to liquidate by arrangement, and the partnership property, goodwill, &c., having been sold by the trustee in the liquidation, the purchaser became bankrupt without having fully paid the purchase-money.

Motion by the trustee in liquidation for an order for the payment to him of the proceeds of a sale of the trade mark by the trustee in bankruptcy, refused, on the ground that the trade mark passed to the purchaser from the trustee in liquidation, under the assignment from the latter, and that the purchaser's trustee in bankruptcy was entitled to the benefit of it, and

Held, that the trade mark was a chattel within sect. 15, sub-s. 5 of the Bankruptcy Act, 1869.

[538.] HARRINGTON *v.* LIBBY.

Feb., 1877.

[*U. S. C. C., S. Dt. of N. Y.—Johnson, J.*] ——12 *U. S. Pat. Gaz.* 188.]

The plaintiff selling small pails of ornamented tin, for use as collar boxes, the defendant sold similar boxes.

Motion by the plaintiff, for an injunction to restrain the defendant from selling such boxes, as being an infringement of the plaintiff's trade mark, the alleged trade mark consisting of the article, refused, on the ground that such an article could not constitute a trade mark.

STRAHAN & CO., LIMITED, *v.* KING & CO. 539.

Feb. 22*nd*, 1877.
[*Malins, V.C.*]

The plaintiffs being the proprietors of *The Contemporary Review*, the defendants, the publishers and an ex-editor of that periodical, made preparations for publishing a new magazine or review under the title of *The Nineteenth Cen' ry.*

Motion by the plaintiffs for an injunction to restrain the defendants from so doing, and from representing their new magazine to be a continuation of *The Contemporary Review*, and from misrepresenting the principles or objects of the latter periodical, refused, on the ground that the defendants were engaging in a perfectly fair competition with the plaintiffs, as they had a right to do, and that they had not been guilty of any misrepresentation with regard to either their own intended publication, or the plaintiffs'.

IN RE BARROWS [T. M. A., 1875-8.] 540.

March 1*st*; *April* 26*th*, 1877.
[*Malins, V.C.*——5 *Ch. D.* 353; 46 *L. J., Ch.* 450; 36 *L. T., N. S.* 291; 25 *W. R.* 407; 1 *Trade Marks*, 122.]

[*Ct. of App.*—*Jessel, M.R., James and Baggallay, L.JJ.* ——5 *Ch. D.* 364; 46 *L. J., Ch.* 725; 36 *L. T., N. S.* 780; 25 *W. R.* 564; 1 *Trade Marks*, 126.]

On motion by Barrows & Sons, successors to Bradley, Barrows & Hall, iron manufacturers, of Bloomfield Works, Staffordshire, for the separate registration of numerous trade marks used by them in their business, consisting respectively of the letters "B. B. H.," (being the initials of the former firm), and of the word "Bloomfield" or "Bloom,"

(representing the name of the works), used with a variety of marks indicative of quality, as "Best," "Best, Best," &c., or common to the trade, as the figure of a crown, of a horseshoe, &c., and the Registrar of Trade Marks having, by direction of the Commissioners of Patents, declined to place on the register all the combinations, but offered to register any one of them,

Held, by the V.-C., (1) that every valid mark used before the Act of 1875 was entitled to separate registration under it; (2) that the Court was not bound by the direction of the Commissioners of Patents; (3) that the motion must, therefore, be granted.

Held, by the Court of Appeal, that the proper mode would be to register the letters "B. B. H." and the words "Bloomfield" and "Bloom," being the essential particulars, separately, a note being appended in each case, to the effect that the mark might be used either alone, or in combination with common marks, words of quality, &c., so that the various combinations would be protected by representative registration.

[541.] **GILMAN** *v.* **HUNNEWELL.**

March 1*st*, 1877.

[*Mass. Sup. Ct.*——122 *Mass.* (8 *Lathrop*) 139.]

The plaintiffs having purchased from John L. Hunnewell certain medicines and the wrappers, labels, trade marks, &c., used upon them, the defendant, Edwin Hunnewell, who had formerly been in John L. Hunnewell's employ, set up in business in the same house as the plaintiffs as "Hunnewell & Co.," and made and sold similar medicines with wrappers and labels similar in many respects to the plaintiffs', except that for "John L. Hunnewell" "Hunnewell & Co." was substituted.

Injunction to restrain the defendant from infringing the plaintiffs' rights, refused, on the ground that (1) the plaintiffs could not have a right of trade mark in such words as "cough remedy," or "a sure remedy for chronic or common cough, sore throat, and other minor throat complaints so often by neglect the forerunner of consumption;" (2) there was not such similarity as to be likely to deceive; (3) no intention to defraud was proved; (4) the circulars distributed by the defendant to his customers correctly stated his former relation to John L. Hunnewell.

"A trade mark may consist of a name, or a device, or a peculiar arrangement of words, lines, or figures in the form of a label, which has been adopted and used by a person in his business to designate goods of a particular kind manufactured by him, and which no other person has an equal right to use. The right in a trade mark, so applied, is recognised as property, which a Court of Chancery will protect by injunction.

"A mere general description, by words in common use, of a kind of article, or of its nature or qualities, cannot of itself be the subject of a trade mark.

"A person may have a right in his own name as a trade mark, as against a person of a different name. But he cannot have such a right as against another person of the same name, unless the defendant uses a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture.

"The Court will not restrain a defendant from the use of a label, on the ground that it infringes the plaintiff's trade mark, unless the form of the printed words, the words themselves, and the figures, lines and devices, are so similar that any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake the one for the other."

KINNEY *v.* **BASCH.** [542.]

March, 1877.

[*N. Y. Sup. Ct.*—*Van Brunt, J.*}——1 *Trade Marks*, 183.]

The plaintiff being a manufacturer of cigarettes, on which he used a label containing a device of sun's rays,

the words "St. James," and the symbol "½," the defendants sold other cigarettes with a label containing the words "St. James' Parish Perique Cigarettes" (of which the words "St. James" were much the more conspicuous) and the symbol "½" in the same style as the plaintiff's, but the labels were in other respects different.

Injunction granted to restrain the defendants from infringing the plaintiff's trade marks, on the ground that whether the plaintiff had or had not an exclusive right in the marks, the defendants had acted so as to deceive.

"The use of any words, geographical or otherwise, numerals or symbols, adopted for the purpose of defrauding the public, will be restrained by the Court. It is the duty of the Court to protect the public from fraud, even at the suit of a plaintiff who has not the exclusive right to the use of such words, numerals, or symbols."

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543. **CARNRICK** *v.* **MORSON.**

March 22*nd*, 1877.

[*Bacon, V.C.*——*L. J., Notes of Cas.* 1877, *p.* 71; *Chemist and Druggist*, 1877, *p.* 161.]

The plaintiffs being the manufacturers of a medical compound which they called "Lacto-Peptine," the defendants sold a preparation in bottles labelled "Lacto-Pepsine."

On motion by the plaintiffs, injunction granted to restrain the defendants from using the name, and

Held, that a defence that the word "Lacto-Peptine" was descriptive of the composition of the plaintiff's article, failed.

IN RE PARK. [544.]

March 26th, 1877.

[*U. S. Patent Office*—*Spear, Comm.*}—12 *U. S. Pat. Gaz.* 2.]

On an application for the registration as labels of three labels, each including a figure of a swan, or the word "Swan," which figure and word the applicant had previously sought unsuccessfully to register as his trade mark on gin,

Held, that, before this figure or word could be registered as part of a label, the applicant must establish his right of trade mark therein.

ALLSOPP *v.* WALKER [T. M. A., 1875.] 545.

April 10th, 1877.

[*Jessel, M.R.*]

The defendants having applied for the registration of a device consisting of a female hand pointing horizontally, with the letters "W. & G." upon it, as their trade mark for bottled ale and porter, the plaintiffs opposed the application, on the ground that the use of the mark by the defendants, if permitted, would be calculated to deceive, by reason of the similarity between that mark and their own trade mark on the same article, consisting of a male hand pointing upwards.

Special case stated by the Registrar of Trade Marks.

Held, that the mark too nearly resembled the plaintiffs' mark to be admitted to registration in the same class.

546. **STEINTHAL** *v.* **SAMSON.**

April 17th, 1877.

[*Ct. of App.*—
James, Mellish and Baggallay, L.JJ.]

The plaintiffs being manufacturers and exporters of cotton goods, to whom the defendant, a former partner, had, on the dissolution of the partnership, assigned all his interest in the business, the deed containing a proviso to the effect that the defendant should be at liberty to continue to carry on a similar business, and to use the trade marks of the firm, except the private arms, crest, and motto of the plaintiffs, the motto consisting of the word "Excelsior," the defendant subsequently sold cotton goods bearing that word, but not used as a heraldic device.

Injunction to restrain the defendant from the breach of the covenant alleged to be thereby committed, refused, on the ground that the restrictive covenant had reference only to the heraldic use of the plaintiffs' arms, crest, and motto, and not to the use of the word "Excelsior" in another manner.

[547.] **IN RE THE GOODYEAR RUBBER CO.**

April 25th, 1877.

[*U. S. Patent Office*—
Doolittle, Asst. Comm.} ——11 *U. S. Pat. Gaz.* 1062.]

Application for the registration of the words "Crack-proof" as a trade mark on india-rubber goods, refused, on the ground that the term was merely descriptive of quality.

CAMPBELL *v.* **HOLLINS.** 548.

April 26th, 1877.
[*Malins, V.C.*]
[*House of Lords.*]

The appellant (defendant) Campbell and the respondent (plaintiff) Hollins, having been in partnership as manufacturers of china and encaustic tiles, separated the two businesses in 1859, the former being styled by them "Herbert Minton & Co.," and the latter "Minton, Hollins & Co.," and the respondent (defendant) Taylor was afterwards taken into the latter firm. On the retirement of Taylor in 1868 the partnership was dissolved, Campbell taking the china business, Hollins the tile business. Taylor having subsequently begun to manufacture tiles as "Robert Minton, Taylor & Co.," Hollins commenced proceedings to restrain him from so doing, but these were discontinued on Taylor's undertaking not to trade in any other name than "Robert Minton Taylor." Campbell purchased Taylor's business in 1875, and announced his intention of continuing it as "The Minton Brick and Tile Co."

Action by Hollins for an injunction to restrain the defendant Campbell from using the name "Minton."

Held, by the V.-C. and House of Lords, that the plaintiff was entitled to the exclusive use of the name "Minton & Co." in connexion with the tile business, and that an injunction must be granted to restrain the infringement of that right by Campbell.

HENNESSY *v.* **COOPER.** 549.

April 26th, 1877.
[*Malins, V.C.*]

The plaintiffs being brandy merchants, the defendant

sold his own brandy in cases formerly belonging to the plaintiffs, and still bearing their marks.

On motion by the plaintiffs, injunction granted to restrain the defendant from so doing.

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550. **LEDGER** *v.* **RAY.**

April 28th; May 3rd, 1877.

[*Bacon, V.C.*]

[*Ct. of App.*—

James, Baggallay, Bramwell and Brett, L.JJ.]

The plaintiff being the proprietor of a dramatic and sporting newspaper called *The Era*, which had for many years published articles signed "Touchstone," the defendant made preparations for the publication of a new newspaper on the same subjects, under the title of *Touchstone, or, the New Era.*

Action by the plaintiff for an injunction to restrain the defendant from so doing.

Held, by the Court of Appeal, that the adoption of that name for a new newspaper was not calculated to cause it to be bought in mistake for the old one, and that an injunction which had been granted must, therefore, be dissolved.

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551. **ROSE** *v.* **HENLEY.**

April 27th, 1877.

[*Malins, V.C.*——*Cited* 47 *L. J., Ch.* 577; 38 *L. T., N. S.* 410.]

The plaintiff being a manufacturer of lime juice, who sold his article in bottles moulded specially for him with a spray of lime-tree leaf and blossom and his name "Rose & Co.," and who further placed on his bottles a label con-

taining the same spray and name, the defendant systematically collected the plaintiff's empty bottles, and sold them refilled with lime juice not of the plaintiff's preparation.

Injunction granted to restrain the defendant from infringing the plaintiff's rights.

WOLMERSHAUSEN *v.* **O'CONNOR.** 552.

May 3rd, 1877.

[*Bacon, V.C.*——36 *L. T., N. S.* 921.]

The defendant (who had for many years been manager of, and for a shorter time partner in, the firm of Foster & Co., tailors, of High Street, Oxford, and Mayfair, and had latterly resided at Headington Hill, near Oxford) covenanted with the plaintiff, the principal partner, on the dissolution of the partnership, not to carry on the business of a tailor, &c., within ten miles of Oxford, and not to represent himself in any manner as having been connected in trade with the plaintiff or his firm, as partner, manager, or servant, but shortly afterwards set up a tailor's business in Cavendish Square, and issued advertisements, in which he described himself as "late of Headington Hill, Oxford, and formerly of Mayfair."

On motion by the plaintiff, injunction granted to restrain the defendant from acting in breach of his covenant and from issuing the advertisements in question.

IN RE KIMBALL. [553.]

May 3rd, 1877.

[*U. S. Patent Office—Doolittle, Act. Comm.*——11 *U. S. Pat. Gaz.* 1109.]

On an application for the registration of the words "Vanity Fair" as a trade mark on cigarettes, the applicant

having prepared eight different arrangements of his manner of using the words, by way of complying with the requirement of the U. S. Statute of 1870 for the manner of application to be described,

Held, that one *fac simile* was sufficient to illustrate the method of use, and that so many varieties of arrangement could not be permitted to be filed, on account of the encumbrance that such a practice would occasion.

[554.] **SWIFT** *v.* **PETERS.**

May 8*th*, 1877.

[*U. S. Patent Office—Doolittle, Act. Comm.*] ——11 *U. S. Pat. Gaz.* 1110.]

Interference declared between Swift, an applicant for the registration in his name of a trade mark on an agricultural compost, consisting of the words "The John C. Ragsdale Ammoniated Dissolved Bone," and Peters, in whose name the trade mark was already registered, for the purpose of determining to whom the mark in question belonged.

Held, (1) that Swift had acquired no title to the mark by being the first to suggest it, the title to a trade mark depending on its adoption and use, and not on its invention; (2) that Swift had acquired no title to the mark by user, since whatever use of the mark had been made by him he had made in the capacity of agent for the firm of Snowden & Peters; (3) that the question whether Peters, the registered proprietor of the mark, was or was not entitled to the exclusive use of it, inasmuch as he was only one of the former members of the dissolved firm of Snowden & Peters, was a question for the Courts and not for the Patent Office; (4) and, therefore, that priority must be awarded to Peters, Swift never having acquired any right to the mark by adoption or user.

EX PARTE BARROWS [T. M. A., 1875]. 555.

May 11*th*, 1877.

[*Jessel, M.R.*——*W. N.* 1877, *p.* 119; *L. J., Notes of Cas.* 1877, *p.* 110.]

Messrs. Barrow having long used as their trade mark on bar-iron the letters "B. B. H.," surmounted by a crown, and having registered that device as their trade mark in class 5 in the first schedule to the rules, Messrs. Halton & Co., who had used the letters "T. H. H.," surmounted by a crown, as their trade mark on tin plates, turn plates, and sheet-iron, applied for the registration of that device as their trade mark in class 5, the articles on which they had used the mark being included with bar-iron and other goods in that class.

On motion by Messrs. Barrow for a declaration that Messrs. Halton & Co. were not entitled to have the mark so registered,

Held, that the mark in question, being an old mark, might be registered for part of a class only, and that leave should be given for the mark to be registered in class 5 for the articles on which it had been previously used only.

HENNESSY *v.* **KENNETT.** 556.

May 18*th*, 1877.

[*Malins, V.C.*]

The plaintiffs were brandy merchants, who sold two classes of brandy, the best being sold in cases and the other in casks.

Injunction to restrain the defendant from selling brandy not the plaintiffs' "case" brandy in cases branded with the latter's name and trade mark, refused, on the ground that the only occasion on which the defendant was proved to have done so was when an agent of the plaintiffs bought some of the plaintiffs' "cask" brandy of the defendant, and the defendant, at the agent's request, placed the "cask" brandy in one of the plaintiffs' cases.

[557.] **KINNEY** *v.* **ALLEN.**

May, 1877.

[*U. S. C. C., Dt. of E. Va.*—*Hughes, J.*] ——1 *Hughes* 106; 4 *Am. L. T., N. S.* 258.]

The plaintiff being a manufacturer of cigarettes, who placed upon several varieties of his cigarettes the symbol "½," in red, and had registered the same as his trade mark in the U. S. Patent Office, the defendants sold other cigarettes under a similar symbol.

Suit for an injunction to restrain the defendants from using the symbol.

Held, (1) that as the plaintiff had always used the symbol on cigarettes containing tobacco of two different kinds, half and half, and as the symbol served to indicate this, though it did not clearly express it, an injunction restraining the use of the symbol generally could not be granted; (2) that a limited injunction should be granted, restraining the use of the symbol in the identical form, size, colour, and style in which the plaintiff had used and registered it, and this, notwithstanding that the defendants had used it on a label which was in other respects quite unlike those of the plaintiff.

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558. **IN RE THE WALKDEN AËRATED WATERS CO. [T. M. A., 1875-6].**

June 8th, 1877.

[*Jessel, M.R.*——1 *Trade Marks*, 39.]

On motion to register as the applicants' trade mark for mineral waters a newly adopted device of a cock standing on a circle, registration having been refused by the registrar, on the ground that two marks of a similar character were already on the register in respect of the same class of article,

Held, that the consent of the proprietor of one of the two registered marks having been already given, the mark might be registered on the consent of the proprietor of the other registered mark being obtained.

"The Commissioners of Patents have considered the point as to how often any new device or emblem may be registered as a trade mark for goods or articles in the same class, and they have decided that, for the sake of distinctiveness, in no case whatever should the number of times exceed three. They have also decided that if a device is used by more than three persons it cannot be registered at all under the Act, as by being used by so many persons it wants that element of distinctiveness which it is necessary for a trade mark as defined by the Act to possess. A mark that is common to several persons cannot be said to be a distinctive mark, and, therefore, cannot be registered."

SOCIETÉ ANONYME DES MINES ET FONDERIES DE ZINC DE LA VIEILLE MONTAGNE *v.* BAXTER. [559.]

June 12th, 1877.

[*U. S. C. C., S. Dt. of N. Y.*—*Blatchford, J.*——14 *U. S. Pat. Gaz.* 679.]

The plaintiffs being manufacturers of dry white oxide of zinc, the defendants sold white oxide of zinc ground in oil, under the same trade mark as that used by the plaintiffs.

Injunction to restrain the defendants from infringing the plaintiffs' rights, refused, on the ground that the article on which the defendants used the mark was different from that on which it was used by the plaintiffs.

MASSAM *v.* J. W. THORLEY'S CATTLE FOOD CO. 560.

June 14th, 1877.

[*Malins, V.C.*——6 *Ch. D.* 574; 46 *L. J., Ch.* 707; 36 *L. T., N. S.* 848.]

Joseph Thorley having in his lifetime been a manufacturer of a compound known as "Thorley's Food for

Cattle," which was sold in packets labelled with those words and with Thorley's signature; and Thorley's brother, J. W. Thorley, having been for many years his manager, and equally acquainted with the secret recipe of the compound; J. W. Thorley, after his brother's death, founded the defendant company for the manufacture and sale of the same article, which was sold in packets labelled with the words "Thorley's Food for Cattle," with a *fac simile* of the seal of the company, composed of its name in a circle enclosing the heads of various animals, and the company also issued a prospectus stating its connexion with J. W. Thorley, and containing the same directions for use as those issued by Joseph Thorley.

Motion by the executors of Joseph Thorley, who had registered the signature alone as the trade mark of their business, for an injunction to restrain the defendants from representing their business or goods to be those of the plaintiffs, and from infringing the plaintiffs' trade mark, refused, on the ground (1) that J. W. Thorley was entitled to use his own name, either alone, or as part of the name of a company, or in the phrase "Thorley's Cattle Food," in the manufacture of an unpatented article, with the recipe of which he was acquainted, provided that he acted without fraud; (2) that the name "Thorley's Cattle Food" had become the common recognised designation of an article which any one might use who could produce the same article, although he might not represent it to be made by any one but himself; (3) that the article being the same as the plaintiffs', the same directions for use were correctly used; (4) that the trade marks of the parties, consisting respectively of the signature and seal, were entirely different.

CONDY *v.* MITCHELL. 561.

June 15th; Nov. 27th, 1877.

[*Bacon, V.C.*——37 *L. T., N. S.* 268.]

[*Ct. of App.*— *James, Baggallay & Thesiger, L.JJ.* } ——37 *L. T., N. S.* 766; 26 *W. R.* 269.]

Shortly after the dissolution of the firm of "Bellmann Condy & Co.," who carried on business as manufacturers of "Condy's Fluid," and "Condy's Ozonized Water" (those articles having been invented and formerly patented by H. B. Condy) under articles of partnership, by which the partnership profits, goodwill, and property became, on dissolution, divisible in equal shares between the partners, H. B. Condy and Mitchell, Condy set up a separate business of his own as "H. Bollmann Condy," and Mitchell founded a company for the same purpose under the name of "The Condy's Fluid Co."

Action by Condy for an injunction to restrain Mitchell from using the name "Condy" in the title of his company and its manufactures.

Injunction refused, on the ground (1) that the name "Condy's Fluid" had come to be the name of an article of commerce made under Condy's expired patent; (2) that on the formation of the partnership between Condy and Mitchell, the latter acquired an equal right with the former to manufacture the article and use the name; (3) that this was not affected by the dissolution; (4) that Mitchell had not acted fraudulently in the adoption of the name for his company, or otherwise, nor in a manner calculated to cause his article to be mistaken for the plaintiff's.

[562.] **SEABURY** *v.* **GROSVENOR.**

June 16*th*, 1877.

[*U. S. C. C., S. Dt. of N. Y.—Blatchford, J.*] ——53 *How. Pr.* 192; 14 *U. S. Pat. Gaz.* 679.]

The plaintiffs being manufacturers of "Benson's Capcine Plasters," which name they had registered in the U. S. Patent Office as their trade mark, the defendant sold other plasters under the name of "Capsicin."

Injunction to restrain the defendant from infringing the plaintiffs' rights, refused, on the ground that the plaintiffs were disentitled by their own false representations of the origin and value of their plasters, the word "Capcine" being shown to be quite unknown, and not to imply any such qualities as were described by the plaintiffs, whereas the defendant's word "Capsicin" was the name of a well-known substance.

[563.] **IN RE CORNWALL (1).**

June 29*th*, 1877.

[*U. S. Patent Office—Doolittle, Act. Comm.*] ——12 *U. S. Pat. Gaz.* 138].

A device, consisting of a star and crescent, admitted to registration as a trade mark in respect of soap, notwithstanding that the figure of a star was already registered as a trade mark on soap, on the ground that the use of the proposed mark was not calculated to deceive.

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564. **J. W. THORLEY'S CATTLE FOOD CO.** *v.* **MASSAM.**

June 30*th*, 1877.

[*Malins, V.C.*——6 *Ch. D.* 582; 46 *L. J., Ch.* 713.]

The plaintiffs in *Massam* v. *J. W. Thorley's Cattle Food Co.* began, shortly after the decision of that case, to issue

advertisements of their cattle food, in which they stated that they alone were possessed of the secret recipe of the article.

Motion by the defendants in that case for an injunction to restrain the issue of such advertisements, as being detrimental to them, refused, on the authority of *Prudential Assurance Co.* v. *Knott*, but

Held, that, notwithstanding that decision, the Court had now power, under the Judicature Act, 1873, s. 25, sub-s. 8, to grant an injunction in such a case. The plaintiffs' costs made costs in the cause, but the defendants to pay their own costs in any event.

IN RE CORNWALL (2). [565.]

July 7th, 1877.

[*U. S. Patent Office—Doolittle, Act. Comm.*——12 *U. S. Pat. Gaz.* 312.]

The word "Dublin" admitted to registration as a trade mark on soap, on the ground that the fact that the soap was not manufactured in Ireland, but in America, showed that the word was not used in its ordinary descriptive geographical sense, but as an arbitrary fancy designation.

SELBY *v.* THE ANCHOR TUBE CO. 566

July 19th, 1877.

[*Bacon, V.C.*——*W. N.* 1877, *p.* 191.]

The plaintiff and defendants having been partners in a firm of tube manufacturers, who carried on business at Birmingham as "The Imperial Iron Tube Co," and at Smethwick as "The Birmingham Patent Iron and Brass Tube Co.," the plaintiff became entitled, on the dissolution of the partnership, under the articles

of partnership, to the Smethwick premises, and the styles and goodwill of the firm, and the defendants became entitled to the Birmingham premises. The plaintiff then began to carry on business on his own account as "The Imperial Iron Tube Co." at new premises in Birmingham, and also at the Smethwick premises, and the defendants carried on business at the old Birmingham premises, and issued circulars headed "The Anchor Tube Co. (late) the works of and partners and manager in the Imperial Tube Co., Gas Street, Birmingham," and also employed a traveller to solicit orders from the customers of the old firm.

On motion by the plaintiff, injunction granted to restrain the defendants from representing that they were lately the partners in the plaintiff's firm of the Imperial Tube Company, or that they had succeeded to the business of that company, or that that company had ceased to exist, and also from soliciting or executing orders on any such representations.

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567. **MOET** *v.* **PICKERING.**

July 23*rd*, 1877; *March* 29*th*, 1878.

[*Chanc. Div.*—*Fry, J.*] ——6 *Ch. D.* 770.]

[*Ct. of App.*—*James, Cotton & Thesiger, L.JJ.*] ——8 *Ch. D.* 372; 47 *L. J., Ch.* 527; 38 *L. T., N. S.* 799; 26 *W. R.* 637.]

The plaintiffs being French wine growers, who branded on the bottoms of the corks used by them for a special quality of wine the letters "M. & C.," enclosed, together with a star, in a circle, and also branded the word "England" on the side of each cork, the defendant Pickering had consigned to him from abroad a quantity of wine having corks similarly branded to the plaintiffs', the wine being in the possession of certain wharfingers.

Action by the plaintiffs for an injunction to restrain the defendant Pickering from infringing the plaintiffs' trade mark, and from dealing with the wine in the wharfingers' possession, and to restrain the wharfingers, who were also made defendants, from parting with the wine, except under the direction of the Court, and for an order on Pickering to deliver up all spuriously marked corks, and for an account and damages from him.

Held, by Fry, J., (1) that the plaintiffs were entitled to the injunctions, order, and account; (2) that the plaintiffs were entitled to a lien upon the wine for their costs in priority to the wharfingers' lien for their charges; (3) that, the wharfingers having only submitted to act as the Court should direct upon having their charges and costs paid or provided for, and it having been argued on their behalf that, even if the plaintiffs' right were established, they would not be entitled to touch the bottles for the purpose of removing the spurious corks until the charges were paid, the wharfingers, as well as Pickering, must be made liable for the plaintiffs' costs.

Held, by the Court of Appeal, on appeal by the wharfingers, (1) that the wharfingers were entitled to a lien on the wine for their charges, in priority to any lien of the plaintiffs for their costs, if such plaintiffs' lien existed, which was doubted; (2) that the wharfingers had done nothing to disentitle them to their costs, and that the plaintiffs must pay such costs in both Courts.

IN RE MITCHELL [T. M. A., 1875-6] (1). **568.**

Aug. 2nd, 1877.

[*Hall, V.C.*——*7 Ch. D.* 36; 46 *L. J., Ch.* 876; 26 *W. R.* 326; 1 *Trade Marks*, 55.]

Motion to register the applicants as the proprietors of a trade mark for steel pens, consisting of the letter "A.,"

refused, notwithstanding that the applicants and their predecessors in business had used that letter and other letters of the alphabet as their trade marks for many years, on the ground that a single letter was not within the definition of a registrable trade mark contained in the T. M. A., 1875, and that that definition was not extended by the Act of 1876.

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569. **IN RE SALAMON [T. M. A., 1875].**

Aug. 3rd, 1877.

[*Jessel, M.R.*——1 *Trade Marks*, 135.]

An application for the registration of certain trade marks on sewing machines, consisting respectively of the words "Howe Sewing Machine Company," a monogram inscribed with the same words, and the name "Little Howe," having been opposed, mainly on the ground that the exclusive right to use the name "Howe" as a trade mark belonged to the opponents, and that the applicant had never used the name as a trade mark, nor otherwise, except as agent for them or their predecessors in business;

On motion by the opponents for a direction as to how the case should be heard,

Held, that the question being one of title to the marks and their user by the applicant, one of the parties should bring an action to try the right.

"I always direct that these cases should be mentioned to the Court, that I may decide the proper way in which they are to come before the Court; that way depends on the circumstances in each case. If it be a simple question of law, it had better be by special case; if for directions as to carrying out the Act, by summons at chambers; if of disputed facts, by motion."

DENCE *v.* **MASON (2).** 570.

Aug. 8th, 1877.
[*Malins, V.C.*]

The defendant, F. Mason, in *Dence* v. *Mason* (1), having been enjoined from using the name "Brand" in connexion with his articles, nevertheless continued to sell goods bearing the words "Frank Mason & Co.'s ('Brand's') Essence of Beef."

On motion by the plaintiffs, defendant committed for contempt. (On Dec. 18th he was discharged, on undertaking not to use the name "Brand" until the hearing of the action.)

IN RE WARBURG & CO. [571.]

Aug. 25th, 1877.
[*U. S. Patent Office—Doolittle, Act. Comm.*}——13 *U. S. Pat. Gaz.* 44.]

Application for the registration of the words "Cachemire Milano" as a trade mark on silks (the words being claimed as the essential part of the mark, though used in connexion with the name "R. Savie & Co.," and a picture of Milan Cathedral), refused, on the ground that the words were either descriptive of the quality and appearance of the article, or deceptive.

IN RE GORDON. [572.]

Aug. 27th, 1877.
[*U. S. Patent Office—Doolittle, Act. Comm.*}——12 *U. S. Pat. Gaz.* 517.]

On an application for the registration of a strip of leaf tobacco, intended to be wrapped round the mouthpiece of a cigarette, and to vary with the size of the cigarette, as a trade mark on cigarettes,

Held, (1) that the mere fact that the proposed trade mark was consumed with the article to which it was attached was no objection to it; (2) but that the proposed trade mark was, in fact, adapted to serve a mechanical purpose rather than to distinguish the applicant's goods from others, and that, therefore, registration must be refused.

[573.] **PRINCE METALLIC PAINT CO.** *v.* **CARBON METALLIC PAINT CO.**

1877.

[*N. Y. Sup. Ct.*——*Codd. Dig.* 209.]

The plaintiffs manufacturing paint, on which they placed the words "Prince's Metallic Paint" in a special form, the defendants, being brothers of the name of Prince, manufactured a paint which they called "Iron Ore Paint," and sold under the words "Prince Bros. Iron Ore Paint."

Motion by the plaintiffs to continue an injunction which had been granted to restrain the defendants from infringing the plaintiffs' rights, and using the name "Prince," refused, and injunction dissolved, on the ground that the defendants were entitled to use their own name so as not to deceive, and that the manner in which the defendants had used it was not intended or calculated to deceive.

[574.] **AYER** *v.* **RUSHTON.**

1877.

[*N. Y. C. P.*——*Codd. Dig.* 229.]

The plaintiff being the inventor and manufacturer of a medical preparation, which he sold under the name of "Ayer's Cherry Pectoral," the defendant began to make

lozenges, which he called "Cherry Pectoral Troches," and subsequently to make a liquid medicine, which he put up in bottles somewhat similar to the plaintiff's, and labelled with the words "Cherry Pectoral, for sale, wholesale and retail, by Rushton & Co., 11, Barclay Street, New York." He also put up over his premises a sign, with the words "Depôt of the Cherry Pectoral Company," and inside a notice "Ayer's Cherry Pectoral, One Dollar; Rushton's Cherry Pectoral, Fifty Cents. Which will you have?" and he instructed his employés to explain the differences between the articles to customers.

Injunction which had been granted to restrain the defendant from using the words "Cherry Pectoral," and otherwise infringing the plaintiff's rights, dissolved, and

Held, (1) that the defendant had only traded in competition with the plaintiff, and had not acted in a manner intended or calculated to cause his article to be mistaken for the plaintiff's; (2) that the plaintiff could have no exclusive right in the words "Cherry Pectoral," since the first word described one of the ingredients in the compound, the wild cherry, and the other described the intended application of the compound, so that the whole term was common property and incapable of appropriation.

HELMBOLD *v.* **THE HENRY T. HELMBOLD MANUFACTURING CO.** [575.]

Sept., 1877.

[*N. Y. Sup. Ct.*—*Westbrook, J.*]—53 *How. Pr.* 453.]

Henry T. Helmbold having invented an article which he called "H. T. Helmbold's Highly Concentrated Compound Fluid Extract of Buchu," and having become bankrupt, the plaintiff, his brother, claimed to have manufactured the article for H. T. Helmbold and his assignee in bank-

ruptcy, and to have purchased the assignee's rights in the preparation. The defendant company was subsequently formed and assisted by H. T. Helmbold, and sold the same compound under the same name.

Motion by the plaintiff for an injunction to restrain the defendant company from so doing, refused, and

Held, (1) that the plaintiff was in any case disentitled by reason of his own false representations in continuing to use labels guaranteeing the personal inspection and supervision of H. T. Helmbold; (2) that, while H. T. Helmbold could himself have sold the right to use his name, a sale by the assignee in bankruptcy could not deprive him of the right to use it; (3) that the same principle applied to his trade secret, even assuming the plaintiff to be acquainted with it, which H. T. Helmbold denied; (4) that the remainder of the title of the preparation (exclusive of the name) was purely descriptive and incapable of appropriation.

[576.] **BOON** *v.* **MOSS.**

Sept. 18*th*, 1877.

[*N. Y. Ct. of App.*——70 *N. Y.* (25 *Sickels*) 465.]

Hall, the proprietor of a newspaper called *The Watertown Weekly Reunion*, entered into a contract with Warren to sell to him (subject to certain conditions, including certain specified payments) "*The Watertown Weekly Reunion* printing establishment, including the presses, machinery, type of all description, newspaper and jobbing material, tools, implements, &c., appertaining to the said printing business." Warren assigned his interest under the agreement to Moss and Boon, and Hall assigned his to Flower. Boon and Moss failed after some years to make the payments, and an action was commenced between them for

dissolution of partnership, &c., in which a receiver was appointed.

An action was subsequently brought, by leave of the Court, by Flower against the receiver, to enforce his rights under the agreement.

Held, that the agreement between Hall and Warren being for a conditional sale, the title did not vest in the purchaser till the payments were made and conditions fulfilled; that the goodwill of the business, including the name of the paper, subscription list, &c., was included in the sale; and that Flower was entitled to recover from the receiver the value of the goodwill, which had been sold by him.

"The goodwill of a newspaper establishment often constitutes its largest value. . . . There is one kind of goodwill which has been said to be only a probability that customers will resort to the old place; and another, far more valuable, when a retiring partner agrees not to engage in the same business in competition with the old establishment. The goodwill of a permanent newspaper establishment is generally more tangible than either."

IN RE DOLE BROTHERS. [577.]

Sept. 20th, 1877.

[*U. S. Patent Office—Doolittle, Act. Comm.*}——12 *U. S. Pat. Gaz.* 939.]

An application for the registration of the words "Egg Macaroni" as a trade mark on macaroni having been refused, on the ground that the words were either descriptive of the article, or, if no eggs were used in its manufacture, deceptive; on a renewed application based on the proviso in the U. S. Act of 1870 admitting to registration lawful trade marks rightfully in use on July 8th, 1870,

Held, (1) that long before the adoption of the words by Pfeiffer, the applicants' assignor, in connexion with his

macaroni, the words were in common use; (2) that, besides this, Pfeiffer had always used the words in connexion with his own name, as "Pfeiffer's Egg Macaroni," and generally with a landscape picture; (3) and that, for both these reasons, the words "Egg Macaroni" alone were not a lawful trade mark rightfully in use on July 8th, 1870, and that registration must, therefore, be refused.

[578.] **IN RE CONSOLIDATED FRUIT JAR COMPANY.**

Sept. 20th, 1877.

[*U. S. Patent Office—Doolittle, Act. Comm.*}——14 *U. S. Pat. Gaz.* 269.]

On an application by the assignees of certain patents for screw-neck bottles and jars granted to J. L. Mason, for the registration as their trade mark of the name "Mason," which they alleged that they had used on their jars, cards, circulars, &c., for many years,

Held, (1) that the name, being the name merely of a person, unaccompanied by a distinctive mark, could only be registered if it were a lawful trade mark rightfully in use on July 8th, 1870; (2) that the name was not such a lawful trade mark, since it was the name of the inventor of a patent article attached to that article, which article the applicants had, indeed, the sole right to make, and therefore to designate by its name, until the expiration of the patents, but which article would then cease to be the exclusive property of the applicants, whereupon all makers of it would be entitled to describe it by its appropriate descriptive name; (3) and that the application must, therefore, be refused.

COLMAN *v.* CRUMP. [579.]

Oct. 2nd, 1877.

[*N. Y. Super. Ct.*——40 *N. Y. Super. Ct.* (8 *J. & S.*) 548.]
[*N. Y. Ct. of App.*——70 *N. Y.* (25 *Sickels*) 573; 16 *Alb. L. J.* 352.]

The plaintiffs being English manufacturers of mustard, which they sold in packages labelled with the device of a bull's head, the defendants began to sell mustard in packages also labelled with a bull's head.

Injunction granted to restrain the defendants from infringing the plaintiffs' rights, notwithstanding that there were points of difference between the two bull's heads, and that the same device had long been used by other manufacturers on other classes of goods.

70 N. Y. 578—"It is not necessary that the symbol, figure, or device used, or printed and sold for use, should be a *fac simile* or precise copy of the original trade mark, or so close an imitation that the two cannot be distinguished except by an expert, or upon a critical examination by one familiar with the genuine trade mark. If the false is only colourably different from the true, if the resemblance is such as to deceive a purchaser of ordinary caution, or if it is calculated to deceive the careless and unwary, and thus to injure the sale of the goods of the proprietor of the trade mark, the injured party is entitled to relief. Neither is it necessary to establish a guilty knowledge or fraudulent intent on the part of the wrongdoer. It is sufficient that the proprietary right of the party and its actual infringement are shown."

P. 580.—"The fact that the same device is used upon other articles of merchandise does not take from the plaintiffs their right to its exclusive use on this one article of their manufacture."

McLEAN *v.* FLEMING. [580.]

Oct., 1877.

[*U. S. Sup. Ct.*——96 *U. S. Rep.* (6 *Otto*) 245; 13 *U. S. Pat. Gaz.* 913.]

The plaintiff (respondent), being entitled, under the will of the previous proprietor, to a druggist's business and

goodwill, first established by Dr. C. McLane in or about 1834, an important part of the business consisting of the manufacture and sale of pills known as "Dr. C. McLane's Liver Pills," which pills were, from the year 1847, put up in boxes sealed on the top with a red seal bearing the name of the inventor, and enclosed in a certain wrapper containing, among other things, the name of the pills, the defendant (appellant), Dr. J. H. McLean, commenced a similar business in 1849, and from and after 1851, to the knowledge of the plaintiff or his predecessors in business, manufactured and sold pills under the name of "Dr. McLean's" or "Dr. J. H. McLean's Universal Pills," and placed them in boxes sealed similarly to the plaintiff's, and enclosed in wrappers of similar colour and appearance, bearing the name applied by the defendant to his pills, but in 1872 he changed his wrappers, and adopted new and unobjectionable ones, on complaint made by the plaintiff.

Suit by the plaintiff for an injunction to restrain the defendant from infringing his rights.

On appeal by the defendant from the decision of the U. S. Circuit Ct. for the E. Dt. of Missouri, awarding an injunction and an account,

Held:—

1. That in trade mark cases the original invention or proprietorship of the article with which the trade mark is connected is not in question, but that the Court proceeds on the ground that the plaintiff has a valuable interest in the goodwill of his business, and that in this is included the trade mark by which his goods are distinguished.

2. That a trade mark may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant as distinctive of his goods.

3. That even common words and phrases, not invented for the purpose, may be so adopted and used, if not previously applied to the same or similar articles.

4. That a name, when so adopted and used, but not otherwise, may be a good trade mark, as against a trader or dealer of a different name.

5. But that there is no exclusive right of trade mark in a name, even a man's own name, as against a person of the same name.

6. But that a person will not be allowed so to use his name as to represent his goods to be those of another person of the same name.

7. That a person may have a good trade mark for goods which he exposes for sale, though not of his manufacture, and this, although the name of the actual manufacturer is included in the device.

8. That, to constitute an infringement of trade mark, exact similitude is not required, but that an infringement has been committed when ordinary purchasers buying with ordinary caution are likely to be misled.

9. That positive proof of fraudulent intention is not required, when probability of deception has been produced.

10. That it is not necessary to prove infringement of a specific trade mark if the defendant has acted with fraudulent intention, and has refused to change his course of conduct.

11. That an injunction will not in general be refused only on the ground of delay.

12. But that, although the injunction may be granted, yet, where there has been great delay, an account may be refused.

13. That, in the case in question, a probability of deception had been established, and the injunction must be continued.

14. And that the plaintiff must, therefore, have his costs in the Court below.

15. But that, on account of the plaintiff's great laches, the account granted by the Court below must be refused.

16. And that, that being so, the appellant was entitled to his costs of the appeal.

581. **CARVER** *v.* **BOWKER.**

Nov. 10*th*, 1877.

[*Lancaster Chanc.*—*Little, V.C.*—1 *Trade, Marks* 252.]

The plaintiffs carrying on business at Manchester as merchants and shippers of cotton goods, on which they used certain combinations of marks, of which combinations the first consisted of a heading of specially coloured stripes, certain other stripes, the number "109," the figure of a coronetted eagle, the words "Carver Irmaos," the initials "R. H.," and the name of the firm of Portuguese importers, and the other combinations were substantially the same, but with variations in the number and colour of the stripes, and in the number, for "109" being substituted "406," "409," "413," &c., the defendant, who carried on a similar business at Manchester, used on his goods combinations of marks resembling those of the plaintiffs.

Suit by the plaintiffs for an injunction to restrain the defendant from infringing their rights.

Held, (1) that, as to the component parts of the various combinations, the eagle and the number "109" were in common use and descriptive of quality; (2) that, although the remaining numbers were not in common use, they could not be exclusively appropriated; (3) that the remaining parts of the combinations were distinctive of the plaintiffs' goods; (4) that an injunction must be granted to restrain the defendant from the use of the combination marks as a whole, and also of the individual component parts, with the exception of the eagle and the numbers, on any goods to be exported for sale in the Oporto market; (5) and that the plaintiffs were further entitled to an account of profits or to damages, the defendant not being able to establish a systematic infringement amounting to public user.

IN RE PARKER. [582.]

Nov. 13*th*, 1877.

[*U. S. Patent Office—Doolittle, Asst. Comm.*——13 *U. S. Pat. Gaz.* 323.]

On an application for the registration as a trade mark of the figure of a boy, together with certain words, surrounded by a border of lines, and printed in minute squares upon a card, for the purpose of serving as a pattern for sampler-work to be wrought in the squares, and then the whole to be attached to a piece of abrasive paper and used in firing friction matches,

Held, that the combination in question was not a trade mark but a design, inasmuch as it was not intended to be attached to an article as a distinguishing feature, but was itself the article, and, therefore, that application should have been made to patent it as a design, and that registration as a trade mark must be refused.

TWENTSCHE STOOM BLEEKERY GOOR *v.* ELLINGER & CO. 583.

Nov. 15*th*, 1877.

[*Malins, V.C.*——26 *W.R.* 70.]

On motion by the plaintiffs, a Dutch bleaching company, injunction granted to restrain the defendant, a commission agent, from infringing the plaintiffs' trade marks, and

Held, (1) that the fact that the plaintiffs' marks were not registered, and that the writ in the action was issued on a date (July 27th, 1877) subsequent to the date (Jan. 1st, 1877) fixed by the T. M. A., 1876, as the date before which a trade mark must have been registered to entitle its proprietor to sue for an infringement, and before the Royal Assent (Aug. 15th, 1877) had been given to the

T. M. A., 1877, by which the time was extended to Jan. 1st, 1878, did not disentitle the plaintiffs to their remedy; (2) that the assertion of the defendant that the goods had been marked, packed, and exported without his knowledge was no defence; (3) that the defendant must pay all the costs, though it might have been otherwise if he had submitted at once, having regard to the fact that no proper notice had been given him by the plaintiffs before the issue of their writ.

[584.] **IN RE BLOCK & CO.**

Nov. 22nd, 1877.

[*U. S. Patent Office*—*Spear, Comm.*}——14 *U. S. Pat. Gaz.* 235.]

An application for the registration of a trade mark having been refused, on the ground that the proposed mark did not constitute a registrable trade mark, an application was made for the registration of an essentially different mark, which was granted, but an application for the second application to be considered and treated as an amendment of the original application was refused.

On an application for the return of the fee paid upon the filing of the original application, as having been paid by mistake,

Held, that a fee paid upon an application could only be returned when it had been paid by actual mistake, such as when it was a payment in excess of the proper amount, or was not required by law, and that the application must be refused.

ROBINSON *v.* **FINLAY.** 585.
WARD *v.* **ROBINSON.**

Nov. 24*th*, 1877; *May* 14*th*, 1878.

[*Bacon, V.C.*——9 *Ch. D.* 489.]

[*Ct. of App.*—*James, Baggallay & Bramwell, L.JJ.* } ——9 *Ch. D.* 487; 39 *L. T., N. S.* 398; 27 *W. R.* 294.]

A certain group of five trade marks, consisting respectively of Robinson's name, his coat of arms, his crest, a figure of an elephant, and a varying number, called a range number, together with a heading of coloured threads, having been exclusively used on cotton goods, which, in the habitual course of business, were manufactured by Ward, exported by Robinson, and consigned to Galbraith, who sold them, after bleaching, at Rangoon (three of such marks having been previously used by Robinson, one, in a slightly different form, by Robinson and Galbraith, while the other one was new); after the interruption of the connexion, Robinson continued to use the same group of marks, and Ward began to export goods bearing substantially the same marks, through Finlay.

Cross actions commenced respectively by Robinson against Finlay, and by Ward against Robinson, for an injunction to restrain the use of the group of marks.

Held, by the V.C., that the marks were indicative of goods selected by Robinson, and exported and sold on his responsibility, and that an injunction must be granted in the first action.

Held, by the Ct. of App., that, inasmuch as the group of marks had never been used except on goods which had passed through the hands of all the three parties (although separately some of them had been so used), the group of marks, as a whole, was indicative of goods which had passed through that particular course of trade, that neither

of the parties was entitled to the exclusive use of the group, and that both actions must, therefore, be dismissed without costs.

Per Baggallay, L.J.—"It being clear upon the evidence that the designs were designs in which three persons were interested for the purpose of carrying on a business or adventure in which all three were interested, it follows that, upon the termination of that adventure, none of the three could claim any title against the other."

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586. **IN RE ORR-EWING & CO. [T. M. A., 1875-6].**

Dec. 15*th*, 1877; *June* 7*th*, 1878.

[*Hall, V.C.*——8 *Ch. D.* 798; 47 *L. J., Ch.* 180; 38 *L. T., N. S.* 313; 26 *W. R.* 259; 1 *Trade Marks*, 211.]

[*Ct. of App.*—*James, Baggallay & Bramwell, L.JJ.* } ——8 *Ch. D.* 794; 47 *L. J., Ch.* 807; 38 *L. T., N. S.* 695; 26 *W. R.* 777.]

An application having been made for the registration of certain trade marks in respect of cotton goods, consisting of triangular green labels or tickets with a device in gold, being a curtain bearing an inscription and held up by supporters, the Committee of Experts at Manchester placed such marks in the second class, as being not entitled to registration, on the ground that the shape and style and principal component parts of the marks were in common use in the trade, though the exact combinations were only used by the applicants.

On motion by the applicants for a declaration that the marks were true trade marks within the Trade Marks Registration Acts, and for a direction to the Registrar to proceed with the registration,

Held, by the V.C., that each of the tickets, looked at as a whole, was distinguishable from the other tickets in use, and that the motion must be granted.

Held, by the Ct. of App., that the Committee of Experts

were constituted by the Trade Marks Registration Acts and Rules a tribunal to decide as to the validity or invalidity of cotton marks; that their decision should not be reversed, except on proof that they had proceeded on some wrong principle, or in some improper manner; that, in the case in question, this was not established; and that the motion should have been refused.

METZLER *v.* **WOOD.** **587.**

Dec. 17*th*, 1877; *April* 1*st*, 1878.

[*Malins, V.C.*——8 *Ch. D.* 608.]

[*Ct. of App.*—
James, Cotton & Thesiger, L.JJ. } ——8 *Ch. D.* 606; 47 *L. J., Ch.* 625; 38 *L. T., N. S.* 541; 26 *W. R.* 577.]

The plaintiffs being the proprietors of "Hemy's Royal Modern Tutor for the Pianoforte," published in a yellow cover bearing that title, the defendant employed Hemy to prepare a new edition of an obsolete work called "Jousse's Royal Standard Pianoforte Tutor," and published it in a grey cover with the title "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor," the name "Hemy's" being in large and conspicuous letters.

Injunction granted to restrain the defendant from infringing the plaintiffs' rights, and

Held, by the V.-C., (1) that the plaintiffs were not disentitled by reason of a representation that this was the 600th edition of the plaintiffs' work, it being proved to be a trade custom to style every issue of 250 copies a new edition, nor by a statement that their work was specially revised by Hemy, the words being properly interpreted to mean that it was a specially revised edition, but not to distinguish it from all previous ones in that respect; (2) that the plaintiffs having set up claims as to copyright

and gone into the internal structure of the defendant's work, but failed on that point, the defendant must pay one-half, instead of the whole, of the plaintiffs' taxed costs.

[588.] **BAIN** *v.* **MUNRO.**

Jan. 10*th*, 1878.

[*Ct. of Session*—*Ct. of Sess. Cas., 4th Ser., V.* 416; 15 *Scot. L. Rep.* 260.]

Action to recover from the widow and executrix of a medical man a sum of money guaranteed by the defendant's husband to the plaintiff.

Held, by the Lord Ordinary (Lord Curriehill) and the Court, that a sum of money paid to the defendant by way of purchase-money for the goodwill of her husband's medical practice, with a recommendation from herself, belonged to the defendant, and not to the estate of her deceased husband, on the ground that the goodwill of a medical practice was personal and not transmissible, and that the money was, in fact, paid for the defendant's recommendation.

Per Lord Curriehill.—"There is truly no such thing as goodwill in the case of a business carried on by a professional man, such as a physician, surgeon, or law agent, whose success depends entirely upon his own personal skill. It is quite different in the case of a trade or manufacture, where the employer may have the possession of patents or trade secrets, or may, by long exercise of his trade or manufacture in some particular locality, have drawn together skilled artisans and attracted the custom of a district to his establishment. In such a case it is not the individual skill of the employer, but the reputation which his establishment has acquired, which creates that incorporeal, but frequently valuable, estate known as the 'goodwill' of a trade. But there is no such thing in the case of a professional man. His business dies with him, and the man who comes after him in the district must depend for success upon his own exertions. It is quite true that such businesses are occasionally sold; but what is thus sold in the case of a living professional man retiring from

business is truly the personal recommendation which the seller gives to his former clients or patients in favour of his successor, coupled with the predecessor's own retirement from business. But where the physician or law agent is dead, nothing of the kind can take place. He has been removed by death from all possibility of competing with the new doctor or the new solicitor, and his voice being for ever silenced, he cannot give any recommendation to his clients or patients. But if the family of the deceased professional man offer to recommend a successor to the clients or patients of the deceased on receiving a money equivalent, what is paid for is merely the recommendation of the living members of the family of the deceased."

Per the Lord Justice Clerk.—"It is quite clear that a distinction has always been drawn between the goodwill of a trade, where the individual skill of the trader has often less to do with the success of the undertaking than other circumstances connected with it, and a profession which is only carried on with success by means of the brain and other personal qualifications of the person conducting it. The distinction which has been drawn between these is thorough, and so the law has been laid down in these cases which have been quoted to us. The benefit derived from the exercise of a profession seems to me to be so personal to the individual exercising it that nothing can be said to transmit to the effect of being assets in the hands of an administrator."

Per Lord Ormidale.—"I think it is impossible to hold that a medical man's practice can transmit, and that the value of the goodwill of such a practice can be considered an asset in the deceased's executory."

Per Lord Gifford.—"I think it is quite clear that there may be the goodwill of the practice of a professional man as well as of a trade. You have instances of this in the case of medical men every day. It is said that this is only the case when both parties are living, the retiring doctor and his successor. But I cannot assent to this. I see nothing to prevent a medical man bequeathing his practice to a friend."

IN RE POWELL
IN RE PRATT } [T. M. A., 1875.] 589.

Jan. 12*th*, 1878.

[*Jessel, M.R.*——1 *Trade Marks*, 237.]

A representation of a willow-pattern plate having been used by the former of the above parties since 1864 as his

trade mark on his "Goodall's Yorkshire Relish," and by the latter of the parties since 1868 on his "Club Sauce," and each of the parties having applied for the registration of the device as his trade mark, and opposed the application of the other;

On two summonses taken out by the parties by direction of the judge and adjourned into Court,

Held, that, inasmuch as each of the parties had used the mark independently and *bonâ fide* for several years, the mark should be registered in both names.

[590.] **BLACKWELL** *v.* **DIBRELL.**

Jan. 14*th*, 1878.

[*U. S. C. C., E. Dt. of Va.*—*Hughes, J.*] ——14 *U. S. Pat. Gaz.* 633.]

The plaintiffs being manufacturers of tobacco at Durham, in North Carolina, who labelled their tobacco with the figure of a Durham ox and the words "Durham Smoking Tobacco" (their title being derived as stated in *Armistead* v. *Blackwell*), the defendants manufactured tobacco at Richmond, Virginia, and labelled it in the same way, except that the head and neck of the bull were substituted for the entire figure.

Suit for an injunction to restrain the defendants from infringing the plaintiffs' rights.

Held, (1) that, even if W. A. Wright (through whom the defendants claimed to be entitled to use the label) had, as he alleged, adopted the label used by the defendants before Green, through whom the plaintiffs claimed, had begun to use the label used by them, yet he had lost whatever rights he had in the mark by abandonment and disuse for eight or nine years from 1861; (2) that during that period of disuse the name had acquired a local signification, as indicating tobacco grown at the town of Durham; (3) that,

whether the plaintiffs had or had not an exclusive right in the mark as against other manufacturers at Durham, they were at all events entitled to a remedy against the defendants, who did not carry on business at Durham, and that an injunction must be granted, with an account.

"That the right to use a trade mark may be lost by abandonment or disuse is too clear to need argument or the support of authority."

SIEGERT *v.* **FINDLATER.** 591.

Jan. 15*th*, 1878.

[*Chanc. Div.*—*Fry, J.* ——7 *Ch. D.* 801; 47 *L. J., Ch.* 233; 38 *L. T., N. S.* 349; 26 *W. R.* 459.]

Dr. Siegert having in 1830 commenced manufacturing at Angostura (since 1846 re-named Ciudad Bolivar), in Venezuela, a fluid which he termed "Aromatic Bitters," and sold in peculiarly shaped bottles, enclosed in wrappers printed with descriptions of the virtues and uses of the preparation, in parallel columns of Spanish, English, and German, and underneath in French, the heading of the centre column being "Aromatic Bitters, prepared by Dr. Siegert at Angostura (now Ciudad Bolivar)," and the fluid having generally acquired the name of "Angostura Bitters," though not so termed by Dr. Siegert; in 1870 Dr. Meinhard began at Ciudad Bolivar to make and sell another preparation in bottles similarly shaped to Dr. Siegert's, with similar descriptions on the wrappers in the same languages similarly arranged, the heading of the centre column being "Aromatic Bitters, prepared by Teodoro Meinhard, Ciudad Bolivar, formerly Angostura," which inscriptions he somewhat altered in 1874, after the suit of *Siegert* v. *Ehlers* in Trinidad, so that the new heading was "Angostura Bitters, prepared by Teodoro Meinhard, Ciudad Bolivar, formerly Angostura," and across the three columns the words "Angostura Bitters" were printed in red letters.

Action by the successors in business of Dr. Siegert, who had in 1875 removed their business to Port of Spain, in Trinidad, and thereupon somewhat varied their wrappers, adopting the term "Angostura Bitters" for the first time, so that the heading now ran "Aromatic Bitters, or Angostura Bitters, prepared by Dr. Siegert, at Angostura (now at Port of Spain, Trinidad)," and who, after the commencement of the action, again changed their wrappers, for an injunction to restrain an infringement by the English agents of Dr. Meinhard.

Held, (1) that Meinhard had acted in a manner intended and calculated to deceive, and which had deceived; (2) but that the plaintiff was not entitled to the exclusive use of the term "Angostura Bitters," since that had become the name of an unpatented article which any one who could discover the secret recipe might make and call by its name, although it had hitherto been made by only one firm, because they alone knew the secret; (3) that a defence, based on the plaintiffs being disentitled by reason of misrepresentation in their new wrappers, failed, there being, in the first place, no substantial misrepresentation, and the label having, in the second place, not been adopted till after the commencement of the action; (4) and, therefore, that an injunction must be granted to restrain the defendant from using the word "Angostura," or the words "Angostura Bitters," in such a way as to be calculated to deceive, but not so as to prevent their being applied to an article identical with the plaintiffs', by whomsoever made.

"It is to be observed that the person who produces a new article, and is the sole maker of it, has the greatest difficulty (if it is not an impossibility) in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from. No distinction can arise from using the name of the class so long as the class consists of only one species, for then the name of the species and the name of the class will be the same."

IN RE FARINA [T. M. A., 1875] (1). 592.

Jan. 17*th*, 1878.
[*Hall, V.C.*——26 *W. R.* 261.]

J. M. Farina and his predecessors in business having long manufactured Eau-de-Cologne at Cologne, which was sold in bottles bearing a label, on which was printed Farina's signature, with a peculiar flourish, and with a medallion of his family arms in the upper left hand corner, and he having registered this label as his trade mark in Germany and England, another manufacturer of Eau-de-Cologne, who used a label on his bottles very similar to Farina's, but having a different medallion in the corner, obtained registration in Germany, and applied for registration in England of a medallion identical with that contained in the plaintiff's label, asserting that it was also his own family arms.

Motion by the registered proprietor for a declaration that the applicant was not entitled to registration, and to restrain him from taking further proceedings with a view to registration, refused, on the ground that the question whether registration should be allowed must depend on whether an injunction would be granted in an action independent of the Registration Acts, and that in the case in question the medallion, used alone, was not so similar to the label with the medallion in the corner as to be calculated to deceive.

IN RE HYDE & CO. [T. M. A., 1875.] 593.

Jan. 18*th*, 1878.
[*Jessel, M.R.*——7 *Ch. D.* 724; 38 *L. T., N. S.* 777; 26 *W. R.* 625; 1 *Trade Marks*, 245.]

Hyde & Co. obtained the registration of the words "Bank of England," which they had used on sealing-wax

for upwards of forty years, as their trade mark on that article, notwithstanding that the words had been used by various other sealing-wax makers for different periods up to thirty years, and for at least six years to Hyde & Co.'s knowledge.

On motion by other firms of manufacturers of sealing-wax for the removal of the mark from the register,

Held, (1) that where an old mark had been used habitually by more than three firms on the same class of goods, it had become a common mark and incapable of appropriation; (2) that this was the case with the words in question, and that the registration must, therefore, be rescinded; (3) that Hyde & Co., having registered a mark to which they were not entitled, and having declined until the hearing of the motion, to consent to the rectification of the register, they must pay the costs of the motion, notwithstanding that the firms moving in the matter had allowed the mark to be placed on the register without opposition.

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594. **HINRICHS** *v.* **BERNDES.**

Jan. 18*th*, 1878.

[*Jessel, M.R.*——*W. N.* 1878, *p.* 11; *L. J., Notes of Cas.* 1878, *p.* 11.]

Motion for an injunction to restrain the publication of certain libellous statements, refused, but

Held that, if a plaintiff in an action of libel had obtained a verdict, and the libel were repeated, damages might be given at the hearing for the past libel, and at the same time its continuance in the future be restrained by injunction.

MARCOVITCH *v.* **BRAMBLE, WILKINS & CO.** 595.

Jan. 24th, 1878.
[*Malins, V.C.*]

On motion to commit for contempt of court an auctioneer, who had had served on him a notice of an injunction which had been granted to restrain his firm from offering for sale a parcel of cigarettes marked with the plaintiff's trade mark, the words "Vanity Fair," and who had nevertheless offered them for sale, but without success, he supposing the notice of injunction to require some further official authentication,

Held, that, while the defendant had made himself liable to committal, under the circumstances, he should only be required to submit to the injunction and pay the costs.

IN RE HALL & CO.
IN RE ATKINSON. [596.]

Feb. 2nd, 1878.
[*U. S. Patent Office—Doolittle, Act. Comm.*—13 *U. S. Pat. Gaz.* 229.]

On two separate applications for the registration of the name "Calhoun" as a trade mark on ploughs,

Held, that, although the name had, when first used, been the valid trade mark of the firm of Calhoun and Atkinson, under the latter of whom both applicants claimed, it had since then become *publici juris* by being used by a number of firms without opposition by the representatives of Calhoun and Atkinson, and that registration must, therefore, be refused in both cases.

597. **IN RE HORSBURGH [T. M. A., 1875].**

Feb. 3*rd*, 1878.

[*Jessel, M.R.*——1 *Trade Marks*, 260.]

The registered proprietors of a trade mark used by them on lubricating oils, and consisting of a certain device with the word "Valvoline," opposed an application by other oil merchants for the registration in their name of another trade mark, consisting of an entirely different device with the word "Valvoleum," on the ground that it was calculated to produce deception.

On summons adjourned into Court,

Held, (1) that each of the words in question was simply equivalent to "Valve Oil," and, therefore, merely descriptive of the use of the article and incapable of appropriation, although, if the words were ornamented in some special manner, the manner of ornamentation might be claimed; (2) that the devices used in combination with the words being perfectly distinct, each might be registered with or without the additional word, the device being the essential particular, which must be encroached upon for the trade mark to be infringed; (3) that the enactment in § 6 of the T. M. A., 1875, forbidding the registration of any words, the exclusive use of which would not, by reason of their being calculated to deceive or otherwise, be deemed entitled to protection in a Court of Equity, has reference to deceptiveness inherent in the mark itself, and not to any question of comparison or similarity between two or more trade marks.

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598. **EX PARTE THE KING OF SAXONY [T. M. A., 1875].**

Feb. 7*th*, 1878.

[*Hall, V.C.*——1 *Trade Marks*, 245.]

The King of Saxony being the proprietor of certain

long established marks for porcelain, which had been registered in England, opposed an application by another person for the registration in the latter's name of certain marks for porcelain, on the ground that they so nearly resembled his own registered marks as to be calculated to deceive.

On an *ex parte* application on behalf of the King of Saxony for a direction as to the mode of trial,

Held, that the case should be heard on motion, but that leave should be given to the other party to give notice of motion for the following week to have the case heard in some other way, if he wished to do so.

BRAHAM *v.* **BEACHIM** (1). **599.**

Feb. 12*th*, 1878.

[*Chanc. Div.*—*Fry, J.*] ——7 *Ch. D.* 848; 47 *L. J., Ch.* 348; 38 *L. T., N. S.* 640; 26 *W. R.* 654.]

The principal plaintiff, Countess Waldegrave, being the owner or lessee of all the collieries within the parish of Radstock, except one very small piece, and raising and selling the coal therefrom under the style of "The Radstock Coal Company," the defendants began to sell coal under the same title; after which the plaintiff changed her style to "The Countess Waldegrave's Radstock Collieries," and the defendants adopted the style of "The Radstock Colliery Proprietors," and, upon remonstrance, of "The Radstock Coal Company, Colliery Proprietors," in newspapers and on their office blind, although they were never entitled to raise coal within the parish of Radstock, nor, until after the commencement of the action, within any part of the district through which the seams of Radstock coal extended.

Action by the Countess and her trustees for an injunction to restrain the defendants from infringing their rights.

Held, (1) that the defendants were not entitled to call themselves "The Radstock Colliery Proprietors," since that was calculated to attract to them custom intended for the plaintiff as practically the only colliery proprietor in the parish, as well as the largest proprietor in the district; (2) that the defendants were not entitled to style themselves proprietors of collieries at Radstock, since that designation also pointed to the parish, and, therefore, to the plaintiff's works; (3) that the course of conduct adopted by the defendants was calculated to deceive, and that proof of actual damage having been sustained by the plaintiff was, therefore, not requisite; (4) that an injunction must, therefore, be granted to restrain the defendants from using either of the above appellations; (5) but that this injunction should not extend to prevent the defendants from adopting those appellations if they should at any time become owners or lessees of collieries within Radstock parish.

[600.] **IN RE LISNER.**

Feb. 14*th*, 1878.

[*U. S. Patent Office*— *Doolittle, Act. Comm.* } ——13 *U. S. Pat. Gaz.* 455.]

On an application for the registration of a trade mark in respect of "fancy goods,"

Held that, although a trade mark might be registered on a single application for an entire class of merchandise, it could not be so registered for the numerous classes of goods included in the term "fancy goods," and that registration must, therefore, be refused until the particular class of goods in respect of which the application was made was more clearly specified.

IN RE PATON [T. M. A., 1875.] **601.**

March 1st, 1878.
[*Jessel, M.R.*——1 *Trade Marks*, 285.]

An application for the registration of the word "Alloa" as the applicants' trade mark for woollen yarns being opposed,

On motion for a direction as to the manner in which the case should be heard,

Held, (1) that the case should be heard on summons taken out by the opponents and adjourned into Court; (2) that a delivery at the Trade Marks Registry Office by the opponents' solicitors of a copy of the notice of the opposition motion, together with a copy of the endorsement of acceptance by the applicants' solicitors, was a sufficient compliance with the requirement in the Instructions to Applicants for Registration (paragraph 37) for notice of the opposition motion having been brought before the Court to be given to the Registrar of Trade Marks by the delivery at the office by the opponent's solicitors of a copy of the notice of motion, with an endorsement of service on the applicants, signed by the opponents' solicitors, and that the personal service on the applicants and the endorsement might be dispensed with.

FULLWOOD *v.* FULLWOOD (2). **602.**

March 5*th*, 1878.
[*Chanc. Div.*—*Fry, J.*——9 *Ch. D.* 176; 47 *L. J., Ch.* 459; 38 *L. T., N. S.* 380; 26 *W. R.* 435.]

The plaintiff carrying on at Somerset Place, Hoxton, the business of an annatto manufacturer, established by his father in 1785, under the name of "R. J. Fullwood & Co.,"

the defendants, one of whom had formerly been the plaintiff's partner, but had sold his interest to the plaintiff, began to carry on the same business under the name of "E. Fullwood & Co.," and to put out advertisements, in which they described themselves as "late of Somerset Place, Hoxton, Original Manufacturers of Liquid and Cake Annatto," and their business as having been "Established in 1785."

Action by the plaintiff for an injunction to restrain the defendants from representing their business to be identical with or similar to his own.

Held, (1) that the defendants had acted in a way intended and calculated to produce deception; (2) that the fact, if it were established, that the plaintiff had delayed till November, 1876, to commence his action, he having been aware of the defendants' conduct early in 1875, was no defence, the period fixed by the Statute of Limitations not having elapsed; (3) and that the injunction must be granted.

"The right asserted by the plaintiff in this action is a legal right. He is in effect asserting that the defendants are liable to an action for deceit. It is clear that such an action is subject to the Statute of Limitations, and it is also clear that the injunction is sought merely in aid of the plaintiff's legal right. In such a case the injunction is, in my opinion, a matter of course if the legal right be proved to exist. In saying that, I do not shut my eyes to the possible existence in other cases of a purely equitable defence, such as acquiescence or acknowledgment, and the various other equitable defences which may be imagined. But mere lapse of time, unaccompanied by anything else, and to that I confine my observations, has, in my judgment, just as much effect and no more in barring a suit for an injunction as it has in barring an action for deceit."

FRESE *v.* BACHOF (2). [603.]

March 22nd, 1878.

[*U. S. C. C., S. Dt. of N. Y.*—*Wheeler, J.*}——13 *U. S. Pat. Gaz.* 635.]

The plaintiffs being a firm of tea-merchants, who sold "Hamburg Tea" in a peculiar form of package, the tea being enclosed in long cylindrical parcels with pink wrappers, and with crimson papers of directions and yellow ones of warning tied in, and having a white label with the firm name within a circle pasted across the ends of the string, and another white label with the same and the words "Hamburg, Hopfensack, 6" embossed thereon, pasted on the package, the defendant at first put up his tea in a precisely similar manner, with the firm name and address, but after the commencement of the suit, discontinued the use of the firm name and address, and substituted his own.

Injunction granted to restrain the defendant from using packages similar to those of the plaintiffs, with damages.

HAGG *v.* DARLEY. 604.

March 25th, 1878.

[*Bacon, V.C.*——*47 L. J., Ch.* 567; 38 *L. T., N. S.* 312.]

The plaintiff purchased from the "Government Sanitary Company," composed of the defendant and three others, the goodwill of their business of manufacturing certain fluids and soaps known as the "Government Carbolic Disinfectants," (on which occasion the defendant and his partners covenanted with the plaintiff not to manufacture or sell disinfectants for fourteen years, nor for the same time to disclose the secrets of the manufactures in question), and carried on the business of the company under the old name with the defendant as his manager.

Action by the plaintiff, alleging that the defendant had left his employ and set up in business as the "Old Government Sanitary Company," and was committing other breaches of the covenant by communicating the secret to his workmen, &c., and claiming an injunction to restrain the defendant from using the name, carrying on the manufacture of disinfectants, communicating the secret, &c.

Demurrer by the defendant overruled, on the ground that (1) the defendant had both pleaded and demurred without the leave of the Court, under Order XXVIII., rule 5; (2) the covenant was not too wide or unreasonable.

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605. **STEUART** *v.* **GLADSTONE.**

March 25th, 1878; *March 4th*, 1879.

[*Chanc. Div.*—*Fry, J.*—10 *Ch. D.* 646; 47 *L. J., Ch.* 423; 38 *L. T., N. S.* 557; 26 *W. R.* 657.]

[*Ct. of App.*—*Jessel, M.R., James & Bramwell, L.JJ.*—10 *Ch. D.* 626; 40 *L. T., N. S.* 145; 27 *W. R.* 512.]

Partnership action.

The plaintiff had been expelled from the defendants' firm of commission merchants, in which he had been a partner, and which was carried on under articles, one of which provided that a retiring partner should receive the share in the partnership property to which he was entitled upon the basis of annual accounts taken, under another article, of the partnership "estate and effects," provision being thereby made for a fair valuation and appraisement of all the particulars included in such accounts, which might be in their nature susceptible of valuation, but no mention being made of the goodwill of the business.

Held, on appeal, that the share of partners in the goodwill of a commission business not being ordinarily estimated in calculating their annual share of profits, and it not

having been so in the present case, the goodwill could not be taken into account and valued as being included in the partnership "estate and effects."

SAXBY *v.* **EASTERBROOK.** 606.

March 25*th*, 1878.

[*C. P. Div.*——3 *C. P. D.* 339; 27 *W. R.* 188.]

Action for damages, and an injunction to restrain the publication of statements with regard to certain patents, the property of the plaintiff, which statements were found by the jury to be libellous.

Held that, the question of libel or no libel having been decided by the verdict of the jury, the injunction must be granted.

Per Lindley, J.—"The principle upon which the courts of equity have acted in declining to restrain the publication of matter alleged to be libellous, is, that the question of libel or no libel is pre-eminently for a jury. But, when a jury have found the matter complained of to be libellous, and that it affects property, I see no principle by which the Court ought to be precluded from saying that the repetition of the libel shall be restrained."

WARD *v.* **DRAT.** 607.

April 3*rd*, 1878.

[*Chanc. Div.*—*Fry, J.*——*L. J. Notes of Cas.* 1878, *p.* 67.]

Motion for an injunction to restrain the defendant from sending libellous demands for payment of rent, having been refused by Malins, V.C., who reserved the costs,

Held, that the Court had no authority to grant an injunction in such a case, either original, or under the Judicature Act, 1873, § 25, sub-s. 8.

608. **ROSE *v.* LOFTUS.**

April 10*th*, 1878.

[*Malins, V.C.*——47 *L. J., Ch.* 576 ; 38 *L. T., N. S.* 409.]

The plaintiff being a manufacturer of lime juice, which he sold in bottles moulded specially for him with a spray of lime tree leaf and blossom and his name "Rose & Co.," and who further placed on these bottles a label containing the same spray and name, the defendant, who manufactured a similar article, on one occasion, at the request of a customer, filled some of the plaintiff's bottles brought to him by the customer with his own article, but washed the plaintiff's labels from the bottles and replaced them with his own, and also gave the customer a large printed card with the words "Loftus' Lime Juice Cordial," for public exhibition.

Action by the plaintiff for an injunction to restrain the defendant from infringing his rights.

Held, (1) that the defendant had acted wrongfully, notwithstanding that he had placed his own labels on the bottles, since they still bore the plaintiff's name and mark; (2) but that he had not acted with any fraudulent intention, and that charges of fraud made by the plaintiff in his statement of claim were not established; (3) and, therefore, that on the defendant undertaking not to repeat the act the injunction should not be granted, nor any costs or account of profits.

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609. **ENO *v.* STEPHENS.**

April 11*th*, *May* 29*th*, 1878.

[*Bacon, V.C.*——1 *Trade Marks* 324.]

[*Ct. of App.*— *Jessel, M.R., James & Bramwell, L.JJ.*——1 *Trade Marks* 325.]

The plaintiff being the proprietor of "Eno's Fruit Salt,"

who had for some time used, and had registered under the T. M. A., 1875, certain labels containing, with other words and devices, those words, and the words "Fruit Salt," "Fruit Saline," or "Fruit Powder," without the name, the defendant sold certain preparations under the names of "Fruit Saline," "Stephens & Co.'s Effervescing Vinous Fruit Salts," and "Stephens' Vinous Salts."

Injunction granted to restrain the defendant from using the words "Fruit Salt," "Fruit Saline," or "Fruit Powder," or any such combination of words.

IN RE LEONARDT [T. M. A., 1875.] **610.**

April 12th, 1878.
[*Jessel, M.R.*——1 *Trade Marks* 316.]

A steel-pen manufacturer procured the registration, as parts of his trade marks on pens, of certain words and devices, consisting respectively of the royal arms, the words "Penna Vittorio Emmanuele" with a portrait, the word "Garibaldi" with a portrait, the word "Masonic" with the Masonic arms, and the words "Selected," "Improved," "Superior," "Office," "Commercial," and "International," those words and devices having been in common use by more than three firms of steel-pen makers for some years.

On motion by certain firms of steel-pen manufacturers, and with the consent of the registered proprietor,

Held, that there must be added to the registration of the marks in question a note containing a disclaimer of an exclusive right in the particulars specified.

IN RE MITCHELL [T. M. A., 1875] (2). **611.**

April 12th, 1878.
[*Jessel, M.R.*——*W. N.* 1878, *p.* 101 ; 1 *Trade Marks* 317.]

The words "Selected Pens, London," together with the arms of the city of London, were registered by a steel-pen

manufacturer as his trade mark on steel-pens, the word "Selected" having been in common use by more than three firms of steel-pen makers.

On motion by certain firms of steel-pen manufacturers,

Held, that on evidence of the consent of the registered proprietor being produced a note must be added to the registration of the mark in question, to the effect that the word "Selected" in the above-mentioned mark was common to the pen trade.

[612.] **IN RE RADER & CO.**

April 16*th*, 1878.

[*U. S. Patent Office—Spear, Comm.*] ——13 *U. S. Pat. Gaz.* 596.]

Application for the registration of the words "Iron Stone," enclosed in an oval border, (other words descriptive of the article and place of sale or manufacture being also included within the border), as a trade mark on water pipes, refused, on the ground that the words were in themselves merely descriptive of the substance of the pipes, and that the oval border in which they were enclosed did not give the requisite distinctiveness, and, further, that the oval border was not associated with the words in question only.

[613.] **DUWEL** *v.* **BOHMER.**

April, 1878.

[*U. S. C. C., S. Dt. of Ohio—Swing, J.*] ——14 *U. S. Pat. Gaz.* 270.]

Suit by a citizen of the State of Ohio for an injunction to restrain an infringement of his trade mark, registered in the United States, by another citizen of Ohio.

Demurrer, on the ground that the U. S. Circuit Court had no jurisdiction in such a suit between two citizens of the same State, overruled, and

Held, that the U. S. Circuit Courts had jurisdiction in trade mark cases between citizens of the same State, concurrent with that of the State Courts.

ROLT *v.* **BULMER.** 614.

May 13*th*, 1878.

[*Jessel, M.R.*——*W. N.* 1878, *p.* 119.]

Action for a dissolution of partnership and accounts, the partnership having been carried on under articles which provided for an account being taken, at the determination of the partnership, of the partnership "moneys, stock-in-trade, debts, effects, and things," but did not directly refer to the goodwill of the business.

Held, that the goodwill must be taken into account, as being included in the "effects and things."

REYNOLDS *v.* **BULLOCK.** 615.

May 13*th*, 1878.

[*Hall, V.C.*——47 *L. J., Ch.* 773; 39 *L. T., N. S.* 443; 26 *W. R.* 673.]

Action for a partnership account commenced by one of two members of a partnership firm, on the expiration of the partnership term, the partnership having been carried on under articles which provided for the valuation of the partnership "property and effects" on the dissolution, but contained no reference to the goodwill of the business.

Held, that, there being no direct negative stipulation in the articles, the goodwill must be taken into account and valued, as being included in the "property and effects."

616. IN RE JELLEY, SON & JONES [T. M. A., 1875.]

May 18*th*, 1878.

[*Jessel, M.R.*——1 *Trade Marks* 346.]

Application having been made for the registration of a device, consisting of a pointer eating out of a porridge-pot, (which the applicants had long used on a variety of metal goods contained in class 13, but not on other goods), as an old trade mark for class 13, and as a new trade mark for other classes, in particular for class 12, containing cutlery and edge tools, and for fencing-wire, being one of the kinds of goods included in class 5; the application was opposed by the proprietor of another trade mark, consisting of a device of a pointer dog standing at a point, with the word "Staunch," and registered for all the goods contained in classes 5, 12, and 13, on the ground that the applicants' device so nearly resembled his as to be calculated to deceive.

On summons adjourned into Court,

Held, (1) that with respect to old marks, the rule of the Court was to permit registration of even identical old marks up to the number of three, though if more than three applications for the registration of the same old mark were received, it must be treated as common, and that, with regard to class 13, the mark, being a *bonâ fide* old mark, must be admitted to registration; (2) that with respect to new marks, it was the duty of a person about to adopt one to make it as distinct as possible, and that the fact that a man had been in the habit of using a certain trade mark on one class of goods did not entitle him to begin to use it on another class if it would interfere with another person's mark, and, therefore, with respect to class 12, that inasmuch as the applicants' mark so nearly resembled the opponent's as to be calculated to deceive, especially when

they were compared as stamped on the metal, registration in class 12 must be refused; (3) that with respect to class 5, the mark might be registered in that class for fencing-wire only, as that would not interfere with the opponent's trade; (4) that no order could be made as to costs.

GUINNESS *v.* **HEAP.** 617.

May 30th, 1878.
[*Malins, V.C.*]

The plaintiff being a brewer of stout, who used a trade mark on his bottles containing the words "Guinness' Extra Stout," with a harp, the defendant sold other beer in bottles bearing labels of the same shape as those used by the plaintiff, but which had the words "Genuine Extra Stout" substituted for the words "Guinness' Extra Stout" in the plaintiff's mark, and also contained a device in imitation of the harp used by the plaintiff.

Injunction granted to restrain the defendant from infringing the plaintiff's rights, notwithstanding that the defendant had altered the device, discontinued the use of the labels, and offered to undertake not to use any more of them.

THE LONDON AND COUNTY BANKING CO. *v.* **THE HAMPSHIRE AND NORTH WILTS BANK.** 618.

June 7th, 1878.
[*Jessel, M.R.*]

Motion by the plaintiff company, under § 20 of the Companies Act, 1862, for an injunction to restrain the defendants from changing their name to "The Capital and Counties Bank," refused, on the ground that the adoption of the latter name by the defendants was not calculated to deceive persons who used ordinary care in the conduct of their business transactions.

619. **THE MERCHANT BANKING COMPANY OF LONDON (LIMITED) *v.* THE MERCHANTS' JOINT STOCK BANK.**

June 29th, 1878.

[*Jessel, M.R.*——9 *Ch. D.* 560 ; 47 *L. J., Ch.* 828 ; 26 *W. R.* 847.]

On motion by the plaintiff company for an injunction to restrain the defendant company from using its name recently assumed and registered, as being too similar to the name of the plaintiff company, or any other too similar name,

Held, (1) that inasmuch as § 20 of the Companies Act, 1862, only affected the question of registration of the name of a company, the rights of companies after registration were not varied by that enactment ; (2) that the similarity between the names was not sufficient to show an intention or probability of deception ; (3) and that the motion must, therefore, be refused.

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620. **EX PARTE SALES POLLARD & CO.** [T. M. A., 1875.]

July 8th, 1878.

[*Jessel, M.R.*]

On motion by the registered proprietors of a trade mark on snuff, consisting of the letters "S. P." (the initials of the firm), which they had discovered, subsequently to registration, to have been in common use for many years in the snuff trade, though used originally by themselves,

Leave given to rectify the register by striking out the mark in question.

IN RE ROSING [T. M. A., 1875.] 621.

July 11*th* ; *Nov.* 13*th*, 1878.
[*Bacon, V.C.*——1 *Trade Marks* 371.]
[*Ct. of App.*—
Jessel, M.R., Baggallay & Thesiger, L.JJ.

Application having been made for the registration of the applicant's family arms, consisting of a sprig of two roses and a twisted horn, as his trade mark for several classes of goods, and among others for classes 5, 12, and 13, containing cutlery and other metal goods, the Cutlers' Company of Sheffield opposed the application as to classes 5, 12, and 13, on the ground that the mark in question so nearly resembled a Sheffield corporate mark many years previously assigned to another manufacturer of cutlery, and still used by him, as to be calculated to deceive, the latter mark consisting of a plain horn suspended by a looped cord.

On motion by the applicant for a direction to the Registrar to register the mark in the classes in question,

Held, by the V.-C., (1) that the two marks were not sufficiently similar for deception to be anticipated, and that the applicant's mark must, therefore, be registered; (2) that the Cutlers' Company must pay the costs, notwithstanding that they had intended to act in the public interest.

Held, by the Court of Appeal, (1) that the two marks were too similar, especially when looked at as stamped on the metal, for the applicant's mark to be admitted to registration in classes 12 and 13 (as to class 5 the Cutlers' Company abandoned their opposition); (2) that the applicant must pay the costs of the appeal, but that no costs of the motion in the Court below could be given, the applicant having succeeded as to class 5.

622. **IN RE BROOK [T. M. A., 1875-6-7.]**

July 13*th*, 1878.
[*Hall, V.C.*——26 *W. R.* 791.]

An application having been made for the registration of a considerable number of trade marks in respect of cotton goods, the Committee of Experts at Manchester placed half of the marks in the first class, as being entitled to registration, and the other half in the second class as not being so entitled; and the Registrar of Trade Marks refused registration to the marks so placed in the second class, and further divided the marks placed in the first class, admitting six of them to separate registration, but offering only representative registration to the remainder, on the ground that the essential feature in all of them was a device consisting of a goat's head crest, and the name "Brook's."

On motion by the applicants for the separate registration of the whole of the marks,

Held, (1) that as to the marks placed by the Committee in the second class, the case was governed by *In re Orr Ewing & Co.*, and that the Court was debarred from reconsidering the decision of the Committee; (2) that as to the marks placed in the first class, but offered only representative registration, the case was governed by *In re Barrows*, and that separate registration must be refused; but that the goat's head crest and the name "Brook's" should each be registered separately, as a representative mark, with the additional words to mark its representative character appended to each.

IN RE LYSAGHT [T. M. A., 1875.] 623

July 19th, 1878.
[*Jessel, M.R.*]

A trade mark having been registered in respect of the goods contained in class 5,

On motion by the registered proprietor,

Order made to rectify the register by limiting the registration to galvanized sheet iron, on which alone it was his old mark.

EX PARTE WALKER & CO. 624.

July 25th, 1878.
[*Malins, V.C.*]

On motion by the registered proprietors of a trade mark on iron, consisting of the letter W, a crown, and the word "Netherton,"

Leave given to rectify the register by substituting the word "Dudley" for the word "Netherton," the address being held not to be an essential particular of the trade mark in question.

IN RE SAUNION & CO. [T. M. A., 1875.] 625.

Aug. 2nd, 1878.
[*Jessel, M.R.*]

The Anglo-Portuguese Oyster Fisheries Company having been for some years in the habit of importing oysters dredged in Portuguese waters into England, and selling them there, either without previous fattening, or after fattening at beds at Queenborough, and Saunion & Co.

having acted as the agents for the company in this undertaking, under an agreement which amounted in law to an agreement for a partnership terminable at the will of the company, the partnership was dissolved and the connexion terminated by the company, who then carried on business through a new agent. Saunion & Co. afterwards applied for the registration of a trade mark consisting of a device containing, among other particulars, the words "Anglo-Portugo Oysters," those words being the words by which the company had designated their oysters, and they claimed to use this mark upon any oysters which they considered to be of the same breed as the company's, whether brought from Portugal or not.

On motion by the company,

Held, that the inclusion of the words "Anglo-Portugo" in the applicants' trade mark was either deceptive, if the oysters did not come from Portugal, or descriptive if they did, or if the words denoted a particular breed, and not the country of origin, and that the words must be struck out of the trade mark which it was proposed to register.

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626. **IN RE BRANDRETH [T. M. A., 1875.]**

Aug. 8th, 1878.

[*Jessel, M.R.*——9 *Ch. D.* 618; 47 *L. J., Ch.* 816; 27 *W. R.* 281.]

On application, by way of adjourned summons, for the registration of the word "Porous" as a trade mark in respect of "Allcock's Porous Plasters," and opposed,

Held, (1) that the word "Porous" was descriptive, and, therefore, incapable of registration; (2) that in any case it could only be registered as included in the phrase "Allcock's Porous Plasters," which phrase was itself descriptive; (3) that the application must be refused with costs; (4) that the only costs which, under Order LV., could be given were the costs of the proceedings subsequent

to security for costs being given by the opponents, that being the time when, by rule 16 of the Trade Marks Rules, the case stood for the determination of the Court, and that the costs of the previous proceedings in the Trade Marks Registry Office could not be given.

THE HOOSIER DRILL CO. *v.* INGELS. [627.]

1878.

[*U. S. Patent Office—Doolittle, Act. Comm.*] ——14 *U. S. Pat. Gaz.* 785.]

A trade mark having been registered in the name of Ingels at a time when another application by the company for the same trade mark was pending, and an interference having been declared between the parties, the Commissioner of Patents held that only the question of priority of adoption could be inquired into on an interference, and not questions of disputed ownership.

On motion by the company to rehear,

Held, (1) that neither prior invention, use, or adoption was necessary to entitle to the registration of a trade mark under the U. S. Statute, a simple intention to use being sufficient; and (2) that in investigating the title to a trade mark, all matters relating to the ownership should be gone into, and not only the question of priority of adoption, and that the motion must be granted.

THE MANHATTAN MEDICINE CO. *v.* WOOD. [628.]

Sept. 21*st*, 1878.

[*U. S. C. C., Dt. of Me.—Clifford, J.*] ——14 *U. S. Pat. Gaz.* 519.]

The plaintiffs manufactured a medicine called "Atwood's Vegetable Physical Jaundice Bitters" (which they sold in peculiar shaped bottles, having the words "Atwood's

Genuine Physical Jaundice Bitters, Georgetown, Mass." blown in the glass, and bearing a yellow label), in succession to the firm of Carter & Dodge, who had purchased from the original inventor and proprietor the right to manufacture and sell the medicine and use the trade mark used by him, but not in Maine and some other excepted places. The defendant in 1861 purchased from the son of the original proprietor the genuine secret recipe for the medicine, to be used in Maine, and from that time till the commencement of the suit he continued to manufacture and sell the medicine and use the trade mark without interference, though it did not appear that the son had sold by his father's authority.

Suit for an injunction and an account.

Held, (1) that the plaintiffs had no exclusive right to sell the medicine or use the trade mark; (2) that neither they nor their predecessors in title had ever had any right to do so in Maine; (3) that the rights possessed by some of the assignors to the plaintiffs had been lost by reason of their having used the genuine trade marks on spurious medicines of inferior quality; (4) that the plaintiffs were, further, disentitled by their delay; (5) that the plaintiffs' assignors had lost whatever right they had in the trade mark by not confining themselves to the districts to which alone the grants from the original proprietor extended; (6) that the trade mark used by the original proprietor had been abandoned by those claiming under him, when they adopted new bottles and labels in place of those used by him; (7) that the article not being patented, and the defendant being in possession of the genuine recipe, and the plaintiffs having no exclusive right, and none at all in Maine, the defendant could not be restrained from using the trade mark, and that the injunction must be refused with costs.

LEIDERSDORF *v.* FLINT. [629.]

1878.

[*U. S. C. C., E. Dt. of Wisc.—Harlan and Dyer, JJ.*] ——13 *Am. L. Rev.* 390.]

The plaintiffs and defendant being alike citizens of Wisconsin, the defendant used upon his packages of tobacco a trade mark which the plaintiffs alleged to be an infringement of that used by them on theirs.

Suit for an injunction to restrain the defendant from infringing the plaintiffs' rights, brought under the U. S. Revised Statutes, section 4942 (Act of 1870, section 79).

On demurrer,

Held, that, inasmuch as Congress was only authorized by the Constitution of the United States to "secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries," and the right to a trade mark did not depend upon invention or originality, but upon prior user, legislation by Congress upon the subject of trade marks was *ultrà vires*; and therefore that, although if trade marks had been within the legislative power of Congress, the Federal Court would have had jurisdiction, under the authority conferred on it by statute, even between citizens of the same State, that not being so, the demurrer must be sustained on the ground of want of jurisdiction.

"In every aspect suggested, and in other respects which might be suggested, it would seem that the analogy between property in the use of a trade mark and a patent for an invention, and between a trade mark right and a copyright, fails. Property in a trade mark exists independently of statute. It is otherwise with inventions and discoveries."

630. **EX PARTE LAWRENCE & CO. [T. M. A., 1875.]**

Nov. 2nd, 1878.
[*Jessel, M.R.*]

Lawrence & Co. carrying on business as manufacturers of printers' rollers and of the composition used for coating the same, and having since 1872 used a trade mark thereon, consisting of a device of a printer's roller, with the words "The Durable" in an oval, their manager, Marler, during the absence abroad of the members of the firm, and without their knowledge, obtained the registration of a mark substantially the same as theirs in his own name, describing himself as a manufacturer of the same articles as his employers, and of their address.

On motion by Lawrence & Co. for rectification of the register, either by the insertion of their firm name in the existing entry in place of that of Marler, or by that entry being expunged, with liberty for them to proceed to advertise their mark, with a view to registration *de novo*,

Held, (1) that relief in the first alternative could not be granted, since the registration of Marler, having been effected without instructions from the applicants, was not a registration on their behalf, or one of which Marler could be treated as a trustee for them, but a wrongful act from the beginning, of which if the applicants wished to take the benefit, they must at the same time take the inconveniences, so that the applicants could only utilise the existing entry by obtaining an assignment from Marler, but that this was impossible, since he had never carried on any business, and, therefore, could not assign the mark, being unable to assign with it the goodwill of the business in which it was used; (2) that the proper method of rectifying the register was by expunging the improper entry altogether, and that relief must, therefore, be granted in the second alternative.

DAY *v.* **BROWNRIGG.** 631.

Nov. 6*th* ; *Dec.* 4*th*, 1878.

[*Malins, V.C.*——39 *L. T., N. S.* 226.]

[*Ct. of App.*—*Jessel, M.R., James & Thesiger, L.JJ.* ——10 *Ch. D.* 294; 39 *L. T., N. S.* 553 ; 27 *W. R.* 217.]

The plaintiffs being the owners of a house and estate at Ashford, Middlesex, known as "Ashford Lodge" and "The Ashford Lodge Estate," the defendant acquired another house in the same neighbourhood, known as "The Villa, Ashford," or "Ashford Villa," and changed the name to "Ashford Lodge."

Action for an injunction to restrain the defendant from using that name to the injury of the plaintiffs' property.

On demurrer,

Held, by the Ct. of App., (1) that the plaintiffs could not acquire an exclusive right in the name of a house, apart from trade, and that the demurrer must be allowed ; (2) that no extended power of granting injunctions was conferred upon the Court by the Judicature Act of 1873, s. 25, sub-s. 8.

EX PARTE EDE BROS. & CO. [T. M. A., 1875-6-7.] 632.

Nov. 8*th*, 1878.

[*Jessel, M.R.*]

Application having been made for the registration of certain trade marks for goods included in the cotton classes, such trade marks were placed by the Manchester Committee of Experts in the first class of marks submitted to them, as being marks qualified for registration. On subsequent application by other firms for the registration in their names of trade marks substantially identical with those so

classed, the Committee placed the marks in respect of which such later application was made in their second class, on the ground that the later applicants had no title to the marks which they sought to register.

On motion by the later applicants,

Held, that the function of the Committee of Experts was to decide whether a trade mark offered for registration contained the particulars necessary to constitute a registrable trade mark, and not to decide questions of title between rival claimants; that in the cases in question the Committee had acted on a mistaken view of their functions; and that, notwithstanding the classification by the Committee, the Registrar must proceed to advertise the marks with a view to registration, leaving the question of title to be decided in the future on any opposition which the prior claimants might offer to the registration of the marks, after due advertisement.

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633. **BRAHAM** *v.* **BEACHIM (2).**

Nov. 14*th*, 1878.
[*Chanc. Div.*— *Fry, J.*

After the decision in *Braham* v. *Beachim* (1), the defendants in that case acquired a colliery, but not in the parish of Radstock, and carried on business as "The Radstock Coal and Waggon Co., Colliery Proprietors, Radstock, Somerset."

Motion by the plaintiffs to commit the defendants for breach of the injunction, refused, on the ground that the term used by the defendants did not imply more than that they were proprietors of collieries, whose place of business was at Radstock, which they were entitled to state, and that no breach of the injunction had been committed.

IN RE THOMAS. [634.]

Nov. 18*th*, 1878.

[*U. S. Patent Office—Doolittle, Act. Comm.*] ——14 *U. S. Pat. Gaz.* 821.]

On an application for the registration as a trade mark of a certain device, to be used in conjunction with other words and symbols, among which were certain of the words and symbols used in Freemasonry,

Held, that the fact that such words and symbols were used in Freemasonry did not disentitle a manufacturer to use them in his trade, by reason of probability of deception of the public or otherwise, and that the application must be granted.

THE SINGER MANUFACTURING CO. *v.* LOOG. 635.

Nov. 21*st*, 1878.

[*Bacon, V.C.*]

During the pendency of an action by the plaintiffs, for an injunction to restrain the English agent of German manufacturers from infringing the trade mark on the plaintiffs' sewing machines, the publisher of a newspaper called *The Sewing Machine Gazette* published a paragraph in which it was stated that the action was pending, that during its pendency unprincipled traders had issued unfair and illegal advertisements, and that, after the conclusion of the existing action, further proceedings would be taken.

Motion by the defendant to commit the publisher of the newspaper for contempt of Court, refused, on the ground that the paragraph in question was not calculated to prejudice the fair trial of the action.

636. **MOSES** *v.* **SARGOOD, EWEN & CO.**

Nov. 22*nd*, 1878.
[*Hall, V.C.*]

The plaintiffs being merchants and manufacturers of ready-made clothing, who placed on their goods a trade mark registered in England and the Colonies, consisting of one or more Royal Crowns, up to the number of six, the number varying according to the quality of the goods, from which mark the goods had acquired the name of "Crown Clothing," the defendants, who alleged that they had long exported to the Colonies quantities of material for clothing not made up bearing a trade mark consisting of an Imperial Crown between two standards, began to export ready-made clothing ticketed with that mark.

On motion by the plaintiffs, injunction granted to restrain the defendants from selling or shipping ready-made clothing bearing the mark in question, or any other mark infringing the plaintiffs' rights, on the ground that, although the mark might not deceive if placed side by side with the plaintiffs' mark, it was calculated to obtain for the defendants' goods the same name as that by which the plaintiffs' were known, and to deceive an ordinary purchaser who had not an opportunity of comparing the marks.

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637. **IN RE KUHN & CO. [T. M. A., 1875.]**

Nov. 29*th*, 1878.
[*Jessel, M.R.*]

Kuhn & Co. having obtained registration as their trade mark of a mark to be placed on steel pens for the German market, containing a description of the pens in German with a figure of a steel pen,

On motion by other manufacturers of steel pens,

Held, (1) that the figure of a steel pen was common to the trade, and could not be exclusively appropriated, and that a note must be appended to the registration to the effect that that figure was not claimed *per se*, but only in combination; (2) that Kuhn & Co. must pay the costs of the proceedings, notwithstanding that the applicants had not given them previous notice of their intention to take action in the matter, but that no costs would have been given if it had been further proved that the mark had only become common by Kuhn & Co.'s mark being copied by English firms without their permission, and that their entire mark had been registered for a year and a half before any objection was made to it.

WELDON *v.* **DICKS.** 638.

Dec. 3*rd*, 1878.

[*Malins, V.C.*——10 *Ch. D.* 247; 39 *L. T., N. S.* 467.]

The plaintiff being the proprietor of the copyright in a novel entitled "Trial and Triumph," first published in 1854, and republished in 1860, and since then long out of print, the defendant in 1875 published a tale under the same name in *Bow Bells*, and republished it in a volume, with other tales, at the end of the same year, and again, in a separate form, in 1877.

Action for an injunction to restrain the defendant from infringing the plaintiff's copyright in the title.

Held, (1) that the title of the plaintiff's book was included in the copyright by which the book was protected; (2) that the fact that the plaintiff's book had been long out of print did not deprive him of the right to protection against infringers; (3) that the plaintiff was not disentitled by reason of delay, he having commenced his action within two months after he first became aware of the assumption

of the title by the defendant; (4) that the injunction must be granted.

"There can only be acquiescence where there is knowledge. This Court never binds parties by acquiescence where there is no knowledge, though it is true that knowledge and acquiescence is in many cases fatal to parties."

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639. **LEVY** *v.* **WALKER.**

Dec. 21*st*, 1878; *Feb.* 5*th*, 1879.

[*Hall, V.C.*——39 *L. T., N. S.* 654.]

[*Ct. of App.*—*Jessel, M.R., James & Bramwell, L.JJ.* }——10 *Ch. D.* 436; 48 *L. J. Ch.* 273; 39 *L. T., N. S.* 656.]

The plaintiff, Mrs. Levy, having (while Miss Charbonnel) carried on business in partnership with the defendant as confectioners, under the name of "Charbonnel and Walker," on the dissolution of the partnership and sale of the business under the direction of the Court, the defendant purchased the entirety of the partnership business, leasehold premises, stock-in-trade, goodwill, &c., and continued to carry on the business under the old firm name.

On motion by the plaintiffs (Mrs. Levy and her husband) for an injunction to restrain the defendant from using the old firm name, and from representing that the plaintiffs or either of them were or was in partnership with her,

Held, on appeal, that the plaintiffs were not entitled to an injunction, on the ground that neither of them could be subjected to any liability by the use of the name by the defendant; and (*per* James, L.J.) that, in any case, the sale of the business and goodwill carried with it the right to use the old firm name.

Per James, L.J.—"The sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade mark. That is to say, somebody has a right to say 'You must not use a name, whether

fictitious or real, or a description, whether true or not, which is intended to represent, or is calculated to represent, to the world that your business is my business, and therefore deprive me by a fraudulent mis-statement of yours of the profits of the business which would otherwise come to me.' That is the sole principle on which the Court interferes. The Court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything."

"I hold that the sale of the goodwill and business did convey the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the person who sold it, and as against all the world, if any person in that world were representing himself as carrying on the same business."

THE ARMY AND NAVY CO-OPERATIVE SOCIETY (LIMITED) *v.* THE JUNIOR ARMY AND NAVY STORES (LIMITED). 640.

Jan. 17*th*, 1879.

[*Jessel, M.R.*]

Motion by the plaintiffs for an injunction to restrain the defendants from using in their business their name (as above) or any other name calculated to deceive, refused, on the ground that the word "Junior" prefixed to the defendants' title was quite sufficient to prevent deception, and that, in any case, there could be no mistake, since the only persons admitted to deal with either establishment were shareholders, or persons introduced through shareholders, who would not be deceived.

IN RE WHITELEY [T. M. A., 1875.] 641.

Feb. 8*th*, 1879.

[*Jessel, M.R.*]

An application having been made by Whiteley, a universal provider, for the registration of a trade mark,

consisting principally of two globes, for goods comprised in numerous classes, including classes 11, 12 and 13 (surgical instruments, cutlery, metal implements, &c.), which trade mark he had used for some years on wrappers, labels, bill-heads, &c., and on metal plates affixed to some of the articles, the application was opposed as to classes 11, 12 and 13 by a firm of cutlers, who had for many years stamped a single globe on their cutlery and metal goods, and had obtained registration of that mark on goods included in the classes in question.

On adjourned summons,

Held, that registration of the applicant's mark should be granted in the classes in question, he giving an undertaking (of which a note was to be entered on the register) not to stamp or impress the mark on any part of the metal of any article in classes 11, 12, or 13, but to affix it to, or use it in connexion with articles in those classes in the manner in which it had previously been affixed or used.

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642. **IN RE FARINA [T. M. A., 1875] (2).**

Feb. 13*th*, 1879.
[*Hall, V.C.*——27 W. R. 456.]

J. M. Farina having long used, and recently registered, three trade marks on Eau de Cologne, consisting respectively of a label with his signature, and a seal in the corner, to be applied to the side of the bottle, a circular stamp with three parallel lines running from it, to be applied to the top and neck of the bottle, and a label consisting of a picture of his house, "Gegenüber dem Jülichs Platz," with medals and letter-press, to be applied to the boxes containing the bottles, another maker of Eau de Cologne applied for the registration in his name of three trade marks similarly composed, to be used in the same manner.

On motion by the registered proprietor for an injunction to restrain the second applicant from proceeding with his application,

Held, (1) that the trade marks were too similar to those already on the register for registration to be allowed, and that the fact that the house on the applicant's third mark, described as "Gegenüber dem Elogius Platz," was said to be a correct view of his house in a street turning out of that square, did not prevent his label from being a colourable imitation of the original, having regard to the similarity in the letterpress and the position of the medals, though these last were not themselves the same as those in the label registered; (2) that the applicant's allegation that he had used his marks for several years without interference did not entitle him to registration, since it was not proved that the original proprietor was aware of such use; (3) that the injunction must be granted as to all three marks, notwithstanding that the German Court of Appeal, differing from the Court of First Instance, had, while prohibiting the registration in Germany of the label with the signature, permitted that of the label with the house, the question of resemblance being purely one of fact, as to which the German decisions were to be merely regarded as opposite verdicts by two special juries.

IN RE RABONE BROS. & CO. [T. M. A., 1875.] 643.
IN RE BURYS & CO. (LIMITED.)

Feb. 15*th*, 1879.
[*Jessel, M.R.*]

Rabone Bros. & Co. having long used a trade mark consisting of a lion couchant, with their trade name, upon iron bars, sheets, and hoops (included in class 5), and upon a large variety of cutlery, edge tools, and other implements (included in classes 12 and 13), applied for the registration

of their trade mark in classes 5, 12, and 13. Burys & Co. having long used a trade mark consisting of a lion couchant, with or without their trade name or other additions, upon steel (included in class 5), and upon edge tools, files, and other goods (included in classes 12 and 13), also applied for the registration of their trade marks in classes 5, 12, and 13. Each application was opposed by the other applicants.

On adjourned summonses,

Held, (1) that both parties should be registered in class 5, for the goods respectively specified only; (2) that since Rabone Bros. & Co.'s trade had been mostly confined to the colonies, both parties should be registered in classes 12 and 13, upon an undertaking being given by Rabone Bros. & Co. not to use their mark in Europe, and an undertaking by Burys & Co. not to use theirs in Australia, Tasmania, New Zealand, the West Indies, or British Columbia, a note of each undertaking to be entered on the register; (3) that inasmuch as Burys & Co.'s marks were cutlers' corporate marks, which had been assigned to them by one John Bedford, but had not been surrendered by him to the Cutlers' Company, or re-assigned by the company to Burys & Co., without which Burys & Co.'s title was not recognised by the company, the registration of their marks must be deferred until their title was perfected.

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644. **SPRATT'S PATENT** *v.* **WARD & CO.**

Feb. 27th, 1879.

[*Bacon, V.C.*——40 *L. T., N. S.* 250; 27 *W. R.* 470.]

Action for an injunction to restrain the defendants from selling dog-biscuits under the name of "Fibrine Dog Cakes," or any other title intimating that their biscuits were

manufactured under Spratt's patent, the property of the plaintiffs.

Notice having been given by the defendants that they required the action to be tried before a judge and special jury,

On adjourned summons taken out by the plaintiffs for the trial to be before the judge himself,

Held, that there being questions involved beyond a mere simple issue of fact, an order must be made on the summons, as asked.

IN RE HARGREAVES [T. M. A., 1875.] 645.

Feb. 27th, 1879.

[*Hall, V.C.*——27 *W. R.* 450.]

On motion for leave to register a new trade mark, consisting of an anchor with the words "Anchor Brand," for bacon and ham, being goods included in class 42, in which class there were already four marks registered in which an anchor was a conspicuous feature, such four marks being used, not for bacon and ham, but for butter, dog-biscuit, preserved fish and meat, and cattle food, respectively, all of which came within class 42,

Held, that leave would not be given to register the mark in question, being a new mark, for part of a class, nor at all, there being more than three similar marks already on the register.

ORR EWING & CO. *v.* **JOHNSTON & CO.** 646.

March 15*th*, 1879.

[*Chanc. Div.*—*Fry, J.*——40 *L. T., N. S.* 307; 27 *W. R.*]

The plaintiffs being manufacturers and exporters to the Indian markets of Turkey red yarn, on which they had long

placed a triangular ticket or label, in green and gold, on which a conspicuous feature was two elephants supporting a banner with an inscription, with a crown between the elephants, the defendants, who had for some years exported other goods to India, with a ticket bearing a figure of the elephant-headed Hindoo goddess, Gunputty, began to export Turkey red yarn, and to place upon it a ticket of a similar shape, and in similar colours to the plaintiffs' (the shape and colours being common to the trade), and having upon it two different elephants supporting a banner with an inscription, with the figure of Gunputty between the elephants, in place of the crown. The plaintiffs' ticket was proved to have acquired a variety of names in India, among which was the name "Bhe Hathi," or "Two Elephant" ticket. Registration had been refused to this ticket (*In re* Orr Ewing & Co.), on the ground that elephants were common to the trade.

Action by the plaintiffs for an injunction to restrain the defendants from infringing their rights.

Held, (1) that though it was not probable that English purchasers or Indian dealers would be deceived, it was not improbable that the ultimate purchasers in India would be, in consequence of the defendants' ticket being calculated to obtain the same name of "Bhe Hathi" as the plaintiffs'; (2) that it was not necessary to prove any fraudulent intention on the part of the defendants; (3) that the fact that a variety of names had become attached to the plaintiffs' ticket and goods did not destroy their right to protection for the mark, where one of those names was likely to be attributed to the defendants' ticket and goods; (4) that the two elephants, forming a material and substantial part of the plaintiffs' trade mark, having been taken by the defendants, the burden was upon them to disprove the probability of deception, not upon the plaintiffs to prove it; (5) that the two elephants were not established to be

common to the trade, since, though a number of other tickets bearing those animals were produced, it was not shown that they had been used or known; (6) that the rights of the plaintiffs in their mark were not affected by the refusal to register, and that the injunction must be granted.

IN RE ROTHERHAM [T. M. A., 1875] **647.**

March 27th, 1879.
[*Bacon, V.C.*——27 *W. R.* 503.]

Messrs. Rotherham & Sons, of Coventry, having long manufactured watches and exported them to Messrs. Tod & Co., of Alexandria, by whom they were sold, such watches bearing on the dial the word "Tod," in Arabic characters, (and that word, when treated as an Arabic substantive, denoting "a high mountain"), applied for the registration of that Arabic word as their trade mark, but registration was refused by the Registrar, on the ground that he was instructed by the Commissioners of Patents not to register words in foreign languages.

On motion by the applicants,

Held, that the direction given by the Commissioners was contrary to the Act and *ultrâ vires*, and that the registration must proceed.

GILLESPIE & CO. *v.* MARSHALL. **648.**

April 7th, 1879.
[*Ct. of App.*—
Brett, Cotton & Thesiger, L.JJ.]

The plaintiffs, agents for a Canadian firm, contracted with the defendant, a sheet-iron manufacturer, to purchase from him a quantity of "Marshall's Canada Plates." The term "Canada plates" was proved to have come within

the previous twelve years to mean plates of iron for roofing purposes, rolled in a particular manner with respect to grain, and to be usually made by tin-plate makers. Formerly "Canada plates" were mere plates of sheet-iron cut irrespective of grain, and the defendant, who had occasionally supplied such plates, and on one occasion to the plaintiffs themselves, under the name and mark of "Marshall's Canada Plates," now supplied the same article to the plaintiffs, by whom the plates were shipped to their principals in Canada. The latter objected to the quality, and re-sold them at a loss.

Action by the plaintiffs to recover the amount of the loss on the re-sale.

The jury having found at the trial—(1) that the contract was for Canada plates as made by Marshall; (2) that the plates were reasonably merchantable; (3) that the goods were not in the commercial sense "Canada plates;" on which verdict judgment was entered for the defendant,

Held, on appeal, by Brett and Thesiger, L.JJ., that the contract was for the goods usually supplied by the defendant under the name of "Marshall's Canada Plates," that the defendant was justified in supplying those goods, and that the judgment must stand.

Held, by Cotton, L.J., that the contract was for "Canada plates," in the commercial sense, to be of Marshall's manufacture, there being no evidence to show that "Marshall's" plates had a different meaning in the market, and that the plaintiffs were entitled to judgment.

[649.] **IN RE BREBNER.**

April 30th, 1863.

[*Victoria Sup. Ct.*—*Molesworth, J.*] ——2 *W. & W.* (*I. E. & M.*) 12.]

On appeal from a decision of the Geelong District Commissioner of Insolvent Estates, by which the appellant, an

insolvent, was refused his certificate, on various grounds, among which was one that he had squandered his means in litigation, he having infringed a trade mark used by other persons on flour, which led to a litigation, which he had to compromise at considerable expense.

Held, that the certificate should be suspended for a year, but not refused.

"The last ground of objection is the general conduct of the insolvent, and under this head comes the imputation against him of having imitated the brands or trade marks of another person. I must regard this as a great dishonesty. It is depriving another man of the benefit of his good name. He is fairly entitled to the benefit of the repute which he has obtained for personal skill and honesty, or the good quality of his produce; and another person who deprives him of that, robs him of his own. Such person, indeed, not only takes that which does not belong to him, but risks the loss by the true owner of his good repute altogether, when an inferior article is substituted for the genuine one. It is also a fraud on the purchaser. Whether he rightly or wrongly thinks an article produced by a particular person to be a superior one, he is cheated if an article made by another person is substituted. It is no answer to say to the purchaser, 'I gave you an article substantially as good as that which is represented;' he would not have given his money at all if he had known the article was made by another person. If a man wants an article of oak, and gets an article of deal, and pays an oak price, it is no answer to say that deal will do as well. A fraud of this sort must also have been accompanied with a great deal of deliberation and contrivance; there must have been combination and systematic continuous action resolved upon and carried out."

HENNESSY *v.* WHITE. [650.]

April 5th; Sept. 2nd, 1869.

[*Victoria Sup. Ct.*—*Molesworth, J.*——6 *W. W. & A'B. Eq.* 216.]

[*Victoria Sup. Ct.*——6 *W. W. & A'B. Eq.* 221.]

The plaintiffs being brandy merchants, of Cognac, who sold their brandy in cask and in bottle, the latter being of the better quality, and who placed on their bottles certain

distinctive labels, corks and capsules, the defendants purchased a large quantity of the plaintiffs' inferior or cask brandy, and sold it in bottles bearing labels, corks and capsules of a similar shape, colour and design to the plaintiffs', except that instead of "Jas. Hennessy & Co., Cognac," on the plaintiffs' labels, corks and capsules, the defendants' had "Jas. Hennessy & Co.'s Cognac;" that instead of an arm with a battle axe on the plaintiffs' they had a spread eagle; and that the defendants' labels also had in small letters the words "Bottled by T. & W. White, Melbourne." And there were some minor differences.

On motion by the plaintiffs,

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

Per Molesworth, J.—"According to the authorities, an intention to produce a mistake is sufficient to warrant the interference of this Court by injunction. According to the authorities, also, it is not necessary that the intention should be to deceive persons who carefully examine. It is enough that there are a class of customers who examine so carelessly that they would be deceived by the resemblance between the two."

"I think a new feature which has not been present in any other case, and is, therefore, not touched by the language of the other cases, is one which I ought to act upon here; that is, that the makers of articles of different qualities are entitled to brand their best article in a particular way, to show the superior value they put upon it. . . . I put this case upon the particular ground, that an article of Hennessy & Co.'s manufacture of a higher quality has had a particular mark used for it, and that the defendants' brand is an attempt to deceive, probably not the direct purchaser of the article, but the ultimate consumer."

Per Stawell, C.J.—"If a brandy different from that which the manufacturer bottled is put into bottles and sold as the manufacturer's bottled brandy, the fact that it is the manufacturer's bulk brandy, does not make the sale less an imposition."

"We were invited to consider the arm and battle axe on the respondents' label as their trade mark, and, because it was not adopted by the appellant, to disregard all other matters as of no importance; but this is precisely the course which the Courts have carefully avoided, namely, selecting any one or more matters, either of resemblance or

difference, and considering them essential, or attempting to define *à priori* what might or might not constitute an improper imitation by one person of the manufacture of another, for such a course would manifestly offer inducements for fraud; persons so disposed would then endeavour to avoid the one or more objectionable points, but yet so present the particular article for sale as to impose on the unwary, who accept as sufficient proof of genuineness a resemblance in the main, without closely examining details. An imitation of the trade mark would, no doubt, render the case still stronger against the appellant; but the mere substitution of one mark for another, both being in the same position and of the same colour, does not, in our opinion, neutralize the effect of all the other points of resemblance."

HENNESSY *v.* **HOGAN.** [651.]

April 29th, 1869.

[*Victoria Sup. Ct.*—*Molesworth, J.*] —6 *W. W. & A'B. Eq.* 225.]

The plaintiffs being brandy merchants, of Cognac, who sold their brandy in cask and in bottle, the latter being of the better quality, and who placed on their bottles certain distinctive labels, corks and capsules, the defendants purchased a quantity of the plaintiffs' inferior or cask brandy, and sold it in bottles bearing labels, corks and capsules, of a similar shape, colour and design to the plaintiffs', except that the name of the plaintiffs did not appear on the defendants' corks and capsules; that the defendants used the device of an arm holding a dart, instead of an arm holding a battle axe; and that the defendants placed on their labels, in bold type, the words "Bottled by Hogan, Money & Co."

On motion by the plaintiffs,

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

"It is not necessary that the imitation should be such as to deceive a person accurately scrutinizing it. It is sufficient if it is done with the intention of deceiving any class of purchasers, or to enable subvendees to make the article in question more attractive."

[652.] **HOSTETTER** *v.* **ANDERSON.**

Feb. 17*th*, 1870.

[*Victoria Sup. Ct.*—*Molesworth, J.*] ——1 *V. R.* (1 *W. A'B. & W.*) *Eq.* 7; 1 *A. J.* 4.]

The plaintiffs being American manufacturers of bitters, which they sold in bottles having the words "Dr. J. Hostetter's Stomach Bitters" moulded in them, and labelled with the words "Hostetter's Celebrated Stomach Bitters," the defendants bought up a considerable quantity of the plaintiffs' moulded bottles, and sold them refilled with other bitters, and labelled "Celebrated Stomach Bitters," but the labels did not in form or colour resemble those used by the plaintiffs.

On motion by the plaintiffs,

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

[653.] **WOLFE** *v.* **HART.**

July 8*th*; *Sept.* 19*th*, 1878.

[*Victoria Sup. Ct.*—*Molesworth J.*] ——4 *Vict. L. R. Eq.* 125.]

[*Victoria Sup. Ct.*——4 *Vict. L. R. Eq.* 134.]

The plaintiff selling gin under the name of "Udolpho Wolfe's Aromatic Schiedam Schnapps," in square moulded bottles, enclosed in wrappers bearing inscriptions in blue and red inks, the defendant, a former agent for the plaintiff, began to sell gin under the name of "Hart's Imperial Schiedam Schnapps," or "Imperial Schiedam Aromatic Schnapps," and to sell them in somewhat similar bottles, enclosed in somewhat similar wrappers to the plaintiff's.

On motion by the plaintiff for an injunction to restrain the defendant from infringing the plaintiff's rights,

Held, by Molesworth, J., that the words "Aromatic Schiedam Schnapps" were descriptive and incapable of appropriation, but that the bottles and wrappers were intended and calculated to deceive, and that an injunction must be granted in that respect.

Held, on appeal to the full Court, that the injunction must be affirmed as granted.

Per Stawell, C. J.—"Nor do I concur in the argument that we are to consider the intelligence, or want of intelligence, of the purchaser. We ought not to pronounce a decision which would be applicable to the one and inapplicable to the other, or ignore an uneducated and illiterate person, who may desire to ascertain whether the article he is about to purchase is the same he has had before. We are to consider whether the infringement of the plaintiff's rights has been proved, not by taking particular isolated points, but by looking at the general resemblance of the packages, labels, bottles and other points."

IN RE FARINA [T. M. A., 1875] (3). 654.

April 22nd, 1879.
[*Hall, V.-C.*]

J. M. Farina having long used, and recently registered, two trade marks on Eau de Cologne, consisting respectively of a label with his signature and flourish, the words "Gegenüber dem Jülichs Platz," and a seal in the corner, to be applied to the side of the bottle, and a label bearing a circular seal with three parallel lines running from it, to be applied to the top and neck of the bottle, another manufacturer used on the sides of his bottles a label of similar appearance, bearing the signature "Joseph Anton Farina, Gegenüber dem Central Bahnhof," with a similar flourish, and with a similar seal in the corner, and on the tops and necks of his bottles a label with a circular seal and three parallel lines, similar to J. M. Farina's second label, though differing in some details. The latter manu-

facturer applied for the registration of the two circular seals used respectively in the corner of the first label, and on the top of the bottle, without other accompaniments.

On motion by J. M. Farina for an injunction to restrain the rival manufacturer from proceeding with his application for registration,

Held (1), that the two seals might be registered, but only, as to the first, with a note that it was not to be used with or as part of any label similar to or only colourably differing from J. M. Farina's first label, and, as to the last, with a note that it was not to be used upon the top or cork of any bottle of Eau de Cologne, or with or as part of any label similar to or only colourably differing from J. M. Farina's second label; (2), that the applicant for registration must pay the agreed costs of the application.

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655. **IN RE WORTHINGTON & CO.**

May 9th, 1879.

[*Jessel, M.R.*]

Bass & Co. having long used and since registered as their trade mark on ale and beer (included in class 43), the figure of a triangle, which in practice was coloured red, and from which the beer was known as "triangle beer," Worthington & Co. applied for the registration of a new mark to be used on beer, wine and spirits (all these articles being included in the same class, No. 43, in which Bass & Co.'s mark was registered), such new mark consisting of a triangular device, which contained a church in the centre, and the words "Beccles Brewery—Established 1830," in a border.

On motion by Bass & Co., injunction granted to restrain Worthington & Co. from taking any further proceedings for the purpose of obtaining the registration for which they applied, on the ground that the marks were so similar as to render deception probable.

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